

NO. 35269-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BENJAMIN SALOFI ASAELI, APPELLANT
ERONI JOSEPH WILLIAMS, APPELLANT
DARIUS ASAFO VAIELUA, APPELLANT

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STATE OF WASHINGTON
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Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 04-1-05087-3
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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. As the defendants cases were joined automatically by operation of court rule, has Williams failed to show any prejudicial error by the entry of a formal order of consolidation?
2. Have defendants failed to show that the court abused its discretion in denying their motion to sever?
3. Have the defendants failed to show that the trial court abused its discretion in admitting gang evidence that consisted of eyewitness testimony about the circumstances of the crime and limited expert testimony as to the nature of gangs and the interpretation of gang graffiti?
4. Has Williams failed to show the trial court abused its discretion in admitting evidence of gang graffiti found in his jail cell?
5. Did Defendants Asaeli and Vaielua fail to preserve any claim of error with regard to the admission of threatening telephone calls to the victim's residence when the court made only a tentative pretrial ruling and there was no objection to this evidence when it was adduced at trial?
6. Is Vaielua's claim that he was improperly limited in his cross examination of the State's expert not properly before this

court when it is not the subject of an assignment of error and when there was no offer of proof made in the trial court which is necessary to properly preserve the issue?

7. Have defendants failed to show that the prosecutor engaged in any improper conduct or that there was any resulting prejudice?

8. Did the trial court properly exercise its discretion by denying Vaielua's motion to remove a juror for what was, at most, momentary inattentiveness?

9. Is this court precluded from reviewing Vaielua's challenge to the instruction on accomplice liability by his failure to properly object in the trial court on the basis he raises on appeal and by the doctrine of invited error?

10. Has Vaielua failed to demonstrate that he received ineffective assistance of counsel based solely upon his attorney's failure to propose instructions on manslaughter when he cannot demonstrate deficient performance or resulting prejudice?

11. Did the State adduce sufficient evidence to support the jury's verdicts finding Vaielua and Williams guilty of felony murder in the second degree and were the verdicts consistent with the law regarding jury unanimity?

12. Has Vaielua failed to show why the Andress decision should control in his case when he was convicted under a statute

that was amended expressly to alter the impact of the Andress on his crime?

13. Should this court reject Williams arguments about the need for a jury to determine the existence of his prior convictions when controlling authority does not require a jury determination?

14. Have defendants failed to establish that there was any prejudicial error in their trial, much less an accumulation of it, so as to warrant a reversal under the cumulative error doctrine?

B. STATEMENT OF THE CASE.

1. Procedure

On November 1, 2004, the Pierce County Prosecutor's Office filed an information, under Pierce County Cause No. 04-1-05087-3, charging appellant BENJAMIN ASAELI, with murder in the first degree (premeditated and murder by extreme indifference) in count I and assault in the first degree in count II. ACP 1-7. The State also alleged a firearm enhancement on each count. Id. Faalata Fola was alleged to be the victim of the homicide and Tiare-ann Misionare the victim of the assault. Id. On December 8, 2005 the State filed an amended information charging felony murder in the second degree predicated on felony assault as Count III and possession of a stolen firearm as count IV. ACP 5-8. The State alleged a firearm enhancement on the felony murder count. Id.

On December 2, 2004, the Pierce County Prosecutor's Office filed an information, under Pierce County Cause No. 04-1-05574-3, charging appellant DARIUS VAIELUA, with murder in the first degree (premeditated and murder by extreme indifference) in count I and felony murder in the second degree (predicated on felony assault) in Count II. VCP 1-7. The victim of these crimes was Faalata Fola. The State also alleged a firearm enhancement on each count. Id. The information listed Eroni Williams, Cause No. 04-1-05575-1, and Benjamin Asaeli, Cause No. 04-1-05087-3, as co-defendants. Id. The State filed a corrected information on May 25, 2006, but it did not change the nature or number of charges. VCP 197-198.

On December 2, 2004, the Pierce County Prosecutor's Office filed an information, under Pierce County Cause No. 04-1-05575-1, charging appellant ERONI WILLIAMS, with murder in the first degree (premeditated and murder by extreme indifference) in count I and felony murder in the second degree (predicated on felony assault) in Count II. WCP 1-7. The victim of these crimes was Faalata Fola. The State also alleged a firearm enhancement on each count. Id. The information listed Darius Vaielua, Cause No. 04-1-05574-3, and Benjamin Asaeli, Cause No. 04-1-05087-3, as co-defendants. Id. The State served Williams with notice that he might be found to be a persistent offender upon conviction.

WCP 9. The State filed a corrected information on May 25, 2006, but it did not change the nature or number of charges. WCP 326-327.

On January 20, the court signed an order formally consolidating Asaeli's, Vaielua's, and Williams's cases for trial. VCP 24-25; WCP 19-20. The cases were assigned to the Honorable Katherine M. Stolz for trial, which began on May 25, 2006. After hearing the evidence the jury convicted Asaeli of murder in the first degree by extreme indifference, assault in the first degree, unlawful possession of a stolen handgun and felony murder in the second degree; it returned firearm enhancements on the assault and murder convictions. ACP 109-16. As for Vaielua and Williams, the jury left verdict form for murder in the first degree blank for Count I but found Vaielua and Williams not guilty of the lesser included [intentional] murder in the second degree on Count I. VCP 344, 346; WCP 397, 399 (A&B). The jury convicted Vaielua and Williams of felony murder in the second degree as charged in count III. VCP 348; WCP 401(C). The jury did not find that Vaielua or Williams were armed with a firearm at the time of the commission of their crimes.¹ VCP 349; WCP 402.

The Court held Asaeli's sentencing hearing on August 25, 2006. ACP 117-128. Asaeli was sentenced to the high end of the standard range

¹ The special verdict asked the jury to determine whether the "defendant" was armed with a firearm and not whether a "defendant or an accomplice" was so armed.

on murder in the first degree and the assault in the first degree receiving 333 months and 123 months respectively, to be served consecutively. He received an additional 120 months in firearm enhancements all to run consecutively to the sentences on the murder and assault. Id. He was given a low end standard range sentence on the possession of a stolen firearm to run concurrently with the murder sentence. Id. This resulted in a total confinement period of 576 months. Id.

The court held a sentencing hearing on January 12 2007, for Vaileua and Williams. The court found that Vaileua had an offender score of "0" and a standard range of 123-220 months. VCP 418-429. The court imposed a mid-range sentence of 180 months. Id. At sentencing the court determined that Williams's criminal history included a 1999 Washington conviction for robbery in the second degree and a 2000 Washington conviction for robbery in the second degree. WCP 414-423. These two prior convictions for most serious offenses rendered him a persistent offender and the court sentenced him to life without parole. WCP 414-423.

Defendants filed timely notices of appeal from entry of their judgments. ACP 129; VCP 432; WCP 426.

2. Facts

James Fola² testified that he was the cousin of the victim Faalata Fola. 1RP 263-264. He testified that the victim was a Crip who belonged to the EBK (Everybody Killer) and went by the name of “Blacc.” 1RP 264-265. James also used to be a EBK and affiliated with the Crips. 1RP 389-390, 406. He testified that Breanne Ramaley was the victim’s girlfriend and that Tami and Tiara Misionare were friends of his and of the victim. 1RP 266-267. He indicated that he had not met Angeline Paulo before the night of the shooting and was not sure if the victim knew her before that night or not. 1RP 267-268. James testified that even prior to the shooting he knew of Williams and Vaielua “from the streets.” 1RP 269-275. He knew Williams as “Eroni” or “Twix” and Vaielua as “Skills.” 1RP 269, 273-274. He testified that he knew both defendants as belonging to the set or gang called “K-Blok” or “Kushmen Blokk,” who used brown flags or rags to display their colors. 1RP 271-272, 274. James did not know defendant Asaeli and did not recall him being present the night of the shooting. 1RP 275.

² As James Fola has the same last name as the victim, Faalata, they will be referred to by their first names for the sake of clarity. This will also be the case for the victim’s sister and mother who testified at trial. No disrespect is intended.

James testified that the victim, another cousin named Taiulu Gago, and he all worked at Phoenix Warehouse in Fife. 1RP 275-278. Gago testified that he would consider Faalata one of his best friends. 2RP 233. On the day of the shooting, they agreed that after James got off work at midnight, they would go to the waterfront to hang out. 1RP 277-279. James and the victim were going to go to the waterfront in Gago's green car, a Mercury Mystique, and would meet up with the Misionare sisters at the waterfront. 1RP 279-282; 2RP 237. The sisters would arrive with Breane Ramaley in Ramaley's car. 1RP 288-289.

James testified that prior to the shooting, Gago's car and Ramaley's car were parked under the Dock Street Bridge and no other cars were there. 1RP 293-298. Both James and Gago testified that a white Trooper drove into the parking area that night and stayed briefly; Gago testified that the Trooper came by before the Ramaley's car arrived on the scene; James testified one occupants of the Trooper asked about some woman. 1RP 300-301; 2RP 245-247. After this exchange the Trooper made a U-turn and left. 1RP 301. James testified that next, a full sized, white sedan, came into the parking area and left. 1RP 302. After the white car, a 4Runner type SUV, possibly blue, pulled into the parking area. 1RP 303. It was followed by the same white car that had been there earlier and a green Jetta. 1RP 303-305. All three cars parked. Id. Gago

testified that a green Explorer or SUV came in followed by the same Trooper that had been there earlier, followed by a white Lumina and a green Jetta. 2RP 250. The SUV parked next to Ramaley's car and the Jetta was in the slot next to the SUV. 1RP 385; 2RP 250-251. Gago testified that the SUV was packed with people, the Trooper had two occupants and he could not recall how many were in the white car and green Jetta. 2RP 252. Gago testified that everyone in the SUV got out; one of whom was Vaielua. 2RP 253-254, 289-290.

James estimated that about fifteen people got out of these cars. 1RP 396. James testified that he recognized Vaielua, whom he called Skills, as the driver of the SUV. 1RP 307, 384. He could not say who came in which car, but he also recognized Williams, who he called Twix, and Verdell Malo, who he called Shaak, as some of the people who came in these vehicles. 1RP 307- 312. Vaielua and James exchanged a "What's up?" then Vaielua asked for Blacc. 1RP 309. James heard others asking for Blacc as well. 1RP 310. Three of the people that arrived went toward Blacc, who was seated in Ramaley's car. 1RP 312-313. Williams was on the right driver's side of the car at the window; a guy in a black hoodie was in the middle; Malo was on the left side. 1RP 313, 324. James heard Williams ask Blacc if he wanted to go "heads" which means to fight one on one. 1RP 409-410, 402, 420. James heard a ruckus or arguing, then

gunshots. 1RP 314. James was standing on the other side of Gago's car when this occurred. 1RP 314-315. James testified that he and Gago were near the trunk of Gago's car when the shots began. 1RP 315-316. James did not see who fired the shots, but is sounded to him that a whole clip of rounds was fired in one steady stream. 1RP 316-318. When the shots stopped, James could see that Blacc had been shot; he and Gago helped Blacc get into Gago's car and they took him to St. Joseph's Hospital. 1RP 319-321. James never saw Blacc in possession of a gun that night. 1RP 322-323. James later identified pictures of Malo, Williams, and Vaielua from photo montages. 1RP 326-331. James is certain that Vaielua was not the person in the hoodie. 1RP 332. James testified that he did not know if Asaeli was the person in the black hoodie or whether he was at the waterfront the night of the shooting; as far as he knew, he had never seen Asaeli before. 1RP 413.

Gago recalled that a couple of the people from the SUV went over to the white sedan. 2RP 326-327. Gago testified that Vaielua and at least one other from the SUV came over to James; the other guy had a brown flag over his face. 2RP 342-344, 358. Gago had met Vaielua at his cousin's house and had seen him one other time at the waterfront prior to the shooting. 2RP 352-353. Gago's recollection was that Vaielua exchanged a "what's up" with James but that it was the another occupant

of the SUV who asked for Blacc. 2RP 291-292. This person had been over at the white sedan and when he approached Ramaley's car he also had a brown bandanna or "flag" over his face and a hoodie on his head. 2RP 293-294, 327-328, 367. Gago associated this color flag with "Kushmen Blokk" a clique of several guys who live on the same block. 2RP 296-297. Gago testified that the man with the bandanna who had been over at the white car started shooting at Blacc while he was at the driver's side door then moved to the front of the car and shot through the windshield. 2RP 300-305. Gago was on the other side of his car, looking over the top of it toward Ramaley's car when the shots were fired. 2RP 305. He testified that there were two people between his car and Ramaley's at the time of the shooting - one leaning on the car and one up toward the hood. 2RP 371. He is not certain which one was talking to Blacc right before the shooting. 2RP 371. Gago testified that he is not certain as to which car brought the shooter to the scene. 2RP 362.

Gago testified that a week before the victim was killed he was with the victim and James at the waterfront when Blacc fired his gun. 2RP 235. The gun was aimed out at the water and no one in the area seemed to get upset about it. 2RP 235. James recalled being at the waterfront with the victim a week prior to the shooting but did not recall if the victim had

fired a gun that night. 1RP 284-286. Williams was also at the waterfront that night. 1RP 333-334.

James testified that he recognized a few people belonging to Kushmen Blokk seated among the spectators at the trial. 1RP 362- 363. During a courtroom break, James went out into the hallway and heard someone say “you’re marked” and “F**k you, Tulo”³ behind him, but he could not identify who said these things. 1RP 364. James stated that he did not feel intimidated by anyone in the courtroom as he was testifying. 1RP 403-404.

Tiare Misionare is the sister of Tami and the friend of Ms. Ramaley.⁴ 1RP 588-589, 1686. She met Angeline Paula through work about a week ahead of the shooting, but does not know where she is living now. 1RP 589-590. She testified that she is friends with James and Gago and was a close friend with the victim and his family. 1RP 590-593. She testified that she does not know Asaeli, Vasaeli, or Williams, but, prior to the shooting, she had heard talk of someone who was called “Skills.” 1RP 586-588. Ramaley testified that she and the victim were in a relationship and talking about marriage at the time he was killed. 1RP 1687-1688,

The night of the shooting Tiare made plans to go to the waterfront with her sister, Ramaley, and Paula. 1RP 625. The four women arrived at

³ This is James Falo’s street name. 1RP 364.

⁴ The Misionare sisters will be referred to by their first names for clarity. No disrespect is intended.

the Dock Street area in Ramaley's red car about 2:00 in the morning. 1RP 627-628, 1357, 1695-1697; 2RP 58. James, Gago, and the victim were already there, standing near Gago's car which was parked under the bridge. 1RP 628, 1354-1356, 1700. Eventually, Ramaley's car was parked next to Gago's car. 1RP 628-629, 631-632, 1360-1361, 1701-1702. Tiare was in the back passenger seat and the victim was in the driver's seat. 1RP 632, 1361-1362. The driver's door was closed but the window was down. 1RP 640.

Tami testified that a white two door car drove by; a few minutes later a dark green Explorer or SUV came into the lot and parked next to Ramaley's car. 1RP 634, 1362-1364. Tami testified that a green Jetta pulled in after the SUV and parked next to the SUV; a white car, which might have been the same white car as before, pulled in front of the Jetta. 1RP 1364-1367. These cars pulled in one right after another. 1RP 1454. Ramaley testified that several cars pulled into the parking lot but was unsure of the order; she recalled that the SUV parked next to her car and that another car, a green one, parked next to the SUV, then a white car parked in front of these two cars. 2RP 61. Ramaley thought that a total of five cars arrived after she did. Id. Tami testified that she knows there were at least three people in the SUV, the Jetta was packed with five people, and that there were two people –a male and female- in the white car. 1RP 1367-1368. Tiare estimated that there were five males in the

SUV; they all got out. 1RP 635-636. Ramaley thought there were four in the SUV. 2RP 65.

Tami testified that the driver of the SUV, whose hair was braided, got out of the car and was waving a light red bandanna. 1RP 1369. Tami testified that the driver of the SUV went up to James and asked where Blacc was. 1RP 1369-1370. Tami identified Vaielua as the driver of the SUV. 1RP 1371. Tami also saw the front passenger get out of the SUV and go toward Gago's car; this person had a dark bandanna over his face from the nose down. 1RP 1378-1379. Tami could not be certain whether this person was in the court room or not. 1RP 1379. Ramaley testified that some males got out of the SUV and went over to where she was standing with James and Gago. 2RP 65. Ramaley testified a tall guy, who had braids and a dark bandanna across his lower face, asked James where Blacc was. 2RP 65-66. Tami did not see anyone get out of the Jetta, but did notice that only the woman was left in the white car and that she was getting into the driver's side. 1RP 1380-1381. Tami, testified that at that point she and Ramaley walked toward the water to smoke a blunt. 1RP 1382. Ramaley testified that she went toward Tami because she was worried about the situation and wanted to alert her friend. 2RP 67-68. Ramaley testified that she got about halfway across the parking lot when she heard a gunshot; she turned around and saw three more flashes coming from the driver's side of her car. 2RP 68-69. Ramaley saw four people near the driver's side of her car, but could not testify as to whether any of

those people were in courtroom. 2RP 69-71. One of the four was more to the front of the car than the others. 2RP 73-75. Tami heard the noise of the gunshots and saw the flash from the shots; she could tell they were being fired under the bridge; they looked like they were coming from close to the front seat of Ramaley's car. 1RP 1383-1385. Tami could see that Vaeilua was standing between Ramaley's car and Gago's car at the time of the shooting. 1RP 1444. Tami and Ramaley watched the SUV, white car, and Jetta drive off. 1RP 1387-1388; 2RP 76. Then Tami heard her sister scream. 1RP 1388, 1391.

Tiare testified that after the SUV arrived that she could see the driver of the SUV motion to the others; a lot of other people came into the area from behind the SUV. 1RP 636-638. Tiare identified Vaielua as the driver of the SUV. 1RP 655-657, 668-669, 673-674. She testified that he had a bandanna tied around his neck. 1RP 676-677. Five males went up to James and Gago who were standing in front of Gago's car. 1RP 637. One male came up to Faalata, who was still sitting in the driver's seat of Ramaley's car and said "This be Twix; let's go heads up," which Tiare took to mean "come fight me." 1RP 639. Tiare identified Williams as the person who made this statement to the victim. 1RP 640-641. Tiare testified that there were others behind Williams and between Ramaley's and Gago's cars. 1RP 640. Faalata leaned over toward the glove box but never touched it. 1RP 649. Tiare heard Williams say "This nigga got a gun, this nigga got a gun" as he jumped back and tapped the guy behind

him. 1RP 649-650. Tiare testified that the gunshots started then; a couple of shots came from the front of the car through the windshield then the origin of the shots seemed to move around to the side of the car so that they were coming through the driver's window. 1RP 650-651. Tiare could not see who the gunman was; she was lying down on the back seat and scared. 1RP 651-652, 813. It seemed to Tiare that several people were standing around the car and that every time Faalata moved, he was shot again. 1RP 652-653, 767. When she got up, the men were gone and so were the vehicles they had arrived in. 1RP 654-657. Before the men left she heard some shout "K" which she took as a reference to Kushmen Blokk. 1RP 686, 720, 726-727, 775.

James and Gago took the victim to the hospital and she, Tami, Paula, and Ramaley followed in Ramaley's car. 1RP 660, 1393-1394; 2RP 78-81. They parked near the hospital and went inside to see about the victim. 1RP 660-662. Tiare never saw the victim with a gun that night. 1RP 757-758. Tiare never saw the victim open the locked glove box or handle the gun that Ramaley kept in there. 1RP 633-634, 707-708. Ramaley never opened her glove box that night or saw anyone else open it. 2RP 79. Ramaley testified that the gun in her glove box was the victim's and that he had asked her to keep it there the Sunday before he was killed. 2RP 109-110. The victim had not had access to the gun during the intervening week. 2RP 111. Ramaley did not see the victim with a gun the night of the shooting and her glove box was locked that

night. 2RP 111. Gago did not see the victim with a gun that night. 2RP 244.

A week prior to the shooting resulting in Faalata Fola's death, Tiare had been with him at the waterfront, near Les Davis Pier, at about one to two o'clock in the morning. 1RP 603. Ms. Rameley and another friend were also there; they had arrived in Ramaley's car. 1RP 603. When a large group of Samoan males that they did not know showed up, Tiare's group decided to relocate to the area under the bridge, near Dock Street. 1RP 603-609, 714. Several other people showed up soon afterwards. 1RP 715. At least an hour went by before a white car showed up there and shortly after Tiare heard gunshots and the sound of bottles breaking. 1RP 609-617, 622-624. She was told that it was Faalata who fired the shots. 1RP 759.

Rosette Flores has known Asaeli for six years and is good friends with him. 1RP 1154-1156. She told police that she and he had been dating for two or three weeks before October 30, 2004. 1RP 1242. She has met Williams and Vaielua. 1RP 1156-1157. Ms. Flores owns a 1995 Chevy Lumina. 1RP 1167. On October 29, 2004, she loaned her car to Asaeli. 1RP 1168. She testified that she later went out with a girlfriend and ended up at Papaya's, a pool hall. 1RP 1169. Asaeli, Williams, Vaielua, and Malo were also at Papaya's that night. 1RP 1169-1170, 1172-1173. When the bar closed at 2:00 a.m., Ms. Flores decided that she would take her car to drive home. 1RP 1174. She saw Asaeli talking to

others, including Williams, Malo, and possibly Vaielua, as they came out of the bar. 1RP 1174-1176, 1208-1210. Asaeli then came over to Flores who was in her car and asked if she wanted to go to the waterfront and hang out a little longer; Flores agreed and they drove to the Dock Street area together. 1RP 1176. Several cars of people went from Papaya's to the waterfront, Asaeli made some phone calls on the way there. 1RP 1176-1179. They followed a green SUV belonging to Vaielua down to the waterfront. 1RP 1211-1212, 1214. Asaeli got out of the car and began talking to some people; she stayed with the car. 1RP 1179-1182. She heard some popping sounds then Asaeli came back to the car; she did not see anything in his hands. 1RP 1182-1184. When interviewed later by police, Ms. Flores described these sounds as gunshots. 1RP 1246. Ms. Flores testified that he was not gone from the car for long, maybe about three minutes, before he came back. 1RP 1205. He got into the car and she drove away; they went to Asaeli's cousin's apartment in Fife. 1RP 1184-1186. She noticed no change in his demeanor from before he left the car. 1RP 1293-1295. From there they went to Asaeli's home; they were there until the police arrested him later that day. 1RP 1188-1189. Ms. Flores testified that Asaeli was not in a gang but that his cousins were in a set. 1RP 1320-1322.

Eugene Van Camp testified that he is a friend of Feleti Asi and that he knows Williams and Asaeli. 1RP 883-885. Van Camp had also heard of "Blacc." 1RP 891. Van Camp and Asi were together on October 29

watching movies and playing pool before they decided to go together to the waterfront. 1RP 893-894. At trial, Van Camp's recollection of the events of October 30 were extremely poor, but he testified that he gave a tape recorded statement to the police on October 30 and again on November 22, while the events were fresh in his memory and that he had told the police the truth. 1RP 894-910, 944-946. The court allowed his tape recorded statement given to police on October 30 to be played as a recorded recollection. 1RP 911-932, 964.

In his taped statement, Van Camp stated that he and Asi were at a billiard parlor when Asi got a phone call; after that call they decided to go to the waterfront. EX 196, 240. On the way there they saw some of Asi's friends in a large green SUV type vehicle, such as an Excursion or an Explorer. Id. They drove to the area near the waterfront underneath a bridge and parked near the green SUV; a white sedan followed Van Camp's green Jetta and parked next to it. Id. A red Nissan was already parked there. Id. A fellow he knew as "Blacc" was seated in the driver's seat of the Nissan. Id. Van Camp stated that he went over to Blacc and spoke to him briefly then went back to his car for a drink and cigarette. Id. A Samoan male named "Ben" was the driver of the white sedan. Id. On the tape and in court, Van Camp identified a photograph of the driver from a montage. Id.; 1RP 935-937. Van Camp stated that Ben [Asaeli] got out of the white sedan and walked over to the red Nissan. Ex. 196, 240. Van Camp stated that he heard gunshots and saw the flashes from the gun;

Asaeli was standing towards the front driver's side of the car toward the hood. Id. There were others standing in the general area but away from the Nissan; three or four other people who arrived in the SUV were near the car. Id. Asi was the only other person Van Camp knew who was standing by the Nissan. Id. Asaeli walked by Van Camp on his way back to the white sedan; he was holding an automatic gun in his right hand. Id. Asaeli got into the passenger side of the white sedan and the car drove off after a red car with three females got out its way. Id. After the white sedan, the SUV left, followed by Van Camp and Asi in the green Jetta. Id. Asaeli and a female were in the white sedan, the female arrived as a passenger, but was driving when the sedan left. Id. Van Camp was not aware that anyone who was at the waterfront that night was in a gang. Id.

The court also allowed portions of Van Camp's recorded statement given to police on November 22 to be played as a recorded recollection. 1RP 986; EX 207A, 239. In that statement, Van Camp indicated that the guys who got out of the SUV type vehicle on October 30 were asking the people already at the waterfront about Blacc. Id. Two of the Samoan males approached Blacc; one of them had a brown rag on his face; one of them asked if he was Blacc. Id. Two second later Van Camp heard "He's got a strap. He's reaching for a gun." Van Camp stated that as those two backed away from the car, Asaeli came through between them and started firing shots. Id. Four guys that had come out of the SUV were near the Nissan and saw the shooting. Id.

.. .

Van Camp testified that he fell in behind the SUV on the way to the waterfront because Asi told him to do so; he does not recall seeing that SUV before that night. 1RP 987, 1018, 1052. A white car fell in behind Van Camp's Jetta at some point, and followed him to the waterfront. 1RP 1019, 1048-1053. Van Camp testified that he spoke briefly to Blacc before he heard others - guys who had arrived in the SUV- asking for Blacc. 1RP 1024- 1026, 1048, 1053. He then heard someone say "he's got a strap and then he heard the shots. 1RP 1053-1054. He testified that he then saw Asaeli walk away with the gun. 1RP 1054. Van Camp testified that he is certain that he saw at least one person with a brown bandanna over his face the night the victim was shot. 1RP 989. On November 22, he identified a photograph of Williams as the being the driver of the SUV; he affirmed that identification in court. Ex. 205; Ex. 207A; Ex. 239. 1RP 948-949, 1014, 1031. Van Camp identified Asaeli in court as the person he knew as Ben. 1RP 990.

A week before Faalata was killed Van Camp drove Asi to the waterfront. 1RP 891-892. Blacc was also there that night. 1RP 987. In one of his recorded recollections, Van Camp indicated that he and Asi went to the waterfront and that he left to go let his cousin into his apartment. EX 207A, 239. He got a phone call there and went back to pick Asi up at the waterfront; while there he saw either Williams or Verdel Malo. Id.; 1RP 1046.

Feleti Asi knows Williams, Vaielua, and Asaeli. 1RP 817-820. He described “Kushmen Blokk” as a family of just boys and as being “all of us.” 1RP 821. He testified that Kushmen Blokk is his family. 1RP 880. When asked who was in this family, he testified that “[i]t’s not my place to say the names of people.” 1RP 821. He testified that all three defendants were like family to him. 1RP 821-822. He testified that he would not “snitch” on his family. 1RP 881.

On October 30, 2004, Asi went to the waterfront with Eugene Van Camp in Van Camp’s green Jetta. 1RP 831- 836. He cannot remember who was at the Dock Street area when he arrived or what cars he saw there. 1RP 836-838, 848-849. He heard gunshots almost as soon as he got there but could not say who was firing the shots, where the shots were coming from or where they were aimed. 1RP 838-839, 850. Asi testified that he was contacted by police on October 30, 2004, and that he spoke with them about the shooting. 1RP 851, 857. He testified that he made things up about the shooting because he “didn’t want to get involved.” 1RP 851. Asi acknowledged that police showed him a photo montage and that his signature was under a photograph of Asaeli, but did not know that he had identified him as the shooter. 1RP 855. Detective Werner later testified that Asi was shown a montage and asked whether there was a picture of the shooter among the photographs. 2RP 456-457. Werner testified that Asi identified a photograph of Asaeli as the shooter. Id. On cross –examination, Asi remembered that there was a red car parked at the

waterfront and that Van Camp parked his car about five or six spaces away from the red car. 1RP 872-873 878-879.

Asi was at the waterfront a week before the shooting that killed Faalata and saw him near the Les Davis Pier. 1RP 828-829, 831, 836. He did not know if he heard any gunfire that night and could not remember if any of the defendants were down there. 1RP 830. Asi's cell phone records were admitted by stipulation. 2RP 429-430.

Hospital staff notified the Tacoma Police Department that a shooting victim had come to the emergency room and police responded to the dispatch at approximately 2:37 a.m. 1RP 200-201, 209. The police contacted James Fola, Nofo Fola, Breanne Ramaley, Angeline Paula, Tami Misionare, and Tiare Ann Misionare at the hospital. 1RP 211, 241. The victim had been transported to the hospital in Gago's green Mercury Mistique. 1RP 201-202, 211, 228. Police located the red four-door Nissan Sentra in one of the hospital's parking lots and impounded it. 1RP 205-209, 235. Another officer went to the crime scene at Dock Street to secure it. 1RP 245-250.

Mary Lally, a forensic specialist with the Tacoma Police Department, was dispatched to the Dock Street crime scene at 3:36 in the morning of October 30, 2004. 1RP 480-484. She took photographs, measurements, and videotape of the crime scene as well as collected items of possible relevance. 1RP 486- 494. She collected seven FC 9mm Luger casings from the scene. 1RP 495-496. All of these were examined for

fingerprints but none were found. 1RP 496. Several beer bottles, cigarette packages and soda cans found at the scene were also collected and processed for fingerprints, but none of the prints collected could be identified. 1RP 499. After Dock Street, Ms. Lally went to a parking lot near St. Joseph's hospital to photograph a red Nissan. 1RP 486, 500. Without going inside the car, she photographed the exterior and interior compartments; the car was processed later, after it was towed to a secure location. 1RP 501-502. Ms. Lally recovered fingerprints from three locations on the exterior of the car that appeared to be left by two different people. 1RP 503, 507. Latent prints recovered on the exterior left front window and from the left side of the hood above the wheel well belonged to Asaeli. 1RP 508-509. Latent prints recovered from the exterior right rear door window belonged to Tiare Misonare. 1RP 509-511, 515-516. From the interior she recovered a spent round (Ex 189) from the front passenger seat as well as several shotgun shells and a wooden box containing two full boxes of 9mm ammunition and two more shotgun shells and a empty box of .25 caliber ammunition. 1RP 519- 522, 525-527, 552. In the glove box of the Nissan she recovered a box containing two gun magazines and an old .25 caliber Raven handgun. 1RP 523. There was no ammunition in the car that would fit this weapon. Id.

Ms. Lally also processed a White Lumina and a VW Jetta. 1RP 516-518, 527-528. She collected a black knit cap from the Lumina. 1RP 518.

Karen Green, an analyst employed by the Washington State crime lab examined the Nissan and noted two bullet holes through the windshield, but no other bullet holes, primary or secondary, in the body or the interior of the car. 1RP 1073-1078. She did locate a fired bullet on the floor behind the driver's seat. 1RP 1077-1080. She did not locate any shell casings. 1RP 1080. Surrounding the bullet holes on the windshield in a seven inch pattern was some black sooty material consistent with the appearance of gunshot residue. 1RP 1081. Ms. Green swabbed the gun recovered from Asaeli's room and obtained a mixed DNA sample. 1RP 1093-1096. She could not eliminate Asaeli as a contributor to this mixed sample. 1RP 1095-1096.

On the morning of October 30, 2004, several detectives, including Detective Werner, went to Asaeli's home at 1304 South 119th Street in Tacoma. 1RP 452-455, 464-465. Based on witness information and shell casings located at the crime scene, detectives were hoping to find a 9mm automatic firearm. 1RP 456. After getting Asaeli's consent to search, detectives searched his bedroom. 1RP 456, 465. The detectives found a black semi-automatic pistol and a clip loaded with four rounds in the clothes hamper, underneath some clothing. 1RP 457-459; 2RP 470, 490. On the top shelf of the closet, detectives located a shoe box that held a box of 9mm ammunition, a sock, some latex gloves and papers relating to Asaeli. 1RP 459-462, 469, 477. On cross-examination, Detective Werner

indicated that he did not see any items that he associated with gang paraphernalia in Asaeli's room. 1RP 467.

Gilbert Smith testified that he bought a 9mm firearm with his father in the summer of 2004 while he was in Mississippi. 2RP 570-574. He brought the gun with him when he returned to Washington State. In August of 2004, he had the gun with him when he, his girlfriend Rosette Flores, Asaeli, and Asaeli's cousin went to American Lake together; he placed the gun under the front passenger seat of his girlfriend's car. 2 RP 577- 578. Asaeli was seated directly behind him and knew that he was putting the gun under the seat. 2RP 578-579. The gun later turned up missing; Smith confronted Asaeli and his cousin about the missing gun, but both denied taking it. 2RP 579-581. Smith reported the gun as stolen. 2RP 582. Smith identified the gun found in Asaeli's room as the gun that had been stolen from him. 2RP 582-583.

Matt Noedel, a former firearms examiner for the Washington State Patrol, examined the .9mm gun found in Asaeli's room, shell casings recovered from the crime scene and bullets recovered during the autopsy and the search of Ramaley's car. 7/10 RP 19-22. He concluded that all seven recovered shell casings had been fired from the recovered gun. 7/10 RP 40-45. After examining the four recovered spent bullets he concluded that all of those bullets had been fired from the same gun. 7/10 RP 45-65. He could tell that one of the bullets recovered from the victim's body had passed through glass and fabric before stopping in the victim's body. 7/10

RP 49-55. This bullet was associated with the wound that went through the victim's left arm and into the victim's chest. 1RP 1576-1582, 1589-1591. This means that the victim had to be sitting so that the entrance wound was in a direct line with the windshield. 7/10 RP 110-111. The fibers were consistent with the pullover the victim was wearing when he was shot. 7/10 RP 58. Mr. Noedel also examined the victim's clothing for gunshot residue; based upon the patterns of residue he found upon the clothing and his tests, he opined that the muzzle of the gun was between two and sixteen inches away for one of the shots that impacted the arm of the victim. 7/10 RP 78-91. He also found glass residue on the front of the sweatshirt, which means that the victim had to be facing forward for one of the shots that came through the windshield. 7/10 RP 91-93; 7/11 RP 107. Mr. Noedel also testified that if the gun was found with four cartridges in the magazine that it must have been reloaded after firing seven shots as the gun had a maximum capacity of nine cartridges. 7/11 RP 114. The .9mm gun had a trigger pull of eight pounds.

Roseann Fola, the victim's sister, and his mother, Nofo Lotu Fola, testified that the victim Faalata Fola was sometimes staying at his parent's house in Tukwila and sometimes at his aunt's house in Tacoma around the time of his death. 1RP 1122-1124; 1135-1137. Within the two weeks preceding his death, Roseann answered two phone calls at her parent's house where the caller asked for "Blacc" and, upon being told that he was not there, left a message. The first caller, a male, left a message that she

should tell "Blacc that he was marked." 1RP 1125-1126. He sounded as if he were giggling when he said it. Id. On the second call, there were two people on the line, a male and a female; the male instructed Roseann to relay a message to Blacc that "they were going to drop him." 1RP 1126-1127. Roseann told her brother and her mother about the calls but did not contact police. 1RP 1129. Faalata mother also answered a couple of calls like this. 1RP 1137-1139. His mother also testified that the Thursday before he was killed, her son was in her room talking on the "donut" a party line for Samoan youth; he was very angry and shouting into the phone. 1RP 1139-1141.

Dr. Roberto Ramoso, an associate medical examiner for Pierce County performed the autopsy on Faalata Fola. 1RP 1550-1558. There were ten gunshot wounds to the victim's body. 1RP 1561. Seven of the wounds were to the victim's torso and three were to his left arm. 1RP 1576-1593. It is probable that the bullet that one of the arm wounds was made by the same bullet that made one of the torso wounds. 1RP 1589-1591. It is possible that the bullets that also made the other two arm wounds were responsible for two of the other torso wounds, meaning that there were at least seven gunshots. 1RP 1591-1593, 1629. Of the seven torso wounds, five wounds had a left to right and slightly downward trajectory; the other two had a left to right and slightly upward trajectory. 1RP 1576-1589. Dr. Ramoso opined that assuming the victim was in the front seat of an automobile and the shooter was outside the car at the time

the shots were fired, that the wounds with a downward trajectory would be consistent with the victim being seated upright and the upward trajectory wounds would be consistent with the victim leaning over towards his right. 1RP 1627-1634. The cause of death was multiple gunshot wounds. 1RP 1637. There was nothing so incapacitating about these wounds so as to render the defendant incapable of firing a gun if he had one in his hand. 1RP 1657-1658.

On August 9, 2005, Detective Werner went to Williams's jail cell with a forensic technician who took photographs of the graffiti that was on the walls; some of these pictures were admitted into evidence. 2RP 470-477; Exs. 138, 149, 150, 153, 154, 156, 158.

Detective John Ringer testified that he is employed by the Tacoma Police Department and has been a detective for ten years. 2RP 655-656. He was a patrol officer working the Hilltop area when the gangs first hit Tacoma in 1988 and had to deal with gang issues on a daily basis. 2RP 656-657. He has worked gang cases in one capacity or another for most of the last 18 years and attended numerous seminars and training classes related to gang culture. 2RP 657-658. Ringer testified that he has testified numerous times as an expert on gangs in Pierce and Kitsap Counties as well as in federal court; he has also testified as an expert in Missouri and Oregon. 2RP 659-660.

Ringer testified that it is difficult to define what a gang is because it is a loosely structured organization, but that generally a "gang" is a

loose knit group of individuals, primarily male, who associate together and work together for a common purpose such as protection, criminal activity, or solidifying the neighborhood. 2RP 660. He testified that the structure of a gang is not hierarchical, but horizontal. 2RP 661. A gang will not have a president or absolute leader but will have certain members that have more stature than others. 2RP 661. He testified that a "set" is generally a subset of a larger gang affiliation; for example the Bounty Hunter Bloods, Keystone Black Tacoma Rangers, and the Lime Street Pirus are all affiliated with the Bloods but they are each associated with a different area of the country or a different neighborhood in a city; each is a set. A "clique" is generally a smaller sub-set of a "set;" there may be several cliques within a set. 2RP 661-662. Ringer explained that the Crips and the Bloods were two gangs that began in the Los Angeles area and who have their origins in two rival high schools. 2RP 662-663. Blue was the color of Compton High School and red was the school color of Centennial High School; a gang formed out of each school and used the school colors for the gang. 2RP 662-664. Crips are generally associated with the color blue and Bloods with the color red. 2RP 663-664. There can be variations however as particular sets might adopt a different color to distinguish themselves; the Lime Street Pirus are a Blood gang but have chosen a light lime green to be their color. 2RP 663. There are gangs or sets in Tacoma that use colors other than red or blue. 2RP 671.

Ringer testified that a gang member wears a bandanna of a particular color to show with whom he is associated; it is a sign of pride and support. 2RP 669-670. Generally, a member will display his colors will be displayed more prominently when he is within his own neighborhood. 2RP 670. Displaying colors in a rival's territory would be a sign of disrespect. Id.

Ringer testified that territory is very important to a gang and that one of the reasons a gang may form is for protection of a neighborhood or control of criminal activity, such as drug dealing, in a neighborhood. In Los Angeles there are very rigid lines of demarcation from one block to the next as to which gang is in control. 2RP 665. In Tacoma the Crips tend to be congregated in the Hilltop Area and the Bloods tend to control the east side of Tacoma. 2RP 665-668. Ringer testified that the waterfront area of Tacoma is a neutral area. 2RP 709.

Ringer testified that gang graffiti is used by law enforcement as an intelligence tool. 2RP 671, 673. Gangs use graffiti to mark their territory. 2RP 673. Police will photograph gang graffiti because it can tell them what gang is operating in that neighborhood, what the street names are of the gang members, and who their rivals are. 2RP 671, 673-674. If there is graffiti that is crossed out or sprayed over then that is an indication that rival gangs may be jockeying for position in the neighborhood. 2RP 673-674. Ringer testified that Blood set graffiti will include heavy use of the letter "B" and lack of the use of the letter "C." 2RP 272. Usually the

letter “K” will be substituted for the letter “C” or a Blood will write the letter “C” but then put a line through it to cross it out. 2RP 672. The phrase CK 187 with the “C” crossed out means “Crip Killer 187” with 187 being a reference to the California penal code provision for homicide. 2RP 272. Graffiti that uses “C’s” without crossing them out would be indicative of Crip graffiti. 2RP 673. The hallmarks of Crip graffiti include the crossed out letter “B;” it is difficult for a Crip to avoid use of the letter “B” because there is no easy substitution in the English alphabet for this letter sound. 2RP 673.

Ringer testified that while there is general animosity between Crips and Bloods that is not always the case. For example, Crip gang members who live in the Hilltop may have cousins who live on the east side who belong to a gang affiliated with the Bloods and, as cousins, they may interact without hostilities. 2RP 674-675. Another example may be that a friendship may have been established between two boys before either joined a gang and this relationship may take precedence over the gang rivalry. 2RP 675.

Ringer went out to Cushman and 74th streets to take some photographs. 2RP 675-676. On May 25, 2006, he took photographs of a fence with graffiti painted on it; he indicated that graffiti covered approximately 70 yards of fencing on two neighboring streets. 2RP 676-677, 690. Detective Ringer observed graffiti of a letter “K” that had “tails” on it similar in style to graffiti found in William’s cell. He saw the

letters “BF” followed by marking that looked like a letter had been cleaned off. 2RP 690-691. One area on the fence had “Kushmen” written on it with the word “Kings” written underneath; there were also references to “ESOLB” referring to the Blood set East Side Original Loco Boyz. 2RP 692. None of the Blood graffiti was crossed out and there were no references to Crip sets in the graffiti. 2 RP 693. Based on his experience, this graffiti was consistent with the area being a part of “Kushmen Blokk” territory. 2RP 693.

The court limited the jury’s consideration of the exhibits showing graffiti in Williams’s cell to a determination of Williams’s guilt. 2RP 681-682. These photographs depicted graffiti of “Twix,” which is Williams’s street name, and “Kushmen Blokk 73.” Officer Ringer opined that the spelling of “Kushmen Blokk” was indicative of being written by a Blood set who would not honor the letter “C.” 2RP 683-685. Officer Ringer also interpreted a the reference to “73” in the jail cell graffiti to be a reference to 73rd Street; when he went to 73rd and Cushman he saw graffiti in that neighborhood that was very similar to graffiti found in the jail cell. Id. The jail cell graffiti included the words “Brown Flag Gangsta” and “Tacoma’s Finest 253” which is a reference to the local area code. One photograph showed that in Williams jail cell was graffiti that said “KB” in large block letters then around that was written “Southwest Kushmen Blokk 73rd Street.” “Tacoma’s Finest 253,” “Twix,” and “BFG” meaning Brown Flag Gangsta. 2RP 689 (Exhibit 150). The graffiti also

had references to other Tacoma Blood sets – the East Side Original Loco Boyz and East Side Pirus; as these had not been crossed out, Detective Ringer opined that a Crip gang member had not been in the cell since the graffiti had been written on the walls. 2RP 688.

Although he has been involved with Pierce County gangs for ten years, Detective Ringer had not heard of “Kushmen Blokk” prior to being asked to look at the police reports in this case. 2RP 698-699. He testified that it was not unusual to learn about a new gang each week. 2RP 699. He looked for information about “Kushmen Blokk” in old police reports and found one reference in a 1999 report. 2RP 703. He did not find Williams name Listed in Tacoma Police Department’s gang files. 2RP 703. Ringer has no information that Kushmen Blokk is involved in drug activity. 2RP 715.

Kristy Devault testified that Asaeli had told her that just before he was shot Blacc was causing problems at the waterfront by firing shots at other people. 2RP 1720-1723.

C. ARGUMENT.

1. THE DEFENDANTS’ CASES WERE PROPERLY CONSOLIDATED BY OPERATION OF COURT RULE; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTIONS TO SEVER.

The joinder of criminal defendants is governed by CrR 4.3(b), which provides in part:

(b) **Joinder of defendants.** Two or more defendants may be joined in the same charging document:

(1) When each of the defendants is charged with accountability for each offense included;

(2) When each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:

(i) were part of a common scheme or plan; or

(ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

The court rules further provide that “defendants properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4.” CrR 4.3.1(a).

A motion to sever joined defendants is governed by CrR 4.4.

Under this rule a motion to sever must be timely brought and preserved.

CrR 4.4(a). Severance of defendants is governed by subsection (c) of the rule, which provides:

(c) **Severance of Defendants.**

(1) A defendant’s motion for severance on the ground that an out-of-court statement of a codefendant referring to him is in-admissible against him shall be granted unless:

- (i) the prosecuting attorney elects not to offer the 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.

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

- (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
- (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

CrR 4.4(c)(1) is referred to as the mandatory severance provision while CrR 4.4(c)(2) is referred to the permissive severance provision. State v. Dent, 123 Wn.2d 467, 483-484, 869 P.2d 392 (1994).

Williams assigns error to the trial court's consolidation of the cases, while Vaielua and Asaeli assign error to the trial court's denial of their motion to sever. As argued below the trial court did not abuse its discretion in trying the co-defendants in a joint trial.

- a. The cases were properly consolidated by operation of CrR 4.3.1(a).

Defendant Asaeli was charged with murder in the first degree regarding the death of Faalata Fola and assault in the first degree on Tiare-ann Misionare by an information filed on November 1, 2004. ACP 1-4.

The murder and assault occurred literally at the same time and place and therefore were “so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others. Defendants Vaielua and Williams were charged with murder in the first degree and murder in the second degree regarding the death of Faalata Fola by information filed on December 2, 2004. VCP 1-7; WCP 1-7. Williams’s information lists Darius Vaielua⁵, Case No. 04-1-05574-3 and Benjamin Asaeli, Case No. 04-1-05087-3, as co-defendants while Vaielua’s information lists Asaeli and Williams as co-defendants. Id. Under CrR 4.3 the State could properly join Williams and Vaielua because their cases fell within the provision of CrR 4.3(b)(1) and could properly join Vaielua and Williams with Asaeli’s case under the provisions of CrR 4.3(b)(3). Since these defendants were properly joined under CrR 4.3 the provisions of CrR 4.3.1(a) came into effect which provides that “defendants properly joined under rule 4.3 *shall* be consolidated for trial.” (emphasis added). As a general rule, the use of the word “shall” in a statute or court rule is mandatory and operates to create a duty. State ex rel. Nugent v. Lewis, 93 Wn.2d 80, 82, 605 P.2d 1265 (1980).

While the State moved for “consolidation” of the defendants’ trials, it is clear that the State was merely asking the court to apply the court rule. The order consolidating the trials reflects this noting that it was

⁵ Vaielua was charged with the same crimes as Williams. VCP 1-7; WCP 1-7.

done “pursuant to CrR 4.3(b) and CrR 4.3.1(a).” WCP 19-20. The State activated the court rule that consolidated the three defendants’ cases by filing the informations charging Williams and Vaielua. The order consolidating was a formal notation of the application of the court rule. Id. Because the consolidation occurred by operation of court rule, any alleged defect in the State’s procedure in filing the motion to consolidate was harmless.

Defendant Williams contends that he was prejudiced by not having an attorney to represent him at the hearing on the motion to consolidate as this was a critical stage. Supp RP 2-3. A person accused of crime has the right to “the guiding hand of counsel at every step in the proceedings against him” and that right is not limited to the presence of counsel at trial. Powell v. Alabama, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed 158 (1932). “It is central to that principle that in addition to counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” United States v. Wade at 227. In applying the principle of Powell v. Alabama in succeeding cases, the Supreme Court scrutinized “any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant’s basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.” United

States v. Wade, 388 U.S. 218, 226, 87 S. Ct. 1926, 18 L. Ed 2d 1149 (1967). This requires the court to “analyze whether potential substantial prejudice to defendant’s rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.” Id., at 227. The Supreme Court has held that “critical stages” include the pretrial type of arraignment where certain rights may be sacrificed or lost, Hamilton v. Alabama, 368 U.S. 52, 54, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) and the pretrial lineup, United States v. Wade, supra.

At least one federal circuit court has held that a consolidation hearing was not a “critical stage” because “counsel could have cured the potential harm arising from his absence by making a motion to sever later in the proceeding against his client.” Van v. Jones, 475 F.3d 292, 314 (6th Cir. 2007). This court should follow the Sixth Circuit and hold that Williams has not shown a denial of counsel at a critical stage. Since the court in this case indicated that it was signing the order without prejudice for Williams to bring a motion to reargue the matter, it is difficult to see how he lost or sacrificed any rights at this hearing.

Regardless of whether this hearing constituted a critical stage and denial of the right to counsel is subject to a harmless error analysis. In Coleman v. Alabama, 399 U.S. 1, 10-11, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970), the Supreme Court held that the denial of a defendant’s right to counsel at a preliminary hearing could be harmless, despite the fact that the same error would mandate reversal if it occurred at trial. See Arizona

v. Fulminante, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Defendants Asaeli and Vaileua had counsel at the hearing and both objected to consolidation. Id. Nevertheless, the court still signed the order of consolidation. WCP 19-20. Thus it does not appear that the presence of counsel would have affected the court's action. Moreover, in signing the order, the court noted that once Williams's counsel was on board that he could bring a motion to reconsider or reargue the matter. Williams acknowledges that his attorney brought motions to sever, rather than a motion to reargue, and that these were denied. See Williams's Opening brief at p. 35. Williams has not assigned error to the court's denial of his motions to sever.

Williams claims that he was prejudiced by not being represented at the consolidation motion because "Mr. Williams faced the more difficult task of convincing the trial court to reverse its previous ruling, rather than the lesser burden of arguing against the initial consolidation." Id. Under the court rule, however, the court was directed to consolidate the cases unless defense counsel could meet the burden imposed under CrR 4.4 for granting severance. See CrR 4.3.1(a). The burden on defense counsel did not change and this record indicates that the court was going to sign the order of consolidation whether defense counsel was present and objecting, such as counsel representing Asaeli and Vaielua, or whether counsel had yet to be appointed, as in William's case.

Williams has failed to show any prejudicial error in the court signing the order of consolidation.

- b. Defendants Asaeli and Vaielua failed to meet the burden in showing that severance was necessary to preserve a fair trial.

Separate trials have never been favored in Washington. State v. Grisby, 97 Wn.2d 493, 647 P.2d 6 (1982). The granting or denial of a motion for severance of jointly charged defendants is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. State v. Alsup, 75 Wn. App. 128 876 P.2d 935 (1994); State v. Barry, 25 Wn. App. 751, 611 P.2d 1262 (1980). To support a finding that the trial court abused its discretion, the burden is on the defendant to come forward with facts sufficient to warrant the exercise of discretion in his favor. State v. Alsup, 75 Wn. App. 128, 876 P.2d 935 (1994). Severance is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial. State v. Grisby, 97 Wn.2d 493, 647 P.2d 6 (1982), cert. denied sub nom, Frazier v. Washington, 459 U.S. 1211 (1983), overruled on other grounds by State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994). Defendants seeking a separate trial must demonstrate manifest prejudice in a joint trial which outweighs the concern for judicial economy. State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991).

The administration of justice would be greatly burdened if required to accommodate separate trials in all cases where multiple parties have participated in a criminal offense and where one or more have confessed to its commission.

State v. Ferguson, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), review denied, 78 Wn.2d 996 (1971), cited in State v. Samsel, 39 Wn. App. 564, 694 P.2d 670 (1985).

A defendant can demonstrate specific prejudice by showing: “(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant’s innocence or guilt; (3) a co-defendant’s statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.” State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995).

Existence of mutually antagonistic defenses is not alone sufficient to compel separate trials. State v. Hoffman, supra; State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968). The defense must demonstrate that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. If the defendants agree on the details leading up to the shooting, but disagree on who killed the victims, the conflict is not sufficient to warrant a severance. State v. Grisby, 97 Wn.2d 493, 647 P.2d 6 (1982). All of the participants in a crime will invariably be in conflict when all are tried for

that crime. If such conflicts are regarded as requiring separate trials, then joint trials will be the exception and not the rule. State v. Grisby, *supra*. If defenses are inconsistent, they are not necessarily irreconcilable. To be irreconcilable, and thus mutually antagonistic, they must be “mutually exclusive to the extent that one must be believed if the other is disbelieved.” State v. McKinzy, 72 Wn. App. 85, 90, 863 P.2d 594 (1993).

A jury is presumed to follow a court’s instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Some presumptions must be indulged in favor of the integrity of the jury and their ability to follow limiting instructions and scrutinize cases separately. If the courts were to assume that jurors are so quickly forgetful of duties of citizenship as to stand “continually ready to violate their oath on the slightest provocation[,]” the inevitable conclusion is that trial by jury is a farce. State v. Pepon, 62 Wash. 635, 644, 114 P.2d 449 (1911).

The fact that some evidence may be admitted against one defendant which is inadmissible against another is not in itself a sufficient reason for multiple trials growing out of a closely related series of transactions. Such evidence does not automatically negate a fair trial. State v. Courville, 63 Wn.2d 498, 387 P.2d 938 (1963); State v. Walker, 24 Wn. App. 78, 599 P.2d 533 (1979).

Both Asaeli and Vaielua assert that the court’s denial of their respective motions to sever denied them a fair trial. Both acknowledge

that they have the burden of showing an abuse of discretion and that each defendant must point to specific prejudice. See Asaeli's brief at pp 68-69; Vaielua's brief at pp.36-37. Relying upon language in State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995), each claims that the specific prejudice he suffered was "that massive and complex quantity of gang evidence against the co-defendants ... made it impossible for the jury to properly allocate that evidence among the co-defendants." Id.

Although the defendants describe the gang evidence adduced in their trial as "massive and complex," that description is not appropriate for what was presented in this case. To begin with, Canedo -Astorga indicates the standard to be met is "a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt." State v. Canedo-Astorga, 79 Wn. App. at 528. This standard indicates that not only does there have to be a "massive" volume of evidence for the jury to consider but that the evidence also has to be "complex" in the sense that much of the evidence can only be considered against one, or some, of the co-defendants. In other words, a case with massive amounts of evidence that was admissible against all of the co-defendants in a joint trial would not meet this standard.

In this case there was very little "gang" evidence adduced in the State's case in chief that had limited admissibility. The court limited the jury's consideration of the evidence of the graffiti found in Williams's jail

cell, as well as Detective Ringer's interpretation of that evidence, to consideration of Williams's guilt. 2RP 681-682. The court found that a limiting instruction on this evidence would be sufficient to protect Vailua and Asaeli. 2RP 854. The court did not abuse its discretion in finding that the limiting instruction was sufficient safeguard under these circumstances.

Defendants fail to identify any other "gang" evidence that was admitted in the State's case in chief where the jury was not allowed to consider the evidence against all of the defendants. This is not indicative of a case where the evidence is complex and difficult for the jury to sort out as to its admissibility against each co-defendant.

The State also disputes that the gang evidence in this case was "massive." As will be discussed later in the section addressing the court's admission of "gang" evidence, much of this evidence stemmed from the testimony of the eyewitnesses to the homicide describing what occurred. Some of this testimony indicated gang involvement in the crime. Certainly a description of the crime by eyewitnesses would be admissible against all three defendants.

The five friends of the victim describe multiple cars occupied by numerous males arriving on the scene together. At least one of these cars had driven through the parking lot a few minutes before, as if to scope out who was at the waterfront. Many of the males get out, including Defendant Vaielua, and began asking for the victim by his street name of

“Blacc.” Several males, some wearing bandannas over their lower face, surround the vehicle in which the victims Faalata and Tiare are seated. Defendant Williams approaches the victim and challenges him to a fight; almost immediately Williams indicates to Defendant Asaeli that the victim has a gun. Asaeli then fires several shots into the car at close range hitting Faalata with at least seven bullets but not striking Tiare. After the shots are fired, all of the males who arrived at the same time in the multiple cars get back into their vehicles and leave the scene. As this group departs, one witness hears one of the males shout “K” which she takes to be a reference to “Kushmen Blokk.” Asaeli, who arrived driving a white sedan, gets back in the same car, but this time as a passenger. In the short time Asaeli was out of the car, the female co-occupant repositioned herself behind the steering wheel, as if to be prepared for a quick departure. From the time the group of vehicles arrived until they departed only a few minutes elapsed. James Falo knew Williams, Vaielua and one other of the arriving males to be associated with a set called “Kushmen Blokk” Gago testified that he associated the brown bandanna he observed being worn with the set called Kushmen Blokk.

Testimony from some of the people who were in the arriving in the suspect vehicles also supported the conclusion that this group was associated with one another at that their reason for being at the waterfront was planned before their arrival. Feleti Asi, who arrived at the crime scene in the green Jetta testified to the existence of “Kushmen Blokk”

although he described it as a family of just boys and as being “all of us.” 1RP 821. He further testified that Kushmen Blokk is his family and that all three defendants were like family to him. 1RP 817-822. 1RP 880. When asked who was in this family, he testified that “[i]t’s not my place to say the names of people” and that he would not “snitch” on his family. 1RP 821, 881. Ms. Flores who drove to and from the crime scene with Asaeli in the white sedan testified that Asaeli was not in a gang but that his cousins were in a set. 1RP 1320-1322. She also testified that most of the occupants of the vehicles that arrived together at the waterfront had been together at a billiard parlor, Papaya’s, and that the plan to go to the waterfront was made before they left Papaya’s. Van Camp indicated that he had been with Asi, who was talking on his cell phone, and that Asi directed him to follow a SUV down to the waterfront where the shooting occurred. All of this information was admissible against all of the defendants.

The second area of gang evidence was expert testimony given by Detective John Ringer; the direct examination of this expert covered approximately forty pages of the verbatim report of proceedings. 2RP 655 - 694. As noted earlier, the only portion of his testimony was subject to a limiting instruction - that regarding the graffiti found in Williams’s jail cell. 2RP 681-688. The rest of his testimony could be considered against all of the defendants. Considering that the entire trial testimony took close to eight weeks to adduce and resulted in thousands of pages of transcript,

the State's expert testimony regarding gangs did not amount to either a massive amount of evidence nor was it too complex for the jury to sort.

In short, defendants have failed to meet their burden of showing specific prejudice stemming from a joint trial. Most of the evidence adduced at trial was admissible against all of the codefendants. The court did not abuse its discretion in concluding that the jury would be able to properly apply the limiting instructions that were given with regard to evidence that was admissible only against one of the defendants. The trial court's denial of severance should be affirmed.

2. THE FOLLOWING LAW PERTAINS TO ALL OF THE EVIDENTIARY ISSUES RAISED IN THIS APPEAL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

In the case now before the court, defendant claims that the trial court made several errors in the admission of evidence. The above case law is applicable to all evidentiary claims while the specific claims will be addressed in the following sections.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING “GANG” EVIDENCE THAT CONSISTED OF EYEWITNESS TESTIMONY ABOUT THE CIRCUMSTANCES OF THE CRIME; EXPERT TESTIMONY AS TO THE NATURE OF GANGS AND THE INTERPRETATION OF GANG GRAFFITI AND EVIDENCE OF GANG GRAFFITI FOUND IN DEFENDANT WILLIAMS JAIL CELL.

When evidence of gang membership or affiliation is offered for a legitimate purpose and not just to portray the defendant as a bad person, it is admissible. Evidence of a defendant’s membership in a gang is relevant to show motive where the trial court finds there is a sufficient nexus between gang affiliation and motive for committing the crime.

In State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050, review denied, 128 Wn.2d 1004, 907 P.2d 296 (1995), the State sought to introduce evidence of the murder defendants’ gang and drug selling activities to establish its theory that: “the defendants killed the victims because the victims did not accord them the appropriate respect and were usurping the defendants’ economic drug turf, and because the defendants thought of themselves as being members of a superior gang.” Id. at 817-18. Based on its determination that “there was a nexus between gang culture, gang activity, gang affiliation, drugs, and the homicides” at issue, the trial court allowed the introduction of gang affiliation and drug selling activity, as well as expert testimony on gang culture to show premeditation, intent, motive, and opportunity. Id. at 818. The trial court

then limited the testimony, excluding matters it considered more prejudicial than probative. Id.; see also, State v. Boot, 89 Wn. App. 780, 950 P.2d 964 (1998)(evidence of the defendant's gang affiliation relevant to show motive, premeditation, and under the res gestae exception).

In State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995), the Court approved the admission of evidence of other bad acts committed by the three defendants within a 48-hour time span before and after the murder with which they were charged. While Lane was not a gang case, it involved three codefendants in a murder, where only one person fired the gun. The court held:

This case involved three individuals, each charged, among other crimes, with the murder of one woman. The evidence suggested there was only one trigger person. Thus, to obtain three murder convictions, the State was required to demonstrate these three men acted in unison. The contested evidence corroborated the State's theory as to how these men interacted -- that when these Defendants committed crimes, each one had a role to play and each one was in some manner responsible and accountable for the crimes charged in this case.

State v. Lane, 125 Wn.2d at 835. The facts of Lane are similar to the facts of this case; the State charged three individuals with the murder of one person when it was clear that there was only one trigger person. The evidence of connections among the defendants – whether it be familial or gang- was a relevant to the issues before this jury.

In Wisconsin v. Mitchell, 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), the United States Supreme Court addressed

whether the First Amendment prohibits the evidentiary use of speech. It held “[t]he First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” 508 U.S. at 489; see also, Haupt v. United States, 330 U.S. 631, 67 S. Ct. 847, 91 L. Ed.1145 (1947) (admission of statements showing sympathy with Germany and Hitler and hostility toward the United States properly admitted to show intent and motive of man charged with treason); United States v. Salameh, 152 F.3d 88, 111-112 (2d Cir. 1998), cert. denied sub nom., Abouhalima v. United States, 525 U.S. 1112, 119 S. Ct. 885, 142 L. Ed. 2d 785 (1999); United States v. Allen, 341 F.3d 870, 886 n.23 (9th Cir. 2003). Thus, admitting evidence of gang affiliation will not violate a defendant’s right of association.

The defendants challenge three types of “gang” evidence adduce at trial: 1) testimony of eyewitnesses (or non-expert) regarding ganglike aspects of the crime and their knowledge of the defendants connections to Kushmen Blokk; 2) testimony of Detective John Ringer regarding gangs and interpretation of gang graffiti; and, 3) evidence of gang graffiti found in Williams cell, which was admitted only against Williams. Each will be addressed in a section below.

- a. This court should not review claims that have not been presented in compliance with RAP 10.3(a)(5), but if it does, it should find no abuse of discretion in the admission of eyewitness evidence describing the circumstances of the crime.

Under RAP 10.3(a)(5), an appellate brief should contain references to the relevant parts of the record, argument supporting issues presented for review, and citations to legal authority. An appellate court need not consider issues unsupported by specific references to relevant parts of the record. Estate of Lint, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998). This is especially important because to claim evidentiary error objections must be timely and specific. State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). Erroneous admission of ER 404(b) is not error of constitutional magnitude, and may not be raised for the first time on appeal under RAP 2.5(a). State v. Everybodytalksabout, 145 Wn.2d 456, 468-469, 39 P.3d 294 (2002).

In this case all three defendants allege that the trial court committed error by admitting “gang” evidence from eyewitnesses. As to the non-expert “gang” evidence, defendants have failed to specifically identify the evidence that was objectionable or show that they properly preserved this challenge for review in the trial court. The parties merely identify the pretrial ruling allowing gang evidence, *in general*. 1RP 81-82.

During trial the court characterized the scope of this pretrial motion as one seeking to preclude the use of the word “gang” in and of itself. 2RP 451. The court indicated that it denied that motion to exclude use of the word gang. *Id.* Thus, the record does not establish that the pretrial ruling was one concerning specific evidence that the State intended to adduce at trial. Additionally, the court indicated that the pre-trial ruling was open for reconsideration. 1RP 81-82. For example, the parties later reargued whether the court should allow Detective Ringer’s testimony. 2RP 443-450, 508-648. Defendants fail to show that they had a final ruling on specific gang evidence that would preserve this issue for appellate review.

Moreover, the information presented to the court at the pretrial motion was based on “gang” references contained in the police reports, See, 1RP 34-67; WCP 33-155. Not all of this evidence was adduced at trial.⁶ Any error the trial court made in a pretrial ruling indicating that certain evidence would be admissible would be harmless if the jury never heard that evidence. Defendants have failed to make any effort to identify *who* adduced the objectionable testimony of “gang” evidence at trial, precisely *what* “gang” evidence was improperly admitted, *where* it was

⁶ For example, the police reports indicate that Rosette Flores told two detectives that Asaeli was affiliated with a gang called “K-blokk.” WCP 33-155. At trial, she testified that Asaeli was not in a gang but that his cousins were in a set. 1RP 1320-1322.

admitted, show that a claim of error was preserved with a proper objection or show that defendants are raising the same claim of error on appeal as was argued in the trial court. Neither the court nor the respondent should have to do the work that is the responsibility of the appellant. The court should refuse to review this claim as it has not been properly presented under the rules of appellate procedure.

Even if this court considers this claim, defendants have failed to demonstrate an abuse of discretion in admitting the eyewitness “gang” evidence. It would appear from the briefs on appeal and the argument below that that the primary argument against introduction of eyewitness “gang” evidence was that, in the defendants’ view, there was insufficient evidence that this “Kushmen Blokk” set or “gang” existed or that the defendants were members. See 1RP 34-50; Brief of Asaeli at pp.29-32; Brief of Vaielua at pp. 82-83; Brief of Williams at pp. 38-47. As argued above in the section concerning severance, the circumstances of the crime created a strong inference that the shooting may have been gang related. At the very least, the circumstances surrounding the crime indicated that several car loads of individuals came to the waterfront as part of a joint plan to locate and confront the homicide victim and challenge him to a fight. The State adduced evidence James Falo knew Williams, Vaielua and one other of the males arriving at the waterfront that night to be

associated with a set called “Kushmen Blokk” Gago testified that he associated the brown bandanna he observed being worn with the set called Kushmen Blokk. As the large group of males, including the shooter, departed after the shooting, Tiare Misionare heard one of the males shout “K” which she took to be a reference to “Kushmen Blokk.” This evidence is sufficient to prove both the existence of the “Kushmen Blokk” set as well as its connection to the charged crime. The record shows the court did not abuse its discretion in allowing this testimony. It was up to the jury to determine the weight to give the evidence and whether the crime was “gang” motivated. Because the evidence concerns the *charged* crime the provisions of ER 404(b) are not applicable. The trial court did not abuse its discretion in allowing the eyewitnesses to testify regarding the apparent “gang” elements of the crime or to their knowledge of the defendants’ association with a certain set.

To the extent defendants are arguing that the State failed to prove the criminal nature of “Kushmen Blokk” that would go to the weight rather than the admissibility of evidence showing the set’s existence. The relationships among the males arriving at the waterfront in the suspect vehicles is important whether they knew each other from a criminal gang or a scouting troop or because they were related to one another. The evidence adduced at trial showed that whatever “Kushmen Blokk” was,

local law enforcement was largely unaware of its activities. The fact that the set did not have a reputation with local law enforcement or any significant history of engaging in criminal behavior lessens the prejudicial impact of the evidence adduced that showed the existence of Kushmen Blokk.

The trial court acted well within its discretion in allowing the eyewitnesses to the crime to testify regarding the circumstances of the crime. Some of these circumstances connected the shooting to a set called “Kushmen Blokk.” The witnesses also testified to their knowledge of two of the defendants’ connection to “Kushmen Blokk.” The evidence was relevant and pertinent to the charged crime.

- b. The trial court did not abuse its discretion in finding Detective Ringer qualified to testify as an expert on gangs.

The admissibility of expert testimony is analyzed under ER 702 and ER 703. When determining admissibility, the trial court should consider the proffered expert testimony in conjunction with ER 401 and ER 403. State v. Ellis, 136 Wn.2d 498, 523, 963 P.2d 843 (1998). In determining whether to admit expert testimony the court should ask whether the witness’s testimony be helpful to the trier of fact. State v. Farr-Lenzini, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). Evidence is helpful if the “testimony concerns matters beyond the common knowledge

of the average layperson, and does not mislead the jury to the prejudice of the opposing party.” Farr-Lenzini, 93 Wn. App. at 461.

The qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of an abuse of discretion. Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wn.2d 629, 642 453 P.2d 619 (1969). Failure to object to an expert witness’s testimony on grounds that the witness was not qualified as an expert precludes appellate review of that issue. State v. Florczak, 76 Wn. App. 55, 72-73, 882 P.2d 199 (1994). As with other evidentiary issues, the admission or exclusion of expert testimony is left to the sound discretion of the trial court.

The subject of the expert testimony should be beyond the common understanding and knowledge of the jury. Reese v. Stroh, 128 Wn.2d 300, 308, 907 P.2d 282 (1995). Generally, neither expert nor lay witnesses are permitted to testify “regarding the veracity of another witness because such testimony invades the province of the jury as the fact finder in a trial.” State v. Demery, 144 Wn.2d 753, 764, 30 P.3d 1278 (2001).

Under these principles, courts have approved expert testimony about jargon and notions commonly used in narcotics transactions, State v. Strandy, 49 Wn. App. 537, 543, P.2d 745 P.2d 43 (1987), United States v. Tutino, 883 F.2d 1125 (2d Cir 1989), cert. denied, 493 U.S. 1081, 110 S. Ct. 1139, 107 L. Ed. 2d 1044 (1990), and the meaning of gang symbols, hand signs and other aspects of gang culture. United States v. Sparks, 949

F.2d 1023 (8th Cir. 1991), cert denied, 504 U.S. 927, 112 S. Ct. 1987, 118 L. Ed. 2d 584 (1992). Courts have also allowed expert testimony on the structure and organization of crime families in racketeering cases. United States v. Ardito, 782 F.2d 358, 363 (2d Cir.), cert. denied, 475 U.S. 1141, 106 S. Ct. 1792, 90 L. Ed. 2d 338 (1986); United States v. Daly, 842 F.2d 1380, 1387-1388 (2d Cir. 1988), cert. denied, 488 U.S. 821, 109 S. Ct. 66, 102 L. Ed. 2d 43 (1988). None of this type of testimony involves the application of the *Frye* rule.

In State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992), the Supreme Court upheld admission of expert testimony on tracking from a man who had gained his specialized knowledge through 23 years of experience and training including tracking approximately 5000 people. The court held that the *Frye* rule, regarding scientific evidence, was not applicable because the “testimony was not based on novel scientific experimental procedures” but on the witness’s “own practical experience and acquired knowledge.” Ortiz, 119 Wn.2d at 311.

i. Ringer was properly found to be an expert.

In this case, defendants challenge the court’s qualification of Detective Ringer as a gang expert asserting that he was not qualified as he had no expertise on Samoan gangs in general or Kushmen Blokk in particular. However, a review of the record reveals that only one

defendant, Asaeli, preserved this claim in the trial court. After the State presented testimony regarding Detective Ringer's qualifications in a hearing outside the presence of the jury, defendants Vaeilua and Williams objected to certain testimony that they did not want adduced before the jury, but neither asserted that Ringer was not qualified as an expert. 2RP 514-515, 516. Only Asaeli asserted that the court should find Ringer not qualified based upon his lack of knowledge of Samoan gangs. 2RP 520.

The court did not abuse its discretion in finding Detective Ringer qualified as an expert in gangs. The record shows that his work as a police officer placed him in the middle of gangs and gang activity for close to twenty years. 2RP 656-658. He has enriched his "on the job" training with numerous seminars and classes related to gang culture. *Id.* He has testified as an expert on gangs in three different states as well as in federal court. 2RP 659-660. Based upon this record the court did not abuse its discretion in finding Detective Ringer qualified to testify as an expert in gangs.

On appeal, Asaeli acknowledges that Ringer might be an expert on gangs but asserts that Ringer had to have specialized knowledge of Samoan gangs before his testimony would be useful to the jury. Asaeli's brief at p 34. This is really a challenge to the admission of his testimony as a whole rather than to his qualifications as an expert. The argument assumes the Samoan gangs are different from other gangs, but Asaeli made no showing in the trial court that Samoan gangs are so different as to

render Ringer's expertise on gangs irrelevant. Ringer's testimony established that "Kushmen Blokk" was associated with the Bloods, thereby linking the facts of the case to his knowledge of how Crip and Blood gangs interact in the Tacoma area. Moreover, a claim that an expert lacks specialized knowledge within his general area of expertise would go more to the weight that the jury should give his testimony rather than provide a basis for exclusion. It is the type of issue that may be explored on cross-examination and argued to the jury. Asaeli presents no authority that a party must offer the testimony of a specialist rather than a general expert in order for the testimony to be properly before the jury.

ii. Detective Ringer's testimony was helpful without being unfairly prejudicial.

Detective Ringer's testimony on direct examination was on gang culture *in general*; he did not testify as to any particular gang activities of any of the defendants. Again, this fact distinguishes the instant situation from cases such as Campbell, where the State was introducing significant 404(b) evidence of the defendant's criminal gang activity.

Ringer's testimony was helpful on a number of fronts. First, his testimony was helpful in that he described the general organization structure of gangs and how each gang may have several sub-sets called a "set" and that each "set" may be comprised of sub-sets called "cliques." 2RP 660-662. There was testimony before the jury that Kushmen Blokk

was not a gang, but a “set” or “clique.” His testimony would help the jury understand the difference among the three terms. His testimony regarding a gang’s use of “colors” or “flags” gave the jury information necessary to assess the relevance of the bandannas used by some of the males at the time of the shooting.

Additionally, Detective Ringer testified to the importance of gang graffiti to law enforcement and how he has learned to read it as an intelligence tool. He testified how he found considerable graffiti near Cushman and 74th streets that was consistent with that area being the territory for a gang called “Kushmen Blokk.” Based on his expertise, the graffiti was consistent with Kushmen Blokk being associated with the Blood gang since it did not use the letter “C” and because references to other Blood sets in the graffiti were not crossed out. This evidence of graffiti was relevant as it tended to corroborate the existence of the set or clique called “Kushmen Blokk” and that clique’s connection to the Blood gang. Detective Ringer’s expertise in being able to read gang graffiti was helpful and relevant because it established a possible bond among the defendants and a possible motive for the homicide. There was evidence that the homicide victim was associated with a Crip set from Seattle. With Detective Ringer’s testimony the jury would understand that the victim, a Crip, would be a natural enemy of a Blood set from South Tacoma. Defendants’ counsel later used this gang evidence in argument to try to

convince the jury that the victim and his friends were the dangerous gangsters at the waterfront that night.

Detective Ringer testified that a gang would form for a common purpose such as protection of a neighborhood, criminal activity, or solidifying the neighborhood. 2RP 660. He did not dwell on the criminal nature of gangs or testify using highly inflammatory language about gang culture. The trial court did not abuse its discretion in allowing this testimony.

- c. The trial court did not abuse its discretion in admitting graffiti evidence found in Williams's jail cell to show his connection to Kushmen Blokk.

At trial a police detective testified that he took photographs of graffiti that was on the walls of defendant Williams' jail cell. 2RP 470-477. The graffiti included references to "Twix," which is Williams's street name, as well as "Kushmen Blokk 73," and "Brown Flag Gangsta." 2RP 681-689. One area of the cell had "KB" in large block letters then around that was written "Southwest Kushmen Blokk 73rd Street." "Tacoma's Finest 253," "Twix," and "BFG" meaning Brown Flag Gangsta. 2RP 689 (Exhibit 150). Detective Ringer testified that the content of this graffiti was very similar to graffiti he found in the area of Cushman and 74th Streets. The graffiti in the jail cell also had references to other Tacoma Blood sets – the East Side Original Loco Boyz and East

Side Pirus; as these had not been crossed out, Detective Ringer opined that a Crip gang member had not been in the cell since the graffiti had been written on the walls. 2RP 688.

Williams asserts that the court abused its discretion in admitting the evidence regarding the graffiti in his jail cell on the grounds that was irrelevant because the State did not present evidence that Williams put the graffiti on the walls or even any evidence as to when the graffiti first appeared.

As noted earlier, evidence is relevant if it tends “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Only minimal logical relevance is required. State v. Bebb, 44 Wn. App. 803, 814, 723 P.2d 512 (1986), aff’d, 108 Wn.2d 515, 740 P.2d 829 (1987). Unfairly prejudicial evidence may be excluded even if relevant. ER 403. Almost all evidence is used to convince the trier of fact to reach one decision rather than another and, in that sense, is prejudicial. State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). But evidence is unfairly prejudicial if it is likely to elicit an emotional response rather than a rational decision. Rice, 48 Wn. App. at 13.

The appellate court reviews a trial court’s evaluation of the relevance of evidence and its probative value versus its prejudicial effect with a great deal of deference. State v. Luvane, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). The trial court’s decision will be reversed only for

an abuse of discretion. State v. Hamlet, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997).

At issue in this case was the existence and nature of a group called “Kushmen Blokk” which eyewitnesses linked to the crime. The graffiti in the jail cell has some relevance in proving the existence of this group as well as its nature. The type of markings found surrounding the references to Kushmen Blokk also tended to prove that it was a gang that used brown flags and was associated with the Bloods. The graffiti included Williams’s street name of “Twix” from which the jury could infer that he placed the graffiti upon the wall and that he associated himself with this set. Williams certainly had the opportunity to place the markings upon the wall as they were found in his jail cell. But even if the jury did not believe that he wrote the graffiti, the evidence was relevant in proving the existence and nature of the “Kushmen Blokk” set. The court did not abuse its discretion in admitting this evidence.

4. DEFENDANTS ASaelI AND VAIELUA
FAILED TO PRESERVE ANY CLAIM OF
ERROR WITH REGARD TO THE TRIAL
COURT’S ADMISSION OF EVIDENCE OF
THREATENING TELEPHONE CALLS.

As noted earlier, a party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. When matters are

decided on motions in limine, the losing party is deemed to have a standing objection where a judge has made a final ruling on the motion, “unless the trial court indicates that further objections at trial are required when making its ruling.” State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615(1995), State v. Koloske, 100 Wn.2d 889, 895, 676 P.2d 456 (1984). When the trial court makes a tentative ruling before trial, error is not preserved for appeal unless the party objects to admission of the evidence when it is offered, allowing the court an opportunity to reconsider its prior ruling. Eagle Group, Inc. v. Pullen, 114 Wn. App. 409, 416-17, 58 P.3d 292 (2002).

Here, the defendants sought a pretrial ruling excluding evidence of threatening phone calls made to the victim’s residence a short time before his death, but the court did not make a final ruling. 1RP 193-194. The court stated:

COURT: I’ll deny the motion at this time. ***This is one of those cases where you have to hear the testimony as it comes [in].*** But at this time I’m going to deny the motion.

1RP 193-194(emphasis added). The clear message from the court was that it needed more information – such as the actual testimony- before it could make a final ruling. Thus, to preserve the error, defendants were required to object. When this testimony was adduced at trial, there was no objection. 1RP 1125-1127, 1138-1139. This claim has not been properly preserved for appellate review.

5. VAIELUA FAILED TO PROPERLY PRESERVE HIS CLAIM THAT THE COURT IMPROPERLY LIMITED CROSS-EXAMINATION OF DETECTIVE RINGER; HE ALSO FAILED TO PROPERLY ASSIGN ERROR TO ANY RULING OF THE TRIAL COURT PERTAINING TO THIS CLAIM.

a. There is no assignment of error pertaining to this issue.

An appellate court will not consider the merits of an issue if the appellant fails to raise the issue in the assignments of error section of the appellant's brief in violation of RAP 10.3(a)(4). State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); In re Marriage of Stern, 57 Wn. App. 707, 710, 789 P.2d 807 (1990).

In this case, Vaielua has provided an argument section in his brief alleging that the trial court improperly limited his cross examination, but there is no corresponding assignment of error for this claim. Vaielua has failed to comply with RAP 10.3(a)(4). Additionally, Vaielua failed to properly identify where in the record the court erred in limiting his right to cross-examine. The argument section in his brief references that this occurred during the testimony of Detective Ringer. That is the only clue the court has in trying to identify where the alleged error occurred. Based upon these deficiencies, the court should refuse to consider this issue.

- b. Vaielua failed to make an offer of proof necessary to preserve this issue for review.

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992); In re Twining, 77 Wn. App. 882, 893, 894 P.2d 1331, review denied, 127 Wn.2d 1018 (1995). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997). Limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice. Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (stating that the "accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence" (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988))). Similarly, the Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (discussing Washington's rape shield law).

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. State v. Knapp, 14 Wn. App. 101, 107-08, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); State v. Kilgore, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001).

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by offer or was apparent from the context of the record. "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. Ray, 116

Wn.2d at 539, citing Mad River Orchard Co. v. Krack Corp., 89 Wn.2d 535, 537, 573 P.2d 796 (1978). Finally if the ruling was a tentative ruling on a motion in limine, a defendant who does not seek a final ruling waives any objection to the exclusion of the evidence. State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994), citing State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991).

The essence of Vaielua's claim is that he was wrongly precluded from adducing certain evidence in front of the jury during his cross examination of Detective Ringer. In order for the trial and appellate courts to properly assess this claim, it would need to know the substance of what Vaielua hoped to adduce. Vaileua fails to identify where he preserved this claim in the trial court by making an offer of proof. The State is unclear as to which ruling is being challenged. Without this information, the State and appellate court would merely be guessing at the nature of this claim as well as the impact the exclusion of the evidence might have had on the trial below. This provides another basis for not reviewing the alleged error.

6. DEFENDANTS HAVE FAILED TO SHOW THAT THE PROSECUTOR ENGAGED IN ANY IMPROPER CONDUCT THAT WOULD DEPRIVE THEM OF A FAIR TRIAL.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the

defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn’t support a defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d

747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87.

Defendants assert that the prosecutor engaged in misconduct by presenting powerpoint slides during closing that misstated the law. Vaielua also contends⁷ the prosecutor committed misconduct by adducing improper comment from a State's witness and arguing facts not in evidence.

- a. The prosecutor's power point slides were not meant to be statements of the law, but argument; they did not constitute improper argument.

All three defendants accuse the prosecutor of committing misconduct for using a powerpoint presentation during closing which they contend contained many misstatements of the law. ACP 132-138. They assert that these powerpoint slides, through subliminal means or otherwise, somehow became more compelling to the jury than the court's written instructions. As the prosecutor pointed out, the slides were not designed to be statements of the law, they were designed to be argument.

⁷ In his section addressing prosecutorial misconduct, Vaielua asserts that the prosecutor twice called a defense witness a liar citing to 2RP 1716, 1722. He does not develop his argument on this topic any further. A review of the relevant portion of the report of the proceeding reveals that the witness had testified inconsistently from one day of testimony to the next about whether she had ever spoken to Asaeli about the shooting. The prosecutor was trying to ascertain which of these sworn inconsistent statements was the truth and which was a lie. He did not ever call the witness a "liar," but rather was asserting that only one of her statements could be true. It is not misconduct to question a witness about inconsistent statements made under oath. See, 2RP 1715-1724

2RP 1970. The judge agreed that the slides had to be viewed as argument, similar to when lawyers in the past would write things up on a big charts or on white boards. 2RP 1945, 1970. Thus, the question before this court is whether the slides contained improper argument.

It is preposterous to accept the defendants' argument that slides - which were shown on an overhead projector, not read out loud in their entirety and not allowed in the jury room - could somehow "override" the court's written instructions. A "jury is presumed to follow the instructions of the court." State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). The jury in this case was instructed that it was to take its law from the court's instructions. ACP 48-108; WCP 555-615, Instruction No. 1. The jury was instructed to disregard any of the lawyer's remarks, statements and arguments that were not supported by the law. Id. During the closing argument, in response to an objection, the prosecutor stated in the presence of the jury that his powerpoint slides were not meant to be instructions but his "words as to what the instructions mean." 2RP 1970. The court overruled the objection and reminded the jury that the argument was not the law and that the law was in the instructions. Id. The prosecutor reminded the jury that the law was set forth in the written instructions and that "if during your deliberations, you have some question on the law, look at the instructions, read though it." 2RP 1981. Williams's defense counsel reminded the jury that the law was set forth in the instructions. 2RP 2023, 2051. He repeatedly argued that what "you

saw on the screen today from [the prosecutor] isn't in [the instructions].” 2RP 2051, 2052-2053. Asaeli's defense counsel reminded the jury that the law came from the judge. 2RP 2071. He also argued that what was on the prosecutor's powerpoint slides was not evidence or law, but just the prosecutor's arguments. 2RP 2098-2099. Thus in the face of constant instruction and reminders that the law was set forth in the court's instructions and to disregard any argument not supported by the law, it is preposterous to contend that the powerpoint slides took on a greater importance to the jury than the court's written instructions. There is nothing to support the conclusion made by the defendants that the jury rejected the law as presented in the instructions and used the statements in the powerpoint slides as the applicable law.

Nor do the slides exceed the bounds of appropriate argument. It was the State's view of the case that the defendants and several others went to the waterfront that night for the express purpose of confronting the victim and engaging him in a fight. Within seconds of Williams confronting the victim and issuing the challenge, Asaeli is shooting an entire clip from his .9mm gun at the victim from point blank range. Asaeli claimed self-defense. The State contended it was murder. In light of this, slides containing statements such as “When a challenge to a fight is used as an excuse to kill, its murder!” and “Self- defense: Killing after a challenge to a fight is not lawful defense, its murder” are simply arguments of the State's theory of the case and a petition to the jury to

reject the self- defense claim should be rejected. A prosecutor does not commit misconduct by arguing his theory of the case.

In his closing the prosecutor spent time talking about how self-defense required several elements, discussing each of those elements, and pointing out that the State need only disprove one element to defeat the claim. 2RP 1958, 1969 -1975. This argument and the corresponding slides were entirely consistent with Instruction No. 20. The prosecutor also discussed the “good faith” component, which is found in the courts instruction on acting on appearances. 2RP 1970-1973. ACP 48-108; WCP 555-615, Instruction No. 25.

Defendants contend that a slide headed with the words “Killing is Not lawful When...” and followed by several bullet points relating to facts of the case, was contrary to the court’s instruction regarding no duty to retreat. The slide does not state that Asaeli had a duty to retreat. Each of the bullet points went to a required element of self defense that the State contended was missing. For example, if there was “no provocative behavior by the victim” then there was no reason to believe that the person slain intended to inflict death or great personal injury. The fact that Asaeli did not “give a verbal warning” or fire a “warning shot” or “attempt to hold [the victim] at gunpoint” are all factors the jury could consider in deciding whether he used “such force as a reasonably prudent person would use” or whether he used excessive force. The fact that Asaeli shot the victim “seven times” when the victim “had no means to shoot back” or

that Asaeli put “other people at risk” with his acts also goes to whether he used “such force as a reasonably prudent person would use.” In short this entire slide is a summation as to why the jury should reject Asaeli’s claim of self –defense. It does not constitute improper argument.

This court must not examine the slides as if they were “alternative” jury instructions, but whether defendants have shown they contain improper argument. They have failed to make this showing.

- b. The prosecutor’s rebuttal argument about Vaielua’s involvement in the crime was arguing reasonable inferences from the evidence.

In rebuttal the prosecutor made the following argument:

Darius Vaielua, what did he do that makes him an accomplice? In addition to driving Eroni Williams down there, in addition to waving the bandanna around, he asked for Blacc. The evidence isn’t ...as compelling against Darius Vaielua as it is Eroni Williams; but in the end, *it is difficult to imagine that Darius Vaielua would have been positioning himself between Blacc and Blacc’s friends for another purpose.* It’s difficult to imagine that Darius Vaielua would have been holding a bandanna, twirling a bandanna, possibly putting a bandanna on for any other purpose.

2RP 2213 (emphasis added). Vaielua contends that the emphasized portion was arguing facts not in evidence. There was no objection to this argument at trial so Vaielua must show that it was so blatant and ill-intentioned that no curative instruction could have eliminated the

prejudice. He cannot meet that standard. He cannot show that it was improper argument.

The State asked most of the witnesses to the shooting draw diagrams as to where people were standing. A couple of the State's powerpoint slides showed pictures of these diagrams. ACP 132-138. Vaielua's attorney argued that there was not testimony to support the State's claims as to Vaielua's location. 2RP 2153-2154. Under the instructions, the jury would reject any argument that was unsupported by evidence. As for Vaielua's motivation for being in a particular location, the prosecutor was free to argue that based upon the witnesses recollections of where people were standing that night that Vaielua might have chosen his position because it placed him between where James Fola and Gago were located and where the victim was seated in Ramaley's car. This is arguing reasonable inferences from the evidence presented. It certainly cannot be characterized as "blatant and ill-intentioned misconduct." Vaielua has failed to show misconduct or at least misconduct that can cause reversal without an objection below.

- c. There is nothing in the record to indicate that the prosecutor committed misconduct with respect to a witness's poorly worded answer.

Vaielua asserts that the prosecutor should be held to task for a comment made by the State's expert witness on redirect which he asserts

was in violation of the court's order in limine. It should be noted that there is no assertion that the State violated the terms of the motion in limine on its direct examination. Cross-examination, however, might have opened the door to additional areas thereby allowing the State to ask follow-up questions that might have been improper on its initial direct examination. Here, Vaielua asserts prejudicial error stemming from an answer given by the State's expert on gangs on redirect. While there were many objections made regarding the content of the witness's answer, including non-responsive and lack of foundation, there was not a single objection raised to the prosecutor's question that elicited the response. No one asserted that the question went beyond the scope of cross-examination or that it called for matters previously ruled inadmissible or that it was otherwise improper. 2RP 758-759. There is no evidence of prosecutorial misconduct.

When the witness did include an objectionable remark within the content of his answer- namely that gang members are generally felons (2RP 759) - the prosecutor immediately agreed that the remark should be stricken. 2RP 762. The court instructed the jury to disregard this remark. 2RP 764. There is nothing about this exchange to indicate that the prosecutor was trying to adduce this remark which might make it an issue of prosecutorial misconduct. The matter was ultimately stricken and the jury instructed to disregard so there was no enduring prejudice.

Because the defendants have failed to meet their burden of showing that the prosecutor engaged in misconduct or that it was prejudicial, the court should dismiss this issue as meritless.

7. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING VAIELUA'S MOTION TO REMOVE A JUROR FOR WHAT MIGHT HAVE BEEN MOMENTARY INATTENTIVENESS.

The determination as to whether a juror has been so inattentive that there is prejudice to the defendant is a matter left to trial court's discretion; it is reviewable only for abuse of discretion. State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986) (citing Casey v. Williams, 47 Wn.2d 255, 257, 287 P.2d 343 (1955)); State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993). Unless counsel objects to a juror's inattentiveness during trial, the error is waived on appeal. Hughes, 106 Wn.2d at 204. Under RCW 2.36.110, the judge has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of . . . inattention . . . or by reason of conduct or practices incompatible with proper and efficient jury service."

The facts in Hughes show that there were continuing problems with drowsy jurors due to a poorly ventilated and crowded courtroom. Id. The court made efforts to combat this by having the jurors stand and stretch every half hour and whenever counsel would signal that a juror was having difficulty staying awake. Despite these efforts, one juror continued

to doze and was replaced with an alternate juror. On appeal, Hughes argued that he had been prejudiced by the general drowsiness of the jurors. Id. The Supreme Court rejected this claim noting that the trial court monitored the potential problem and handled the situation appropriately. It concluded that the record did not suggest that “the jury drowsiness problem was such as to prejudice the defendant.” 106 Wn.2d at 204.

The party who asserts juror misconduct bears the burden of showing that the alleged misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). The determination of whether misconduct has occurred lies within the discretion of the trial court. State v. Havens, 70 Wn. App. 251, 255-56, 852 P.2d 1120, review denied, 122 Wn.2d 1023 (1993).

Defendant Vaelua claims that the trial court abused its discretion by denying his motion to remove a juror who might have been sleeping. The record shows that Williams’s trial counsel first raised this issue one afternoon. William’s counsel asserted that one juror had been sleeping during his cross examination of the forensic specialist who had processed the crime scenes. 1RP 544. Asaeli’s counsel had not noticed any sleeping during the cross-examination but had thought that the juror had been sleeping during the morning session. 1RP 545. Vaelua’s counsel and the prosecutor had not noticed the juror sleeping. 1RP 545. Nevertheless, Vaelua joined William’s motion to have the juror excused. 1RP 545. The prosecutor indicated that he had been watching the jury during the

cross and he noticed that juror closing his eyes briefly, but that it did not appear that he was sleeping. 1RP 545-546.

The court indicated that it had been watching the jury and hadn't noticed anyone visibly nodding off. 1RP 546. The judge noted that she had closed her eyes a few times during the cross simply because she found the bright lights in the courtroom became tiresome by the afternoon. 1RP 546. The court indicated that it was going to keep a close watch on the situation and if it noted a continuing problem, then the juror would be excused. 1RP 546-547. The court denied the motion to remove the juror at that time. 1RP 547. Vaeilua fails to identify any point in the record where this matter was re-raised with the court to suggest there was a continuing problem.

This record shows the court acted well within its discretion. Only one of the attorneys saw what he believed to be inattentiveness on the part of the juror during the cross –examination. The court had not seen anything which raised a concern, but promised to keep a closer watch on the particular juror. The court had at least one other possible explanation for closed eyelids that did not render the juror inattentive. Furthermore, the court indicated a willingness to excuse any juror who it believed was sleeping during the trial. Clearly, the court was not convinced of the juror's unfitness to serve at that point. The facts of Hughes show a widespread prevalence of juror inattentiveness, yet the Supreme Court found that it was insufficient to demonstrate resulting prejudice to Hughes.

The same conclusion must be drawn here. Defendant points to only one brief possible occurrence of juror inattentiveness in a trial that lasted for weeks. This court should find that Vaielua has failed to meet his burden of proving that juror misconduct occurred and that he has failed to show any abuse of discretion in denying the motion to excuse the allegedly sleeping juror.

8. DEFENDANT VAIELUA'S CHALLENGE TO THE INSTRUCTION ON ACCOMPLICE LIABILITY HAS NOT BEEN PROPERLY PRESERVED FOR REVIEW.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, reversed on other grounds, 141 Wn.2d 448, 6 P.3d 1150 (2000), citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997); State v. Hernandez, 99 Wn. App. 312, 997 P.2d 923 (1999)(trial court properly refused to instruct on manslaughter). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. Id.

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963).

Vaielua assigns error to the instruction on accomplice liability. Assignment of error No. 14, Vaielua's opening brief at p. 3. He asserts in his brief that he objected to the Court's instruction on accomplice liability "due to concerns regarding the potential confusion with applying an accomplice liability instruction that only specified 'the crime' to two crimes commissionable with four different levels of mens rea." Id. at p 39. The record does not support this assertion; the record indicates that his issue was not preserved for review.

- a. The doctrine of invited error precludes review of defendant's challenge to Instruction 6.

The invited error doctrine provides that a party may not request an instruction and then later complain on appeal that the requested instruction was given. State v. Gentry, 125 Wn.2d 570, 646-647, 888 P.2d 1105 (1995). There is a distinction between the failure to except to an erroneous instruction and "actually proposing an erroneous instruction; the former is a failure to preserve error, the latter is error invited by the defense." Id. A defendant who affirmatively assents to an instruction also has invited error as to that instruction, should it be erroneous. State v. Studd, 134 Wn.2d 533, 547, 973 P.2d 1049(1999). In Gentry, this court took the opportunity to clarify whether it would review instructional error in a capital case.

We will adhere to our normal use of the invited error doctrine, but will review any invited instructional error in connection with an ineffectiveness of counsel argument; this will ensure that any error which was indeed prejudicial could be grounds for reversal.

Gentry, at 646-647. If any instructional error was invited and the defendant does not assert an ineffective assistance of counsel claim, then the claim as to the instructional error is not reviewable. State v. Elmore, 139 Wn.2d 250, 280, 985 P.2d 289 (1999).

Defendant assigns error to the wording of the Jury Instruction 6, which read:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

Instruction 6, ACP 48-108; WCP 555-615.

The defendant Vaielua proposed the following instruction on accomplice liability:

A person is an accomplice in the commission of a crime if, with [knowledge]⁸ that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

VCP 321-340.

Comparing the two, the defendant’s proposed instruction does not include the first paragraph of the court’s instruction or the last, but the remainder is identical. When the parties were discussing which version of the accomplice liability instruction to use, Vaielua objected to the inclusion of the first paragraph and argued that it was unnecessary. 2RP 1779-1780. That was the same objection he made when the court was taking formal objections to the court’s instructions. 2RP 1930-1931. Vaielua has abandoned any argument as to the inclusion of this first paragraph on appeal. In the trial court Vaeilua did not object on the basis

⁸ Vaielua’s instruction omitted the word knowledge; presumably this was an unintentional oversight.

that he now raises on appeal. He now asserts that that the instruction created “potential confusion” by not clarifying that ‘the crime’ would refer to different crimes as the jury considered the various charges contained within the instructions.

But any error in this regard was waived for his own instruction was worded identically to the State’s on this issue. Thus, he invited the court to give the instruction of which he now complains; he is precluded by the doctrine of invited error from raising this claim directly; it could only be raised in the context of an ineffective assistance of counsel claim, but Vailelua did not raise this as a basis for ineffective assistance of counsel.

b. The Ninth Circuit’s opinion in *Sarausad v. Porter* is not controlling.

Vailelua relies upon the recent decision in *Sarausad v. Porter*, 479 F.3d 671, rehearing, en banc denied, 503 F.3d 822 (9th Cir. 2007) to support his claim that the instruction relieved the State of its burden of proof. Out the outset, it should be noted that there was a strong dissent on the denial of the motion for rehearing in the federal court, with several circuit justices agreeing that the Ninth Circuit was overstepping its bounds by not giving proper deference to the Washington Supreme Court’s interpretation of state law. See *Sarausad v. Porter*, 503 F.3d at 823-826.

The Ninth Circuit’s constitutional holdings are not binding on this court or the Washington Supreme Court. *In re Personal Restraint of*

Grisby, 121 Wn.2d 419, 430, 853 P.2d 901 (1993); In re Personal Restraint of Benn, 134 Wn.2d 868, 937, 952 P.2d 116 (1998). This court is bound by the decisions of the Washington Supreme Court. State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227, 39 A.L.R.4th 975 (1984) (the Court of Appeals is bound by decisions of the Washington Supreme Court).

The accomplice liability instruction given in this case mirrored Washington's accomplice liability statute; consequently, the instruction complies⁹ with what the Washington Supreme Court has indicated would be proper wording. State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000); State v. Roberts, 142 Wn.2d 471, 511-12, 14 P.3d 713 (2000) (citing State v. Davis, 101 Wn.2d 654, 656, 682 P.2d 883 (1984)). The instruction is consistent, in the relevant part, with an instruction that has been approved by this court as a proper statement of the law. State v. Winterstein, 140 Wn. App. 676, 686-687, 166 P.3d 1242 (2007). These decisions should control this issue rather than the Ninth Circuit decision in Sarausad.

⁹ Because the instruction was a proper statement of the law in Washington, Vaielua cannot show that his attorney was deficient for proposing the instruction.

This court should find that any error in the wording of the accomplice liability was invited as Vaelua proposed an identically worded instruction.

9. VAIELUA HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON HIS ATTORNEY'S FAILURE TO PROPOSE INSTRUCTIONS ON MANSLAUGHTER IN THE FIRST DEGREE.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also, State v.

Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "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, 335, 899 P.2d 1251 (1995); see also, Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different."

Strickland, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant Vaielua seeks to show ineffective assistance of his trial counsel for his failure to propose lesser included instructions on

manslaughter in the first degree. In order to succeed on his claim Vaielua must show that the court would have given such instructions had his attorney requested them at trial (deficient performance) and that had such instructions been given there was a reasonable probability that he would have been convicted of manslaughter rather than felony murder in the second degree (prejudice). He cannot meet his burden on either prong of the Strickland test.

a. Vaielua cannot show deficient performance.

The decision of whether to request an instruction on a lesser-included offense is a matter of trial strategy. United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1992). Generally, decisions regarding trial tactics are accorded “enormous deference,” United States v. Hirschberg, 988 F.2d 1509, 1513 (7th Cir. 1993), cert. denied, 114 S. Ct. 311 (1993), and will not constitute ineffective assistance if, “viewed from counsel’s perspective at the time, [they] might be considered sound trial strategy.” Kubat v. Thieret, 867 F.2d 351, 360 (7th Cir. 1989), cert. denied, 493 U.S. 874 (1989). The decision not to request a lesser-included instruction will not constitute ineffective assistance when requesting the instruction would conflict with a reasonable trial strategy. Kubat, 867 F.2d at 364-65 (seeking lesser-included instruction in kidnapping case would conflict with alibi defense); see also, Moyer v. State, 620 SE2d 837 (Ga. App. 2005); Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998) (a tactical

decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense).

Presenting the jury with an all-or-nothing choice is generally a reasonable trial strategy because, although it involves a risk, it increases the chances of an acquittal. See Collins v. Lockhart, 707 F.2d 341, 345-46 (8th Cir. 1983) (Gibson, J. concurring); United States ex rel. Sumner v. Washington, 840 F. Supp. 562, 573-74 (N.D. Ill. 1993); Parker v. State, 510 So. 2d 281, 286 (Ala. Crim. App. 1987); Henderson v. State, 664 S.W.2d 451, 453 (Ark. 1984); see also, Heinlin v. Smith, 542 P.2d 1081, 1082 (Utah 1975) (court noted that counsel's failure to request a lesser included offense instruction was not unreasonable, but a likely tactic involving the idea that an all-or-nothing stance might better lead to an outright acquittal); Coble v. State, 1992 Del. LEXIS 26 (Del. 1992) (tactical decision by attorney not to request instruction on lesser cannot be considered plain error).

The evidence in this case was that only Asaeli fired a gun at the victim and Vaielua's defense was that he was not an accomplice to Asaeli, who acted on his own. In order to argue to the jury that he should be found guilty of manslaughter, Vaeilua would have to retreat from this primary defense and argue that he was somehow accountable for Asaeli's conduct but that Asaeli was not as culpable as the State alleged. Such an argument would dilute the strength of Vaielua's primary defense. This

undermining of the primary defense also distinguishes Vaielua's case from the circumstances presented in State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004) and State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006) where the defense to the lesser offense was the same as the defense to the greater charge. Thus, Vaielua cannot show deficient performance based upon a tactical decision made by his attorney.

Nor can Vaielua show that he was entitled to the instructions on manslaughter. The law concerning the giving of jury instructions in general cited in the previous argument section at pp. 48 is applicable here. With regard to instructions on lesser included offenses, a defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser crime is a necessary element of the charged crime, and (2) the evidence supports an inference that the lesser crime--and only the lesser crime--was committed. State v. Hurchalla, 75 Wn. App. 417, 421-23, 877 P.2d 1293 (1994). As to this second prong, there must be some affirmative evidence from which the jury could conclude that the defendant committed the lesser included crime. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), disapproved on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). A reviewing court examines the evidence in the light most favorable to the proponent of the instruction. State v. Fernandez-Medina, 141 Wn.2d at 455-456. However, "the evidence must *affirmatively* establish the defendant's theory of the

case – it is not enough that the jury might disbelieve the evidence pointing to guilt.” Id., at 456 (emphasis added).

A defendant is entitled to a manslaughter instruction if the evidence indicates that he thought he was in imminent danger and needed to act in self defense, but recklessly or negligently used more force than was necessary. State v. Schaffer, 135 Wn.2d 355, 358, 957 P.2d 214 (1998), review denied, 142 Wn.2d 1005, 11 P.3d 827 (2000). A defendant who commits manslaughter lacks the intent to kill. See RCW 9A.32.060(1). If there is any evidence that the defendant believed he was in imminent danger, but recklessly used more force than was necessary to defend himself, the trial court is obligated to give a proposed manslaughter instruction. Schaffer, 135 Wn.2d at 358. This is sometimes labeled “imperfect self-defense” because the jury could find that the defendant was in a situation where he had a right to use lawful force but exceeded the scope of what was lawful by using too much force.

In the instant case, the State would concede that *had* Asaeli requested instructions on manslaughter, the trial court would have been obligated to give them. The State does not concede that Vaielua was legally entitled to the same instructions. The State could find no Washington case holding that a similarly situated defendant was entitled to such instructions.

For while there is a theoretical basis for the person who actually uses the lethal force in self-defense to request manslaughter instructions

based upon “imperfect self-defense” that does not mean that there is a legal basis for a defendant who is charged as an accomplice to the person using the lethal force to request such instructions.

In Washington, an accomplice need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal. State v. Sweet, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999); State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991). The accomplice liability statute, RCW 9A.08.020(3)(a), requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged. State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). The Supreme Court has also noted that the legislative history of RCW 9A.08.020 supports a conclusion that the legislature “intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has ‘knowledge[.]’” State v. Roberts, 142 Wn.2d 471, 510, 14 P.3d 713 (2000). The putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate “the crime” for which he or she is eventually charged, and that knowledge of “‘a crime’ does not impose strict liability for any and all offenses that follow.” Roberts, 142 Wn.2d at 513.

For a conviction of manslaughter based upon accomplice liability to stand, the evidence must support a finding that the defendant solicited, commanded, encouraged or requested the principal to commit

manslaughter, or aided or agreed to aid the principal in planning or committing it, knowing that his acts would either promote or facilitate the crime of manslaughter. See RCW 9A.08.020(3)(a) (requirements for accomplice liability); State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003).

In an “imperfect self-defense” situation, there is no “crime” that exists prior to the overuse of force that was employed initially in lawful self-defense. Consequently, the first awareness or general knowledge an accomplice to manslaughter premised on imperfect self defense could have of such a crime is while the excessive force is being employed. In order for an accomplice to be entitled to instructions on manslaughter in this situation, he would have to show that there was evidence from which to conclude that once he became aware that the principal was using excessive force in self-defense that he solicited, commanded, encouraged or requested the principal to use even *more* excessive force or that he somehow aided or assisted the principal in using additional excessive force. Vaielua fails to establish that there is a factual basis for the giving of manslaughter instructions in his case. Because he has failed to demonstrate that the court would have given the instructions had they been requested he has failed to demonstrate deficient performance.

b. Vaielua cannot show resulting prejudice.

However, even if this court were to find that Vaeilua was legally entitled to manslaughter instructions, he must demonstrate prejudice. To demonstrate prejudice, he must show that the outcome of the trial would probably have been different if counsel had offered the instruction. State v. Brett, 126 Wn.2d 136, 199, 892 P.2d 29 (1995). Even if the court were to assume that the evidence was sufficient to warrant a manslaughter instruction, Vaeilua cannot show that the outcome would have been different.

Under an imperfect self-defense theory, Vaeilua's liability for manslaughter is derivative of Asaeli's liability, because only Asaeli employed force against the victim. In other words, the jury had to believe that Asaeli was lawfully acting in self-defense but recklessly or negligently used more force than necessary before it would be possible for the jury to find that Vaielua was guilty of manslaughter via accomplice liability. If the jury rejected Asaeli's self-defense claim, then the failure to give manslaughter instructions for Vaielua would be harmless.

Under the court's instructions, the jury could find that with respect to Faalata Fola's death that: 1) Asaeli was acting in self-defense and not guilty of any crime; 2) Asaeli was guilty of murder in the first degree based on either a premeditated intent or extreme indifference to human life means of committing that crime; 3) Asaeli was guilty of intentional murder in the second degree; 4) Asaeli was guilty of felony murder in the

second degree predicated on either assault in the first degree or assault in the second degree; and/or 5) Asaeli was acting in lawful self-defense and not guilty of any homicide. ACP 48-108; WCP 555-615. The jury was also asked to determine whether Asaeli was guilty of assaulting Tiare-ann Misionare or whether that was also an act done in self-defense. Id. The jury found Asaeli guilty of murder in the first degree, felony murder in the second degree and assault in the first degree. By special verdict, the jury indicated that it could not reach unanimous agreement as to the premeditated murder means but that it was unanimous that Asaeli had acted with extreme indifference to human life. ACP 110-111. These verdicts show unequivocally that the jury rejected Asaeli's self-defense claim and found that his use of force was unlawful and assaultive. As Vaielua could only hope to be found guilty of manslaughter if the jury gave credence to Asaeli's self-defense claim, he could not have been prejudiced by the lack of manslaughter instructions given in his trial.

Because he cannot show either deficient performance or resulting prejudice, Vaielua's claim of ineffective assistance of counsel is without merit.

10. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICTS FINDING VAIELUA AND WILLIAMS GUILTY OF FELONY MURDER IN THE SECOND DEGREE; MOREOVER THE VERDICTS SATISFY THE LAW WITH REGARD TO JURY UNANIMITY.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also, Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

The jury was instructed that to convict defendants Vaielua and Williams of the crime of murder in the second degree (felony murder) as charged in Count III, the following elements had to be proved beyond a reasonable doubt:

(1) That on or about the 30th day of October, 2004, Faalata Fola was killed;

(2) That the defendant or a person to whom the defendant was acting as an accomplice was committing, or attempting to commit, the crime of assault in the first or second degree;

(3) That the defendant or a person to whom the defendant was acting as an accomplice caused the death of Faalata Fola in the course of and in furtherance of such crime or in immediate flight from such crime;

(4) that Faalata Fola was not a participant in the crime; and

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

WCP 555-615, Instruction Nos. 42 (Vaielua) and 43 (Williams). As discussed earlier in this brief, the jury was given an instruction on accomplice liability that mirrored the statutory language and was an accurate statement of Washington law. See Id., Instruction No. 6.

In their briefs, Defendants Vaielua and Williams do not challenge the proof of elements (1) , (4), or (5), but argue that there was insufficient evidence of an assault in either the first or second degree and that there was insufficient evidence that they were acting as accomplices to Asaeli. Vaielua's Brief at pp. 26-37; Williams's brief at pp. 24-31.

Before the State addresses these claims, it is important to address an erroneous legal argument proffered by defendant Vaielua. He asserts that, in order to find him guilty of felony murder predicated on Asaeli's assault with a firearm, the State had to prove that he knew his accomplice was armed. Vaielua's Brief at pp. 31-34.

The Supreme Court recently summarized its cases addressing what must be shown regarding an accomplice's mental state in order for the accomplice to be liable for the principal's acts. In re Personal Restraint of Domingo, 155 Wn.2d 356, 119 P.3d 816 (2005). The Court began with the premise that the complicity statute, RCW 9A.08.020, requires that a defendant charged as an accomplice must have *general knowledge* of the charged crime in order to be convicted of that crime, but that *specific knowledge* of the elements of a coparticipant's crime is not required. Id. at 358, 364 (emphasis added). The court established these principles in State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984), and State v. Rice, 102 Wn.2d 120, 683 P.2d 199 (1984). Davis had stood lookout while his associate held up and robbed a pharmacy. Davis claimed that he did not know that his associate was armed and thus could not be convicted as an accomplice to first degree (armed) robbery. But the Supreme Court rejected this argument holding that Davis was validly convicted as an accomplice to first degree robbery even if he did not know the principal was armed because the State proved he had general knowledge that he was aiding in the crime of robbery. Davis, 101 Wn.2d at 658. The facts of Rice are even more relevant to the issues in the case now before the court. Rice and his codefendant Luna were charged and convicted of felony murder predicated on second degree assault. After discussing whether the two defendants were charged as principles or accomplices, the court noted

that ultimately it did not affect their liability for the crime. It made the following statement on the nature of accomplice liability in this context:

[W]here criminal liability is predicated on the accomplice liability statute, the State is required to prove only the accomplice's general knowledge of his coparticipant's substantive crime. Specific knowledge of the elements of the coparticipant's crime need not be proved to convict one as an accomplice. ***Consequently, even assuming Rice and Luna were charged as accomplices to felony murder, the State would only have been required to prove their knowledge of their coparticipant's criminal assault on the victim. It would have been unnecessary for the State to prove the defendants' actual knowledge of their coparticipant's possession of a deadly weapon or his mental intent.***

State v. Rice, 102 Wn.2d at 125-126 (emphasis added). In In re Pers. Restraint Petition of Domingo, 155 Wn.2d 356, 119 P.3d 816 (2005), the Supreme Court noted that, despite some contrary opinions expressed in decisions from the Court of Appeals, that it has never departed from the principle expressed in Davis and Rice. Domingo, 155 Wn.2d at 365-367; see also, State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) (to prove accomplice liability for crime of assault in the first degree, State had to show defendant possessed general knowledge that he was aiding in the commission of the crime of assault) .

Thus, Vaielua's claim that the State had to prove he knew Asaeli was armed with a firearm in order for him to be properly convicted of felony murder predicated on felony assault is not the law in Washington. In order for the State to prove that Vaielua and Williams were liable for

Asaeli's assaultive acts it had to prove that each had a general knowledge that a coparticipant was going to commit a criminal assault against the victim and not that each was aware of the specifics that would elevate that assault to higher degree of assault.

- a. There was sufficient evidence for the jury to find that Faalata Fola died in the course or furtherance of an assault in either the first or second degree and the verdicts returned by the jury reveal jury unanimity.

The jury was instructed on the three common law definitions of assault including that the language that "an assault is an intentional ...shooting of another person." ACP 48-108, WCP 555-615, Instruction No. 29. The jury was instructed that assault in the first degree occurs when a person, with "intent to inflict great bodily harm, assaults another and inflicts great bodily harm or assault another and a firearm or with a deadly weapon." Instruction No. 27. The jury was instructed that assault in the second degree occurs when a person "intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon." Instruction No. 32.

The evidence adduced at trial shows that Faalata Fola was sitting in a car, unarmed, when he was shot by Asaeli at least seven times with a .9mm handgun from a short distance away. Fola died a short time later. The cause of death was determined to be multiple gunshot wounds. Asaeli did not deny firing the shots that killed Fola but claimed that he acted in

self defense. From the verdicts, it is clear that the jury rejected Asaeli's claim of self-defense. This evidence supports a finding that Asaeli intentionally shot Fola with a firearm, thereby satisfying the elements of assault in the second degree. The number of shots, the proximity from which they were fired, and the rapidity in which they were fired all indicate an intent on Asaeli's part to inflict great bodily harm. This satisfies the elements of assault in the first degree. There was sufficient evidence to support the jury's determination that an assault in either the first or second degree occurred.

Defendant Vaielua claims that he was deprived of jury unanimity because the State failed to present sufficient evidence of each of the means of committing assault that the jury was instructed upon. Vaielua was not charged with the crime of assault; he was charged with murder in the second degree - felony murder predicated on either assault in the first degree or assault in the second degree. An alternative means case arises when a defendant is charged under a criminal statute that describes a single offense committable in more than one way. State v. Arndt, 87 Wn.2d 374, 376, 553 P.2d 1328 (1976); State v. Wixon, 30 Wn. App. 63, 76, 631 P.2d 1033 (1981). In an alternative means case, there must be jury unanimity as to guilt for the single crime charged; unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987); State v. Arndt, supra,

State v. Ellison, 36 Wn. App. 564, 676 P.2d 531 (1984). Even if one of the alternative means lacks substantial evidence, the absence of a unanimity instruction still may be harmless error if the record plainly shows that the jury was unanimous as to the means. State v. Bonds, 98 Wn.2d 1, 18, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831, 104 S. Ct. 111, 78 L. Ed. 2d 112 (1983), implied overruling on other grounds recognized by State v. Bargas, 52 Wn. App. 700, 707, 763 P.2d 470 (1988). The State bears the burden of proving that any such error is harmless. State v. Guloy, 104 Wn. 2d 412, 425, 705 P.2d 1182 (1985), cert denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

As argued above, there was sufficient evidence to support both of the predicate felonies of assault in the first degree and assault in the second degree. Moreover, any error in failing to inquire of the jury as to which predicate felony it was using to finding Vaielua guilty of felony murder can be deemed to be harmless beyond a reasonable doubt. The State agrees with Vaielua that he was found guilty of felony murder based upon his being an accomplice to Asaeli's assaultive conduct. The elements of the "to convict" on the felony murder did not specify against whom the defendant or accomplice was committing the crime of assault in the first or second degree, only that Fola died in the course or furtherance of such a crime. ACP 48-108; WCP 555-615, Instruction 42. Vaielua's liability for felony murder can be predicated on Asaeli's assaultive conduct against either Ms. Misionare or Mr. Fola. The jury unanimously

found Asaeli guilty of assault in the first degree for assaulting Tiare Misionare. ACP 112. There was, literally, no difference in the assaultive conduct against Ms. Misionanare and that against Mr Fola. The assaults occurred simultaneously; each shot fired was an assaultive act against Mr. Fola and Ms. Misionare. Because the jury was unanimous that Asaeli was guilty of assault in the first degree¹⁰ with respect to Ms. Misionare, this court can discern that the felony murder verdict was predicated on the crime of assault in the first degree. Although the jury was not asked to specify whether it found that an assault in the first degree was committed against Mr. Fola, it was unnecessary to do so. Moreover, this court can be certain that it would have returned such a verdict had it been asked to do so.

Vaielua further asserts that this is also a “multiple acts” case as there were many assaultive acts that the jury could have used to convict him of felony murder. The State disagrees. Based upon the definitions of assault in the first degree and assault in the second degree given to the jury, only Asaeli’s acts of shooting his firearm could have been the basis for finding guilt on felony murder. Only Asaeli employed the use of a firearm or deadly weapon. Only Asaeli’s acts produced injury. While Williams’s verbal challenge to Mr. Fola might be used to show complicity

¹⁰ Under the “to convict” instruction for that crime the jury had to unanimously find that: 1) Asaeli assaulted Ms. Misionare; 2) with a firearm; 3) and with the intent to inflict great bodily harm. ACP 48-108, Instruction No. 28.

in assault, only Asaeli's actions fulfilled the elements for assault in the first or second degree. Therefore, there can be no doubt as to which assaultive act the jury based its verdict.

- b. There was sufficient evidence to find that Vaielua and Williams possessed general knowledge that they were aiding in the commission of the crime of assault so as to be liable for felony murder predicated on felony assault.

When discussing the sufficiency of the evidence to prove that Vaielua and Williams should be held liable for felony murder based on Asaeli's acts which caused the death of Faalata Fola it is important to remember that two different principles of participant liability come into play. By showing that Vaielua and Williams were accomplices to Asaeli in the crime of assault, then each is liable for Asaeli's assaultive acts under the accomplice liability statute, RCW 9A.08.020. However, their liability for felony murder is not based upon the accomplice liability statute but upon the provisions of the second degree felony murder statute, RCW 9A.32.050(1)(b), which contains a "built-in vicarious liability provision that provides a mechanism by which liability for a homicide may be imputed to a coparticipant who does not commit a homicide." State v. Carter, 154 Wn.2d 71, 79, 109 P.3d 823 (2005) (discussing this principle in the context of the first degree felony murder provision). The court in Carter went onto state:

[T]hough one participant in a predicate felony, alone, commits a homicide during the commission of, or flight from, such felony, the other participant in the predicate felony has, by definition, committed felony murder. In such cases, the State need not prove that the nonkiller participant was an accomplice to the homicide.

Carter, 154 Wn.2d at 79. A “participant” for the purposes of the felony murder statute means another principal, meaning one who participates directly in the commission of the predicate crime, or an accomplice to the predicate crime, meaning one who meets the statutory definition of accomplice. Id. at 79-80. “[I]n order for a person to be found guilty of felony murder, the State must prove that he or she committed or attempted to commit a predicate felony and that he or she, or a coparticipant, committed homicide in the course of commission of the felony.” Id. at 80.

There is significant evidence from which to infer that Asaeli, Vaielua and Williams were acting as accomplices for the crime of assault. Based upon the testimony of the friends of the victim who witnessed the shooting, the three defendants arrived with several others at the waterfront at essentially the same time. It took at least three, possibly as many as five, vehicles (“suspect vehicles”) to transport everyone there, but their arrival was simultaneous. These witnesses testified that several males including Vaielua and Williams, got out of the suspect vehicles and immediately started asking for the victim by his street name “Blacc.” James Fola testified that Vaielua was the driver of one of the suspect vehicles (the SUV) and that he got out and asked for “Blacc” and that he

was one of several from the suspect vehicles doing so. From this the jury could infer that the occupants of the suspect vehicles, including the defendants, came to the waterfront for the purpose of locating the victim Faalata Fola.

Tiare Misionare testified that shortly after the suspect vehicles arrived, Williams went up to Faalata Fola, who was sitting in the front seat of Ramaley's red Nissan and said 'This be Twix; let's go heads up' which she understood to be a challenge to fight. There had not been any interaction between Faalata and any of the arriving males prior to this challenge. This suggests that the sole reason the defendants went to the waterfront that night was to locate the victim and challenge him to a fight. The fact that nothing had occurred that night to precipitate this challenge indicates that the desire to fight Faalata was precipitated by some earlier event or interaction. Several witness testified that more than one male from the suspect vehicles were near Ramaley's car and the victim at the point that Williams issued his challenge, rendering Faalata outnumbered by his opponents. Almost immediately after the initial challenge Williams said "This nigga got a gun, this nigga got a gun," then he jumped back and tapped Asaeli, who pulled out his gun and began firing numerous shots rapidly into the car, most of which hit Faalata in the torso. 1RP 649-650. Faalata's companions all testified that Faalata did not have a gun that night. This suggests that Williams was prompting Asaeli to fire shots at the victim without any cause and that Asaeli complied without question or

examination of the situation. Then, although only a few minutes had elapsed since their arrival, everyone who had arrived in the suspect vehicles, including the defendants, got back into their cars and departed the area. In the few minutes that Asaeli was out of Ms. Flores's white sedan, she repositioned herself behind the steering wheel. From this the jury could infer that she was preparing for a quick departure after Asaeli had accomplished his task. The rapid departure of so many vehicles suggests organization and joint purpose for their trip to the waterfront. Once the purpose had been accomplished there was no reason to stay there any longer. The only thing that had been accomplished in the time that the suspect vehicles were at the waterfront was the assault against Faalata Fola, which also victimized Tiare Misionare. There was no effort or attempt by the defendants to party or to socialize. From the evidence adduced at trial the jury could conclude that the defendants' actions were goal oriented; arrive in a large group at the waterfront; find "Blacc;" challenge him to a fight; assault/shoot him; leave as quickly as possible. The evidence adduced by the State suggests unity of action and purpose in the reason that all three defendants went to the waterfront that night: they went there with the purpose to facilitate and promote the commission of an assault against Faalata Fola.

This inference is bolstered by the evidence from Ms. Flores, that prior to the waterfront, the defendants had all been together at a pool hall where they had made the decision to caravan over to the waterfront in

several vehicles. 1RP 1169-1173, 1176-1179. She followed Vaielua's SUV down to the waterfront. 1RP 1211-1214. Despite a known destination and a trip that involved taking the freeway across town, all of the suspect vehicles arrived together. Evidence from Van Camp showed that the group at Papaya's had called up others to join the caravan, thereby increasing their numbers before arriving at the waterfront. Van Camp indicated that his friend Asi directed him to drive his car so as to meet up with a Vaielua's SUV on the freeway and, from there, the followed him to the waterfront. Prior to the mass arrival of the suspect vehicles, there is evidence that one, possibly two of the suspect vehicles took an investigatory drive-by or swing through the parking lot so as to scope out the situation before arriving en masse. This may have been an effort to verify Faalata's presence or to ascertain whether they might be outnumbered. Regardless, from this evidence the jury can infer that the mass arrival of the defendants in the suspect vehicles was a planned and coordinated event rather than a casual meeting of friends who decided to go "party" at the waterfront. Finally, Ms. Flores testified that she noted no change in Asaeli's demeanor from when he got out of the car to when he returned three minutes later. 1RP 1205, 1293-1295. It is undisputed that Asaeli fired numerous shots at Faalata Fola in the brief time that he was out of Ms. Flores's car. From this the jury can infer that Asaeli's shooting of Faalata was not upsetting, unexpected, or an unplanned event.

There was evidence adduced to suggest that the assault on Faalata might have been precipitated by his engaging in gunplay at the waterfront the week prior to his death or by comments he made on a Samoan party line called "the donut" or because he was associated with a Crip set and defendants Vaielua and Williams are associated with a Blood set called "Kushmen Blokk." Some of the males arriving in the suspect vehicle were know to be associated with "Kushmen Blokk," were wearing brown bandannas -the colors of "Kushmen Blokk," and one of the males shouted "K," a reference to "Kushmen Blokk" as he ran back to his vehicle after the shooting. Shortly before the shooting, there had been messages left with Faalata's family members by unidentified callers to tell the victim that he was a marked man.

Looking at the evidence in the light most favorable to the State it supports a conclusion that Asaeli, Vaielua, and Williams planned to assault Faalata Fola that night and that this plan had been decided upon before their arrival at the waterfront. Vaielua assisted the commission of the assault by transporting Williams to and from the scene and by being the lead car in the caravan of suspect vehicles; he further assisted by trying to locate "Blacc" upon his arrival at the waterfront. Williams actively participated in the assault by challenging the victim to a fight then signaling Asaeli to shoot at the victim. Asaeli responded to Williams signal and fired numerous shots at the victim, essentially at point blank range without any provocation or any need to do so. This activity is

consistent with Williams and Vaielua having knowledge that Asaeli was going to engage in assaultive behavior and being present at the scene of the crime ready to assist and encourage him in the commission of that assault. The jury could also infer that Asaeli and Vaielua were there ready to assist and encourage Williams in committing an assault against Faalata Fola and that Asaeli assisted by stepping in and assaulting Fola himself. Either way it renders any one of the defendants equally liable for the assaultive conduct of the other two. This jury found beyond a reasonable doubt that when Asaeli fired those shots with his firearm that he was acting with the intent to inflict great bodily harm and returned a verdict of guilt on the charge of assault in the first degree. Williams and Vaielua are guilty by accomplice liability of the crime of assault in the first degree. Because they were participants in the felony assault they are also vicariously liable for the felony murder by the express provisions of the felony murder statute.

This court should find that there was sufficient evidence to uphold the jury verdicts finding Vaielua and Williams guilty of felony murder in the second degree.

11. BECAUSE OF LEGISLATIVE AMENDMENTS
TO THE SECOND DEGREE FELONY MURDER
STATUTE, ADDRESS IS NOT CONTROLLING.

The purpose of the felony murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for

killings they commit. State v. Leech, 114 Wn.2d 700, 708, 790 P.2d 160 (1990). Up until the decision in In Re Personal Restraint Petition of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), the Washington State Supreme Court consistently rejected arguments that the merger doctrine should preclude the use of a felony assault as a predicate crime for felony murder. State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978); State v. Roberts, 88 Wn.2d 337, 344 n.4, 562 P.2d 1259 (1977); State v. Thompson, 88 Wn.2d 13, 558 P.2d 202, appeal dismissed for want of federal question, 434 U.S. 898 (1977); State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966). These decisions made it clear that the question was one of legislative intent rather than a constitutional question. See Thompson, 88 Wn.2d at 17-18.

Early Supreme Court cases indicated that the 1975 criminal code revisions (effective July 1, 1976) had not changed the Court's view on whether the assault merger doctrine should be applied to Washington's felony murder statute. State v. Thompson, supra at 17 ("... the statutory context in question here was left unchanged."); State v. Wanrow, supra at 313 (Hicks, J., concurring) (Legislature did not modify Harris rule with the new 1976 criminal code). Later decisions likewise applied the Harris reasoning to the current felony murder statute. State v. Crane, 116 Wn.2d 315, 333, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991) (citing Wanrow and Thompson and refusing to reconsider assault merger rule or constitutional challenges to felony murder); State v. Leech, 114 Wn.2d

700, 712, 790 P.2d 160 (1990) (refusing to reconsider Wanrow and constitutional challenges to felony murder rule); State v. Johnson, 92 Wn.2d 671, 681 n.6, 600 P.2d 1249 (1979) (recognizing that Harris interpretation applied to new statute because Legislature did not act to overrule it); State v. Davis, 121 Wn.2d 1, 7, n.5, 846 P.2d 527 (1993) (recognizing third degree assault could be predicate for felony murder); State v. Tamalini, 134 Wn.2d 725, 734, 953 P.2d 450 (1998) (recognizing second and third degree assault as predicate offenses for felony murder).

But in In Re Personal Restraint Petition of Andress, the Court made it clear that the comments it had made in Wanrow, Thompson and Roberts were not equivalent to actually analyzing the changes to the statutory language and that, in fact, it had not previously analyzed whether the changes to the statute enacted in 1975 somehow signaled a legislative intent to exclude felony assault as a predicate for felony murder. 147 Wn.2d at 609-616. The Court discerned that by adding “in furtherance of” to the felony murder statutes, the Legislature had intended to remove assault as a predicate felony from the felony murder rule. Id. at 616.

Following the Andress decision, the legislature amended the second degree felony murder statute, effective February 12, 2003, to expressly declare that assault is included among the predicate crimes under the second degree felony murder statute. Laws of 2003, ch. 3, § 2. The statute proscribing felony murder in the second degree now reads, in the relevant part:

(1) A person is guilty of murder in the second degree when:

(b) He or she commits or attempts to commit any felony, ***including assault***, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants;

RCW 9A.32.050 (emphasis added). At the same time the legislature enacted an intent statement; it stated, in part:

The legislature finds that the 1975 legislature clearly and unambiguously stated that any felony, including assault, can be a predicate offense for felony murder. The intent was evident: Punish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony. This legislature reaffirms that original intent and further intends to honor and reinforce the court's decisions over the past twenty-eight years interpreting "in furtherance of" as requiring the death to be sufficiently close in time and proximity to the predicate felony. The legislature does not agree with or accept the court's findings of legislative intent in *State v. Andress*, Docket No. 71170-4 (October 24, 2002), and reasserts that assault has always been and still remains a predicate offense for felony murder in the second degree.

Laws of 2003, ch. 3, § 1. Whether a felony assault can act as a predicate for felony murder has always been a question of legislative intent. For crimes committed after February 12, 2003, the legislature intended felony assault to be a predicate crime for felony murder.

Vaielua asks this court to apply Andress to his conviction despite the fact that his offense date was October 30, 2004, well after the legislative amendments designed to stop the impact of Andress went into

effect. Apparently, the Legislature does not agree with the Supreme Court that including assault as a predicate for felony murder leads to “absurd results.” This is a question of legislative intent and statutory construction. Once again the intent the “intent of the legislature to punish those who commit a homicide in the course of a felony under the applicable murder statute is clear.” See State v. Wanrow, 91 Wn.2d at 308; Laws of 2003, ch. 3, § 1.

Vaielua makes a brief argument that his conviction for felony murder raises an equal protection claim because it allows the prosecution to choose between charging manslaughter or felony murder resulting in “different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations.” See Vaielua’s opening brief at pp. 120-121. There is no equal protection violation when the crimes that the prosecuting attorney has the discretion to charge require proof of different elements. State v. Leech, 114 Wn.2d 700, 711, 790 P.2d 160 (1990); State v. Wanrow, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978). As the elements of felony murder differ from those of first degree manslaughter there is no violation of equal protection. State v. Parr, 93 Wn.2d 95, 97, 606 P.2d 263 (1980). Moreover, a person who causes an unintentional death while in the course of committing a felony is not in the same position as a person who causes an unintentional death. A person who causes an unintentional death while engaged in felonious activity has a greater degree of culpability than someone who causes a

death recklessly or negligently but is not engaged in felonious conduct.

This is not a matter of differing punishments for similarly situated persons.

The Washington Supreme Court found the felony murder statute constitutional in Wanrow; Vaielua's challenge must be rejected.

12. UNDER STATE v. THIEFAULT AND OTHER CONTROLLING AUTHORITY, A JURY NEED NOT DETERMINE THE EXISTENCE OF PRIOR CONVICTIONS THAT RESULTED IN WILLIAMS BEING SENTENCED AS A PERSISTENT OFFENDER.

Defendant Williams contends that his right to trial under the federal and state constitutions was violated when the court found that he was a persistent offender without a jury determination as to the existence of his prior convictions. Williams's argument, however, is controlled by authority that is binding on this court. In State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007), the Washington Supreme Court held that Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), do not require that prior convictions used to establish persistent offender status be submitted to a jury and proved beyond a reasonable doubt. See also, State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) (holding neither the federal nor state constitutions require the fact of prior convictions be determined by jury); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001) (holding Apprendi v. New Jersey, 530 U.S. 466,

120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) does not require that prior convictions used to establish persistent offender status be submitted to a jury and proved beyond a reasonable doubt); State v. Ball, 127 Wn. App. 956, 113 P.3d 520 (2005), review denied, 156 Wn.2d 1018 (2006) (holding Blakely does not apply to sentencing under the Persistent Offender Accountability Act).

Williams's claims regarding the impropriety of his sentence are without merit under this well-established authority.

13. DEFENDANTS HAVE FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” Neder v. United States, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” Brown v. United States, 411

U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also, State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); State v. Coe, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); see also, State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors

have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. See Id. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. Id. Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. See, e.g., Johnson, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. See, e.g., State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial,

either because of the enormity of the errors, see, e.g., State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, see, e.g., State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, see, e.g., State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See Stevens, 58 Wn. App. at 498.

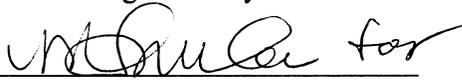
In the instant case, for the reasons set forth above, defendants have failed to establish that their trial was so flawed with prejudicial error as to warrant relief. Defendants have failed to show that there were any errors in the trial. They have failed to show that there was any prejudicial error much less an accumulation of it. Defendants are not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgments and sentences entered below.

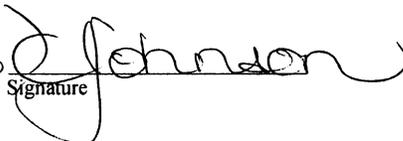
DATED: February 1, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/1/08 
Date Signature

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