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STATE OF WASHINGTON  
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NO. 37323-8-II  
Pierce County No. 07-1-01971-7

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**DIRECE MARLOW**

**Appellant.**

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**BRIEF OF APPELLANT**

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10/10/08

**TABLE OF CONTENTS**

**A. ASSIGNMENTS OF ERROR ..... 1**

**I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. MARLOW’S MOTION TO SEVER THE UNLAWFUL POSSESSION OF A FIREARM CHARGE. .... 1**

**II. MR. MARLOW WAS DENIED HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION..... 1**

**III. MR. MARLOW’S CONVICTION FOR ROBBERY SHOULD BE REVERSED AND DISMISSED DUE TO INSUFFICIENT EVIDENCE. .... 1**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1**

**I. THE COURT’S REFUSAL TO SEVER THE FELON IN POSSESSION CHARGE WAS AN ABUSE OF DISCRETION, AND MR. MARLOW RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO COMPLY WITH THE COURT’S REQUEST FOR BRIEFING ON THE ISSUE..... 1**

**II. MR. MARLOW’S SIXTH AMENDMENT RIGHT OF CONFRONTATION WAS VIOLATED WHEN THE COURT ALLOWED DETECTIVE MILLER TO TESTIFY, BASED ON WHAT OTHERS HAD TOLD HIM, THAT TONY GUNS WAS MAURICE MCDANIEL AND REESE WAS DIRECE MARLOW. .... 1**

**III. THE EVIDENCE IS INSUFFICIENT TO PROVE MR. MARLOW ACTED AS MR. MCDANIEL’S ACCOMPLICE TO ROBBERY IN THE FIRST DEGREE. .... 1**

**C. STATEMENT OF THE CASE..... 1**

**D. ARGUMENT ..... 6**

**I. THE COURT’S REFUSAL TO SEVER THE FELON IN POSSESSION CHARGE WAS AN ABUSE OF DISCRETION, AND MR. MARLOW RECEIVED INEFFECTIVE ASSISTANCE**

**OF COUNSEL WHERE HIS ATTORNEY FAILED TO COMPLY WITH THE COURT'S REQUEST FOR BRIEFING ON THE ISSUE..... 6**

**II. MR. MARLOW'S SIXTH AMENDMENT RIGHT OF CONFRONTATION WAS VIOLATED WHEN THE COURT ALLOWED DETECTIVE MILLER TO TESTIFY, BASED ON WHAT OTHERS HAD TOLD HIM, THAT TONY GUNS WAS MAURICE MCDANIEL AND REESE WAS DIRECE MARLOW. .... 13**

**III. THE EVIDENCE IS INSUFFICIENT TO PROVE MR. MARLOW ACTED AS MR. MCDANIEL'S ACCOMPLICE TO ROBBERY IN THE FIRST DEGREE. .... 15**

**E. CONCLUSION..... 18**

## TABLE OF AUTHORITIES

### **Cases**

<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824 (1967).....	19
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354 (2004) .....	18, 19
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S.Ct. 2266 (2006) .....	19
<i>In re Personal Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004)...	10, 11
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068 (1970).....	21
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983) .....	21
<i>State v. Bandura</i> , 85 Wn.App. 87, 931 P.2d 174, <i>review denied</i> , 132 Wn.2d 1004 (1997).....	16
<i>State v. Bryant</i> , 89 Wn.App. 857, 950 P.2d 1004 (1998) .....	11
<i>State v. Catterall</i> , 5 Wn.App. 373, 486 P.2d 1167, <i>review denied</i> 80 Wn.2d 1001 (1971).....	23
<i>State v. Everybodytalksabout</i> , 145 Wn.2d 456, 39 P.3d 294 (2002) .....	23
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	21
<i>State v. Hardy</i> , 133 Wn.2d 701, 946 P.2d 1175 (1997).....	12
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	16
<i>State v. Israel</i> , 113 Wn.App. 243, 54 P.3d 1218 (2002).....	23
<i>State v. Kalakosky</i> , 121 Wn.2d 525, 852 P.2d 1064 (1993) .....	15
<i>State v. King</i> , 113 Wn.App. 243, 54 P.3d 1218 (2002) .....	22
<i>State v. Luther</i> , 157 Wn.2d 63, 134 P.3d 205, <i>cert. denied</i> , 127 S.Ct. 440 (2006).....	21
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251(1995).....	16
<i>State v. Mierz</i> , 127 Wn.2d 460, 901 P.2d 186 (1995).....	16
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	22
<i>State v. Ramirez</i> , 46 Wn.App. 223, 730 P.2d 98 (1986).....	15
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003).....	11
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	21
<i>State v. Stein</i> , 144 Wn.2d 236, 27 P.3d 184 (2001).....	23
<i>State v. Varga</i> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	22
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984) .	15, 16, 17

### **Statutes**

RCW 9A.08.020 (3) (a) .....	22
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### **Rules**

CrR 4.4 (b) ..... 10, 11, 14  
ER 609 (d)..... 12

**Constitutional Provisions**

U.S. Const. amends. 5, 14..... 11  
Wash. Const. Art. 1, Sec. 3, 22 ..... 11

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**III. THE EVIDENCE IS INSUFFICIENT TO PROVE MR. MARLOW ACTED AS MR. MCDANIEL'S ACCOMPLICE TO ROBBERY IN THE FIRST DEGREE.**

**C. STATEMENT OF THE CASE**

In the early morning hours of July 29, 2006, Cashundo Banks went in search of marijuana after a night of heavy drinking and taking drugs.

Trial RP 578, 857-59. He went down the street and approached a Blazer-

like SUV with tinted windows. Trial RP 857-59, 944. The SUV had the passenger side window cracked, and Mr. Banks claimed he got a look at the driver at that time. Trial RP 944, 1009. The passenger told Mr. Banks to go up the block, and the SUV met him there. Trial RP 862-63. The passenger got out of the car and took the money Mr. Banks offered to him and then fired several shots at him without speaking. Trial RP 863. After the shooting, the car sped off and Mr. Banks made his way back to his friend's house, half a block away. Trial RP 870-01.

A neighbor called the police and when they arrived, Mr. Banks gave a false name of Ricky Richardson because he had an outstanding warrant. Trial RP 873, 879-80. He told the police he had been attacked by two men but he didn't describe them. Trial RP 606. He couldn't give any details except that the suspects drove away in a Suburban. Trial RP 671-72, 689-90. Mr. Banks admitted that he lied to the police for most of the questions they asked him. Trial RP 986.

Mr. Banks injuries were not life-threatening, despite being shot numerous times. Trial RP 582, 588. After several days in the hospital, Mr. Banks left against medical advice, and with unhealed injuries, because he believed he would be arrested if he stayed. Trial RP 587.

Meanwhile, Detective Gene Miller was investigating an unrelated homicide involving a suspect named Verrick Yarbrough who was

incarcerated in the Pierce County jail. Trial RP 766. Miller had a warrant for Mr. Yarbrough's phone calls and he listened to over 70 hours of recorded phone calls Yarbrough made from the jail. Trial RP 768-770. In one series of conversations Miller heard Yarbrough talk to two people about a shooting they had done, and, after investigating an unsolved shooting on 45<sup>th</sup> Street, concluded they were describing Mr. Banks' shooting. Trial RP 6, 771, Exhibit 82 (recording), Exhibit 84 (transcript of recording). The phone calls contain three speakers: Mr. Yarbrough, a person who called himself Tony Guns, and a person who called himself Reese. Trial RP 771-73, Ex. 82, 84. The phone calls were placed from the Pierce County jail to a residence occupied by Direce Marlow and several other people. Trial RP 769. Detective Miller testified at trial that Tony Guns was Maurice McDaniel (Mr. Marlow's co-defendant) and that Reese was Direce Marlow. Trial RP 772-73.

Detective Miller explained in a pre-trial hearing how he arrived at the conclusion that Maurice McDaniel was Tony Guns and Direce Marlow was Reese. Detective Miller learned that "Tony Guns" was Maurice McDaniel because another gang member, who was involved in yet another unrelated investigation, told him so. Trial RP 30. He learned that Reese was Direce Marlow based on two things: A picture he found during a search warrant executed in the Verrick Yarbrough case depicting Direce

Marlow and Verrick Yarbrough together, with the word "Reese" below Direce's image; and conversations with three people (Greg Hughes, Daron Warren, and Marsha Tucker) who told him that Reese was Direce Marlow. Trial RP 26, 49. None of these people was on the State's witness list or called to testify before the jury. Report of Proceedings.

The attorneys for Mr. Marlow and Mr. McDaniel objected to Detective Miller being able to testify, based on what others told him, that Reese was Mr. Marlow and Tony Guns was Mr. McDaniel asserting, among other bases, that such testimony would violate the defendants' Sixth Amendment right of confrontation and the holding of the United States Supreme Court in *Crawford v. Washington*. Trial RP 142-44. The trial court ruled that Detective Miller would be allowed to identify Reese as Direce Marlow and Tony Guns as Maurice McDaniel based on what other, non-testifying parties told him because "[h]e has firsthand information, in that he has heard." Trial RP 144.

When being treated at Madigan Army Hospital, Mr. Banks was found to have cocaine, methamphetamine and marijuana in his system, as well as a blood alcohol level of .179. Trial RP 578. Eight months after the shooting, on April 10<sup>th</sup>, 2007 Mr. Banks, while incarcerated at the Pierce County jail, was shown two photo montages by Detective Miller. Trial RP 788. One montage contained a photo of Direce Marlow and the

other contained a photo of Direce Marlow. Trial RP 781. Detective Miller claimed that after giving Mr. Banks the admonition, he scanned the first montage and immediately picked out Direce Marlow's picture. Trial RP 789. After a few minutes later, Miller again read the admonition and showed Mr. Banks the second montage. Trial RP 791. Miller claimed that Mr. Banks immediately picked out Maurice McDaniel and said "that's the fucker that shot me." Trial RP 792.

There was no evidence linking Marlow with the shooting beyond Detective Miller's testimony that he was one of the two speakers (other than Yarbrough) on the audio recording where the shooting was described and Mr. Banks photo montage identification. Neither Miller nor anyone else identified Mr. Marlow's voice. Report of Proceedings. Mr. Marlow did not testify. Report of Proceedings.

The State charged Mr. Marlow 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 18-20. At the beginning of the trial, both defense counsel moved to sever the unlawful possession of a firearm count from the other two charges in an effort to prevent the jury from learning that Mr. Marlow and Mr. McDaniel each had a serious offense as juveniles on their records. RP 11/15/07, p. 96-97, Trial RP 162-66, 189-94. Both defendants offered to waive their right to a

jury trial on that count and to have the court decided that count after the jury's verdict, using the same evidence presented at the trial save for the evidence of the prior convictions, which were stipulated to and would be presented to the judge after the jury trial was completed. *Id.* After a jury trial Mr. Marlow was convicted of robbery in the first degree with a firearm enhancement and unlawful possession of a firearm in the first degree. CP 68, 69, 71. He received a standard range sentence and filed this timely appeal. CP 76, 88.

**D. ARGUMENT**

**I. THE COURT'S REFUSAL TO SEVER THE FELON IN POSSESSION CHARGE WAS AN ABUSE OF DISCRETION, AND MR. MARLOW RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO COMPLY WITH THE COURT'S REQUEST FOR BRIEFING ON THE ISSUE.**

The trial court abused its discretion by asserting it lacked discretion to sever the charge involving evidence of Marlow's prior conviction for a serious offense. A trial court has "broad discretion" on the decision of whether to grant or deny a motion to sever charges. *In re Personal 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. 1, Sec. 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 discretion by using the wrong legal standard or by failing to exercise discretion.” *Id.* 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* at 711; CrR 4.4 (b). In the case at bar, the court declined to weigh the interests at stake, believing it had no duty to do so in the absence of paper briefing by defense counsel. RP 11/15/07, p. 98, Trial RP 165.

The unlawful possession of a firearm charge depended upon Mr. Marlow’s prior juvenile adjudication for a serious offense, as well as proof that he constructively or actually possessed a firearm as a principal or an accomplice. Mr. Marlow was only seventeen years old at the time of the shooting, and his attorney sought to keep the jury from hearing that by that point in his life, he had already committed a serious offense.

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). The evidence tending to prove Mr. Marlow was an accomplice to robbery in the first degree and unlawful possession of a firearm was, to put it charitably, not strong. Hearing that he had a prior conviction (as a juvenile, no less) for a serious offense would unduly bolster the prosecution’s weak evidence that Mr. Marlow had knowledge of Mr. McDaniel’s crimes before he committed them and assisted him. Mr. Marlow agrees with Mr. McDaniel that this evidence also served to bolster the dubious identification of Marlow and McDaniel by Mr. Banks some eight months later by allowing the jury to draw the inference that Marlow had the propensity to commit serious crimes.

The court’s requirement that it be provided with paper briefing before giving proper consideration to Mr. Marlow’s motion to sever constituted an abuse of discretion because it amounted to a refusal to exercise discretion. The court’s requirement of authority on point allowing severance before it would consider the motion was unreasonable and untenable. And although defense counsel for Mr. Marlow articulated a basis for the court to sever the charge, the court seemed to penalize defense counsel for the argument coming in oral, not written form, stating: “Although, it’s presented in a way certainly that doesn’t give the Court the advantage of full briefing, or being able to consider it at the Court’s

leisure. I think the lack of briefing has got to work against the defense, and certainly at this juncture I haven't been presented any case authority that suggests that this is other than an area of discretion that the Court has." Trial RP 193-94. The court then gave cursory attention to the factors weighing for and against severance and denied the motion.

The court's ruling rested on two general factors disfavoring severance: Judicial economy and the concern that when you "chop up a case into pieces" the results may be inconsistent. Trial RP 194. In the case at bar, however, such concerns were misplaced. First, judicial economy was not implicated where the defense attorneys were willing to waive jury and allow the court to decide the guilt or non-guilt of the defendants based on the evidence presented to the jury, save for the consideration the court would give to the defendants' stipulations to their prior juvenile convictions. This process could have taken no more than five minutes, similar to a stipulated facts bench trial. And the concern about inconsistent results seems particularly misplaced where the judge would decide the firearm charge immediately after the discharge of the jury utilizing the same evidence.

The court noted the relative strength of evidence is a factor in the decision of whether to sever the charges, and concluded the firearms counts were "very similar" in strength. Trial RP 194. The court seemed

to ignore the fact that while the attempted murder and robbery charges rested on the credibility of Mr. Banks and his stale, tardy identification of perpetrators who he saw while he was extremely intoxicated and high on a cocktail of illegal drugs, the unlawful firearm charge rested on a prior conviction for a serious offense. The court's emphasis on the relative strength of the charges trumped the court's consideration of prejudice. Further, the court unreasonably raised the threshold for the defense to win severance by requiring written briefing and on-point case law requiring severance.

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, 852 P.2d 1064 (1993). By adding the obstacle of requiring controlling legal authority before it would consider severance, the court abused its discretion. The court further compounded the prejudice suffered by Mr. Marlow by failing to give the limiting

instruction it promised to give when it denied the motion for severance.

Trial RP 194.

Although the court abused its discretion by requiring written briefing from the parties for consideration of the severance motion, defense counsel should nevertheless have provided written briefing when it became clear the court was requiring it, and defense counsel clearly should have done it well in advance of trial.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) the defense attorney's representation fell below an objective standard of reasonableness, and (2) the attorney's deficient performance prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Here, counsel's failure to aggressively advocate for severance by failing to follow the court's directive fell below an objective standard of reasonableness and cannot be attributed to trial strategy or tactics. His failure to follow the court's directive was only to the detriment of his client. Further, counsel should have proposed a limiting instruction. 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* at 694. Here, the prejudice is obvious: The jury was permitted to surmise that Mr. Banks' identification was legitimate, and that Mr. Marlow had prior knowledge of Mr. McDaniel's intent to commit robbery, because he was a nefarious character as evidenced by his prior conviction. Marlow and McDaniel's criminal history of serious offenses allowed the jury, in the absence of a limiting instruction, to conclude they were the types of people who commit these crimes. Mr. Banks had serious credibility problems, not just due to his extreme intoxication and drug impairment at the time of the shooting, but because he lied repeatedly to the police. He also lied, in his testimony, about his drug use and was forced to admit he was lying to protect his friends. Trial RP 955, 1020. Further, the evidence against Mr. Marlow was tenuous, at best, even assuming Mr. Banks' identification was legitimate. Because of this evidence, a jury would be

less likely to believe that Mr. Marlow had knowledge only of Mr. McDaniel's intention to engage in a drug deal with Mr. Banks, not a robbery and attempted murder with a firearm. Mr. Marlow was denied a fair trial due to the court's abuse of discretion in denying his motion to sever and because he received ineffective assistance of counsel, and he should be granted a new trial.

**II. MR. MARLOW'S SIXTH AMENDMENT RIGHT OF CONFRONTATION WAS VIOLATED WHEN THE COURT ALLOWED DETECTIVE MILLER TO TESTIFY, BASED ON WHAT OTHERS HAD TOLD HIM, THAT TONY GUNS WAS MAURICE MCDANIEL AND REESE WAS DIRECE MARLOW.**

In order to prove that Mr. Marlow was Reese and Mr. McDaniel was Tony Guns the State relied on the opinion of Detective Miller, which was based on what other people (gang associates) had told him. These people on whose statements Detective Miller relied did not testify at any point in these proceedings. 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 (2004). A statement to the police officer in the course of a police investigation is the "core class" of statements considered testimonial. *Crawford* at 68-69; *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266 (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.

The phone calls in which two remorseless individuals described a shooting on 45<sup>th</sup> Street that most likely was the shooting of Mr. Banks was the only evidence, beyond Mr. Banks' truly unbelievable identification of Marlow and McDaniel eight months after the shooting, that linked the two men known as Reese and Tony Guns to the charged crimes. Ex. 82, 84. And the only evidence that Mr. Marlow was Reese and that Mr. McDaniel was Tony Guns was the testimony of Detective Miller, based entirely on the testimonial, un-confronted statements of gang associates.

The State bears the burden of proving that a confrontation clause violation was harmless beyond a reasonable doubt by showing it didn't affect the outcome of the case. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967). Here, the State could not make such a claim. Evidence that the boys on those phone calls, "Reese" and "Tony Guns," were Mr. Marlow and Mr. McDaniel was the single most important piece of evidence in the case. Those phone calls were the only evidence linking *any* known person to Mr. Banks' shooting. The gun was not admitted into evidence or linked to Mr. Marlow or Mr. McDaniel, no physical evidence was recovered linking Marlow and McDaniel to the crime, no statements

were made by Marlow and McDaniel, no testimony was given by Marlow and McDaniel. Other than an identification made by Mr. Banks eight months after the incident, an identification made in spite of the fact that he couldn't remember anything about the time he spent in the hospital (Trial RP 879), gave no physical description of the perpetrators after the shooting, and was high and extremely drunk when the shooting took place, there was no evidence against Marlow and McDaniel other than these phone calls. As such, there can be no legitimate claim that Detective Miller's testimony that Marlow was Reese and McDaniel was Tony Guns, testimony which violated both defendants' right of confrontation, did not affect the outcome of the case. Mr. Marlow should be granted a new trial.

**III. THE EVIDENCE IS INSUFFICIENT TO PROVE MR. MARLOW ACTED AS MR. MCDANIEL'S ACCOMPLICE TO ROBBERY IN THE FIRST DEGREE.**

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the State must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d

1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). A sufficiency claim admits the truth of the State's evidence. *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205, *cert. denied*, 127 S.Ct. 440 (2006). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). In considering sufficiency of the evidence, the Court will give equal weight to circumstantial and direct evidence. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The Court will not substitute its judgment for that of the jury on issues of fact. *State v. King*, 113 Wn.App. 243, 269, 54 P.3d 1218 (2002).

In order to prove that Mr. Marlow acted as an accomplice to Mr. McDaniel in the robbery, the State was required to prove that Mr. Marlow, with knowledge that it will promote or facilitate the commission of the crime, he or she either solicits, commands, encourages, or requests another person to commit the crime; or aids or agrees to aid another person in planning or committing the crime. RCW 9A.08.020 (3) (a). The State was required to prove Mr. Marlow had knowledge of the crime Mr. McDaniel intended to commit, and solicited, commanded, encouraged, aided, or agreed to aid Mr. McDaniel in planning or committing the crime. *State v. Everybodytalksabout*, 145 Wn.2d 456, 39 P.3d 294 (2002). Mere

physical presence and assent to the commission of the crime is not enough to make one an accomplice. *State v. Catterall*, 5 Wn.App. 373, 486 P.2d 1167, *review denied* 80 Wn.2d 1001 (1971). A defendant cannot be charged for merely any foreseeable crime committed as a result of the complicity. *State v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001); *State v. Israel*, 113 Wn.App. 243, 54 P.3d 1218 (2002).

Here, at most the State proved that Mr. Marlow had knowledge of, and assented to and agreed to aid Mr. McDaniel in a drug deal. The State relied on the fact that Mr. Marlow drove away as conclusive proof that he had prior knowledge, and aided in the commission of, the robbery and attempted murder. This assumption does not flow from the evidence, but was considerably aided by the improper decision of the court not to sever the unlawful firearm charge from the other two charges. This complicity cannot be simply assumed, it must be proved. The testimony of Mr. Banks established that he believed he was going to engage in a drug deal with the passenger of the car, but that when he arrived at the curb the passenger met him there and immediately began shooting him after taking his money.

Assuming Mr. Marlow drove away in great haste, and failed to stop and assist Mr. Banks, that does not prove he acted as an accomplice to Mr. McDaniel's actions. Even the statements on the recording do not

demonstrate prior knowledge, on the part of Mr. Marlow, of Mr. McDaniel's actions. Had Mr. Marlow been charged as an accomplice to attempted delivery of a controlled substance, certainly the evidence would be sufficient to establish knowledge, promotion and aid. But the State presented no evidence which would establish that McDaniel informed Mr. Marlow that he planned to shoot and rob Mr. Banks rather than simply sell him the marijuana he sought. Mr. Marlow's robbery conviction should be reversed and dismissed.

**E. CONCLUSION**

Mr. Marlow's conviction for robbery should be reversed and dismissed due to insufficient evidence. Alternatively his convictions should be reversed and his case remanded for a new trial.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of October, 2008.

  
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## **APPENDIX**

### § 9A.08.020. Liability for conduct of another -- Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

(4) A person who is legally incapable of committing a particular crime himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He is a victim of that crime; or

(b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

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

STATE OF WASHINGTON,

Respondent,

vs.

DIRECE MARLOW,

Appellant.

) Court of Appeals No. 37323-8-II

) Pierce County No. 07-1-01971-7

) AFFIDAVIT OF MAILING

FILED  
COURT OF APPEALS  
DIVISION II  
OCT 14 PM 1:02  
STATE OF WASHINGTON  
PULLY

ANNE M. CRUSER, being sworn on oath, states that on the 10<sup>th</sup> day of October,

2008 affiant placed a properly stamped envelope addressed to:

Kathleen Proctor  
Pierce County Prosecuting Attorney  
930 Tacoma Ave. South, Room 946  
Tacoma, WA 98402

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Mr. Direce Marlow  
DOC# 317504

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Washington Corrections Center  
P.O. Box 900  
Shelton, WA 98584

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. MARLOW)
- (3) AFFIDAVIT OF MAILING

Dated this 10<sup>th</sup> day of October, 2008

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: October 10, 2008, Kalama, WA

Signature: Anne M. Cruser

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COURT OF APPEALS  
DIVISION II

08 OCT 17 AM 10:46

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

STATE OF WASHINGTON,

Respondent,

vs.

DIRECE MARLOW,

Appellant.

) Court of Appeals No. 37323-8-II  
) Pierce County No. 07-1-01971-7

) AMENDED AFFIDAVIT OF MAILING

ANNE M. CRUSER, being sworn on oath, states that on the 17<sup>th</sup> day of October,

2008 affiant placed a properly stamped envelope addressed to:

Mr. Direce Marlow  
DOC# 317504  
Washington State Penitentiary  
1313 N. 13<sup>th</sup> Ave.  
Walla Walla, WA 99362

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. MARLOW)
- (3) AMENDED AFFIDAVIT OF MAILING

Dated this 17<sup>th</sup> day of October, 2008

AFFIDAVIT OF MAILING - 1 -

**Anne M. Cruser**  
*Attorney at Law*  
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Kalama, WA 98625  
Telephone (360) 673-4941  
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anne-cruser@kalama.com

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*Anne M. Cruser*  
ANNE M. CRUSER, WSBA #27944  
Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: *Oct. 17, 2008, Kalama, WA*

Signature: *Anne M. Cruser*

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