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STATE OF WASHINGTON

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

ARMONDO SHELBY.

Petitioner.

NO. 29358-7

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Must the petition be dismissed where the petitioner cannot show actual prejudice to a constitutional right?
2. Did the trial court comment on the evidence in its self-defense instruction where it gave the revised instruction in light of State v. Walden?
3. Did the trial court properly give an initial aggressor instruction where the evidence supports that the defendant broke into the victim's home and shot him five times?
4. Was defendant's right to speedy trial honored where he requested a continuance and signed a speedy trial waiver?

1 5. Must the remainder of the petitioner be dismissed where defendant fails to include
2 a statement of facts to support his allegations?

3 6. Is there cumulative error requiring reversal?

4 B. STATUS OF PETITIONER:

5 Petitioner, ARMONDO SHELBY, is restrained pursuant to a Judgment and Sentence
6 (Appendix "A") entered in Pierce County Cause No. 98-1-00715-1, for the offense of First
7 Degree Murder while armed with a firearm, First Degree Burglary while armed with a firearm,
8 and Unlawful Possession of a Firearm in the First Degree. Defendant received a total sentence
9 of 510 months. (Appendix "A").

10 The Court of Appeals affirmed defendant's conviction in an unpublished opinion, case
11 number 24986-3-II. (Appendix "B").

12 Defendant now comes before this court with his first personal restraint petition.

13 C. ARGUMENT:

14 1. PETITIONER HAS FAILED TO MEET HIS BURDEN OF SHOWING
15 ACTUAL PREJUDICE ARISING FROM AN ERROR OF
16 CONSTITUTIONAL MAGNITUDE TO AVOID DISMISSAL OF THIS
17 PETITION.

18 Personal restraint procedure has its origins in the State's habeas corpus remedy,
19 guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of habeas
20 corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal
21 restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. In
22 re Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral relief undermines the
23 principles of finality of litigation, degrades the prominence of the trial, and sometimes costs

1 society the right to punish admitted offenders. These are significant costs, and they require that
2 collateral relief be limited in state as well as federal courts. Hagler, Id.

3 In this collateral action, the petitioner has the duty of showing constitutional error and
4 that such error was actually prejudicial. The rule that constitutional errors must be shown to be
5 harmless beyond a reasonable doubt has no application in the context of personal restraint
6 petitions. In re Mercer, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987); Hagler, 97 Wn.2d at 825.
7 Mere assertions are insufficient in a collateral action to demonstrate actual prejudice. Inferences,
8 if any, must be drawn in favor of the validity of the judgment and sentence and not against it. In
9 re Hagler, 97 Wn.2d at 825-26. To obtain collateral relief from an alleged nonconstitutional
10 error, a petitioner must show "a fundamental defect which inherently results in a complete
11 miscarriage of justice." In re Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher
12 standard than the constitutional standard of actual prejudice. Id. at 810.

13
14 Reviewing courts have three options in evaluating personal restraint petitions:

- 15 1. If a petitioner fails to meet the threshold burden of showing actual prejudice
16 arising from constitutional error or a fundamental defect resulting in a
17 miscarriage of justice, the petition must be dismissed;
- 18 2. If a petitioner makes at least a prima facie showing of actual prejudice, but the
19 merits of the contentions cannot be determined solely on the record, the court
20 should remand the petition for a full hearing on the merits or for a reference
21 hearing pursuant to RAP 16.11(a) and RAP 16.12;
- 22 3. If the court is convinced a petitioner has proven actual prejudicial error, the
23 court should grant the personal restraint petition without remanding the cause
24 for further hearing.

25 In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

An examination of petitioner's claims shows that he cannot avoid summary dismissal.

1 2. THE TRIAL COURT DID NOT COMMENT ON THE
2 EVIDENCE WITH ITS INSTRUCTIONS ON SELF-DEFENSE.

3 Defendant contends that the trial court used an erroneous self-defense instruction and
4 cites to State v. Corn¹ and State v. Walden.² Defendant overlooks that the trial court did not
5 give the same instruction that was criticized in Corn and Walden. Defendant also overlooks
6 that the very instruction that he claims error to was proffered by the defense.

7 In Walden, the Supreme Court analyzed an instruction which defined “great bodily harm”
8 in the context of self-defense:

9 Instruction 18:

10 One has the right to use force only to the extent of what appears to be the
11 apparent imminent anger at the time. However, when there is no
12 reasonable ground for the person attacked or apparently under attack to
13 believe that his person is in imminent danger of death or great bodily
14 harm, *and it appears to him that only an ordinary battery is all that is*
15 *intended*, he has no right to repel a threatened assault by the use of a
16 deadly weapon in a deadly manner.

17 *Great bodily injury as used in this instruction means an injury of a graver*
18 *and more serious nature than an ordinary battery with a fist or pounding*
19 *with the hand*; it is an injury of such a nature as to produce severe pain,
20 suffering and injury.

21 131 Wn.2d at 472 (italics added). The court criticized the above italicized language as
22 impermissibly limiting the jury from considering defendant's subjective impressions. 131 Wn.2d
23 at 477.

24

25 ¹ 95 Wn. App. 41, 975 P.2d 520 (1999); PRP at 10.

² 131 Wn.2d 469, 932 P.2d 1237 (1997); PRP at 11-12.

1 In the instant case the trial court did not use the italicized language. Still, defendant
2 argues that the trial court erred when giving the following instruction:

3 A person is entitled to act on appearances in defending himself, if that
4 person believes in good faith and on reasonable grounds that he is in
5 actual danger of great bodily harm, although it afterwards might develop
6 that the person was mistaken as to the extent of that danger.

7 Instruction 32, CP 107, PRP at 12. The defendant proffered the same instruction to the court.
8 Defense Instruction No. 5, CP 43. A defendant may not propose an instruction and then claim
9 error on appeal. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). The defendant has
10 waived this claimed error.

11 3. THE TRIAL COURT PROPERLY GAVE AN INITIAL AGGRESSOR
12 INSTRUCTION.

13 Jury instructions are sufficient if they permit each party to argue his theory of the case
14 and properly inform the jury of the applicable law. State v. Bowerman, 115 Wn.2d 794, 809,
15 802 P.2d 116 (1990). "The right of self-defense cannot be successfully invoked by an
16 aggressor or one who provokes an altercation, unless he or should in good faith first
17 withdraws from the combat at a time and in a manner to let the other person know that he or
18 she is withdrawing or intends to withdraw from further aggressive action." State v. Riley,
19 137 Wn.2d 904, 909, 976 P.2d 624 (1999) (citation omitted). Where the evidence supports
20 that the defendant made the first move by drawing a weapon an aggressor instruction is
21 appropriate. Id. at 910 (citing, State v. Thompson, 47 Wn. App. 1, 7, 733 P.2d 584 (1987)).
22 This is true even where the evidence is conflicting as to whether the defendant's conduct
23 precipitated a fight. Id. (citing State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)).

1 In the instant case the evidence supports the giving of an aggressor instruction. The
2 evidence shows that the defendant kicked in the victim's door and entered his home where he
3 shot him five times. (Appendix "B"). The record shows that both victim Butler and Bohlen
4 locked the door. RP 879. The defendant forced entry into the apartment and victim Butler
5 tried to hide from the defendant. RP 882, 888-89. The defendant and Butler struggled and
6 shots were fired. RP 431, 433, 439-440, 482. The evidence supports that it was the defendant
7 who entered the victim's home and sought out the victim. Although there was a struggle
8 between the two, it was the defendant who provoked the struggle and who introduced the gun
9 into the situation. (Appendix "B"). The aggressor instruction was properly given.
10

11 4. THERE WAS NO VIOLATION OF DEFENDANT'S RIGHT TO A
12 SPEEDY TRIAL.

13 "A trial court's grant or denial of a motion for a CrR 3.3 continuance or extension will
14 not be disturbed absent a showing of a manifest abuse of discretion." State v. Williams, 104
15 Wn. App. 516, 520-21, 17 P.3d 648 (2001) (*citing State v. Cannon*, 130 Wn.2d 313, 326, 922
16 P.2d 1293 (1996)). "Discretion is abused only where it is exercised on untenable grounds or for
17 untenable reasons." Id. at 521 (*citations omitted*).

18 CrR 3.3(h)(2) permits the court to grant a "continuance" of the trial date "when required
19 in the administration of justice," if the defendant is not substantially prejudiced. Id.; CrR
20 3.3(h)(2). This rule operates to toll or exclude the period that is used in the computation of time
21 for trial. Williams, 104 Wn. App. 522.

22 A court may grant a continuance under CrR 3.3(h)(2) due to the prosecutor's or defense
23 counsel's unavailability. Williams, 104 Wn. App. at 523, *citing State v. Cannon*, 130 Wn.2d at

1 326; State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984). An appellate court may affirm a
2 trial court on any ground. Williams, 104 Wn. App. at 524.

3 In the instant case the trial court properly continued the case.³ The record shows that the
4 matter was continued on January 14, 1999, because defendant's attorney was in trial on another
5 matter. (Appendix "C"). Defendant entered a speedy trial waiver through April 26, 1999.
6 (Appendix "D"). The matter was then continued from April 26, 1999, to May 5, 1999, because
7 co-counsel was removed from the case due to defendant's unwillingness to communicate with
8 her. (Appendix "E", RP 13, 4/26/99). The trial court found that this continuance was necessary
9 in the due administration of justice and that there was no prejudice to the defendant. There is
10 nothing in the record to support defendant's claim that the case was continued due to court
11 congestion. Because there were valid grounds for the continuances the defendant's right to a
12 speedy trial was not violated.
13

14 5. THE REMAINDER OF THE PETITION MUST BE DISMISSED
15 WHERE DEFENDANT FAILS TO INCLUDE A STATEMENT OF
16 FACTS TO SUPPORT HIS ALLEGATIONS.

17 The petition must include a statement of the facts upon which the claim of unlawful
18 restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2);
19 Petition of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). If the petitioner fails to provide

20
21 ³ The defendant's argument in this section is almost indecipherable. At one point he states, "The parties
22 dispute whether the January 27th continuance was proper." (PRP at 25). The undersigned spent a
23 considerable amount of time looking in vain through the record to see what happened during the
24 January 27th continuance. As it turns out this language was taken verbatim from State v. Bruce
25 Eric Smith, and has nothing to do with the facts of this case.

1 sufficient evidence to support his challenge, the petition must be dismissed. Williams at 364.
2 Affidavits, transcripts and clerk's papers are readily available forms of evidence which a
3 petitioner may employ to support his claims. Id. at 364-365. A reference hearing is not a
4 substitute for the petitioner's failure to provide evidence to support his claims. As the Supreme
5 Court stated, "the purpose of a reference hearing is to resolve genuine factual disputes, not to
6 determine whether the petitioner actually has evidence to support his allegations." In re Rice,
7 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "Bald assertions and conclusory allegations will not
8 support the holding of a hearing," but the dismissal of the petition. Rice at 886; Williams at
9 364-365.

10
11 The petitioner's brief goes beyond a mere omission of facts and includes careless
12 references to the record that are unsupported. The following claims are bald assertions:⁴

13 4. Implied Bias of Juror – Petitioner claims that one of the jurors was biased
14 because the juror was the sister of a jail guard. (PRP at 25). Defendant
15 cites to an 8/20/99 transcript and CP 54. The State is not in possession of
16 an 8/20/99 transcript and defendant has not attached it to his brief. Clerks
17 paper 54 is in reference to proposed jury instructions and has nothing to do
18 with the issue of juror bias.

19 5. Ineffective Assistance of Counsel.

20 a. Equal Protection claim based on no transcripts. Petitioner's argument is
21 difficult to understand but it appears that he feels he was denied pretrial
22 transcripts. There is no affidavit supporting this assertion.

23 b. Blood spatter – Petitioner claims that defense should have called an
24 expert on blood spatter. Defendant does not include an affidavit of what
25 the proposed testimony would contain. He also does not claim how it

⁴ For this court's convenience the State uses the same numbering/lettering as that contained in defendant's
petition.

1 would affect the outcome of the trial. He references CP 774-77. The
2 clerk's papers do not go that high.

3 c. Failure to call impeachment witness. Petitioner claims that defense
4 failed to call a witness who would have testified that the victim had
5 previously shot at him in the same apartment. He does not cite any
6 supporting affidavits. Although there is a quote to a letter from counsel,
7 he does not include this letter as an affidavit. PRP 38.

8 d. Impeaching testimony. Petitioner claims that the defense should have
9 attacked Daniel Griffith with his prior convictions and called his sister to
10 impeach his testimony. There is no supporting affidavits or facts to prove
11 what prior convictions Mr. Griffith has or to suggest what the sister's
12 testimony would be.

13 Petitioner also claims that the defense failed to impeach an eyewitness
14 with the physical evidences in the case. Defendant does not cite to the
15 record or state which witness he is referring to or what physical evidence
16 should have been used to impeach.

17 e. Failure to call witness who overheard eye witness statement:
18 Defendant claims defense counsel should have called a witness to testify
19 that he/she heard the eyewitness say defendant was acting in self defense.
20 PRP at 41. Defendant does not provide any facts to support this claim.

21 f. Failure to bring in Ms. Bohlen's criminal history. Petitioner alleges that
22 Ms. Bohlen had outstanding warrants and cites to RP 882, PRP 43. This
23 part of the record is simply Ms. Bohlen's direct examination and contains
24 nothing to support his claim that she had outstanding warrants.

25 g. Victim's reputation for violence. Petitioner claims that he knew the
victim was a gang member and that this should have been brought to the
jury's attention. Petitioner does not provide any facts to support his claim
that the victim was a gang member.

6. Prosecutorial misconduct. Petitioner claims that the State withheld
witness statements. He cites to exhibit E-1. This exhibit is not attached to
his brief and the State is unaware of such an exhibit.

Given the defendant's complete lack of effort to bring factual claims before this court,
the petition should be dismissed.

APPENDIX "A"

Judgment and Sentence

3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff,
vs.
ARMONDO TREMAINE SHELBY,
Defendant.
DOB: 5/13/73
SID NO.: WA14122653
LOCAL ID:

CAUSE NO. 98-1-00715-1
JUDGMENT AND SENTENCE
(FELONY/OVER ONE YEAR)



I. HEARING

1.1 A sentencing hearing in this case was held on 8/20/99.
1.2 The defendant, the defendant's lawyer, RAYMOND H. THOENIG, and the
deputy prosecuting attorney, SUE L. SHOLIN, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court
FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on the 25th day
of May, 1999 by

[] plea [X] jury-verdict [] bench trial of:

Count No.: I
Crime: MURDER IN THE FIRST DEGREE, Charge Code: (D3)
RCW: 9A.32.030(1)(c), 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 2/12/98
Incident No.: TPD 98-043-1029

Count No.: II
Crime: BURGLARY IN THE FIRST DEGREE, Charge Code: (G1)
RCW: 9A.52.020(1)(a)(b), 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 2/12/98
Incident No.: TPD 98-043-1029

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR
ENTERED
JUDGEMENT

99-9-08868-0

Count No.: III
 Crime: UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE,
 Charge Code: (GGG66)
 RCW: 9.41.040(10(a))
 Date of Crime: 2/12/98
 Incident No.: TPD 98-043-1029

- Additional current offenses are attached in Appendix 2.1.
- A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s).
- A special verdict/finding for use of a firearm was returned on Counts I+II.
- A special verdict/finding of sexual motivation was returned on Count(s)_____.
- A special verdict/finding of a RCW 69.50.401(a) violation in a school bus, public transit vehicle, public park, public transit shelter or within 1000 feet of a school bus route stop or the perimeter of a school grounds (RCW 69.50.435).
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

<u>Crime</u>	<u>Sentencing Date</u>	<u>Adult or Juv. Crime</u>	<u>Date of Crime</u>	<u>Crime Type</u>
ASLT 3°	02/09/87	JUVENILE	08/22/86	NV
UPCS	09/08/88	JUVENILE	06/14/88	NV
UPCS/TMVWOP	03/15/91	JUVENILE	11/16/90	NV
BURG 2°	03/15/91	JUVENILE	12/11/90	NV
ESCAPE 1°	06/14/91	JUVENILE	01/07/91	NV
FELONY ELUDING	08/20/93	ADULT	02/24/91	NV

- Additional criminal history is attached in Appendix 2.2.
- Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(5)(a)):

JUDGMENT AND SENTENCE
 FELONY / OVER ONE YEAR - 2

2.3 SENTENCING DATA:

	<u>Offender Score</u>	<u>Serious Level</u>	<u>Standard Range(SR)</u>	<u>Enhancement</u>	<u>Maximum Term</u>
Count I:	7	XIV	338 - 450	FASE + 60 MONTHS	LIFE
Count II:	7	VII	67 - 89	FASE + 60 MONTHS	TWENTY YEARS
Count III:	6	VII	57 - 75		TEN YEARS

[] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE:

[] Substantial and compelling reasons exist which justify an exceptional sentence

[] above [] within [] below the standard range for Count(s) _____ . Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [] did [] did not recommend a similar sentence.

2.5 RECOMMENDED AGREEMENTS: *N/A - no plea agreement*

[] For violent offenses, serious violent offenses, most serious offenses, or any felony with a deadly weapon special verdict under RCW 9.94A.125; any felony with any deadly weapon enhancements under RCW 9.94A.310(3) or (4) or both; and/or felony crimes of possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first or second degree, and/or use of a machine gun, the recommended sentencing agreements or plea agreements are [] attached [] as follows:

2.6 RESTITUTION:

[] Restitution will not be ordered because the felony did not result in injury to any person or damage to or loss of property.

Restitution should be ordered. A hearing is set for 10/22/99.

[] Extraordinary circumstances exist that make restitution 1:30pm inappropriate. The extraordinary circumstances are set forth in Appendix 2.5.

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 3

[] Restitution is ordered as set out in Section 4.1, LEGAL FINANCIAL OBLIGATIONS.

2.7 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability to pay:

- [] no legal financial obligations.
- [X] the following legal financial obligations:
 - [X] crime victim's compensation fees.
 - [X] court costs (filing fee, jury demand fee, witness costs, sheriff services fees, etc.)
 - [] county or inter-local drug funds.
 - [] court appointed attorney's fees and cost of defense.
 - [] fines.
 - [] other financial obligations assessed as a result of the felony conviction.

A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [] The court DISMISSES.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

\$ TBD, Restitution to:

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 4

- 1
- 2
- 3
- 4 \$ 110, Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);
- 5 \$ 500, Victim assessment;
- 6 \$ _____, Fine; [] VUCSA additional fine waived due to indigency (RCW 69.50.430);
- 7 \$ _____, Fees for court appointed attorney;
- 8 \$ _____, Washington State Patrol Crime Lab costs;
- 9 \$ _____, Drug enforcement fund of _____;
- 10 \$ _____, Other costs for: _____;
- 11 \$ 610, TOTAL legal financial obligations [] including restitution [X] not including restitution.

- 13 [] Minimum payments shall be not less than \$ _____ per month. Payments shall commence on _____.
- 14 [X] The Department of Corrections shall set a payment schedule.
- 15 [] Restitution ordered above shall be paid jointly and severally with:

<u>Name</u>	<u>Cause Number</u>
_____	_____
_____	_____

18 The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement to assure payment of the above monetary obligations.

20 Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

22 Defendant must contact the Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release, or by _____.

24 [X] Bond is hereby exonerated.

4.2 CONFINEMENT OVER ONE YEAR: The defendant is sentenced as follows:

(a) CONFINEMENT: (Standard Range) RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

450 months on Count No. I [X] concurrent [] consecutive
89 months on Count No. II [X] concurrent [] consecutive
75 months on Count No. III [X] concurrent [] consecutive

(b) CONFINEMENT (Sentence Enhancement): A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 MONTHS ON COUNT I
60 MONTHS ON COUNT II

TOTAL MONTHS CONFINEMENT ORDERED: 510

Sentence enhancements in Counts I+II shall run [X] concurrent [] consecutive to each other. Sentence enhancements in Counts I+II shall be served [X] flat time [] subject to earned good time credit.

Standard range sentence shall be [] concurrent [] consecutive with the sentence imposed in Cause Nos.:

[X] Credit is given for 551 days served;

4.3 [X] COMMUNITY PLACEMENT (RCW 9.94A.120). The defendant is sentenced to community placement for [] one year [X] two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

[] COMMUNITY CUSTODY (RCW 9.94A.120(1)). Because this was a sex offense that occurred after June 6, 1996, the defendant is sentenced to community custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

While on community placement or community custody, the defendant shall: 1) report to and be available for contact with the assigned community corrections officer as directed; 2) work at Department of Corrections-approved education, employment and/or community service; 3) not consume controlled substances except pursuant to lawfully issued prescriptions; 4) not unlawfully possess controlled substances while in community custody; 5) pay supervision fees as determined by the Department of Corrections; 6) residence

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 6

location and living arrangements are subject to the approval of the department of corrections during the period of community placement.

(a) [] The offender shall not consume any alcohol;
(b) [X] The offender shall have no contact with: see (f)

(c) [] The offender shall remain [] within or [] outside of a specified geographical boundary, to-wit: _____

(d) [] The offender shall participate in the following crime related treatment or counseling services: _____

(e) [X] The defendant shall comply with the following crime-related prohibitions: no controlled substances unless lawfully prescribed

(f) [X] OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS:
no contact with Jennifer Bohlen, Jennifer Burnham, Ervin Bradley, Melvin Bradley, Jeremy Cleveland

(g) [] HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. (RCW 70.24.340)

(h) [X] DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The Department of Corrections shall be responsible for obtaining the sample prior to the defendant's release from confinement. (RCW 43.43.754)

[] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND DEPORTATION BY THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SUBJECT TO ARREST AND REINCARCERATION IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO THE EXPIRATION OF THE SENTENCE.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9.94A.200(2)).

FIREARMS: PURSUANT TO RCW 9.41.040, YOU MAY NOT OWN, USE OR POSSESS ANY FIREARM UNLESS YOUR RIGHT TO DO SO IS RESTORED BY A COURT OF RECORD.

ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 24 HOURS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130.

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 7

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT'S RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE CONVICTION OR THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: 8/20/99

[Signature]
JUDGE

Presented by: [Signature]

Approved as to form: [Signature]

SUE L. SHOLIN
Deputy Prosecuting Attorney
WSB # 21333

RAYMOND H. THOENIG
Lawyer for Defendant
WSB # 2510

trp

[Signature]
Kathleen Oliver
Deputy Prosecuting Attorney
WSB # 18252



STATE OF WASHINGTON, County of Pierce
ss: I, Kevin Stock, Clerk of the above
enitled Court, do hereby certify that this
foregoing instrument is a true, and correct
copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of said Court this
day of August, 201999
Kevin Stock, Clerk
By [Signature] Deputy

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 8

APPENDIX F

Cause No. 98-1-00715-1

FILED IN OPEN COU. DEPT. IS AUG 20 1999 Pierce County Clerk Deputy

The defendant having been sentenced to the Department of Corrections a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

- (I) The offender shall remain within, or outside of, a specified geographical boundary:

- (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: Jennifer Bohlen, Jennifer Burnham, Ervin Bradley, Melvin Bradley, Jeremy Cleveland
- (III) The offender shall participate in crime-related treatment or counseling services;
- (IV) The offender shall not consume alcohol;
- (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or
- (VI) The offender shall comply with any crime-related prohibitions.
- (VII) Other: _____

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

FINGERPRINTS

Right Hand

Fingerprint(s) of: ARMONDO TREMAINE SHELBY, Cause #98-1-00715-1

Attested by: Ted Rutt, CLERK.

By: DEPUTY CLERK Judith E. Whitmer Date: 8-20-99

CERTIFICATE

OFFENDER IDENTIFICATION

I, _____
Clerk of this Court, certify that
the above is a true copy of the
Judgment and Sentence in this
action on record in my office.

State I.D. #WA14122653

Date of Birth 5/13/73

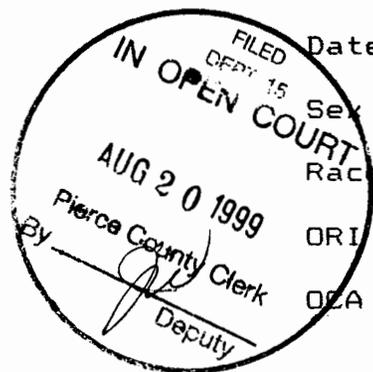
Sex MALE

Race BLACK

Dated: _____

CLERK

By: _____
DEPUTY CLERK



ORI _____

OZA _____

OIN _____

DOA _____



FINGERPRINTS

APPENDIX “B”

State v. Armondo Tremaine Shelby
Opinion, COA No. 24986-3

2001 Wash. App. LEXIS 278, *

2 of 4 DOCUMENTS

**STATE OF WASHINGTON, Respondent, v. ARMONDO TREMAINE
SHELBY, Appellant.**

No. 24986-3-II, No. 25261-9-II (consolidated)

COURT OF APPEALS OF WASHINGTON, DIVISION TWO*2001 Wash. App. LEXIS 278***February 9, 2001, Date Opinion Filed****NOTICE:**

[*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

SUBSEQUENT HISTORY:

Petition for Review Denied September 5, 2001, Reported at: *2001 Wash. LEXIS 578*.

PRIOR HISTORY:

Superior Court of Pierce County. Superior Court Docket No. 98-1-00715-1. Date filed in Superior Court: August 20, 1999 and October 27, 1999. Superior Court Judge Signing: Thomas Feltnagle.

DISPOSITION:

Shelby's convictions and sentence affirmed.

COUNSEL:

FOR APPELLANT (COURT APPOINTED): Linda J. King, Attorney At Law, Steilacoom, WA, Raymond H. Thoenig, Dept of Assigned Counsel, Tacoma, WA.

FOR RESPONDENT: Barbara L. Corey-Boulet, Pierce County Deputy Pros Atty, Tacoma, WA.

JUDGES:

WRITTEN BY: Seinfeld, J. CONCURRED IN BY: Morgan, J., Armstrong, C.J.

OPINIONBY:

Seinfeld

OPINION:

Seinfeld, J. -- Armondo Shelby appeals his conviction

for first degree felony murder, first degree burglary, and first degree unlawful possession of a firearm. He claims that his attorney had a conflict of interest and provided ineffective assistance, thereby depriving him of his Sixth Amendment right to counsel. He also argues that the trial court erred in instructing the jury during voir dire that the case did not involve the death penalty and in calculating his offender score. In his pro [*2] se brief, Shelby challenges the admission of statements he made to the police and the State's closing argument. Finding no error, we affirm.

FACTS

Shelby had a confrontation with Thomas Tirrell Butler, the murder victim, outside Butler's apartment. The two men were arguing over Jennifer Bohlen, who was living with Butler at the time. Shelby wanted Bohlen to come with him. When Bohlen went inside the apartment and locked the door, Shelby kicked the door in and entered. Once inside, he shot Butler multiple times. Butler died later that night from five gunshot wounds.

Shelby turned himself in to the police four days later. The police first interviewed Shelby in the presence of his mother and his pastor. The police then interviewed him alone.

In both interviews, Shelby claimed that the shooting was in self-defense and that it followed a struggle between Butler and himself that led to their breaking through the front door into the apartment. In the first interview, Shelby claimed that Butler initially had the gun but that during the struggle he took it from Butler. In the second interview, after Shelby spoke privately with his pastor, Shelby admitted that he had brought the gun, [*3] a silver .357, to the apartment.

The State charged Shelby with aggravated

premeditated first degree murder committed within the course of a burglary, *RCW 9A.32.030(1)(a)* and *RCW 10.95.020(1)(c)*, or, in the alternative, with first degree felony murder, *RCW 9A.32.030(1)(c)(3)*. Both alternatives included a deadly weapon enhancement. The State also charged Shelby with first degree burglary, *RCW 9A.52.020x(1)(a)* or (b), and first degree unlawful possession of a firearm, *RCW 9.41.040(1)(a)*.
n1

n1 The State also originally charged Shelby with violation of a no-contact order regarding Bohlen but the court severed the charge and it was ultimately dismissed.

In April 1999, Shelby's lead counsel informed the court that there was a complete communications breakdown between co-counsel and Shelby. The trial court then granted lead counsel's motion for the withdrawal of co-counsel. [*4]

Later, at a CrR 3.5 hearing, Shelby's uncle and the two officers who interviewed Shelby testified. The uncle said that Shelby had requested an attorney upon his arrival at the police station but one of the detectives who met Shelby outside the station testified that Shelby did not request an attorney. The State also introduced the waiver form that Shelby had signed and his pastor had witnessed before the police began the interview. The court ruled that Shelby's statements were admissible.

Also at the CrR 3.5 hearing, Shelby's lead counsel informed the court that Shelby's mother had filed a bar complaint against Shelby's now former co-counsel. n2 Lead counsel did not disclose the substance of the complaint but acknowledged that Shelby was not a named complainant. Nonetheless, counsel said that Shelby "agreed with the allegations." Report of Proceedings (RP) (Trial) at 73.

n2 The Washington State Bar Association dismissed the complaint without investigation but, according to defense counsel, the possibility of appeal remained.

[*5]

Lead counsel expressed "concern" about his continued representation of Shelby in light of the bar complaint. Lead counsel stated that the circumstances made him "uncomfortable" and that he sought the

court's "advice and counsel[.]" *RP (Trial)* at 74. After seeking a response from the State and Shelby, the trial court proceeded with lead counsel representing Shelby.

At trial, the State moved to admit an application for an Oregon identification card made the day after the shooting for a "William Black." The trial court admitted the application but it did not allow the State to submit handwriting analysis evidence because of untimely discovery. The court did admit evidence of Shelby's 1991 second degree burglary conviction as the predicate offense for the unlawful possession of a firearm charge.

The jury found Shelby guilty of first degree felony murder and first degree burglary, both while armed with a firearm, and of first degree unlawful possession of a firearm. After concluding that Shelby had an offender score of 7 for the felony murder and burglary convictions and a score of 6 for the unlawful possession of a firearm conviction, the court sentenced Shelby to a [*6] total of 510 months. The court also ordered Shelby to pay \$ 14,482.26 in restitution. n3

n3 Shelby filed a separate notice of appeal from the restitution order, which we consolidated with his appeal of his conviction and sentence. But Shelby specifically notes in his appellate brief that he does not appeal the restitution order.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Bar Complaint -- Conflict of Interest

Citing the bar complaint that his mother filed against defense counsel's former co-counsel, Shelby argues that defense counsel had an actual conflict of interest that impaired his defense and denied him effective assistance of counsel.

In reviewing a claim of ineffective assistance of counsel, we consider the entire record. *State v. McDonald*, 96 Wn. App. 311, 316, 979 P.2d 857 (1999), review granted, 139 Wn.2d 1015, 994 P.2d 846 (2000); *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). The Sixth Amendment right to effective assistance [*7] requires that a defendant have counsel free of conflicting interests. *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976); *White*, 80 Wn.

App. at 410. There are two situations where counsel's

conflict of interest is reversible error even without a showing of actual prejudice: (1) where there is an actual conflict that impairs the attorney's performance; and (2) where the trial court "knows or reasonably should know of a particular conflict into which it fails to inquire." *In re Personal Restraint Petition of Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983). See also *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

1. Conflict of Interest

To establish reversible error based upon an allegation of an actual conflict of interest, "[t]he appellant must demonstrate that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *State v. Martinez*, 53 Wn. App. 709, 715-16, 770 P.2d 646 (1989). An actual conflict of interest exists when the attorney [*8] owes duties to another that are adverse to the defendant's interests. *White*, 80 Wn. App. at 411-12. See also RPC 1.7(b).

Shelby suggests that the mere filing of a bar complaint by his mother against co-counsel created an actual conflict of interest for Shelby's lead counsel. But he fails to explain how his attorney's interest conflicted with that of his own. See *Mannhalt v. Reed*, 847 F.2d 576, 581 (9th Cir. 1988). This is not a case where defense counsel's vigorous defense might somehow compromise counsel in another matter; nor is there an issue of multiple representations. See *Mannhalt*, 847 F.2d at 581; *In re Personal Restraint Petition of Stenson*, 142 Wn.2d 710, 721-722, 16 P.3d 1 (Wash. 2001).

We agree with the reasoning in decisions from other states that have held that a bar complaint, even against the challenged defense counsel, is not per se a conflict of interest. See, e.g., *Carter v. Armontrout*, 929 F.2d 1294, 1300 (8th Cir. 1991) (pending lawsuit between defendant and attorney may create conflict of interest but defendant does not necessarily create such conflict merely by filing lawsuit); [*9] *People v. Johnson*, 227 Ill. App. 3d 800, 592 N.E.2d 345, 353-56, 169 Ill. Dec. 858 (1992) (noting the court need not honor request for new counsel merely because defendant filed a disciplinary complaint); *Dunn v. State*, 819 S.W.2d 510, 519 (Tex. Crim. App. 1991) (filing of civil action against court appointed attorney not per se conflict of interest warranting disqualification of attorney "at the whim of the criminal defendant"). But see *Mathis v. Hood*, 937 F.2d 790, 795-96 (2d Cir. 1991) (finding actual conflict of interest where defendant filed well-founded grievance). As these courts recognized, a per se rule would

encourage defendants to file groundless complaints as a dilatory tactic. *Johnson*, 592 N.E.2d at 355. To discourage such tactics, a defendant must bear the responsibility of providing sufficient information to enable the trial court, and this court, to determine whether a complaint has merit and therefore suggests a conflict of interest.

Here, the complaint against co-counsel is not part of the record. Thus, we do not know the nature of the allegations against co-counsel and have no basis to determine [*10] whether the complaint created an actual conflict. See *Cuyler*, 446 U.S. at 350 (noting that "the possibility of conflict is insufficient to impugn a criminal conviction"); *Garner v. State*, 864 S.W.2d 92, 99 (Tex. App. 1993) (refusing to find conflict where defendant wrote letter to bar association regarding trial counsel because defendant failed to provide record of nature of complaint). We can only surmise from our scant record that the dispute was over trial strategy. And "[c]ase law does not support the application of the concept of a conflict of interest to conflicts between an attorney and client over trial strategy." *Stenson*, slip op. at 11. n4

n4 Shelby cites to two letters from his pastor to the trial court suggesting that his attorney was not representing him effectively but the letters fail to show the pastor's basis of knowledge or provide details. At most, they suggest that Shelby was unwilling to accept his attorney's advice to seek a plea agreement.

[*11]

Shelby also attempts to prove that an actual conflict existed by pointing to specific instances of deficient performance in the record that, he argues, show his attorney had a conflict.

But Shelby fails to establish a nexus between these instances and the alleged conflict, and we see no connection between the alleged deficiencies and the dismissed bar complaint.

Nor is Shelby's reliance on *State v. Graham*, 78 Wn. App. 44, 896 P.2d 704 (1995), persuasive. In *Graham*, defense counsel represented four defendants in a drug case. 78 Wn. App. at 48. There was no mention of a conflict of interest below but on appeal *Graham* argued that certain trial conduct suggested that his defense counsel had a conflict in regard to the multiple representation. *Graham*, 78 Wn. App. at 54-55. This court found that the alleged instances did not

suggest a conflict resulting from the multiple representation. *Graham*, 78 Wn. App. at 55-56.

Similarly, here, there is only speculation as to the nature of the bar complaint and unsupported allegations as to the connection between counsel's trial performance and the alleged conflict. [*12] This is not a sufficient basis to reverse a conviction. *See Cuyler*, 446 U.S. at 350.

2. Trial Court's Duty to Inquire

The trial court's duty to inquire into alleged conflicts arises only when there are special circumstances indicating that the court "knows or reasonably should know that a particular conflict exists[.]" *Martinez*, 53 Wn. App. at 713, 714 (quoting *Cuyler*, 446 U.S. at 346-47). In *McDonald*, the Court of Appeals found reversible error where the trial court failed to conduct a sufficient inquiry into an alleged conflict after both prosecution and defense counsel moved for substitution of new standby counsel. 96 Wn. App. at 318-20.

In that case, the court appointed a public defender as standby counsel for the defendant who was proceeding pro se. *McDonald*, 96 Wn. App. at 314. Before trial, the State twice moved to dismiss standby counsel, first because the defendant had filed a lawsuit against the public defender's office and again after the defendant sued standby counsel in federal court. *McDonald*, 96 Wn. App. at 314. The trial court denied both motions [*13] and then denied standby counsel's motion to withdraw, which standby counsel filed after the prosecutor's office assumed his defense in McDonald's federal suit. *McDonald*, 96 Wn. App. at 314.

The Court of Appeals found that the trial court had failed to make a sufficient inquiry into the alleged conflict, noting specifically that the trial court should have asked about the status of the federal lawsuit, the nature of the allegations against [defense counsel], whether [defense counsel] had already disclosed client confidences to his attorney ..., whether the prosecutor had erected a "chinese [sic] wall" as a prophylactic measure to avoid learning about any disclosures of McDonald's communications, and what if anything [defense counsel's] attorney had learned about McDonald's defense strategy or details of the case.

McDonald, 96 Wn. App. at 320.

In this case, Shelby's lead counsel was the one who initially informed the trial court of the communications breakdown between co-counsel and Shelby. But the record contains no indication that lead counsel suggested at that time that he had a possible conflict of

interest. Rather, lead counsel [*14] told the court that although he was asking that co-counsel be allowed to withdraw, he believed that "Mr. Shelby and I can work together[.]" *RP* (4/26/99) at 4. Therefore, at that point, the trial court did not have a duty to inquire.

Later, at Shelby's CrR 3.5 hearing, lead counsel informed the court about the bar complaint against co-counsel, which by then had been dismissed. He asked the court for "advice and counsel" after explaining that "the nature of the allegations are such that they encompass conduct which I was personally responsible for as well as [co-counsel] in that I have always been the lead attorney on the case." *RP* (Trial) at 74.

The trial court then inquired about the situation, seeking argument from the State and asking Shelby if he wanted lead counsel to continue to represent him. Shelby gave an ambivalent response; he stated that he did not want lead counsel to represent him "if he's not going to be representing me right." *RP* (Trial) at 76-77.

After these responses, the trial court noted that Shelby or his family should not be allowed to control the proceedings by use of a bar complaint. The court decided to proceed [*15] with lead counsel representing Shelby and defer any other decision until lead counsel had a chance to research and present argument as to further steps the court should take. As Shelby acknowledges, lead counsel did not raise the issue again.

The record here does not contain the special circumstances calling for further inquiry that were present in *McDonald*. In *McDonald*, the State initiated the move to dismiss standby counsel, then moved a second time. 96 Wn. App. at 314. Defense counsel also moved to withdraw. And counsel advised the trial court of two lawsuits by the defendant against his lawyer and the public defender's office. *McDonald*, 96 Wn. App. at 314. In contrast, here, defense counsel merely mentioned his uneasiness because of a dismissed bar complaint filed by Shelby's mother.

Further, the court asked for comment from both parties, including Shelby personally, and expressly made itself available should defense counsel or the State desire to provide more information about the conflict and the appropriate steps to follow. Thus, we conclude, based on the record before us, that the trial court made sufficient inquiry into the potential [*16] conflict.

B. Cumulative Ineffective Assistance of Counsel

Shelby also claims that the specific instances he asserts demonstrate a conflict of interest also show that he was

denied his right to effective assistance of counsel. To prevail on this theory, he must show that counsel's representation "fell below an objective standard of reasonableness" and that defense counsel's deficient representation caused him prejudice, "i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If he fails to establish either prong, we need not proceed further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is a strong presumption that the defendant received effective representation. *McFarland*, 127 Wn.2d at 335. Trial tactics do not constitute ineffective assistance. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

1. Death Penalty Instruction

Shelby first challenges his counsel's failure to object to the court's comment [*17] to the jury venire that this was not a death penalty case. n5 According to *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145, 149 (2001), a death penalty instruction is improper and there is "no possible advantage to be gained by defense counsel's failure to object[.]" Silence in the face of such an instruction is deficient performance.

n5 The trial court stated: "I want to tell you that normally, and this case is not any different, jurors have nothing to do with any punishment that follows a conviction. I do want to go so far as to tell you that this is not a death-penalty case. So do not have that on your mind." *RP (Trial) at 237*.

But here, as in *Townsend*, there is no reasonable probability that an objection would have affected the outcome in this case. 15 P.3d at 150. The jury rejected the aggravated premeditated murder charge and found Shelby guilty of first degree felony murder. Ample evidence supports that conviction. Shelby admitted bringing the gun to [*18] Butler's apartment and three people witnessed Shelby kicking in the apartment door. Further, the evidence indicated that Butler had been shot four times, at least twice from behind. Finally, the court's single statement at the start of a week-long trial was neither provocative, inflammatory, nor misleading. Thus, as counsel's failure to object could not have affected the verdict, Shelby has failed to show that his attorney's deficient performance prejudiced him.

2. ER 404(b) Evidence

Shelby next argues that his counsel's failure to object to the admission of the Oregon identification card application for "William Black" constituted deficient performance. The State responds that the application was relevant to a consciousness of guilt as evidence of flight and that the trial court properly weighed the probative value of the evidence against its prejudicial effect.

Evidence of other crimes or bad acts is not admissible to prove a person's character but it may be admissible for other purposes, including to show a consciousness of guilt. ER 404(b). The evidence must be logically relevant to a material issue and its probative value must outweigh its potential for unfair prejudice. [*19] *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The trial court must conduct its balancing of the probative value and its prejudicial effect on the record; failure to do so is error. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984).

But because evidentiary rulings in violation of ER 404 are not of constitutional magnitude, such rulings do not require reversal absent prejudice. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The trial court's failure to conduct the balancing on the record is harmless error if the record is sufficient for us to determine that the trial court would have admitted the evidence if the balancing had taken place on the record or if the admission of the evidence did not affect the trial's outcome. *State v. Carleton*, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996).

Insofar as the evidence suggested that Shelby was fleeing the scene, it was admissible if "the evidence or circumstances introduced and giving rise to the contention of flight [were] substantial and sufficient to create a reasonable and substantive inference that the defendant's departure [*20] ... was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." *State v. Bruton*, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965); see also *State v. Nichols*, 5 Wn. App. 657, 660, 491 P.2d 677 (1971).

Here, the trial court identified the purpose of the evidence and discussed its relevance and probative value on the record. The evidence, an application for an identification card in a different state that was made the day after the shooting, contained a photograph of an individual of similar looks, height, and weight to Shelby.

Although the trial court did not discuss the

potential for prejudice, the record on review is adequate for us to determine that the court would still have admitted the evidence. *See Carleton, 82 Wn. App. at 686*. As the trial court noted, whether Shelby and the subject of the photograph were the same person was a matter for the jury's consideration and went to the weight, not the admissibility, of the evidence. Further, there was nothing about the evidence that was likely to inflame the passions of the jurors such that they would make a decision [*21] based upon inappropriate considerations. *See Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994)* (evidence with potential for unfair prejudice is that likely to arouse emotional response rather than rational decision).

3. Unlawful Possession of Firearm Predicate Conviction

Shelby also argues that his attorney should have stipulated to his 1991 second degree burglary conviction for purposes of the unlawful possession of a firearm count. He asserts that this evidence, along with the evidence of flight, allowed the jury to consider cumulatively prejudicial evidence. The State contends that the defense counsel had legitimate tactical reasons for failing to stipulate and thus this decision does not constitute deficient performance.

An unlawful possession of a firearm (UPF) charge requires a constitutionally valid predicate conviction as one element of the offense. *RCW 9.41.040*; n6 *see also State v. Reed, 84 Wn. App. 379, 384, 928 P.2d 469 (1997)*. Because of the prejudicial affect of such evidence, defendants sometime stipulate to the predicate offense, in which case, the State and trial court may be obligated [*22] to accept the stipulation. *See State v. Johnson, 90 Wn. App. 54, 62-63, 950 P.2d 981 (1998)*. Here, Shelby had a prior conviction for second degree burglary but defense counsel did not stipulate to it; instead, counsel asserted that there was no identity of name or birth date and Shelby had not been advised of his right to counsel or the consequences of his guilty plea when he pleaded. n7

n6 *RCW 9.41.040(1)(a)* provides in part: "A person ... is guilty of the crime of unlawful possession of a firearm in the first degree, if the person ... has in his or her possession ... any firearm after having previously been convicted ... of any serious offense[.]"

n7 The certified disposition order for the second degree burglary offense had the name "Armondo Shelby" and a birthdate of 5/17/73. But the original information in this case has the

name of "Armondo Tremaine Shelby" with a birthdate of 5/13/73.

Although in hindsight one may question the wisdom of the failure [*23] to stipulate, it appears that the decision was a trial tactic. *See Garrett, 124 Wn.2d at 520* (noting ineffective assistance will not be found where actions relate to trial tactics). And the record reflects that defense counsel actively sought to challenge the evidence on the UPF charge and to have it severed or dismissed. n8 The failure to stipulate is not ineffective assistance of counsel.

n8 Shelby also acknowledges that counsel discussed the issue on a number of occasions.

Nor do we find merit in Shelby's suggestion that defense counsel's argument was based entirely on the constitutional invalidity of the prior conviction. The trial court saw two issues related to the prior conviction: the identity match between the person named in the prior conviction and the current defendant, a question of fact for the jury, and the constitutional validity of the prior conviction, a question for the court. Thus, even after the trial court concluded that the prior conviction was constitutionally valid, [*24] the identity question remained before the jury.

Also, again Shelby has failed to show prejudice. n9 In addition to the ample evidence discussed above, testimony contradicted Shelby's assertion that the gun went off during a struggle with Butler. For instance, Cleveland heard Shelby say, after the first gunshot, "You like that, huh? You want some more?," followed by a couple more gunshots as Cleveland ran from the apartment. *RP (Trial) at 434*.

n9 The trial court thoroughly analyzed the potential prejudice of the prior burglary conviction in considering Shelby's motion to sever the UPF charge and concluded that the prejudice was minimal overall.

Thus, we see no reasonable probability that a stipulation to the predicate conviction would have affected the outcome.

4. Offender Score -- Same Criminal Conduct

Finally, Shelby argues that defense counsel was deficient because he failed to argue at sentencing that Shelby's current convictions for first degree felony murder and burglary constituted [*25] the same criminal conduct. As we discuss more fully below in response to Shelby's separate claim of sentencing error, the trial court considered the issue and properly exercised its discretion in finding that the two offenses did not constitute the same criminal conduct. Thus, this failure is not ineffective assistance of counsel.

C. Pro Se Arguments -- Ineffective assistance

In his pro se supplemental brief, Shelby further argues that his defense counsel was unprepared to cross-examine and impeach the State's witnesses, specifically Kevin Cuban and Bohlen, and that his counsel failed to pursue a plausible heat of passion/sudden quarrel defense.

1. Cross-examination of State's Witnesses

The defense cross-examined Bohlen at length and specifically asked her about prior inconsistent statements. See *In re Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998) ("[E]ven a lame cross-examination will seldom, if ever, amount to a Sixth Amendment violation."). Further, although defense counsel was apparently not present at Bohlen's interview, his investigator was and he provided a summary to counsel.

Defense counsel did indicate [*26] that he was unprepared to cross-examine Cuban and he did not ask Cuban any questions. There was some indication at the end of Cuban's testimony that the defense might recall him as a defense witness because of an alleged recantation of his testimony but the matter was not raised again and Cuban was not recalled. As defense counsel may have had a legitimate tactical reason for electing not to recall Cuban, Shelby has not rebutted the presumption of effective representation. See *McFarland*, 127 Wn.2d at 336; see also *State v. Hayes*, 81 Wn. App. 425, 443, 914 P.2d 788 (1996) (noting that personal restraint petition appropriate vehicle for raising ineffective assistance claim involving matters outside the record).

2. Heat of Passion/Sudden Quarrel Defense

Shelby argues that his counsel should have used a heat of passion/sudden quarrel defense in "tandem" with the defense of self-defense. But this is not a defense to homicide in Washington. See *State v. Van Zante*, 26 Wn. App. 739, 740-41, 614 P.2d 217 (1980).

Generally, "[j]ury instructions are sufficient if they permit each party [*27] to argue his theory of the case and properly inform the jury of the applicable law." *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). Here, the court instructed on self-defense and the lesser included offenses of second degree murder and first and second degree manslaughter. Thus, Shelby has not shown deficient performance. See *Van Zante*, 26 Wn. App. at 740-41 (rejecting ineffective assistance claim finding that defense of provocation instruction inappropriate because evidence of provocation negates premeditation and intent but not a defense per se and defense allowed to introduce provocation evidence).

II. DEATH PENALTY INSTRUCTION

Shelby separately assigns error to the trial court's instruction to the jury that the case did not involve the death penalty. As we discussed above in our ineffective assistance of counsel analysis, counsel's failure to object to the instruction was deficient performance. *Townsend*, 15 P.3d at 149. It was not ineffective assistance, however, as Shelby suffered no prejudice. Further, Shelby failed to object below and does not show that this is an error of constitutional magnitude. [*28] Thus, we do not address this claim on appeal outside of the ineffective assistance context. RAP 2.5(a).

III. OFFENDER SCORE

Shelby argues for the first time on appeal n10 that the trial court erroneously calculated his offender score because it did not find that two of his current convictions, first degree felony murder and first degree burglary, constituted the same criminal conduct under *RCW 9.94A.400(1)(a)*. He also asserts the court did not make an adequate record evidencing that it exercised its discretion.

n10 A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). But see *State v. Nitsch*, 100 Wn. App. 512, 520-23, 997 P.2d 1000 (suggesting that court's failure to sua sponte determine whether current offenses constitute same criminal conduct is not a challenge to illegal or erroneous sentence reviewable for first time on appeal), *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000).

[*29]

2001 Wash. App. LEXIS 278, *

Page 8

When sentencing a defendant for two or more current offenses, if the court finds that some or all of the current offenses constitute the same criminal conduct, those offenses count as one crime for purposes of calculating the offender score. *RCW 9.94A.400(1)(a)*. n11 "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *RCW 9.94A.400(1)(a)*. The court construes the statute narrowly to disallow most such claims. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

n11 *RCW 9.94A.400(1)(a)* provides in part:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

[*30]

As Shelby acknowledges, the Supreme Court held that the anti-merger statute, *RCW 9A.52.050*, n12 gives the sentencing court discretion to punish burglary separately even when the burglary and the additional crime constitute the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992); see also *State v. Kisor*, 68 Wn. App. 610, 618, 844 P.2d 1038 (1993). Thus, Shelby's assertion that the first degree felony murder and first degree burglary convictions constitute the same criminal conduct is immaterial if the trial court exercised its discretion and elected to punish the two offenses separately.

n12 The anti-merger statute states: "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." *RCW 9A.52.050*.

The sentencing court initially noted that it had three issues before [*31] it: "whether we have a merger

question, a double-jeopardy violation, or same course of conduct on any of these offenses." *RP (Sentencing) at 11*. After both parties declined to argue the issues further, the court ruled: n13

n13 The State specifically argued in its sentencing memorandum that none of Shelby's three current offenses constituted the same criminal conduct.

In this situation, I'm convinced we have clearly a separation between the burglary and the murder. The facts in this case seem to indicate that the burglary was accomplished with Mr. Shelby wanting to get into the house to have further contact with Jennifer Bohlen or remove Jennifer Bohlen from the house; that from there, it erupted into a fight between Mr. Shelby and Tirrell Butler; that Mr. Butler's death was caused thereafter; that that's a whole separate sequence from the burglary and that there's nothing that would suggest that the Court ought not to sentence the burglary and the felony-murder as individual offenses.

*RP (Sentencing) [*32]* at 12-13. n14

n14 In conclusion, the trial court stated that "[e]ach of these [three counts] ... appears to be a separate and distinct offense, and the Court would not be precluded by either the anti-merger statute or double jeopardy in sentencing separately." *RP (Sentencing) at 13*.

Shelby contends that the record fails to show that the trial court exercised its discretion because: (1) the court referred to "sentencing" the burglary and felony murder convictions as individual offenses rather than specifying that they were separate offenses for purposes of calculating the offender score; (2) the elements of same criminal conduct were not explicitly discussed; (3) the court addressed Shelby's subjective intent rather than the objective criminal intent of the offenses; and (4) the State's sentencing memorandum did not inform the court that the anti-merger statute does not preclude a same criminal conduct analysis.

Shelby's first, second, and fourth arguments are [*33] nothing more than semantics and are meritless. A sentencing court is not required to use specific words or delineate the facts relevant to each element. Nor did the State have a duty to inform the court of its discretionary power.

As to Shelby's third argument, the test for evaluating intent for purposes of same criminal conduct is whether the intent, objectively viewed, changed from one crime to the next. *Lessley*, 118 Wn.2d at 777. "Under that test, if one crime *furthered* another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." *Lessley*, 118 Wn.2d at 777.

In this case, the trial court's reasoning suggests that it either found that the two offenses had different intents or had different victims, either of which precludes a same criminal conduct finding. If one offense has multiple victims but another crime has only one, a same criminal conduct finding is precluded, *See*, e.g., *Lessley*, 118 Wn.2d at 779 ("Because more than one victim was involved in the burglary, it was not the same criminal [*34] conduct[.]"); *State v. Davis*, 90 Wn. App. 776, 782-83, 954 P.2d 325 (1998) (finding different victims where multiple victims of burglary but only one victim of assault); *State v. Davison*, 56 Wn. App. 554, 558-60, 784 P.2d 1268 (1990) (same).

In this case, Butler, Bohlen, and Cleveland were all staying at the apartment and were present when Shelby broke in; thus, these three were victims of the burglary. *See Davison*, 56 Wn. App. at 558-59 (rejecting defendant's argument that only the building occupant, not the guest, was the burglary victim). But Butler was the only murder victim. As the two crimes involved different victims, the court could not find the acts to be the same criminal conduct. Thus, the sentencing court did not abuse its discretion in counting the two offenses separately. *See State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990) (same criminal conduct determination reviewed for abuse of discretion or misapplication of law).

IV. PRO SE ARGUMENTS

A. Admissibility of Statements

Shelby appears to argue that the trial court should not have admitted the statements he made to police after [*35] he turned himself in because he invoked his right to an attorney prior to police interrogation. The State responds that we should not review this claim because Shelby failed to assign error to the trial court's CrR 3.5 findings of fact and conclusions of law and that, in any event, Shelby made his statements voluntarily.

Unchallenged findings entered following a CrR 3.5 hearing are verities on appeal and challenged findings are verities if supported by substantial evidence. *State*

v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

As Shelby does not challenge the trial court's findings entered following the CrR 3.5 hearing, they are verities. The trial court found that Shelby did not ask for an attorney and that Shelby did not indicate that he did not want to make a statement. It thus concluded that Shelby was properly advised of his rights, that he voluntarily waived those rights, and that he voluntarily made a statement [*36] to police.

Further, this was not a case of a "swearing contest" between one testifying officer and Shelby as to whether Shelby invoked his rights. *See State v. Davis*, 73 Wn.2d 271, 286-88, 438 P.2d 185 (1968) (swearing contest between the defendant and an investigating officer is not sufficient evidence to establish the State's heavy burden of showing a waiver occurred). n15 Here, all three officers who had contact with Shelby testified at the CrR 3.5 hearing but only Shelby's uncle testified that Shelby had requested an attorney outside the police station. Shelby also signed a written waiver of his rights and his pastor, who had come with Shelby, witnessed that waiver. Thus, the evidence of waiver was not limited to a swearing contest that affords a tie to the defendant. *See State v. Pam*, 1 Wn. App. 723, 725-26, 463 P.2d 200 (1969) (distinguishing *Davis* because defendant signed waiver of right to an attorney and statement that he understood his rights).

n15 Further, the *Davis* court noted that more than a "swearing contest" is required if an interrogation takes place "with no one present who is either favorable to the accused or suited for the role of a neutral and impartial observer[.]" 73 Wn.2d at 287. In this case, Shelby was not interrogated in isolated circumstances -- he arrived with seven friends and family members and both his mother and pastor were present during the first interview.

[*37]

B. Prosecutorial Misconduct -- Closing Argument

Finally, Shelby alleges prosecutorial misconduct in the State's closing argument. He raises a number of allegedly improper remarks but the only defense objection in the record does not relate to an instance of

2001 Wash. App. LEXIS 278, *

alleged misconduct. n16 Because Shelby failed to object below, he bears the burden of proving both that the remarks were "flagrant and ill intentioned" and that they were prejudicial. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). He must show "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict" and that an instruction could not have cured any prejudice. *Russell*, 125 Wn.2d at 86. We afford counsel latitude in arguing the facts in evidence and the reasonable inferences therefrom. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).

n16 The exchange was as follows:

[State]: Consider all of the evidence in this case, not just bits and pieces. Go back there, hash it out, take your time. Take this seriously. From the State's perspective, this is a very straight forward case. It may not seem to you when you start working on it.

[Defense]: I object, Your Honor.

The Court: Basis?

[Defense]: It's improper for [the prosecution] to state what [its] perspective is on the case.

The Court: Overruled.

RP (Trial) at 1056.

[*38]

Shelby asserts that the prosecution improperly argued that he could not exercise his right to bear arms. n17 But this argument was accurate; Shelby lost this right because he had a previous felony conviction. *See Commonwealth v. Harley*, 275 Pa. Super. 407, 418 A.2d 1354, 1360 (1980) (finding no error in refusing to instruct on right to bear arms because defendant prosecuted for using a weapon to kill a police officer, not for possessing a weapon in his own home). Thus, the statement was neither flagrant nor ill intentioned. Nor do we see a substantial likelihood that it affected the verdict.

n17 The prosecution stated: "Now we can see why we have laws that say certain people that commit certain crimes don't get to have handguns because they can't be trusted with them, because they might go out and hurt someone the way that Armondo Shelby did on the night of February 12th, 1998." *RP (Trial) at*

1038.

Shelby also challenges the State's characterization of him as a "cold-blooded murderer. [*39] " n18 But given the latitude afforded counsel in arguing the facts and related inferences and the need for the State to prove premeditation, the comment does not appear flagrant and ill intentioned. Nor was it so prejudicial that a curative instruction would not have been effective. *Cf. State v. Belgarde*, 110 Wn.2d 504, 506-07, 510, 755 P.2d 174 (1988) (holding it was misconduct for prosecutor to call American Indian Movement "a deadly group of madmen" that were "butchers, that killed indiscriminately").

n18 The State argued as follows: "I ask you to go back to the jury room and deliberate on this case, and return a verdict that reflects the truth of what happened that night. Armondo Shelby had no cause to do what he did, and that he is, in fact, a cold-blooded murderer." *RP (Trial) at 1038.*

Third, we see no misconduct in the prosecutor's discussion of a threatening phone call that was made three days before Butler died. n19 The argument was in response to defense counsel's [*40] assertion that the call was not a true threat.

n19 Defense counsel argued as follows:

Think about the telephone call to Daniel Griffith three days earlier. Is that a real threat through a third person? Not to Mr. Butler or is that like a dog marking its territory? Is that a young man trying to scare away the competition? Is that evidence of premeditation, or is that something else? Is that evidence of a relationship that existed? He wouldn't be doing that unless there was a relationship between them.

RP (Trial) at 1044. The prosecution responded to this argument in the following fashion:

[Defense counsel] suggested to you that the threat that was made on the phone was not a real threat. In fact, he proposed to you a hypothetical question: Was the call to Daniel Griffith a real threat? I don't know, let's ask Tirrell. Tirrell, what do you think? Do you like that? Do you want some more? How about that,

2001 Wash. App. LEXIS 278, *

Page 11

Tirrell, do you like that? Do you want some more? Do you like that? Do you want some more? Tirrell, tell us what you think about that phone call. Was that a real threat? Do you like that? Do you want some more?

Ladies and gentlemen, that was a threat more real than anything you or I could ever imagine, and the only other person that you haven't heard from in this case who could tell you how real it was, was Tirrell.

RP (Trial) at 1055-56.

[*41]

Even if this remark was improper, it would not be a basis for reversal if defense counsel invited or provoked it and if the remark was a pertinent reply, unless it was so prejudicial that a curative instruction would be ineffective. *Russell, 125 Wn.2d at 86*. The prosecutor is an advocate and is entitled to make a fair response to defense counsel's argument. *Russell, 125 Wn.2d at 87*. Here, as the prosecution's remark was in direct response to the defense argument, there was no reversible error.

Finally, Shelby challenges the prosecutor's statement to the jury that it had "an obligation or DUTY to pass judgment on Shelby." n20 Pro Se Supp. Br. at 31. This differs from telling the jury its duty is to convict the defendant. See *United States v. Sanchez, 176 F.3d 1214, 1224-25 (9th Cir. 1999)*. It is not misconduct to tell the jury that its duty is to determine the facts from the evidence and decide the case accordingly. See *State v. Luoma, 88 Wn.2d 28, 40, 558 P.2d 756 (1977)* (noting that jury does have a duty to render a verdict based on the evidence).

n20 The State argued as follows:

Take your time and think about it because, remember when I first got up here to do my closing argument to you I talked to you about the truth of what happened that night, not just the truth from one person's perspective, by [sic] the overall truth of what happened.

That is your duty in this case, to determine the truth, and then based upon the truth as you decide it, pass judgment on that man, and what he did.

RP (Trial) at 1056.

[*42]

Therefore, finding no reversible trial court error, ineffective assistance of counsel, or prosecutorial misconduct, we affirm Shelby's convictions and sentence.

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

Seinfeld, J.

We concur:

Morgan, J.

Armstrong, C.J.

APPENDIX "C"

Order for Continuance of Trial Date (January 14, 1999)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON

Plaintiff,

vs.

NO. 98-1-00715-1

Armond T. Shelby

ORDER FOR CONTINUANCE
OF TRIAL DATE

FILED
DEPT. 8
IN OPEN COURT
JAN 14 1999
Pierce County Clerk
By [Signature]
DEPUTY

Defendant(s).

I. BASIS

This matter came before the court upon motion of: defense counsel

II. FINDINGS

[] The defendant has shown good cause for a continuance in that:

Atty Thoenig is in trial in State v. Sap Kiey which will, in all likelihood end sometime in February 1999

[x] The (deputy) prosecuting attorney has established:

- [] that good cause exists and the defendant expressly consents to a continuance; or
- [] that the state's evidence is presently unavailable, the prosecution has exercised due diligence and reasonable grounds exist to believe that it will be available within a reasonable time; or
- [] lab; [] witness; [] other _____
- [x] that a continuance is required in the due administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense.

[x] The court established that a continuance is required in the due administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense.

The defendant (has) ~~(has not)~~ waived the right to a speedy trial.

III. ORDER

IT IS ORDERED that this case presently set for trial on: 2/1/99 is continued to: April 26, 1999

DATED: 1-14-99

[Signature]
JUDGE

Presented by: [Signature]
21333
Deputy Prosecuting Attorney

Attorney for Defendant

5
JAN 14 1999

APPENDIX "D"

Waiver of Speedy Trial

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON

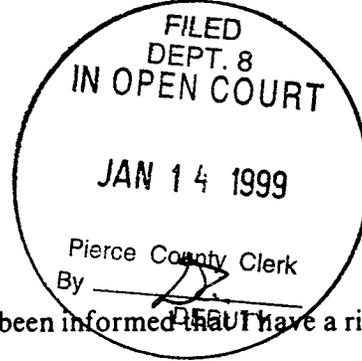
Plaintiff,

NO. 98-1-00715-1

vs.

WAIVER OF SPEEDY TRIAL

Armando T. Shelby



Defendant(s).

I, above named, a defendant in this case, acknowledge that I have been informed that I have a right to a trial within:

[] 90 days following my preliminary appearance on this charge;

[X] 60 days following my preliminary appearance on this charge because I am in custody;

and that if I do not receive a trial within the above time period, the case will be dismissed with prejudice unless I give this right.

JAN 14 1999

ARRAIGNMENT DATE: _____

I UNDERSTAND THAT I HAVE A RIGHT TO TRIAL WITHIN THE TIME NOTED ABOVE AND I GIVE UP THAT RIGHT AND CONSENT TO A TRIAL DATE OF: 4-26-99

DATED: 1-14-99

Armando Shelby
Defendant

[Signature]
Defendant's Lawyer

Signed by defendant in the presence of ^{his Attorney} the undersigned judge on:

Date: 14 Jan 1999

[Signature]
JUDGE

APPENDIX "E"

Order for Continuance of Trial Date (April 26, 1999)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON

Plaintiff,

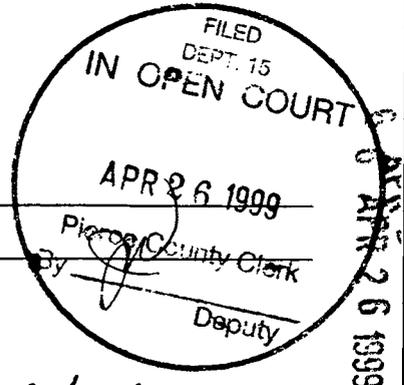
vs.

NO. 98-1-00715-1

ORDER FOR CONTINUANCE
OF TRIAL DATE

Armando T. Shelby

Defendant(s).



I. BASIS

This matter came before the court upon motion of: defense counsel

II. FINDINGS

The defendant has shown good cause for a continuance in that:

Co-counsel can no longer participate in the defense and lead counsel needs additional time to take over the role that co-counsel was to fulfill during the trial.

The (deputy) prosecuting attorney has established:

- that good cause exists and the defendant expressly consents to a continuance; or
- that the state's evidence is presently unavailable, the prosecution has exercised due diligence and reasonable grounds exist to believe that it will be available within a reasonable time; or
- lab; witness; other _____;
- that a continuance is required in the due administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense.

The court established that a continuance is required in the due administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense.

The defendant ~~has~~ ^{has not} waived the right to a speedy trial.

III. ORDER

IT IS ORDERED that this case presently set for trial on: ~~4-26-99~~ 5-10-99 is

continued to: \$ 5-10-99 for trial; 5-5-99 Pre-trial motions

DATED: 4-26-99

Presented by: _____

[Signature]
JUDGE

21333
Deputy Prosecuting Attorney

Attorney for Defendant