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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
THE COURT OF APPEALS OF THE STATE OF WASHINGTON
BY DEPUTY
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MAURICE MCDANIEL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE..... 5

E. ARGUMENT 8

 1. THE COURT’S REFUSAL TO SEVER THE FELON IN POSSESSION CHARGE WAS AN ABUSE OF DISCRETION, AND DEFENSE COUNSEL’S INCOMPETENT EFFORTS TO SEEK SEVERANCE OR LIMIT THE CLEAR PREJUDICE RESULTING FROM JOINDER CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL 8

 a. The trial court abused its discretion by asserting it lacked discretion to sever the charge involving evidence of McDaniel’s prior conviction for a serious offense 8

 b. The court’s refusal to sever the charge or provide the promised limiting instruction denied McDaniel a fair trial 11

 c. Counsel’s failure to explain the court’s discretionary authority or request a limiting instruction constitutes ineffective assistance of counsel..... 16

 2. THE ERRONEOUS AND INCOMPLETE DEFINITION OF PREMEDITATION DENIED MCDANIEL A FAIR TRIAL AND REQUIRES REVERSAL 22

 a. The trial court’s refusal to clarify the meaning of premeditated murder and failure to plainly direct the jury that it must find premeditated intent to convict of

attempted first degree murder denied McDaniel due process.....	22
b. The court’s instruction defining premeditation created ambiguity regarding both the nature of the deliberation that must precede the formation of an intent to kill and the amount of time in which a design to kill is formed	24
c. The court’s inaccurate and misleading “to convict” instruction for attempted murder diluted the prosecution’s burden of proof.....	31
d. The instructional error requires reversal because of the ambiguous instructions.....	33
3. THE PROSECUTION’S RELIANCE ON IMPROPERLY ADMITTED, PREJUDICIAL EVIDENCE DENIED MCDANIEL A FAIR TRIAL	37
a. The court must not admit unduly prejudicial evidence that lacks an adequate probative value	37
b. The prosecution relied on uncontroverted testimony to prove McDaniel was the perpetrator.....	38
c. The court improperly admitted flight evidence that was not probative of guilt	41
F. CONCLUSION.....	46

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Berrocal v. Fernandez</u> , 155 Wn.2d 585, 121 P.3d 82 (2005).....	30
<u>In re Restraint of Lord</u> , 123 Wn.2d 296, 868 P.2d 835 (1994).....	31
<u>In re: Pers. Restraint of Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004)8, 9	
<u>McClaine v. Terr.</u> , 1 Wash. 345, 25 P.3d 453 (1890).....	32, 35
<u>State ex rel. Clark v. Hogan</u> , 49 Wn.2d 457, 303 P.2d 290 (1956) .	9
<u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289 (1993)	31
<u>State v. Bruton</u> , 66 Wn.2d 111, 401 P.2d 340 (1965)	41
<u>State v. Carter</u> , 4 Wn.App. 103, 480 P.2d 794, <u>rev. denied</u> , 71 Wn.2d 1001 (1971).....	31
<u>State v. Clark</u> , 143 Wn.2d 731, 24 P.3d 1006 (2001)	31
<u>State v. Emmanuel</u> , 42 Wn.2d 799, 259 P.2d 845 (1953)	32
<u>State v. Everybodytalksabout</u> , 145 Wn.2d 456, 39 P.3d 294 (2002)	37
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	25
<u>State v. Golladay</u> , 78 Wn.2d 121, 470 P.2d 191 (1970)	35
<u>State v. Hardy</u> , 133 Wn.2d 701, 946 P.2d 1175 (1997)	10
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	16
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	24
<u>State v. Kalakosky</u> , 121 Wn.2d 525, 852 P.2d 1064 (1993)	14

<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996) .	22, 23, 33, 35
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1998).....	16
<u>State v. Ollens</u> , 107 Wn.2d 848, 733 P.2d 984 (1987)	24
<u>State v. Pope</u> , 100 Wn.App. 624, 999 P.2d 51, <u>rev. denied</u> , 141 Wn.2d 1018 (2000).....	31
<u>State v. Quismundo</u> , __ Wn.2d __, 2008 Wash. LEXIS 938 (2008) 9, 11, 15	
<u>State v. Rice</u> , 110 Wn.2d 577, 757 P.2d 889 (1988), <u>cert. denied</u> , 491 U.S. 910 (1989)	30
<u>State v. Roberts</u> , 88 Wn.2d 337, 562 P.2d 1259 (1977)	22
<u>State v. Rohrich</u> , 149 Wn.2d 647, 71 P.3d 638 (2003)	8
<u>State v. Rutten</u> , 13 Wash. 203, 43 Pac. 30 (1895)	28
<u>State v. Shirley</u> , 60 Wn.2d 277, 373 P.2d 777 (1962).....	28, 30
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986)	38
<u>State v. Smith</u> , 131 Wn.2d 258, 931 P.2d 156 (1997)	31, 32
<u>State v. Smith</u> , 74 Wn.2d 744, 446 P.2d 571 (1968)	14
<u>State v. Townsend</u> , 142 Wn.2d 838, 15 P.3d 145 (2001)	25
<u>State v. Wanrow</u> , 88 Wn.2d 221, 559 P.2d 548 (1977)	22, 34, 35
<u>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</u> , 122 Wn.2d 299, 858 P.2d 1054 (1993)	9
<u>Wright v. Engum</u> , 124 Wn.2d 343, 878 P.2d 1198 (1994)	30

Washington Court of Appeals Decisions

<u>State v. Bryant</u> , 89 Wn.App. 857, 950 P.2d 1004 (1998).....	8, 14
<u>State v. Commodore</u> , 38 Wn. App. 244, 684 P.2d 1364 <u>review denied</u> , 103 Wn.2d 1005 (1984).....	24
<u>State v. Freeburg</u> , 105 Wn.App. 492, 20 P.3d 984 (2001).....	42
<u>State v. Harris</u> , 36 Wn.App. 746, 677 P.2d 202 (1984).....	14
<u>State v. Nichols</u> , 5 Wn.App. 657, 491 P.2d 677 (1971)	42
<u>State v. Ramirez</u> , 46 Wn.App. 223, 730 P.2d 98 (1986).....	14
<u>State v. Watkins</u> , 53 Wn.App. 264, 766 P.2d 484 (1989)	14

United States Supreme Court Decisions

<u>California v. Chapman</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	34, 40
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)	38, 40
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed. 224 (2006).	38
<u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)	40
<u>Estelle v. McGuire</u> , 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)	38
<u>Mullaney v. Wilbur</u> , 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)	22
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed2d 35 (1999)	34

<u>Pulley v. Harris</u> , 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984)	38
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	16, 17
<u>United States v. Cronin</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	16

Federal Decisions

<u>United States v. Foutz</u> , 540 F.3d 733 (4 th Cir. 1976).....	41
<u>United States v. Howze</u> , 668 F.2d 322 (7 th Cir. 1982).....	42

United States Constitution

Fifth Amendment.....	8, 22
Fourteenth Amendment	8
Sixth Amendment.....	16

Washington Constitution

Article I, § 3	8, 22
Article I, § 22	8, 16

Statutes

Former RCW 9.48.030	28
Former RCW 9.48.040.....	28
RCW 9A.32.020	23
RCW 9A.32.030	23, 30

Court Rules

CrR 4.4.....	8, 9, 13, 17
ER 609.....	10, 11, 13

Other Authorities

2 C. McCormick, <u>Evidence</u> (4th Ed. 1992)	41
Benjamin Cardozo, <i>What Medicine Can Do For Law</i> , <u>Selected Writings of Benjamin Nathan Cardozo</u> 371(M. Hall ed., 1947)..	24
Matthew Pauley, 36 Am.Crim. L.Rev. 145 (1999)	23
WPIC 26.01.01.....	25, 26, 27, 30, 34

A. SUMMARY OF ARGUMENT.

Maurice McDaniel's convictions for attempted murder, robbery, and unlawful possession of a firearm hinged on his identification by a source of undisputedly dubious credibility. The convictions must be reversed because of the trial court's unreasonable and legally erroneous refusal to keep the jury from learning McDaniel has been convicted of a serious offense as a juvenile, the uncontroverted testimony that McDaniel was the person who spoke in a recorded telephone call describing the shooting in boastful and unremorseful language, and the improper admission of "flight" evidence. The attempted murder conviction is further irreparably tainted by incomplete and inaccurate jury instructions defining premeditation and explaining the essential elements of the offense.

B. ASSIGNMENTS OF ERROR.

1. The court abused its discretion by refusing to sever unlawful possession of a firearm in the first degree from the remaining charges.

2. The court incompletely and inaccurately defined premeditation in Instruction 12. CP 47.

3. The “to-convict” instruction for attempted murder in the first degree does not accurately explain the essential elements of the offense. CP 49 (Instruction 14).

4. The court violated McDaniel’s right to confront and cross-examine witnesses against him by admitting unopposed testimony identifying McDaniel as the person who discussed the incident in a recorded telephone call.

5. The court unreasonably admitted prejudicial evidence under the guise of “flight” evidence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A court abuses its discretion in denying a request to sever charges when it refuses to exercise discretion or bases its decision on an incorrect view of the law. Here, the court first refused to acknowledge it had discretion to sever the firearm possession charge and later cursorily denied severance without weighing its prejudicial effect, improperly elevated McDaniel’s burden of persuasion because it incorrectly thought he needed to produce case law authorizing severance, and neglected to give the promised limiting instruction to reduce prejudice. When a charge is easily severable, the impact on judicial economy is slight, the jury will hear unduly prejudicial information without severance, and the

court fails to give a limiting instruction, did the court abuse its discretion, misapply the law, and deprive McDaniel of a fair trial?

2. Premeditated first degree murder is distinguished from intentional second degree murder by the requirement that the perpetrator of the former deliberately took the time and engaged in the mental process of deciding to kill another person. In the case at bar, the court's jury instructions did not make the definition of premeditation manifestly apparent and the court refused to explain premeditation with more clarity. Did the inadequate jury instructions deprive McDaniel of a fair trial by jury when the issue of whether he acted with premeditation was a central to the case?

3. A "to convict" instruction must completely and accurately include all essential elements of the charged offense. Here, the "to convict" instruction for attempted murder in the first degree did not explain the jury must find McDaniel intentionally acted with the premeditated intent to kill the complaining witness. Did the "to convict" instruction mislead the jury as to the essential intent required to commit attempted first degree murder predicated on a premeditated mental state?

4. The Sixth Amendment prohibits the prosecution from introducing testimonial evidence without providing the accused

person an opportunity to confront and cross-examine the declarant. Here, the court allowed a police detective to repeat information he learned in the course of his police investigation without affording McDaniel the opportunity to confront and cross-examine the source of that information, and this information established the crucial connection between the incident and McDaniel. Has the prosecution shown the deprivation of McDaniel's right to confront witnesses against him was harmless beyond a reasonable doubt when the unconfrosted information was the central tie connecting McDaniel to the incident?

5. Evidence an accused person fled from the police after committing a crime may be admissible if it shows the defendant's consciousness of guilt. Here, the prosecution introduced evidence McDaniel was substantially noncompliant with police when they tried to arrest him under the guise of "flight" evidence yet McDaniel did not flee the police, his arrest occurred almost ten months after the incident, and there was no information that McDaniel knew he was being arrested for the charged offenses. Was the unreasonable admission of "flight" evidence unduly prejudicial when McDaniel did not flee but the jury learned that he was both

silent and uncooperative when the police arrested him months after the crime?

D. STATEMENT OF THE CASE.

On July 29, 2006, after an evening of drinking beer and ingesting some drugs, Cashundo Banks went down the street hoping to buy marijuana at about 2 o'clock in the morning. 12/3/07 RP 578;¹ 12/4/07RP 857-59.² He approached a Blazer-like vehicle, with a slightly open tinted window on the passenger side.

12/5/07RP 944, 1009. A man in the passenger seat told him to go up the block, and the car travelled up the street. 12/4/07RP 862-63. The passenger got out of the car, took the money Banks held in his hand, and fired a number of shots at Banks without saying one word. Id. at 863. The car drove away, and Banks made his way back to his friend's house, where a neighbor called the police.

When the police arrived, Banks gave his name as Ricky Richardson, because he had an outstanding warrant. 12/4/07RP 873, 879-80. Despite police efforts to obtain information, Banks did not describe the perpetrators. 12/3/07RP 606, 671, 689-90;

¹ The verbatim report of proceedings (RP) will be referred to by date of proceedings followed by the page number.

12/5/07RP 1041-43, 1046. Banks admitted, "I lied" to "most of the questions he [the police officer] was asking me." 12/5/07RP 986.

Banks' injuries were serious but not life-threatening.

12/3/07RP 582, 588. After several days in the hospital, Banks left against medical advice because he feared he would be arrested if he stayed. Id. at 587. Banks did not otherwise contact the police about the incident.

In the interim, Detective Gene Miller was investigating an unrelated case involving a man named Verrick Yarbough, who was housed in the Pierce County jail. 12/4/07RP 766. Miller listened to over 70 hours of recorded telephone calls Yarbough made to others from the jail. Id. at 770. Miller heard Yarbough talk to two people about how they had shot someone, and he surmised from the conversation that they were talking about Banks' shooting. Id. at 771. One of the speakers was a person who used the name "Tony Guns." Id. at 772-73.

In the course of investigating another unrelated crime, Miller interviewed a suspect, who told him Maurice McDaniel uses the name "Tony Guns." 11/27/07RP 30, 86. Later, after Banks was

² Although Banks denied using drugs or drinking more than two beers, his blood alcohol level was 0.176 and a toxicology screen found cocaine, methamphetamine, and marijuana in his system. 12/3/07 RP 578; 12/4/07RP

arrested for his warrant and held in jail, Miller interviewed Banks about the shooting. He also showed Banks photographs and Banks identified McDaniel as the shooter, and Direce Marlow as the driver of the car. 12/4/07RP 790-92. The calls between Yarbough and the speakers discussing the shooting were made to Marlow's home telephone. 12/4/07RP 769. There was no other evidence linking McDaniel with Marlow and the shooting.

The prosecution charged McDaniel with attempted murder in the first degree, robbery in the first degree, both with firearm enhancements, and unlawful possession of a firearm in the first degree. CP 5-6. After a jury trial before Judge Thomas Felnagle, McDaniel was convicted of the charged offenses, and he received a sentence at the high end of the standard range, 440 months. CP 5-6. McDaniel timely appeals. CP 73.

Pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. THE COURT'S REFUSAL TO SEVER THE FELON IN POSSESSION CHARGE WAS AN ABUSE OF DISCRETION, AND DEFENSE COUNSEL'S INCOMPETENT EFFORTS TO SEEK SEVERANCE OR LIMIT THE CLEAR PREJUDICE RESULTING FROM JOINDER CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

- a. The trial court abused its discretion by asserting it lacked discretion to sever the charge involving evidence of McDaniel's prior conviction for a serious offense. It is well-established that a trial court has "broad discretion" to decide whether to grant a motion to sever charges. In re: Pers. Restraint of Davis, 152 Wn.2d 647, 711, 101 P.3d 1 (2004); CrR 4.4(b). The rules governing severance are based on the fundamental concern that an accused person receive "a fair trial untainted by undue prejudice." State v. Bryant, 89 Wn.App. 857, 865, 950 P.2d 1004 (1998); U.S. Const. amends. 5, 14; Wash. Const. Art. I, §§ 3, 22.

Although a severance determination is reviewed under an abuse of discretion standard, a trial court abuses its discretion when its decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 653, 71 P.3d 638 (2003). A court abuses its

discretion by using the wrong legal standard or by failing to exercise discretion. Id. “Indeed, a court ‘would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.’” State v. Quismundo, __ Wn.2d __, 2008 Wash. LEXIS 938, *7 (2008) (quoting Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

Judicial discretion “means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.”

Fisons, 122 Wn.2d at 339 (quoting State ex rel. Clark v. Hogan, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)).

A trial court’s broad discretion upon considering whether severance is appropriate involves its determination whether severance promotes a fair determination of guilt or innocence. Davis, 152 Wn.2d at 711; CrR 4.4(b). In the case at bar, the court declined to weigh the interests at stake, and instead claimed it lacked discretionary authority to sever the charges.

McDaniel asked to sever the firearm possession charge, waive a jury on that charge, and have a bench trial on this charge. 11/15/07RP 96-97; 11/27/07 RP 162-65; 11/28/07RP 189-94. But the court repeatedly asserted it lacked authority to sever the charge

of first degree unlawful possession of a firearm from the remaining attempted first degree murder and first degree robbery charges.

11/15/07 98; 11/27/07RP 165. The court refused to sever the charge unless defense counsel presented case law demonstrating it had the authority to sever this charge. Id.

The firearm possession charge rested on McDaniel's prior juvenile adjudication for a serious offense, which made it unlawful for him to personally possess a firearm or to act in complicity with another who possesses a firearm. McDaniel asked to sever this charge because the jury would otherwise learn that he had been convicted of a serious offense as a juvenile. 11/15/07RP 96-7; 11/28/07RP 190-91. Since McDaniel was 16 years old at the time of the incident, the jury learned that he had committed such a "serious" offense at a particularly young age. 12/4/07RP 812, 843.

Juvenile convictions are presumed inadmissible at trial because they are "very prejudicial" and "may lead the jury to believe the defendant has a propensity to commit crimes." State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997); ER 609(d).³ McDaniel contended it would be unduly prejudicial for the jury to learn that McDaniel had been convicted as a juvenile of a "serious

offense” at the time of the charged incident. The jury would surmise that he was a particularly dangerous, as he had already committed such a serious crime before he was 16. Moreover, it would impermissibly bolster the dubious identification of McDaniel as the perpetrator and allow the jury to draw the conclusion that he had the character traits of a serious criminal offender.

The court’s perception that it lacked discretionary authority to sever a charge, and its purported need to be provided with controlling legal authority documenting its discretion in this precise factual scenario, constitutes an abuse of discretion based on the failure to exercise discretion and its erroneous understanding of its authority to sever charges. Quismundo, 2008 Wash. LEXIS 938, *7. The court’s insistence that it needed persuasive authority allowing severance before it would consider it was wholly unreasonable and improper.

b. The court’s refusal to sever the charge or provide the promised limiting instruction denied McDaniel a fair trial.

Although maintaining its perception that it needed persuasive authority to consider severance, the court ultimately cursorily discussed the factors underlying a severance decision.

³ ER 609(d) expressly bars the admission of an accused person’s

11/28/07RP 193. Despite giving passing consideration to the motion to sever, the court insisted that defense counsel's failure to provide persuasive authority dictating severance must "work against" the defense. Id.

The trial court's decision-making process consisted of identifying two general factors causing severance to be disfavored: the court's interest in judicial economy; and the concern that when you "chop up a case into pieces" the results may be inconsistent. Id. at 194. The court did not discuss how these factors weighed against severance in the case at bar. Inconsistent results would be unlikely given that the judge would decide the firearm charge immediately after the jury trial. And judicial economy would be minimally intruded upon given the abbreviated evidence needed to decide the firearms allegation in a bench trial.

The court next noted that relative strength of evidence is a factor in whether to sever charges, and concluded that the firearms counts were "very similar" in strength. 11/28/07RP 194. The court did not acknowledge, or seemingly even consider, that the attempted murder and robbery charges hinged on the credibility of the complainant's identification of the perpetrators while the

juvenile adjudications unless the court finds it is necessary

firearms counts rested on the prior convictions for serious offenses of both of the accused. The court's analysis of "relative strength" disregarded considerations of prejudice.

The court further noted that ER 609 does not forbid evidence of juvenile adjudications in all circumstances, and contended it would give a limiting instruction. Id. The court did not recognize that the prior serious convictions of the defendants were inadmissible for any purpose other than proving the firearms possession charge. Most significantly undermining the court's analysis is that the court did not give a limiting instruction to the jury as it claimed it would.

The court's analysis is inadequate and disregards the pertinent considerations. The court unreasonably raised the threshold for the defense to secure severance because the defense had not provided persuasive case law dictating the court's authority to sever the firearm possession charge.

Court rules provide that severance of offenses "shall" be granted whenever "severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). Joinder of offenses is deemed "inherently prejudicial" and, "[i]f the defendant can demonstrate substantial prejudice, the trial court's

failure to sever is an abuse of discretion.” State v. Ramirez, 46 Wn.App. 223, 226, 730 P.2d 98 (1986). In assessing whether severance is appropriate, courts weigh the inherent prejudice against the State’s interest in maximizing judicial economy. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

The principle underlying severance is “that the defendant receive a fair trial untainted by undue prejudice.” Bryant, 89 Wn.App. at 865. Prejudice will result if a single trial invites the jury to cumulate evidence to find guilt or otherwise infer criminal disposition. State v. Watkins, 53 Wn.App. 264, 268, 766 P.2d 484 (1989) (citing State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968) vacated in part on other grounds, 408 U.S. 934 (1972)). Prejudice may also occur when the accused is embarrassed or confounded in presenting separate defenses. Watkins, 53 Wn.App. at 268. “A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” State v. Harris, 36 Wn.App. 746, 750, 677 P.2d 202 (1984). Here, the court unreasonably added the obstacle of requiring controlling legal authority before it would consider severance and improperly disregarded the principle considerations of prejudice

and fairness as weighed against administrative burdens created by severance.

Additionally, judicial economy did not weigh against severing the counts in the case at bar. McDaniel did not seek an entirely separate trial, but rather a bench trial following the jury trial on the other charges, at which the court could decide whether the prosecution proved the first degree unlawful possession as charged. 11/15/07RP 96-97. This procedure would have been a minimal burden.

Third, the court claimed it would give a limiting instruction to mitigate the prejudice from the jury learning of McDaniel's serious criminal history but failed to do so. The court never instructed the jury that the evidence of McDaniel's serious criminal history could not be used against him in weighing the likelihood he committed the charged offenses.

The court's severance analysis was unreasonable and incorrect. A court necessarily abuses its discretion when relying on an erroneous interpretation of the law. Quismundo, 2008 Wash. LEXIS 938, *7. The court's ignorance of the law governing severance and its failure to accurately consider the necessary factors constitutes an abuse of discretion requiring reversal.

c. Counsel's failure to explain the court's discretionary authority or request a limiting instruction constitutes ineffective assistance of counsel. A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6⁴ Wash. Const. art. 1, section 22.

To prevail in a claim of ineffective assistance of counsel, a defendant must show, "First, [that] counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998).

⁴ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Here, the trial court repeatedly demanded authority before it would consider counsel's request to sever the unlawful possession of a firearm charge. Counsel never told the court that CrR 4.4 dictates the procedure for the court considering any severance motion and no further authority was required for the court to sever the charges. Furthermore, counsel never reminded the court that it had promised to give a limiting instruction but the court neglected to do so. Without a limiting instruction, the jury was free to use the evidence of McDaniel's serious criminal history for any purpose, including using it as a basis to judge McDaniel's character and the likelihood that he was the type of person who committed the crime charged. These actions were unreasonable and served no legitimate tactical purpose.

In the Strickland prejudice analysis, the determinative question is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. To demonstrate this, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693.

Here, the prejudice is plain and serious. The court never instructed the jury that it could only consider evidence that

McDaniel, and Marlow, had been convicted of a serious offense as a juvenile for the single limited purpose of deciding whether they unlawfully possessed a firearm. The court promised such an instruction in analyzing whether severance was appropriate and relied on the limiting instruction as a bulwark against the undue prejudicial affect of the juvenile criminal history of the two defendants. 11/28/07RP 194. Counsel never asked for or offered any limiting instruction.

The probability that learning of the serious offenses each defendant committed as a juvenile affected the outcome of the trial is readily identifiable. The prosecution started the trial not by calling witnesses to testimony about the incident, but by reading the jury stipulations that both McDaniel and Marlow had been convicted of serious offenses as juveniles. 11/28/07RP 226-28.

Beginning the trial by telling the jury of the serious criminal history of each defendant was a blatant effort to be certain this critical information colored the jurors' perception of the case from the start. Yet it was not the prosecution who committed misconduct by ensuring the jury received all of the evidence through the lens of knowing that the two young men now charged with a serious offense had been previously convicted of another

such “serious offense,” but rather defense counsel who neglected to impress upon the court that it had the authority to keep this information from the jury or to remind the court to give a limiting instruction as to the very narrow permissible use of this evidence.

McDaniel and Marlow’s serious criminal history as juveniles played a central role in establishing they were the types of people who could have committed these offenses, because otherwise, the evidence against them was quite tenuous. Cashundo Banks had serious credibility problems. Even though he was shot multiple times and essentially crawled down an alley to get help, he promptly gave the rescuing police a false name because he had warrants and did not want to get arrested. 12/4/07RP 873; 12/5/07RP 986 (admitting “I lied” about most everything told police). He did not describe the perpetrators to the police at the scene, and his later description did not match McDaniel’s physical characteristics. 12/4/07RP 811 (McDaniel was 5’ 4” or 5’ 5” close in time to incident); 12/5/07RP 996 (Banks described shooter as “close to my height” of 6’).

Banks vehemently denied using methamphetamine any time close to the incident, and asserted that he at most used cocaine and marijuana days before the incident, yet the hospital found

methamphetamine, cocaine, and marijuana in his blood.

12/3/07RP 578. Banks admitted he was holding back on part of the true story while testifying because he did not want any of his friends to get into trouble. 12/5/07RP 1020.

The evidence connecting McDaniel to the incident was Banks' identification of his photograph approximately six months after the incident, and the telephone conversation in which Detective Miller claimed McDaniel spoke about the incident. Otherwise, the jury knew nothing about McDaniel except that he was 16 years old at the time of the incident.

As a 16 year-old, a reasonable juror would wonder whether he was the type of person to commit a violent shooting offense. Armed with the knowledge that McDaniel indeed had such a criminal history as to have been convicted of a serious offense before the charged crime, so when he was either 16 years old or younger he had proven himself capable of committing serious criminal acts.

Thus, the knowledge of both defendants criminal history directly boosted the prosecution's claim that Banks was not mistaken in his identification despite the long time that elapsed before his identification, his very limited opportunity to observe

during the incident, his inaccurate description of the shooter that did not match McDaniel, his use of drugs close in time to the incident, and his lies to the police about his true identity even though he had just been shot numerous times. Without a limiting instruction, the jury was free to infer that the serious offense McDaniel had committed as a juvenile made it far more likely that he was the perpetrator, and therefore reasonably affected the outcome of the case. Because the court neglected its fundamental obligation to correctly apply the law and defense counsel neglected its fundamental obligation to take all reasonable steps to ensure the accused person receives a fair trial, reversal is required.

2. THE ERRONEOUS AND INCOMPLETE DEFINITION OF PREMEDITATION DENIED MCDANIEL A FAIR TRIAL AND REQUIRES REVERSAL

a. The trial court's refusal to clarify the meaning of premeditated murder and failure to plainly direct the jury that it must find premeditated intent to convict of attempted first degree murder denied McDaniel due process. A criminal defendant has the due process right to instructions that clearly and accurately charge the jury regarding the law to be applied in a given case. U.S. Const. amends. 5, 14; Const. art. I, section 3; Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977). The standard for clarity in jury instructions is higher than for statutes; while a court can resolve an ambiguously-worded statute through statutory construction, "a jury lacks such interpretive tools and thus requires a manifestly clear instruction." State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). Instructions which relieve the State of its burden or fail to correctly inform the jury of an essential ingredient of the crime prejudicially deny a defendant due process of law. "A legally erroneous instruction cannot be saved by the test for sufficiency." LeFaber, 128 at 903 (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

In LeFaber, the trial court issued an instruction on self-defense that permitted two interpretations, one which was accurate and one which was erroneous. In holding the instruction denied the defendant due process of law, the Washington Supreme Court remarked, “the offending sentence lacks any grammatical signal compelling [the correct] interpretation over the alternative, conflicting, and erroneous reading.” LeFaber, 128 Wn.2d at 902-03.

In the case at bar, the prosecution charged McDaniel with one count of attempted first degree murder requiring the State to prove he acted with premeditation. CP 5-6.⁵ The meaning of premeditation has long been recognized as a difficult concept to define and assess. Judge Benjamin Cardozo described the phrase “deliberate and premeditated,” as “so obscure that no jury hearing it . . . can fairly be expected to assimilate and understand it.”

Matthew Pauley, 36 Am.Crim. L.Rev. 145, 161 (1999) (quoting Benjamin Cardozo, *What Medicine Can Do For Law*, Selected

⁵ RCW 9A.32.030, defining first-degree murder, provides in pertinent part, “(1) A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.” RCW 9A.32.030(1)(a). RCW 9A.32.020(1) states, “the premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in point of time.”

Writings of Benjamin Nathan Cardozo 371, 382-84 (M. Hall ed., 1947)).

Premeditation is not the same as the intent to kill, and the jury instructions may not define premeditation to suggest that the intent to kill suffices. In contrast to the intent to kill, premeditation requires “the deliberate formation of and reflection upon the intent to take a human life,” and must involve the “mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” State v. Hoffman, 116 Wn.2d 51, 82, 804 P.2d 577 (1991); State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987); State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). “Intent” and “premeditation” are separate elements which must each be proved by the State; “intent” involves only “acting with the objective or purpose or accomplish a result which constitutes a crime,” whereas premeditation requires “the mental process of thinking beforehand.” State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 rev. denied, 103 Wn.2d 1005 (1984).

b. The court’s instruction defining premeditation created ambiguity regarding both the nature of the deliberation that must precede the formation of an intent to kill and the amount of time in which a design to kill is formed. Premeditation requires

proof of a “deliberate formation of and reflection upon the intent to take a human life.” State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (quoting State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) (internal citations omitted)). A premeditated murder thus requires not only “thinking over beforehand,” but that the deliberation is specifically on the taking of human life. Townsend, 142 Wn.2d at 848; Gentry, 125 Wn.2d at 597-98.

The court in the case at bar provided the pattern jury instruction defining premeditation, which reads:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

WPIC 26.01.01; CP 47 (Instruction 12). The court further instructed the jury in the “to convict” instruction for attempted murder that the prosecution must prove McDaniel or an accomplice acted “with the intent to commit murder in the first degree.” CP 49 (Instruction 14). The “to convict” instruction did not reference the necessary premeditated intent, but rather a separate instruction

defined first degree murder. CP 46 (Instruction 11, defining murder in the first degree).

The first sentence of Instruction 12, and WPIC 26.01.01, defines “premeditation” as “thought over beforehand” without specifying that this deliberative process must be specifically on the taking of a human life. CP 47. The succeeding sentence heightens this ambiguity by providing, “When a person, *after any deliberation*, forms an intent to take a human life, the killing may follow immediately after formation of the settled purpose and it will still be premeditated.” *Id.* (emphasis added).

According to this definition, a person charged with premeditated murder may deliberate about something other than the taking of human life before forming the intent to kill, and that person could still be convicted. For example, the evidence could establish the defendant deliberated about his or her hostility toward the victim, about his or her desire to harm the victim, or about something entirely unrelated to the charged offense, but under the “any deliberation” language, the defendant would be as culpable as someone who formed a specific design to kill prior to executing the crime.

The last sentence in Instruction 12 and the WPIC does nothing to alleviate the potential confusion to jurors, in that it only indicates that “The law requires some time, *however long or short*, in which a design to kill is deliberately formed.” CP 47 (emphasis added).

The pattern instruction defining intent, also given by the court in this case, does not cure the ambiguity. WPIC 10.01 defines “intent” as, “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.” CP 45 (Instruction 10). There is no significant difference between this instruction and the definition of premeditation, because under WPIC 26.01.01, once the defendant acts intentionally, even if the purpose to kill is instantaneously decided, he or she may still be guilty of first-degree murder. As argued in more detail below, the difference between intent and premeditation were further blurred in the case at bar since the attempted murder instruction focused the jury on “intent” without plainly instructing that this intent must be the intent to commit “premeditated” murder. CP 49.

The Washington Supreme Court has held that an instruction which provided, “It is not necessary for an appreciable period of

time to elapse for premeditation to exist. . . .” was reversible error because it obliterated the distinction between first- and second-degree murder. (Emphasis added.) State v. Shirley, 60 Wn.2d 277, 277, 373 P.2d 777 (1962). The Shirley Court discussed the history of Washington’s laws defining premeditated murder as a greater offense than intentional murder. The longstanding definition before the criminal code was recodified in 1975 defined first degree murder as acting with “a premeditated design” to cause the death, while second degree murder was defined as killing “with a design to effect the death . . . but without premeditation” Id. at 278 (quoting Former RCW 9.48.030; Former RCW 9.48.040).

The court in Shirley recognized that there is no requirement that a substantial period of time elapse in which the perpetrator deliberated and decided to kill, but on the other hand, the trial court’s instruction that deliberation does not require any appreciable time to elapse is simply a dangerous undermining of the distinction between premeditated murder and intentional murder. Id. at 278-79. Shirley emphasized that “the idea of deliberation is the distinguishing idea between murder in the first and second degree.” Id. at 279. (citing, *inter alia*, State v. Rutten, 13 Wash. 203, 212, 43 Pac. 30 (1895)).

The court in Shirley also acknowledged the overlap between first and second degree intentional murder, and warned against diluting the requirement of deliberation when explaining the legal definition of premeditation in a jury instruction. Id. “[D]eliberation means to weigh in the mind, to consider the reasons for and against, and consider maturely, to reflect upon. . . .” Id. Without specifically highlighting and consistently emphasizing the mental process contained in deliberation, and the appreciable time in which it must occur, the distinction between first and second degree murder collapses,

Because [even in second degree murder] the intention to kill must be in the mind of the slayer, and he must do it purposely and maliciously; consequently the act of killing must be preceded by the purpose to kill, and it must be a malicious purpose, and that purpose may be formed instantaneously, or as expressed by the learned court below, 'as instantaneous as the successive thoughts of the mind'

Id. The requirement of premeditation in first degree intentional murder requires deliberation that must mean more than forming the intent to kill. Id.

Consistent with the ruling in Shirley, Washington courts has long held that words or phrases in statutes may not be treated or interpreted as superfluous. Berrocal v. Fernandez, 155 Wn.2d

585, 599-600, 121 P.3d 82 (2005) (“We are duty bound to give meaning to every word the legislature includes in a statute, and we must avoid rendering any language superfluous.”); Wright v. Engum, 124 Wn.2d 343, 352, 878 P.2d 1198 (1994) (“We do not interpret statutes so as to render any language superfluous.”). Premeditation and deliberation are the critical distinctions between first and second degree murder and the court’s instructions may not blur this distinction.

Although the murder statutes at issue in Shirley predate the changes to the criminal code in 1975, the revised murder statutes retain the same distinctions between premeditated murder and intentional murder without premeditation, as the respective touchstones of first and second degree murder. RCW 9A.32.030; RCW 9A.32.040.

It is true that since Shirley, the Washington Supreme Court has found WPIC 26.01.01 does not impermissibly render “premeditation” synonymous with “intent.” State v. Rice, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). However, the Rice Court’s assessment of this issue does not indicate the Court was presented with the ambiguity in the instruction’s language regarding the nature of the deliberation that

must precede the murderous act, and therefore the Rice opinion is not dispositive here.⁶

c. The court's inaccurate and misleading "to convict" instruction for attempted murder diluted the prosecution's burden of proof. The jury has the "right" to rely on the "to convict" as "complete statement of the law" and a violation is a "constitutional defect" requiring automatic reversal. State v. Smith, 131 Wn.2d 258, 262-63, 931 P.2d 156 (1997); see also State v. Pope, 100 Wn.App. 624, 630, 999 P.2d 51, rev. denied, 141 Wn.2d 1018 (2000) ("special status" accorded "to convict" instruction renders verdict based on incomplete instruction "constitutionally infirm"); State v. Carter, 4 Wn.App. 103, 111, 480 P.2d 794, rev. denied, 71 Wn.2d 1001 (1971) ("In a formula instruction, the omission of any essential element of the crime is fatal.").

The elevated importance of the court's instruction that purports to contain all elements necessary for a jury verdict is based upon this Court's understanding of the deliberative process

⁶ Cases relying on Rice dispose of complaints about the adequacy of the definition of premeditation without analysis and without addressing the issue raised herein. State v. Clark, 143 Wn.2d 731, 770-71, 24 P.3d 1006 (2001) (finding no compelling reason presented to find premeditation instruction inadequate without explaining Clark's challenge); In re Restraint of Lord, 123 Wn.2d 296, 317, 868 P.2d 835 (1994) (no discussion of challenge raised); State v. Benn, 120 Wn.2d 631, 657, 845 P.2d 289 (1993), reversed on other grounds, sub. nom Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002) (two sentence

and the strong protection of the jury's role in reaching a verdict as required by the state constitution. See Smith, 131 Wn.2d at 263; State v. Emmanuel, 42 Wn.2d 799, 820-21, 259 P.2d 845 (1953). When a "to convict" instruction does not fully define the elements of the charged offense for the jury, it amounts to a deprivation of the right to trial by jury. The jury's verdict reflects only that contained within the "to convict" instruction, and does not extend to facts and circumstances not fully and accurately set forth in the "to convict" instruction. Otherwise, the defendant is not assured the jury rendered its verdict with a full and accurate understanding of the elements of the offense and the jury has not been honestly apprised of the proof necessary for a guilty verdict. McClaine v. Terr., 1 Wash. 345, 354-55, 25 P.3d 453 (1890).

Here, the "to convict" instruction for attempted murder simply provided, in pertinent part, that to convict McDaniel of the crime of attempted murder in the first degree, it must find "the act was done with the intent to commit murder in the first degree" CP 49 (Instruction 14). The "to convict" instruction did not refer to the necessity that the prosecution prove the actor intentionally acted with premeditated intent to kill.

discussion without citation to any authority).

Since the “to convict” instruction required a verdict without mentioning an essential element, it does not accurately set forth the necessary elements. This error violates McDaniel’s constitutional guarantee of trial by jury. The jury verdict reflected a finding of guilt only for the intent to kill, without expressly requiring the jury find he acted with premeditated intent to kill. Because the definition of premeditation also failed to expressly require the perpetrator deliberate on the intent to kill prior to acting, this error is particularly harmful in the case at bar.

d. The instructional error requires reversal because of the ambiguous instructions. As did the Court in LeFaber, this Court should reject any effort to impart a harmless error analysis to the erroneous instructions: “Before addressing whether an instruction sufficed to allow a party to argue its theory of the case, the court must first decide the instruction accurately stated the law without misleading the jury.” LeFaber, 128 Wn.2d at 903. As in LeFaber, the ambiguity in the instruction issued here had a grave potential to mislead the jury. This Court should reverse the conviction obtained.

The court declined to issue the defense proposed instructions clarifying the definition of premeditation and instead

issued the standard WPIC instruction. 12/6/07RP 1084-86; CP 47; WPIC 26.01.01. The court's definition of premeditation did not unambiguously explain the nature of the thought process required to prove premeditated intent to kill. The court's "to convict" instruction further diluted the State's burden of proving, by failing to completely and accurately explain that the intent required for attempted murder in the first degree is the premeditated intent to kill. CP 49.

The prosecution cannot prove beyond a reasonable doubt the error did not affect the jury verdict. Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The failure to accurately inform the jury of the constitutional requirements of a conviction is presumptively prejudicial unless it affirmatively is proven harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977); see also California v. Chapman, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Stephens, 93 Wn.2d at 191.

As this Court said in Wanrow:

A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case.

(Emphasis added by Wanrow Court) 88 Wn.2d at 237 (quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)).

A single incorrect or incomplete instruction creates an ambiguity in the law which the jury is not expected to parse or ignore. LeFaber, 128 Wn.2d at 902 (reversing where, “[a]lthough a juror could read instruction 20 to arrive at the proper law,” there is no assurance that the jury applied the correct interpretation “over the alternative, conflicting, and erroneous reading.”); see McClaine., 1 Wash. at 353 (an incorrect instruction defining the crime “cannot be cured by reason of any other portion of the charge correctly stating the law.”).

Here, whether McDaniel acted with premeditated intent was the critical question before the jury. The incident arose suddenly and spontaneously among the parties, without words spoken or even much interaction. 12/4/07RP 863. Banks admitted that he was holding back information from the jury that might implicate any friends of his and he refused to acknowledge to his own drug use on the evening in question, despite uncontestedly accurate toxicology tests showing he had consumed a significant amount of alcohol in addition to cocaine, methamphetamine, and marijuana,

thereby contributing to the ambiguity over how the event unfolded. 12/3/07RP 578-79, 600; 12/5/07RP 1020.

Additionally, while Banks suffered numerous wounds and serious injuries, none were life-threatening. 12/3/07RP 588. These wounds were predominantly in his arms and legs, although one shot hit his pelvic area and outside of his hip. *Id.* at 582-84. The placement of the wounds does not demonstrate the premeditated plan to murder even given the number of shots fired. The shots were also delivered rapidly, without pause, reflection, or precise placement, further demonstrating the vagueness of the question regarding premeditation. 12/4/07RP 863.

The instructional errors impact the crux of the case. The prosecutor distracted the jury from the premeditated intent necessary, instead focusing on the “substantial step” of firing multiple shots in close range, but did not address the necessary planning and deliberation required. 12/10/07RP 1100-01. The prosecutor noted that a “classic” premeditation involves having a motive and plan developed over time, but also urged the jury to believe such planning occurred in the case at bar, as his “mind was still working” while he quickly “unloaded” his gun. *Id.* The State’s argument did not cure the instructional errors, as the distinction is

not simply between an impulsive and a premeditated act. Rather, the question is whether the perpetrator acted after an appreciable period of reasoning and decision-making about purposefully trying to kill, or just acted violently without first deliberately deciding to kill. Without consistently and correctly, in plain terms, instructing the jury that first degree murder requires a mental process of deliberately deciding to kill the victim, the prosecution was not held to the correct burden of proof and reversal is required because the instructional ambiguity did not make the critical legal definitions manifestly apparent to the average juror.

3. THE PROSECUTION'S RELIANCE ON
IMPROPERLY ADMITTED, PREJUDICIAL
EVIDENCE DENIED MCDANIEL A FAIR TRIAL

a. The court must not admit unduly prejudicial evidence that lacks an adequate probative value. Unconfronted testimonial evidence is inadmissible and requires reversal unless the prosecution proves beyond a reasonable doubt that the error did not taint the trial. Additionally, acts that are unpopular or disgraceful may not be admitted to show the accused person is the type of person likely to have committed the charged crime. State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). Doubtful cases should be resolved in favor of the defendant. State

v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. 14; Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

b. The prosecution relied on unconfrosted testimony to prove McDaniel was the perpetrator. It is now well-settled that a “testimonial” statement to the police is inadmissible unless the accused person is afforded the opportunity to confront and cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). A statement to a police officer in the course of a police investigation is the “core class” of statements considered testimonial. Id. at 68-69; see Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed. 224 (2006). Statements made in response to formal police questioning, for which the primary purpose is not to explain an on-going emergency, are testimonial and confrontation is mandated under the Sixth Amendment.

Here, Detective Gene Miller testified that McDaniel used the name “Tony Guns,” and McDaniel was the only person he knew

who used this name. 12/4/07RP 772-73. "Tony Guns" was a speaker in a recorded telephone call who laughed about and talked in boastful and unremorseful language about shooting another person and described circumstances similar to Banks's shooting. Ex. 82 (recording); Ex. 84 (transcript of recording). Miller's knowledge that McDaniel was "Tony Guns" came from another jailed suspect who told Miller this information during an unrelated murder investigation. 11/27/07RP 30. Miller specifically asked this third party who used the name "Tony Guns" for the purpose of identifying the perpetrator of the charged shooting.⁷

The only connection between McDaniel and the telephone call was the name "Tony Guns." Neither Miller nor anyone else identified McDaniel's voice. McDaniel did not testify so the jury could compare voices. The telephone number used for the telephone calls was not McDaniel's.

The person identifying McDaniel as "Tony Guns," was not called to testify and was never cross-examined. As made plain in

⁷ Miller ambiguously claimed at least one other person told him McDaniel used the name "Tony Guns," but regardless of the number of sources, all of this information was gathered in the context of Miller investigating past crimes as part of his official duties. 11/27/07RP 88. Miller's identification did not come from first-hand knowledge or from admissions by McDaniel. *Id.* at 34, 41-42, 52, 72-74; 12/3/07RP 578 (hospital toxicology tests show cocaine, methamphetamine, marijuana and .17 blood alcohol shortly after incident); .

Crawford, “[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard.” 541 U.S. at 52.

Here, the prosecution relied on unconfrosted and uncross-examined claims that McDaniel participated in a telephone call central to establishing his involvement in the charged offense without affording McDaniel the opportunity to confront and cross-examine the source of this information.

Confrontation clause violations are harmless only if the State proves beyond a reasonable doubt they did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

The prosecution’s case against McDaniel largely hinged on this recorded telephone conversation between Yarbough and an unidentified individual who used the name “Tony Guns.” Although Banks picked out McDaniel from a photographic array, his opportunity to observe the shooter was fleeting, his physical description of the shooter was both quite vague and inapt for McDaniel, Banks was in hiding from the police during the many months that passed between the shooting and identification, and

Banks had cocktail of cocaine, methamphetamine, and marijuana in his system at the time of the shooting, all of which cast doubt on his ability to accurately observe and recall the perpetrators.⁸

Accordingly, Miller's identification of McDaniel as "Tony Guns," was the key to the case against McDaniel, and McDaniel had no ability to confront and cross-examine the person who alleged he was "Tony Guns."

c. The court improperly admitted flight evidence that was not probative of guilt. Flight evidence may be admitted under certain circumstances to show the defendant's consciousness of guilt. State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). However, flight evidence is often ambiguous and thus not particularly probative. See e.g., United States v. Foutz, 540 F.3d 733, 739-40 (4th Cir. 1976) ("The inference that one who flees from the law is motivated by consciousness of guilt is weak at best."); 2 C. McCormick, Evidence (4th Ed. 1992) p. 182 ("In many situations, the inference of consciousness of guilt of the particular crime is so

⁸ See e.g., 12/4/07RP 810-11 (Banks described shooter as "close to my height" of 6', McDaniel was 5' 4" or 5' 5" close in time to incident and 135-140 pounds); 12/3/07RP (hospital toxicology report shows Banks with 0.17 blood alcohol and cocaine, methamphetamine, and marijuana in system); 12/4/07RP 857 (Banks denies taking any drugs or drinking more than 2 beers); 12/5/07RP 944 (shooter's car windows tinted and dark); 12/5/07RP 984-86 (lied to police about most everything after shooting).

uncertain and ambiguous and the evidence so prejudicial that one is forced to wonder whether the evidence is not directed to punishing the 'wicked' generally rather than resolving the issue of guilt of the offense charged.”). Moreover, flight from the scene of a crime is distinctly more probative than flight from the police after the crime. United States v. Howze, 668 F.2d 322, 325 (7th Cir. 1982) (without immediacy between flight and crime, court must find flight occurred when defendant knowingly fleeing due to specific charged crime).

Evidence of flight is admissible if it creates “a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.” State v. Freeburg, 105 Wn.App. 492, 497, 20 P.3d 984 (2001) (quoting State v. Nichols, 5 Wn.App. 657, 491 P.2d 677 (1971)). In Freeburg, the prosecution properly introduced evidence that the defendant left the area immediately after the crime, changed his name, fled the country, carried false identification, and continually evaded authorities. 105 Wn.App. at 496.

⁹ The jury's note requesting to hear the CD has been designated as a Clerk's Paper.

Here, McDaniel asked to prohibit testimony about the circumstances of his arrest. 11/14/07RP 59. He argued it was highly prejudicial and not probative to introduce evidence that when the police sought to arrest McDaniel, his girlfriend refused to pull over the car she was driving. Id. at 59-60. Although the prosecutor claimed McDaniel tried to run, McDaniel corrected the prosecutor and explained McDaniel did not try to run although the police deemed him “uncooperative.” Id. at 60-61. The prosecutor did not dispute that McDaniel did not actually run to try to run away. The court ruled that evidence of flight was admissible. Id. at 63.

During trial, the arresting officer described the circumstances of McDaniel’s arrest. Mid-afternoon on May 4, 2007, approximately 10 months after the incident, the police tried to arrest McDaniel by appearing at a location with a warrant authorizing his arrest. 12/4/07RP 831. The police did not inform McDaniel they were there to arrest him, but instead silently watched as he got into a car as a passenger.

When the car began driving, five marked police cars approached the car and directed the driver to stop by activating police lights and sirens. The driver initially pulled over but then accelerated away. Id. at 835. All police cars pursued, the wanted

car drove through one red light and stopped on a side street about one-half or three quarters of a mile from the start. Id. at 839.

Once the driver stopped the car, McDaniel got out of the passenger side door. Id. at 840. The police had their weapons drawn and demanded McDaniel lie on the ground. McDaniel did not do so. McDaniel did not say anything, and did not try to leave, but he did not follow the officers' repeated orders to lie down. The police physically pulled him to the ground and handcuffed him. Id. He did not resist despite not actually complying with the officers' orders. Id. at 842, 847-48.

This evidence was not evidence of "flight" or of a consciousness of guilt. McDaniel did not flee. There was no evidence McDaniel directed the car's driver to evade the police. Nor was there evidence McDaniel knew that the police were trying to arrest him for the charged offense approximately 10 months after it occurred. However, not only was this evidence not probative, it was unnecessarily and unduly prejudicial. The evidence describing the circumstances of the arrest made it appear that McDaniel was trying to evade the police, or that he was simply a jerk. It also let the jury know McDaniel did not protest his innocence upon his arrest. It informed the jury that numerous

armed officers gathered to arrest McDaniel, thus further showing him as a dangerous person.

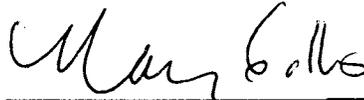
The court's analysis of the "flight" evidence was manifestly unreasonable. McDaniel told the court before trial that the State's claim of "flight" was not true, but the court ruled this information admissible. 11/14/07RP 60-63. Thus, the court allowed the jury to learn that McDaniel was uncooperative and silent when arrested but a heavily armed contingent of officers, all of which was irrelevant and unduly prejudicial. While this error alone might not warrant reversal, in combination of the numerous errors identified, it is grounds for a new trial.

F. CONCLUSION.

For the reasons stated above, Maurice McDaniel respectfully asks this Court to reverse his convictions due to the admission of unduly prejudicial information about his prior juvenile conviction, the erroneous admission of uncontroverted testimony identifying him as "Tony Guns," and the unreasonable admission of "flight" evidence; he also ask to reverse his attempted murder conviction due to instructional errors. Mr. McDaniel also asks that no costs be awarded in the event that has does not substantially prevail on appeal.

DATED this 30th day of September 2008.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.)
)
MAURICE MCDANIEL,)
)
APPELLANT.)

NO. 37323-8-II

FILED
COURT OF APPEALS
DIVISION II
08 OCT -1 PM 12:00
STATE OF WASHINGTON
BY *MS*
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I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 23RD DAY OF SEPTEMBER, 2008, CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED BY U.S. MAIL IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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