NO. 37323-8
Consolidated No.

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MAURICE MCDANIEL, APPELLANT
DIRECE MARLOW, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 07-1-01972-5
No. 07-1-01971-7

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

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B. STATEMENT OF THE CASE.

1. Procedure

The State charged both defendants, Maurice McDaniel and Direce Marlow, on April 12, 2007 with one count each of assault in the first degree, robbery in the first degree and unlawful possession of a firearm. The assault counts carried firearm enhancements. MMCP 3-4, DMCP 94-95[1]. The State filed an amended information on July 16, 2007 in both cases. MMCP 5-6, DMCP 96-97. The amended information removed the assault count and added attempted murder in the first degree with a firearm enhancement. MMCP 5-6, DMCP 96-97. The State filed a second amended information on December 3, 2007 that added the firearm enhancement to the robbery counts. MMCP 19-21, DMCP 98-100, RP 558-560[2].

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[1] The State will refer to the clerk's paper for defendant McDaniel as MMCP and the clerk's papers for defendant Marlow as DMCP.

[2] The State will refer to the verbatim report of proceedings as follows: The 10 sequentially paginated volumes referred to as 1-7, 9, 10, and 13 will be referred to as RP. The remaining hearings will be referred to as follows: 11/14/07AM RP, 11/14/07PM RP, 11/15/07AM RP, 11/26/07 RP, 11/26/07 Voir Dire RP, 11/30/07 RP, Sentencing RP, 3/7/08 RP, 4/4/08 RP.

The case was called for trial on November 14, 2007 in front of the Honorable Thomas Felnagle. 11/14/07AM RP 3. Several pre-trial motions were held. The State moved to introduce evidence of defendants' gang affiliation, to have Detective Gene Miller classified as an expert on gangs and to admit several taped conversations from the Pierce County Jail involving Verrick Yarbrough and the two defendants. 11/14/07AM RP 21-35, 40-43, 11/15/07AM RP 99-136, RP 95-167. Several hearings were held on this matter and Detective Miller was called to testify before the court but outside the presence of the jury. 11/15/07AM RP 136-165, RP 5-92. The court found that based on Detective Miller's experience, he could testify about his expertise with gangs. 11/15/07AM RP 172. The court ruled that Detective Miller could testify as to generalized gang culture but was not allowed to say who was a gang member. 11/15/07AM RP 181-2. The court also found that the tape of the phone calls had been properly authenticated and then ruled as to the portions of the tape that could be used in front of the jury. RP 122-140.

The defense for McDaniel moved to suppress any mention of the circumstance surrounding the arrest of his client. 11/14/07AM RP 59-63. The court denied the motion to suppress finding that it was admissible evidence of flight. 11/14/07AM RP 63-4.

The defendants also moved to sever the unlawful possession of a firearm charge from the remaining charges. 11/15/07AM RP 96-7, RP 163, 189-193. Defense counsel did not brief this motion and the court told

the defense they could brief it and he would consider it. 11/15/07AM RP 98. The court allowed defense another chance to provide case law right before swearing in the jury. RP 167. The court engaged in an analysis of the four part test and found that it was not appropriate to sever the unlawful possession of a firearm charges. RP 193-5.

Finally, the defendants moved to exclude Detective Miller's testimony that defendant McDaniel was known by the nickname Tony Guns and that defendant Marlow was known by the nickname of Reese. 11/15/07AM RP 165, RP 142-144. The court ruled that Detective Miller's testimony as to his knowledge of the defendants' nicknames was not testimonial, not hearsay and not subject to the confrontation clause. RP 142-144, 153.

On December 12, 2007, the jury found defendant McDaniel guilty as charged of all three counts and also found he was armed with a firearm for the attempted murder and robbery charges. RP 1215-6. MMCP 68-72. The jury found defendant Marlow guilty of robbery while armed with a firearm and unlawful possession of a firearm but could not reach a decision on the attempted murder count. RP 1215-6, DMCP 101-5. The court declared a mistrial as to the unresolved count against Marlow. RP 1214, 1220.

Sentencing was held on February 1, 2008. Sentencing RP 3, MMCP 77-89, DMCP109-121. Defendant Marlow's offender score was determined to be a nine as to the robbery and a 5 on the firearm charge.

DMCP 109-121. Marlow's sentencing range on the robbery was 129-171 months plus 60 months. Sentencing RP 4, DMCP 109-121. His standard range on the firearm charge was 41-54 months. Sentencing RP 4, DMCP 109-121. The court sentenced Marlow to a midrange sentence of 210 months. Sentencing RP 11, DMCP 109-121. Defendant McDaniel's offender score was determined to be 4.5 on the attempted murder and robbery charges and 3.5 on firearm charge. MMCP 77-89. McDaniel's sentencing range was on the attempted murder was 210.75-280.5 months plus 60 months for the firearm enhancement. Sentencing RP 14, MMCP 77-89. His range on the robbery was 51-68 months plus 60 months for the firearm enhancement and his range on the firearm charge was 31-41 months. Sentencing RP 14, MMCP 77-89. The court sentenced McDaniel to the high end of the range. Sentencing RP 20, MMCP 77-89.

Defendants both filed these timely appeals. MMCP 73, DMCP 122.

2. Facts

On June 9, 2006, Officer Stanley Jones was on patrol. RP 230. He was in the area of 45th and Lawrence at 3:19 a.m. when he heard about 4 to 5 gun shots. RP 230. This area is a high narcotics area. RP 284. A moment later, dispatch indicated that they had received notification of a shooting. RP 231.

Artisia McFadden resided at 43rd and Warren and heard 5-6 gunshots. RP 438-9. When the shooting victim showed up at her door, she called the police. RP 440. McFadden had heard the victim yelling, "Help, help, help me. Somebody help me. I have been shot." RP 442. The victim was dragging his leg and it looked like a bone was protruding. RP 442.

Charles Van-Hise awoke to gunfire and a speeding car. RP 459. Van-Hise heard 3-4 shots and then the peeling of tires. RP 461. Van-Hise saw a dark pickup or Blazer flying up the road, going faster than the speed limit. RP 462-3, 471, 477. He also heard screaming around the corner, "Oh my God! What happened?" RP 465.

When Officer Jones arrived on the scene, he saw a black male, about 30 years old with gun shot wounds to the abdomen. RP 234, 262. The victim was in front of McFadden's residence which was close to the intersection of 45th and Lawrence. RP 233, 394, 427, 440. The victim had several bullet entry points and was very bloody. RP 263, 395, 441, 669. The victim gave his name to police as Ricky Richardson because he has a warrant for his arrest and didn't want to go to jail. RP 264, 403, 675, 873. The victim was later identified as Cashundo Banks. RP 256, 283, 404, 416, 677. McFadden knew the victim as Cash and that he would sometime stay at a neighbor's house. RP 446-9. Banks was coherent and able to speak with officers. RP 457, 691. Banks did not display any

visible signs of intoxication or drug use. RP 265. Banks gave the officers a vehicle description of a black Suburban. RP 672, 689, 908.

Banks had had a few beers that night. RP 857. He was using a bike to get around. RP 856. Banks had also done some cocaine and "weed" the previous day. RP 858. Early in the morning, on the date of the incident, Banks went to get some more weed. RP 858, 1028. He went to the park and saw a Blazer parked there. RP 859. Banks approached the car and asked if they had any weed. RP 859, 1028. Banks saw two black males in the car. RP 860. The passenger said he has weed. RP 861. Banks said he as looking to buy $40 worth. RP 861. The Blazer then pulled up the street. RP 862, 909. Banks set his bike down and approached the vehicle. RP 863. The passenger door opened, the passenger had a gun in his hands and the passenger shot him. RP 863, 899. Banks had the money in his hands and gave it to the passenger when he saw the gun. RP 893. Banks felt the first couple of shots and then nothing after that. RP 865. Banks heard the car speed off. RP 870. Banks walked down the alley to his friend's house. RP 871. Banks did not recognize the two males in the car and had never seen them before prior to the incident. RP 886.

While on scene, Officer Jones noticed a spent shell casing as well as a bicycle. RP 238, 242. The bicycle was located at the corner of the intersection. RP 303, 391, 500. Officers found a small amount of blood and change near the bicycle. RP 304-5, 315-6, 344, 407, 500. More shell

casings were found a short distance from the bicycle. RP 307, 316, 406, 500. The casings were identified as both .380 and 9 millimeter casings during the preliminary investigation. RP 310, 318, 329, 348-9. Five shell casing were later determined to be 9-millimeter and one was a .380. RP 506, 509, 512, 521, 549. The 9-milimeter cartridges were determined to have been fired from the same gun. RP 715.

Banks was taken to emergency surgery. RP 401. Banks was cooperative and conscious. RP 576, 606. He told the doctor and Officer DeNully that he had been robbed and shot several times. RP 614, 1024. Banks was in pain with 14 wounds in his extremities, back and pelvic bone. RP 578-81. His injuries could have been life threatening. RP 588. Banks admitted to using cocaine and marijuana. RP 578, 1027. A tox screen was positive for cocaine, marijuana and methamphetamine. RP 578. Banks also had a blood alcohol concentration of .176. RP 578. Banks had to undergo surgery and other treatment for his injuries. RP 585-6. He was in the hospital for 9 days before he left against medical advice. RP 586-7.

Detective Miller was investigating an unrelated case. RP 766. As part of that investigation, he obtained a search warrant for phone calls made by a defendant in jail named Verrick Yarbrough. RP 767. The phone calls were all to the number 253-475-6029 between the dates of July 5, 2006 and September 5, 2006. RP 769. This land line is associated with a residence occupied, among others, by defendant Dierce Marlow.

After listening to the conversation, Detective Miller realized they were discussing a shooting. RP 770. The leads he developed gave him reason to believe that the shooting had happened on 45th. RP 770-1. When he searched the police records, he found that only one reported shooting had occurred on 45th during the time period: the one at 45th and Lawrence on July 29, 2006. RP 771. In addition to Yarbrough, the speakers on the tape were Tony Guns and Reese. RP 772-3. Detective Miller testified that Tony Guns is associated with defendant Maurice McDaniel and Reese is associated with defendant Marlow. RP 772-3.

Detective Miller was able to speak with Banks in the Pierce County Jail on April 10, 2007. RP 777. Banks was able to provide a description of the driver and the shooter. RP 779-80. Detective Miller prepared two separate photo montages and showed them to Banks. RP 781. Banks picked out Marlow within 20-30 seconds as the driver. RP 789-90. During the second montage, Banks stated, "That's the fucker that shot me" and pointed to McDaniel. RP 792. Banks became very emotional. RP 789, 793. Banks stated, "I can't believe they just left me there to die. They didn't care." RP 793.

C. ARGUMENT.

1. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION TO SEVER AFTER ENGAGING IN SUFFICIENT ANALYSIS AS DIRECTED BY CASE LAW. FURTHER, COUNSEL CANNOT BE DEEMED INEFFECTIVE.

a. The court did not abuse its discretion in denying defendants' motion to sever after engaging in sufficient analysis as directed by case law.

Washington law disfavors separate trials. ***State v. Grisby***, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). A reviewing court reviews a trial court's ruling on a motion to sever for an abuse of discretion. ***State v. Bythrow***, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Discretion is abused if it is exercised without tenable grounds or reasons. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

CrR 4.3(a) allows the State to join offenses in one charging document if the offenses: "(1) Are of the same or similar character, even if not part of a single scheme or plan; or (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.4(b) allows the trial court to sever joined offenses if doing so "will promote a fair determination of the defendant's guilt or innocence of each offense." A defendant seeking severance has the burden to show that joinder is so manifestly prejudicial that it outweighs the interest in judicial economy. ***Bythrow***, 114 Wn.2d at 718.

Considerations in whether to grant or deny a severance motion are "the jury's ability to compartmentalize the evidence, the strength of the State's evidence on each count, the issue of cross admissibility of the various counts, [and] whether the judge instructed the jury to decide each count separately." ***State v. Kalakosky***, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). A court presumes jurors follow the court's limiting instructions. ***State v. Johnson***, 124 Wn.2d 57, 77, 873 P.2d 514 (1994)

A trial court deciding a motion to sever offenses should consider four factors, the presence of which tends to neutralize any prejudice that may result from the joinder of offenses. Those factors are: (1) the strength of the State's evidence on each count; (2) the clarity of defenses to each count; (3) whether the trial court properly instructed the jury to consider the evidence of each crime, (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined. ***State v. Hernandez***, 58 Wn. App. 793, 798, 794 P.2d 1327 (1990), *disapproved on other grounds by*, ***State v. Kjorsvik***, 117 Wn.2d 93, 812 P.2d 86 (1991), *citing* ***State v. Watkins***, 53 Wn. App. 264, 766 P.2d 484 (1989).

However, even if evidence is not cross-admissible, severance is not mandated. ***Bythrow***, 114 Wn.2d at 720. The defendant must be able to point to "specific prejudice" resulting from the joint trial. *Id.* Given the jury's ability to compartmentalize the evidence of the separate counts, the strength of the State's evidence, and the strong public policy of judicial

economy, a trial court can deny a motion for severance even if the evidence of the individual counts is not cross-admissible.

Even the fact that one of the charges requires admission of a prior conviction will not mandate severance. An appellate court affirmed the denial of a motion to sever offenses in a case in which the defendant was charged with two counts of assault and one count of being a felon in possession of a firearm. ***State v. Thompson***, 55 Wn. App. 888, 781 P.2d 501 (1989), *citing* ***State v. Tully***, 198 Wash. 605, 89 P.2d 517 (1939). The court in ***Thompson*** reiterated that the counts may be tried together unless the defendant can point to undue prejudice resulting from the joint trial. ***Thompson***, 55 Wn. App. at 893.

In the instant case, the court did not abuse its discretion in denying the defense motion for severance of the firearms charge. Defense counsel brought the motion to sever after trial had commenced and without briefing the issue. 11/15/07AM RP 96-7. The defense position was that since juvenile convictions aren't admissible under ER 609 they should not be admitted in this case. RP 189-193. The court asked the defense to brief the severance issue so that he could fully consider it. 11/15/07AM RP 98. Neither defense counsel did so. However, the motion was discussed on the record and counsel was afforded an opportunity to at least present case law. RP 162-3. Contrary to the assertion of defendants on appeal, the court did not declare that it did not have authority to decide this issue but rather asked defense counsel to provide him with authority

or briefing on the issue. 11/15/07AM RP 98, RP 65. As the burden is on the defense to show prejudice, it was not an abuse of discretion for the court to ask defense to brief this issue and to present him with authority to support their position.

Even though defense failed to brief the issue, the court engaged in the appropriate analysis and came to the conclusion that severance was not necessary. The court declared that he had discretion to decide the issue of severance as no one had presented him with any case law to the contrary. RP 193. In addition to noting that separate trials are not favored due to judicial economy, the court looked at other factors to see if severance was necessary. RP 193-5. The court found that the State's evidence as to each count was similar. RP 193-5. The court also found that ER 609 does not make juvenile convictions per se inadmissible but says they are not admissible unless that are needed for a fair adjudication. RP 164-5. In this case, the fact that a crime had been committed was a necessary element of the crime. The court also indicated that the intent was to give a limiting instruction so severance was not appropriate. RP 165. As the court engaged in the proper analysis, there is no abuse of discretion in denying the severance motion.

The court also instructed the jury that they had to consider each count separately. MMCP 33-67, Instruction 5. A jury is presumed to follow a court's instructions. ***State v. Lough***, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). While no limiting instruction was given, no limiting

instruction was ever proposed by counsel. The court simply read the stipulations at the beginning of the trial. RP 227-8. In fact, the convictions were not referred to again until counsel for Marlow referred to the stipulation in saying that defense had stipulated to the second element of the unlawful possession of a firearm charge. RP 1132. The court engaged in appropriate analysis and did not abuse its discretion in denying the defendants' motion for severance.

b. Defendants received constitutionally effective assistance of counsel as defendants cannot show deficient performance or prejudice.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that "the essence of an

ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect."

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

> First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also ***State v. Walton***, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); ***State v. Denison***, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995); ***State v. Foster***, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the ***Strickland*** test.

> There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Under the prejudice aspect, "[t]he defendant must show that 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. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. ***Strickland***, 466 U.S. at 697, ***Lord***, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. ***McFarland***, 127 Wn.2d at 335 (*citing* ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." ***Strickland***, 466 U.S. at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied,* 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding

circumstances. ***State v. Hayes***, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689.

The court must look at the performance of defense counsel in context of the entire trial. A review of the entire record indicates that both counsel for Marlow and counsel for McDaniel were advocates for their clients. Each counsel made several substantial motions in limine and motions to suppress on behalf of their clients. Defendants' attorneys were successful in getting parts of the jail tape recording redacted. Their attorneys were also successful in limiting the amount of gang testimony that was allowed to be introduced before the jury. They also each made many objections during trial.

The fact that a limiting instruction was not proposed by either defense counsel does not make them ineffective. The stipulations were read at the very beginning of the trial on November 28, 2007. RP 227-8. The jury did not receive the case until December 10, 2007. A substantial amount of testimony was presented to the jury in between those two dates. It is a reasonable tactical decision to not call attention to a stipulation that the jury heard about at the beginning of trial. Defense counsel for Marlow then only briefly brought it up in his closing, told the jury it was a stipulation to the second element of the crime of unlawful possession of a firearm and moved on. The jury did not let the stipulation take over their

deliberations as they spent two days deliberating and after some apparent heartfelt discussions on their part, could not reach a decision and did not find Marlow guilty of attempted murder. RP 1212-14.

Defendants cannot prove that their counsels' performances were deficient or that they were prejudiced by them. Defendants' claims cannot prevail.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DETECTIVE MILLER'S TESTIMONY THAT CERTAIN NICKNAMES WERE ASSOCIATED WITH DEFENDANTS AS IT WAS NOT HEARSAY, WAS NOT TESTIMONIAL, AND WAS PROPER UNDER ER 403.

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

that he or she objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

In ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that an out-of-court testimonial statement may not be admitted against a criminal defendant unless the declarant testifies at trial or is unavailable, and the defendant had a prior opportunity to cross-examine the declarant. ***Crawford***, 124 S. Ct. at 1374. The decision in Crawford was restricted to the use of testimonial hearsay, but "left for another day any effort to spell out a comprehensive definition of 'testimonial.'" ***Crawford***, 124 S. Ct. at 1374. The Court, however, gave guidance on the issue by noting various formulations of the "core class" of testimonial statements at which the Confrontation Clause was directed. These include (1) "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ***Crawford***, 124 S. Ct. at 1364.

In the instant case, the testimony of Detective Miller in front of the jury was as follows:

State: And have you heard the name Tony Guns?

Detective Miller: Yes.

State: And where have you heard that name?

Detective Miller: On that jail phone recordings.

State: Is that one of three talkers, I guess, that was discussing the shooting on 45th?

Detective Miller: Yes.

State: Do you know anybody that uses the name Tony Guns?

Detective Miller: Yes.

State: Who?

Detective Miller: Maurice McDaniel.

.....

State: Do you know anybody else other than Maurice McDaniel that goes by the name of Tony Guns?

Detective Miller: No.

State: Did you hear at any point the name Reese?

Detective Miller: Yes.

State: In association with the phone calls regarding a shooting?

Detective Miller: Yes.

State: Do you know anybody that goes by the name Reese?

Detective Miller: Yes.

State: And who is that?

Detective Miller: Direce Marlow.

.....

State: Do you know anybody else who goes by the name of Reese?

Detective Miller: No.

RP 772-3. Detective Miller did not testify as to any hearsay statements before the jury. Detective Miller testified in front of the jury about his investigation and that he knew the name Tony Guns was associated with defendant McDaniel and Reese was associated with defendant Marlow. The Detective did not relate to the jury any statements made by other people.

The statements by Detective Miller were not testimonial as he testified as to his own personal knowledge. RP 144. Further, even if a hearsay analysis was applied, these statements were not hearsay as they were not used to prove the truth of the matter asserted. Simply identifying that the nicknames were associated with the defendants did not make them guilty of the crimes. All it did was potentially identify them as the speakers on the jail phone recordings. RP 772-3. The jail recordings were in slang. RP 799-800. The jury was presented with Detective Miller's interpretation of what the tape represented but it was up to the jury to draw their own conclusion about what the tape meant, if anything, and whether or not defendants had committed the crimes. RP 799-802. The proper

analysis of this testimony is not under the hearsay or confrontation clause analysis.

Further, during pre-trial motions, the court found that Detective Miller arrived as his conclusion as to the monikers being associated with defendants not based on hearsay, but rather based on his impressions from being immersed in the gang culture. RP 144. The Detective testified that how he came to these conclusions was based on numerous factors. The number that Yarborough dialed from the jail was where Marlow lived. RP 40. A search warrant had been obtained for Marlow's residence in another case and a picture had been found that showed Yarbrough as V-Real and Marlow as Reese. RP 26. Details on the phone conversations, such as Tony Guns living with his grandmother, matched information that Detective Miller knew about McDaniel. RP 27. Detective Miller has also spoken with numerous gang members over a period of time in relation to other matters. RP 26-7. Detective Miller had already learned that McDaniel and Marlow were associated with Yarborough as he had been given information that they were present at the murder Yarbrough was charged with. RP 27. In fact, they had been interviewed in association with that investigation and the phone tapes were pulled based on that investigation. RP 25-6. The defendants were known to Detective Miller through various sources, as well as his own observations and deductions, he connect them with their monikers.

The proper analysis of this testimony is under ER 403. Evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence. The court properly found that the evidence of defendants' nicknames was admissible as to identification. However, in weighing the prejudicial effect on defendants versus the probative effect, the court also properly sanitized the testimony so that the Detective could not testify that defendants were gang members, couldn't testify that they had committed the crimes, and couldn't testify that he had initially learned about defendants through a murder investigation. 11/15/07AM RP 181-3, RP 145, 154-55. The court properly balanced the probative value of the testimony and the source of the testimony against the prejudicial effect on the defendants. The court did not abuse its discretion in allowing Detective Miller to testify as to defendants' nicknames.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PROPERLY ADMITTING EVIDENCE OF FLIGHT BY DEFENDANT MCDANIEL.

As noted above, the admission or exclusion of relevant evidence is within the discretion of the trial court. ***Swan***, 114 Wn.2d at 658. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken

the position adopted by the trial court. ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); ***Rehak***, 67 Wn. App. at 162.

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

"Evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence." ***State v. Bruton***, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). "Flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution." *Id.* The law does not define what circumstances constitute flight and as such, what may be shown as evidence of flight is broad. ***State v. Jefferson***, 11 Wn. App. 566, 571, 524 P.2d 248 (1974).

In the instant case, there was evidence defendant McDaniel tried to flee from officers who sought to arrest him on a warrant. Defendant McDaniel was seen getting into a car with his girlfriend. RP 834, 844. Five marked police cars pulled in behind him. RP 834. When they turned

on their lights and sirens, the vehicle pulled to a stop. RP 834-5. However, when Office Martin got out of the car and began to give McDaniel and his girlfriend instructions, the vehicle pulled back onto the roadway. RP 834. The vehicle ran a red light, traveled at excessive speeds and had to be rammed by a patrol vehicle in order to be stopped. RP 836, 839. McDaniel then got out of the car and refused to comply with officer commands. RP 842. McDaniel had to be physically subdued in order to be taken into custody. RP 842.

While is it is true that McDaniel's girlfriend was the one actually driving the car, flight evidence does not require a specific mode, manner or circumstance. The court must look at the situation presented. The evidence favors flight. McDaniel did not comply with officers when the vehicle was finally forced to a stop. McDaniel's actions are not consistent with someone just along for the ride while his girlfriend drove the vehicle during a high speed chase. His actions are consistent with someone wanting to avoid arrest and prosecution. This is consistent with evidence of flight. The court did not abuse its discretion in following case law and admitting evidence of flight.

4. THE TRIAL COURT DID NOT ERROR IN GIVING THE JURY INSTRUCTIONS 12 AND 14 WHEN DEFENDANT MCDANIEL DID NOT TAKE EXCEPTION TO THEM AND THEY ARE IN ACCORD WITH CURRENT CASE LAW.

A trial court's jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. ***State v. Fernandez-Medina***, 94 Wn. App. 263, 266, 971 P.2d 521, *review granted*, 137 Wn.2d 1032, 980 P.2d 1285 (1999), *citing* ***Herring v. Department of Social and Health Servs.***, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. ***State v. Staley***, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

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

that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. ***State v. Harris***, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963).

Defendant claims that there are errors in two jury instructions: both in the to-convict instruction for attempted murder in the first degree and in the definitional instruction for premeditation. MMCP 33-67 (Instructions 12 & 14). However, as to instruction 12, counsel for McDaniel did not take exception to the instruction. While counsel for Marlow did take exception, he did not purpose an alternative instruction. RP 1084. Rather counsel for Marlow stated he had been playing with some language that should have been added but it had not been distilled to a proposed jury instruction. RP 1084.[3] This is not a sufficient exception to preserve this issue for appeal nor was it made by the defendant now raising the issue on appeal. Further, defendant did not object to instruction 14 at all in the trial court. Defendant has not preserved any exception to these instructions.

However, even if the court were to consider defendant McDaniel's arguments, they are without merit. Defendant's argument that instruction 12, the definition of premeditation, does not sufficiently define the term has been repeatedly rejected by the Washington Supreme Court. The

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[3] In fact, there is no evidence of what language counsel for Marlow was trying to purpose. It was not made part of either the oral or written record in this case.

court has held that the language in WPIC 26.01.01 "adequately stated the rule regarding premeditation." ***State v. Benn***, 120 Wn.2d 631, 658, 845 P.2d 289 (1993). Further, as noted in ***State v. Clark***, 143 Wn.2d 731, 770, 24 P.3d 1006 (2001), the Supreme Court has upheld this instruction on so many occasions that "further challenge to the instruction is frivolous." (*See also* ***In re Personal Restraint of Lord***, 123 Wn.2d 296, 317, 868 P.2d 835 (1994); and ***State v. Rice***, 110 Wn.2d 577, 757 P.2d 889 (1988)). The court used the WPIC instruction that has repeatedly been upheld and embodies the statutory definition of premeditation. There is no evidence of what defense counsel would have proposed as an instruction. There is nothing to suggest that the instruction the court gave was improper. The trial court did not abuse its discretion in giving the jurors instruction 12.

Further, the court properly instructed the jury with the "to convict" instruction on attempted murder in the first degree; instruction 14. MMCP 33-67. The court instructed the jury using WPIC 100.02. Defendant did not take exception to this instruction. However, even if the court chooses to consider defendant's argument, there was no error in giving this instruction.

There are two elements in an attempted crime: "intent to commit a specific crime and taking a substantial step toward the commission of that crime." ***State v. DeRyke***, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003), RCW 9A.28.020(1). WPIC 100.02 includes both of those elements and

was presented to the jury in Instruction 14. MMCP 33-67. Further, the Note on Use for WPIC 100.02 states in relevant part:

> Fill in the name of the crime in elements (1) and (2). .... If the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime. ... Use WPIC 10.01, Intent—Definition, and WPIC 100.05, Attempt—Substantial Step—Definition, with this instruction.

The court did instruct the jury with WPIC 10.01 and WPIC 100.05 using Instructions 10 and 13 respectively. MMCP 33-67. The court also properly instructed the jury as to the elements of murder in the first degree in a separate instruction using Instruction 11. MMCP 33-67. The use of this group of instructions in this manner has been approved by the Supreme Court. *See* ***DeRyke***, 149 Wn.2d at 1003-4. The court's instructions allowed both parties to argue their theories of the case, did not relieve the State of their burden, accurately stated the law and are consistent with case law. The court did not abuse its discretion in giving the jurors instruction 14. There was no error in the giving of these instructions.

5. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT MARLOW WAS AN ACCOMPLICE TO ROBBERY IN THE FIRST DEGREE AS MARLOW PROVIDED AID.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime

beyond a reasonable doubt. ***State v. Rangel-Reyes***, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. ***State v. Gerber***, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), ***State v. Theroff***, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. ***State v. Lubers***, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. ***Theroff***, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Sufficient evidence was presented for the jury to find defendant guilty under accomplice liability. RCW 9A.08.020(3) addresses accomplice liability and in relevant part:

> "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."

More than physical presence and knowledge of the criminal activity of another must be shown to establish a person is an accomplice. ***In re Wilson***, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Defendant must give aid in order to be considered an accomplice. Aid is defined as any assistance given by words, acts, encouragement, support or presence. ***State v. Galista***, 63 Wn. App. 833, 839, 822 P.2d 303 (1992). "A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime." *Id.* "The State need not show that the principal and accomplice share the same mental state." ***State v. Bockman***, 37 Wn. App. 474, 491, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984). As long as the jury is unanimous that the defendant was a participant, it is not necessary that the jury be unanimous as to whether the defendant was a principal or an accomplice where there is evidence of both manners of participation. ***State v. Carothers***, 84 Wn.2d 256, 262, 525 P.2d 731 (1974), *overruled on other grounds in* ***State v. Harris***, 102 Wn.2d 148, 685 P.2d 584 (1984), *see also* ***State v. Munden***, 81 Wn. App. 192, 196, 913 P.2d 421 (1996). The jury was given instructions consistent with the statute and case law. MMCP 33-67, instruction 8, 20.

In the instant case, there was sufficient evidence for the jury to find that defendant Marlow was an accomplice to robbery in the first degree. The victim initially approached the car that contained both defendants. RP 859, 1028. After asking if they had drugs, Marlow, who was driving,

moved the car up the road. RP 862, 909. The victim met the car up the road where McDaniel had opened the door and was armed and ready. RP 863-4, 899. McDaniel's gun was already in his hands when Banks got to the vehicle. RP 864. The evidence is consistent with posturing to commit the robbery. Moving up the road allowed McDaniel the chance to get the gun out and confront the victim. Marlow aided in this part of the robbery.

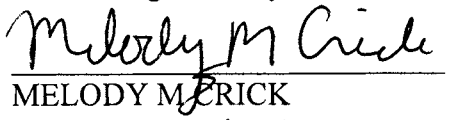
McDaniel then took the money from the victim and proceeded to shot him multiple times. RP 863. The two then sped away from the scene with Marlow driving. RP 459, 870. The time period for this crime was short. The evidence is consistent with Marlow being ready and able to assist McDaniel in the positioning of the vehicle and in driving the getaway car. The jury had sufficient evidence to conclude the Marlow was an accomplice to robbery in the first degree.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm the convictions of both defendants.

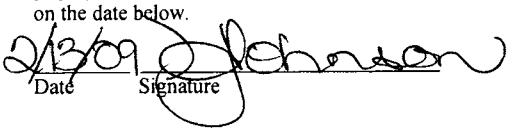
DATED: FEBRUARY 13, 2009

GERALD A. HORNE
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

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

2/13/09 
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