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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

NO. 37381-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICKY V. MAY,

Appellant.

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

The Honorable Stephanie Arend, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
P.O. BOX 2711
VASHON, WA 98070

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A. ASSIGNMENTS OF ERROR

1. Mr. May was denied effective assistance of counsel.
2. The trial court abused her discretion by refusing to entertain Mr. May's motion for withdrawal and substitution of counsel.
3. The trial judge erred as a matter of law by refusing to rule on Mr. May's motion for new counsel.
4. The judge who heard the initial and motion for withdrawal and substitution of counsel abused his discretion by denying the motion.
5. The second judge to hear the motion for withdrawal and substitution of counsel exceeded her jurisdiction by hearing and denying the motion.
6. The state failed to prove beyond a reasonable doubt that Mr. May committed first degree assault against Mr. Phai.

Issues Pertaining to Assignments of Error

1. Was Mr. May denied effective assistance of counsel?
2. Did the trial court abuse her discretion by refusing to entertain Mr. May's motion for withdrawal and substitution of counsel?

3. Did the judge who heard the initial and motion for withdrawal and substitution of counsel abuse his discretion by denying the motion?

4. Did the second judge to hear the motion for withdrawal and substitution of counsel exceed her jurisdiction by denying the motion?

5. Did the state fail to prove beyond a reasonable doubt that Mr. May committed first degree assault against Mr. Phai?

6. Did the trial judge err as a matter of law by refusing to rule on Mr. May's motion for new counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

Ricky V. May was charged by corrected information with two counts of assault in the first degree and with a drive-by shooting. CP 11-12. Following a jury trial he was convicted as charged. CP 46-52, 54-57. This appeal timely follows. CP 74.

2. Substantive Facts

a. Motion for Withdrawal and Substitution of Counsel.

On July 3, 2007, before trial began, at the request of Mr. May, defense brought a motion to withdraw as counsel. Judge Culpepper

heard and decided the motion. (RP 1-7 July 3, 2007). Judge Culpepper asked Mr. May "What's the problem?". Mr. May stated: "I feel like my lawyer is not representing me. He lied to me and expressed to me to take a deal, and I feel that he's not representing me to the fullest" (RP 4 July 3, 2007). The Court responded that it did not understand. Mr. May continued: He's pressuring me to take a deal and telling me to tell on somebody or something, and I'm not trying to do that.". Id. Mr. May indicated in response to the court that Mr. Thoenig had not gone over the standard sentence if convicted. (RP 4 July 3, 2007). The court proceeded to obtain the sentence information and inform Mr. May of his sentence range. (RP 4 July 3, 2007).

Mr. Thoenig indicated that communication was open from his side but not from Mr. May's. (RP 5 July 3, 2007). The state objected to the motion because the case was "old". (RP 6 July 3, 2007). The judge acknowledged that Mr. May "felt Mr. Thoenig had lied to him". RP 6 July 3, 2007).

Following this acknowledgment, Judge Culpepper denied the motion stating that "[t]his is a 367-day-old case. It's been going on for 11 months. All I heard is Mr. May doesn't like the potential penalties he's looking at, so I haven't seen that there's any kind of complete

breakdown here." (RP 6 July 3, 2007). Mr. May never mentioned his sentence range, rather the court asked Mr. May if Mr. Thoenig had discussed the standard range with him, to which Mr. May responded "no". (RP 4 July 3, 2007).

On July 16, 2007, during the 3.5 hearing defense again moved to withdraw citing a complete breakdown in communication. RP 30. Judge Arend refused to entertain the defense motion for withdrawal and substitution of counsel, and insisted that if defense wished to raise the motion, it must be presented to Judge Stolz (even though Judge Culpepper ruled on the prior motion to withdraw). (RP 6 July 3, 2007); RP 30, 36, 39. Defense counsel informed Judge Arend that he did not believe that Judge Stolz had jurisdiction to entertain the motion after trial commenced. RP 38.

On July 18, 2007, Mr. Thoenig explained to Judge Stolz that Mr. May would not communicate with him and that Mr. Thoenig could not provide adequate assistance without the ability to communicate with Mr. May. (RP 4-6 July 18, 2007).

Judge Stolz, asked Mr. May if he had anything to say, to which he shook his head. (RP 5 July 18, 2007). The Court denied the motion without inquiring of Mr. May why he had lost confidence in his

attorney. Without any basis, Judge Stolz assumed that Mr. May was choosing not to participate because he "wishes to act like a three-year old, holding his breath and not getting the toy that he wants, that's his choice.....There is nothing to indicate that Mr. May is anything other than being uncooperative[.]" (RP 6 July 18, 2997).

Judge Stolz had no idea why Mr. May was unable to communicate with Mr. Thoenig because she did not inquire.

b. Trial Facts

Viet Ngo traded use of his black Mistubishi for drugs to a guy named "Bolo". RP 184, 210. Ngo testified that he did not know the guy who was with Bolo during the trade, but that he was positive that Mr. May was not that guy. RP 186, 191. Later he testified that Mr. May was with Bolo during the trade. RP 210. Ngo was arrested on a material witness warrant and only agreed to testify if given immunity. RP 193.

Saroeun Phai testified that on January 11, 2006 he was working on his Cadillac with his cousin when he saw someone in a black Mitsubishi point a gun in his direction. Mr. Phai jumped right and his cousin jumped left and his cousin was shot in the leg. RP 222. Mr. Phai saw a fat girl with long hair driving the Mitsubishi. RP 224, 230.

He did not see the shooter but knew the gun came from the passenger. He saw nothing else because he jumped down when he saw the gun and looked at his cousin who was shot. RP 225. The car was moving very slowly. RP 234.

The Cadillac had bullet holes in it that were likely from a prior unrelated shooting. RP 226. Mr. Phai thought that a bullet went through the window during this shooting. RP 228. Mr. Phal testified that neither he nor his brothers were gang members and that there had never been any gang activity at his home 6462 "C" street. RP 236-37. Mr. Phai also stated that his cousin was not a gang member and that the gang letters on the house were there before he and his brothers moved in. RP 237-240.

Andrew Stansbury, a student with learning disabilities and special education, who admitted to having trouble with his memory testified that he knew Mr. May from some years earlier in middle school. RP 354, 365-66, 387. Mr. Stansbury testified that on January 11, 2006, he was walking with a friend when he saw Mr. May in a car and heard 2 gunshots. RP 354-56. Mr. Stansbury did not see anyone shooting a gun. RP 363. Mr. Stansbury testified that he saw Mr. May driving the car, but that he could not determine if the driver had long

hair or if he had a mustache or if he was Asian; he could just determine that the person was "of color". RP 357, 385-86. Mr. Stansbury was the only person to identify Mr. May as the driver, albeit equivocally. RP 339.

Several other witnesses observed the drive-by shooting but could not identify the occupants of the Mitsubishi. Gary Noel a neighbor saw a Toyota or Honda out of the corner of his eye before hearing gunshots. RP 490-93. Mike Reeder, a neighbor testified that he saw a woman with a "chunky" face driving the black Mitsubishi very slowly and then heard gun shots. RP 294-295. Mr. May was described as 5'2" and very skinny. RP____.

The forensic evidence revealed that the 5 shell casings found on the ground in front of the "C" street house were from the same gun. RP 515. The two bullets found, including the one in Mr. Phal's pant leg. Both were inconsistent with Mr. Phal's leg wound where a bullet passed through Mr. Phal's without hitting bone. RP 526, 529-30.

Over objection, John Bair a Tacoma Police Detective testified that he was familiar with Mr. Phal's brothers as being LOC'd Out Crip members. RP 573. Mr. Bair also testified that he believed that the house was associated with the LOC'd Out Crips.

Id. Mr. Bair testified that he had seen letters associated with the house some time after the shooting incident and based on that post-incident information, determined that the house was gang-related. RP 575.

Mr. Bair also testified that Mr. May admitted to being the driver during the drive-by. RP 590. Mr. Bair was aware that Mr. May's house had been the victim of more than one drive by shooting. According to Mr. Bair, Mr. May informed him whom he thought was responsible for those shootings. RP 591. Neither Mr. Phal nor Mr. Phai was identified as the shooter, but according to Mr. Bair Mr. May said that he drove the car to Mr. Phal's house to do the shooting. RP 593, 596.

According to Mr. Bair, Mr. May shook his head up and down in response to Mr. Bair stating that the drive-by was in retaliation for someone shooting his parents' home. RP 594-95. Mr. May never stated nor implied that he and Mr. Phal and Mr. Phai were involved in any sort of gang war.

C. <u>ARGUMENT</u>

1. DUE TO A COMPLETE BREAKDOWN IN COMMUNICATION, TRIAL COUNSEL WAS INEFFECTIVE WHICH DENIED

APPELLANT HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

Mr. May was denied his Sixth Amendment right to counsel when Judge Culpepper and Judge Stolz denied his repeated motions to substitute counsel and when Judge Arend refused to entertain the motion. Whether a defendant's dissatisfaction with his court-appointed counsel justifies the appointment of new counsel is a matter within the discretion of the trial court. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 140 L. Ed. 2d 323, 118 S. Ct. 1193 (1998).

The right of an indigent defendant in a criminal trial to have the assistance of counsel is a 'fundamental right' essential to a fair trial. Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). A defendant's Sixth Amendment right to effective assistance of counsel is violated when the relationship between he and his attorney completely collapses. In re Personal Restraint of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001) (citing United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998)).

"A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel,

such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." Stenson, 132 Wn.2d at 734. The purpose of the Sixth Amendment is to protect the right to an effective advocate "rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Stenson, 142 Wn.2d at 726 (citing Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

To determine whether an irreconcilable conflict exists, the Washington Supreme Court has adopted the Ninth Circuit's three-part test. The factors include "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." Stenson, 142 Wn.2d at 724 (adopting the test set forth in Moore, 159 F.3d at 1158-59). In Mr. May's case, none of the three judges presented with Mr. May's motion for **any** new attorney but Mr. Thoenig, (not a demand for an attorney of his choosing) made an adequate inquiry into the reasons for the motion.

An inquiry is adequate if it "'might ease the defendant's dissatisfaction, distrust, and concern.'" United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001) (quoting United States

v. Garcia, 924 F.2d 925, 926 (9th Cir. 1991)). The inquiry must also provide a "'sufficient basis for reaching an informed decision.'" Adelzo-Gonzalez, 268 F.3d at 777 (quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986)). Prior to ruling on a motion to substitute counsel, the inquiry must "examine both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." Stenson, 142 Wn.2d at 724. Under United States v. Wadsworth, 830 F.2d 1500, 1511 (9th Cir. 1987), special counsel should be appointed to represent the defendant's interest as soon as it becomes apparent to the court that the discord between the attorney and the client has caused the attorney to not adequately represent the defendant.

In Mr. May's case, despite clear evidence of a complete breakdown in communication between Mr. Thoenig and Mr. May, three separate courts failed to make an adequate inquiry as required under Stenson, 142 Wn.2d at 724. On three occasions defense counsel moved to withdraw as attorney of recording indicating that his client wished to fire him and that he and Mr. May were unable to communicate. The first occasion was prior to trial

before Judge Culpepper (RP 1-7. July 3, 2007); the second occasion was before trial Judge Arend who refused to hear the motion (RP 36, 39); and the third occasion was before Judge Stolz who made unfounded assumptions without any inquiry. (RP 3-6 July 18, 2007 1-7).

Judge Culpepper asked, "what's the problem" (RP 3 July 3, 2007); Judge Arend refused to hear the motion (RP 36, 39); and Judge Stolz, without any inquiry, decided that Mr. May was acting like a "three year old holding his breath" (RP 7 July 18, 2007).

Mr. Thoenig made a record before each judge that Mr. May wanted to fire him, did not trust him, was unable to communicate with him and wanted any attorney but Mr. Thoenig. RP 5, 6, 30, 108, 125. The record is clear; there was a complete breakdown in communication which the court should have inquired into more thoroughly or appointed special counsel to determine if Mr. May's claims were valid. Because the trial court and the other courts did not make such an inquiry, Mr. May was denied his Sixth Amendment right to counsel. This Court should reverse and remand for a new trial with the appointment of new counsel. Stenson, 142 Wn.2d at 724.

(a) Trial Court Violated CrR 3.1(e)

In addition to violating Mr. May's constitutional right to counsel, the trial court also violated Mr. May's statutory right to counsel. CrR 3.1(e). CrR 3.1(e) provides:

> (e) *Withdrawal of lawyer* Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown.

A simple lack of rapport between attorney and client is not a basis for withdrawal of counsel, even where the client and attorney agree that withdrawal is preferred. However, a complete breakdown of communication which may lead to an unjust verdict is considered a good and sufficient reason for withdrawal under CrR 3.1(e). State v. Hegge, 53 Wn. App. 345, 351, 766 P.2d 1127 (1989).

In Hegge, the client had not paid his attorney, attorney and client trial strategies were incompatible and the attorney was required to testify as a witness in court. Under those circumstances, the Court of Appeals determined that a complete breakdown occurred. Hegge, 53 Wn. App. at 350-51. The Court further noted

that the attorney's motion to withdraw was made prior to trial and would not have resulted in delay as Mr. Hegge repeatedly indicated that he was ready to proceed. Hegge, 53 Wn. App. at 351, citing, Lewis v. Lane, 816 F.2d 1165, 1170 (7th Cir. 1987); United States v. Main, 443 F.2d 900, 901 (9th Cir.), cert. denied, 404 U.S. 958 (1971). Ultimately, the Court concluded that "to force" the attorney "to continue in any capacity would be a miscarriage of justice for both [] [the attorney] and Mr. Hegge" Hegge, 53 Wn. App. at 351.

In Mr. May's case, before trial, and during the 3.5 hearing counsel moved to withdraw as counsel citing a complete inability to communicate with Mr. May. RP 5, 6, 30, 108, 125. Counsel made clear that he was not prepared because he had absolutely no ability to communicate with Mr. May and could not provide effective assistance of counsel without an ability to communicate with Mr. May. Id. Counsel informed the court that at one time he was able to communicate with Mr. May, but no longer. RP 7.

After the trial court refused to entertain the motion to withdraw, Mr. May communicated to his attorney by asking him to renew the motion to withdraw. RP 30. Trial counsel again reiterated that "there is a total breakdown in communications" and that

counsel could not provide effective assistance without communication with Mr. May. RP 30, 32.

Trial counsel informed the Court that Mr. May was requesting any attorney but the current trial counsel, which is distinct from requesting a specific attorney. RP 32. Trial counsel also indicated that the case was old and that there would be no prejudice from a change of counsel because all of the witnesses were available. RP 33.Judge Arend refused to entertain the motion to withdraw and referred counsel back to Judge Stolz who initially denied counsel's motion to withdraw. RP 37.

Judge Stolz denied the renewed motion to withdraw. (RP 7 July 18, 2007) RP 108. Counsel argued before the trial court that judge Stolz no longer had jurisdiction because trial had commenced. RP 108.

In Mr. May's case, as in Hegge, it was a miscarriage of justice to deny trial counsel's motions to withdraw as trial counsel. Under CrR 3.1(e) there was good and just reason to permit withdrawal: a complete breakdown in communications. Id.

2. THE TRIAL JUDGE BOTH ERRED AS A MATTER OF LAW AND ABUSED

HER DISCRETION BY REFUSING TO RULE ON THE MOTION TO WITHDRAW.

Since 1960, the Washington State Supreme Court has held subject to limited exception[1] that once a trial commences, the trial court may not substitute another judge to make a ruling without the express agreement of the defendant. State v. Johnson, 55 Wn.2d 594, 596, 349 P.2d 227 (1960):

> As a rule, a judge cannot finish the performance of a duty already entered upon by his predecessor where that duty involves the exercise of judgment and the application of legal knowledge to, and judicial deliberation of, facts known only to the predecessor. *Durden v. People, 192 Ill. 493, 61 N. E. 317*; *Commonwealth v. Thompson, supra,* 30 Am. Jur. 25, § 39.

State v. Gossett, 11 Wn. App. 864, 871, 527 P.2d 91 (1974), quoting, State v. Johnson, 55 Wn.2d 594, 596, 349 P.2d 227

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[1] A different judge than the one who hears the presentation of the evidence may preside over the empaneling and voir dire of the jury, and a substitute judge for the judge who had conducted the trial may accept the verdict of the jury and preside over the polling of the jury after the verdict has been returned.

Gossett, 11 Wn. App. at 571-72, citing, King v. People, 87 Colo. 11, 285 P. 157 (1930); State v. McClain, 194 La. 605, 194 So. 563 (1940); Commonwealth v. Thompson, 328 Pa. 27, 195 A. 115, 114 A.L.R. 432 (1937); Bellah v. State, 415

(1960). In Mr. May's case, trial Judge Arend had commenced the case, made rulings and heard testimony.

> [I]n any case, the substitution of judges during a criminal prosecution should be permitted only under most extraordinary circumstances, where the due administration of justice makes it imperative, and then only when no prejudice can result.

Gossett, 11 Wn. App. at 871-72.

In Gossett, the trial judge left the court house after the jury began deliberating. When the jury sent a note, over the objection of the defense, another judge responded. The Court of Appeals determined that this was error and remanded for a new trial. Gossett, 11 Wn. App. at 870-72.

As in Gossett, Judge Stolz's decision to deny the motion for withdrawal of counsel required the exercise of judgment and judicial deliberation. Mr. May did not agree to have another judge decide this motion, and because the trial had already begun before Judge Arend, it was prejudicial error to allow Judge Stolz to decide the motion over Mr. May's objection. As in Gossett, this Court should remand for a new trial.

(a) Abuse of Discretion

S.W.2d 418 (Tex. Crim. App. 1967).

When a trial judge refuses to exercise her discretion, she abuses that discretion. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005). In May's case, it was for the trial judge alone to determine whether to appoint new counsel for Mr. May.

> It is for the **trial court** to decide, in its discretion, whether the dissatisfaction of the indigent accused with his court-appointed counsel would merit the appointment of new counsel.

(Emphasis added) State v. Lytle, 71 Wn.2d 83, 84, 426 P.2d 502 (1967), citing, United States ex rel. Allen v. Rundle, 233 F. Supp. 633 (E.D. Pa. 1964). In Mr. May's case, Judge Arend, the trial judge refused to exercise her discretion.

Judge Arend's refusal to decide the motion was an abuse of discretion because it was a complete failure to exercise discretion. State v. Elliott, 121 Wn. App. 401, 408, 88 P.3d 435 (2004). For example, the failure to hear expert testimony was a failure to exercise discretion. Elliott, 121 Wn. App. at 408. The failure to determine whether defendant was a security risk before ordering "shock box" was abuse of discretion. State v. Fleiger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998).

In State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214 (1995) the trial court's failure to exercise discretion in determining whether offenses constitute the same criminal conduct was an abuse of discretion. In State v. Tharp, 96 Wn. 2d 591, 598, 637 P.2d 509 (1983) the trial court abused its discretion by failing to exercise discretion in admitting 404(b) evidence. In Tacoma Recycling v. Capitol Material, 34 Wn. App. 392, 396, 661 P.2d 609 (1983), that trial court abused its discretion by failing to exercise discretion in denying a motion for a new trial.

3. THE STATE FAILED TO PROVE THE ELEMENT OF INTENT TO INFLICT GREAT BODILY HARM IN THE FIRST DEGREE ASSAULT CHARGES INVOLVING MR. PHAI.

As charged in May's case, to establish first degree assault, the state had to prove beyond a reasonable doubt intent to inflict great bodily harm. RCW 9A.36.011. A person acts with intent when he acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a). "Evidence of intent . . . is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats."

State v. Ferreira, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993) (quoting State v. Woo Won Choi, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), review denied, 114 Wn.2d 1002 (1990)).

2 RCW 9A.36.011 states in pertinent part:

> "(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> "(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; . . .".

Id.

In May's case, there were no previous threats toward Mr. Phal or Mr. Phai, and no allegations that either of them were gang members. Only Mr. Bair believed that Mr. Phal's brother's were gang members and they lived in the same house with Mr. Phal. When construing all evidence presented at trial in favor of the State, the evidence was insufficient for the jury to find that the unidentified shooter intended to inflict great bodily harm upon Mr. Phai.

In Mr. May's case, Mr. Phai testified that he saw a fat girl driving the car and saw a gun drawn from the passenger. As soon as he saw the gun he ran. RP 222-225. The unidentified shooter

did not shoot at him nor did anyone shout any threats toward Mr. Phai or Mr. Phal. Mr. Phai testified that there were likely bullet holes in the Cadillac that he and his cousin were working on before, because that same car was shot at while in front of the same house on a prior occasion. RP 226-228. Mr. Phai never saw the shooter and is not a gang member. RP 230.

Evidence of pointing of a gun at Mr. Phai without shooting at him does not alone establish beyond a reasonable doubt evidence of an intent to inflict great bodily harm. Ferreira, 69 Wn. App. at 469-70. Thus, there was insufficient evidence to convict Mr. May of first degree assault against Mr. Phai. There was however likely sufficient evidence to convict him of second degree assault under RCW 9A.36.021(1)(c) because he assaulted Mr. Phai with a deadly weapon. RCW 9A.36.021(1) provides, "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree ... *(c)* Assaults another with a deadly weapon." Id.

Mr. May's case is similar to State v. Ferreira, where an occupant of a car during a drive-by shooting was aware of the intent to commit the crime and was aware that the shooter wanted.

to shoot at a house that was "likely apparent that the house was occupied". Ferreira, 69 Wn. App. at 469. In Ferreira, the Court held that the evidence did not support a finding that the shooter acted with intent to inflict great bodily harm, but it did support a finding that they intended to create apprehension or fear to the likely occupants of the house and were therefore guilty of second degree assault. Ferreira, 69 Wn. App. at 469-70, citing, State v. Austin, 59 Wn. App. 186, 193, 796 P.2d 746 (1990). The trial court in Ferreira, instructed the jury as to second degree assault as a lesser included offense and the Court of Appeals reversed and remanded for re-sentenencing reducing each first degree assault charge to a second degree assault charge. Ferreira, 69 Wn. App. at 474.

Following, Ferreira, this Court should direct the entry of a verdict because the trial court instructed on second degree assault and there was sufficient evidence of the lesser included crime of assault in the second degree against Mr. Phai. See State v. Gamble, 118 Wn. App. 332, 336 n.4, 72 P.3d 1139 (2003, aff'd in part, rev'd in part, 154 Wn.2d 457, 114 P.3d 646 (2005)).

4. MR MAY DENIED HIS RIGHT TO A FAIR TRIAL BY THE INTRODUCTION OF GANG-RELATED EVIDENCE

UNDER 404(b) WHERE THE EVIDENCE WAS IRRELVANT AND OVERLY PREJUDICIAL BECAUSE IT FAILED TO ESTABLISH THAT EITHER MR. MAY OR THE VICTIMS WERE GANG MEMBERS.

Prior to trial, the State sought to admit evidence under ER 404(b) regarding gang affiliation to prove motive. RP 121-22. The court admitted the evidence over defense objection. RP 170. Officer Ryan Larsen testified over objection to working in the gang unit. RP 537. On January 28, 2006, Larsen's sole role was to identify Mr. May if he came out of the house under surveillance at 6431 Tacoma Ave. S. RP 536-537. Larsen was never able to identify Mr. May as the person who exited that location. RP 538.

Detective John Bair interviewed Mr. May in custody. RP 578. Bair never interviewed Mr. Phal, but he did interview Mr. Phal's brothers, the occupants of the house on "C" street. RP 572. Mr. Bair testified that the brothers were LOC'D Out Crips and that Mr. Bair knew that the house was associated with the LOC's. RP 593. Mr. Bair also testified over objections on grounds of relevance that two days after the shooting incident he saw the letters LOC on a pillar of the house. RP 574-75.

Mr. Bair testified that he asked Mr. May if he understood his rights from past cases. Defense objected and asked for a mistrial which the court denied. RP 579-80. The trial judge agreed that the comment was impermissible but denied the motion because counsel failed to object to a comment by the officer that Mr. May believed that he had an outstanding marijuana issue. RP 586.

Initially during the interview, Mr. May denied any involvement in the shooting. Later during the interview, according to Mr. Bair, Mr. May stated that he drove the car during the drive-by shooting and might have been involved in retaliation for the shooting up of his parents' home. RP 596-98.

The prosecutor through Mr. Bair elicited that Mr. Bair was unable to get Mr. May to admit that "Bolo" was the shooter. The defense objected on grounds that this was an impermissible comment on the evidence. The court sustained the objection but refused to grant a mistrial. RP 599-605.

The admissibility of the evidence is governed by ER 404(b). The 404(b) analysis is a three-part process for the Court. First, the Court must identify the purpose for which the evidence is offered and it must be a non propensity purpose. Next the Court must

consider its relevance and, third, the Court must balance on the record the probative value against the prejudicial impact. State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050 (1995).

Appellate courts review a trial court's evidentiary rulings and the denial of a motion for a mistrial for abuse of discretion. State v. Cronin, 142 Wn.2d 568, 585, 14 P.3d 752 (2000); State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Appellate courts will overturn the denial of a motion for a mistrial only where "there is a 'substantial likelihood' th[at] prejudice affected the jury's verdict." Russell, 125 Wn.2d at 85. A mistrial should be granted when no other curative measures can be taken to ensure a fair trial. Id. Issues not argued are deemed abandoned. State v. Myers, 6 Wn. App. 557, 573, 494 P.2d 1015 (1972); see State v. Mora, 110 Wn. App. 850, 858, 43 P.3d 38 (2002).

Character evidence is generally not admissible to prove conformity therewith. ER 404(a)(1). Similarly, evidence of "other crimes, wrongs, or acts" are not admissible to show a defendant is a "criminal type" and is likely to have committed the crime charged. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); ER 404(b). ER 404(b) evidence may be admitted for purposes such as

motive and intent. Campbell, 78 Wn. App. at 821; ER 404(b). The court must identify the purpose for its admission, whether it's relevant, and whether it's more probative than prejudicial. Campbell, 78 Wn. App. at 821. The court may instruct a jury to disregard improperly admitted evidence and the jury is presumed to follow the instruction. Russell, 125 Wn.2d at 84.

In May's case, there was no evidence that Mr. May, Mr. Phal or Mr. Phai were gang members. The sole evidence regarding gangs related to Mr. Phal's brothers and their house. The state's introduction of the gang evidence served to impermissibly implicate Mr. May by association in an attempt to demonstrate that since the house was associated with a gang and Mr. Phal's brothers were gang members, then Mr. May must have participated in the shooting in retaliation for his parents' home being shot at during an earlier time. Mr. Bair made the statement regarding retaliation, and according to Mr. Bair, Mr. May assented non-verbally. This is quite distinct from making a statement regarding gang affiliation.

The court abused its discretion in allowing the State to introduce Mr. Bair's testimony. Campbell, 78 Wn. App. at 821-22. Moreover, Mr. Bair's testimony was not based on his experience

and training but rather was based on the statements of others. See ER 801(c). Mr. Bair testified to that Mr. May admitted to his participation as the driver during the shooting in retaliation for a shooting at his parents house. Mr. Bair had no independent knowledge of this assertion.

Additionally, the fact that there were gang symbols on a pillar of the house after the shooting is irrelevant, as was the fact that Mr. Phal's brothers were gang members because Mr. Phal's brothers were not involved in this incident.

Finally, the trial judge failed to engage in a complete 404(b) analysis. In Campbell, the trial court carefully evaluated the evidence and determined that the evidence of the defendant's admitted gang affiliation was relevant and highly probative to show motive and not overly prejudicial. Campbell, 78 Wn. App. At 821-22.

In May's case, unlike in Campbell, there was no evidence that either of the victims or the defendant were gang-members. Rather the only evidence of gang association involved the victim's brothers and their house. As such, it cannot be said that Bair's speculation that the drive-by shooting was gang-related was relevant and probative to

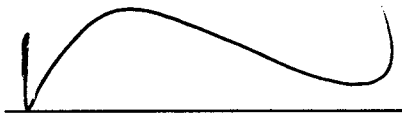
show motive. Rather, the impact was overly prejudicial. D. CONCLUSION

Mr. May was denied his right to due process when the trial judge failed to inquire into the extent of the breakdown in communication between Mr. May and Counsel. This demand a new trial. Similarly, the introduction of overly prejudicial gang evidence requires reversal and remand for a new trial. Finally, the state failed to prove all of the elements of assault in the first degree involving Mr. Phai, this requires a reversal and remand for a reduction in the assault charge against Mr. Phai to assault in the second degree.

DATED this 11th day of August 2008.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the

Pierce County Prosecutor 930 Tacoma Ave S. Rm. 946 Tacoma, WA 98492 and Ricky May DOC# 315692 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 98326-9724 a true copy of the document to which this certificate is affixed, On August 12, 2008. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

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