

No. 39598-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,
Respondent

v.

MIKE ROBERT MCCREVEN
Appellant

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 08-1-01749-6
The Honorable Brian Tollefson, Presiding Judge

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COURT OF APPEALS
DIVISION II
10 SEP 20 PM 4:32
STATE OF WASHINGTON
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A. **ASSIGNMENTS OF ERROR.**

Assignment of Error No. 1.

The trial court erred in admitting irrelevant prejudicial evidence that infringed on Mr. McCreven's constitutionally protected rights of free speech and association.

Assignment of Error No. 2.

The State committed prosecutorial misconduct which deprived McCreven of a fair trial.

Assignment of Error No. 3.

The trial court's denial of his motions to dismiss denied Mr. McCreven his right to a fair trial and was an abuse of discretion.

Assignment of Error No. 4.

Juror misconduct deprived Mr. McCreven of his right to a fair trial.

Assignment of Error No. 5.

The trial court abused its discretion in denying Mr. McCreven's motion for a separate trial.

Assignment of Error No. 6.

The trial court erred in sealing the jury questionnaire without conducting the required analysis.

Assignment of Error No. 7.

Instruction 34, the "To Convict" instruction for felony murder in the second degree, omitted the essential element that the State must prove the absence of self-defense beyond a reasonable doubt.

Assignment of Error No. 8.

Instruction 24, the "Justifiable Homicide" instruction, did not make the subjective standard of standing in the defendant's shoes manifestly clear.

Assignment of Error No. 9.

Instruction 15, defining Recklessness, is an omission or misstatement of the law, effectively relieving the State of its burden to prove every element of an offense violates due process and is reversible error.

Assignment of Error No. 10.

The identification procedure used in this case violated due process because it was impermissibly suggestive in several respects and the totality of the circumstances does not establish that Ford's identification of McCreven was reliable.

Assignment of Error No. 11.

There is not sufficient evidence to convict Mr. McCreven for murder in the second degree; either as a principal or an accomplice.

Assignment of Error No. 12.

In sentencing Mr. McCreven to murder in the second degree the State erred in the calculation of his offender's score. In calculating

Assignment of Error No. 13

Cumulative error deprived Mr. McCreven a fair trial.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred in admitting irrelevant and prejudicial evidence which resulted in violating Mr. McCreven's protected rights of free speech and association? (Assignment of Error No. 1)
2. Whether prosecutorial misconduct deprived Mr. McCreven of his right to a fair trial by violating his right to silence during closing argument, misstating the law, repeatedly violating the court's rulings in limine, coaching witnesses, and improperly questioning witnesses? (Assignment of Error No. 2)
3. Whether the trial court erred in denying his motions to dismiss on the grounds that CrR 8.3(b) standard was not applied, and the courts' application of insufficient and ineffective curative instructions prejudiced jury deliberations? (Assignment of Error No. 3)
4. Whether juror misconduct deprived Mr. McCreven of his right to a fair trial? (Assignment of Error No. 4)
5. Whether the trial court abused its discretion in denying Mr. McCreven's motion for a separate trial? (Assignment of Error No. 5)

6. Whether the trial court erred in sealing the jury questionnaire without conducting the required analysis? (Assignment of Error No. 6)
7. Whether Jury Instruction 34 omitted adequate, essential, and required elements resulting in structural errors that prejudiced the jury's deliberations. (Assignment of Error No. 7)
8. Whether Jury Instruction 24, "Justifiable Homicide" instruction, was presented by the court to the jury as a inherently objective standard, rather than emphasizing the subjective nature of the instruction in which the jury must "stand in the shoes of the accused," when considering the accused actions. (Assignment of Error No. 8)
9. Whether Jury Instruction 15, defining "Recklessness," lead the jury to believe the State was relieved the of its burden to prove Mr. McCreven recklessly inflicted substantial bodily harm. (Assignment of Error No. 9)
10. Whether the trial court erred in admitting Shannon Ford's in court and out of court identification of Mr. McCreven when Ms. Ford's recollection was neither reliable nor specific? (Assignment of Error No. 10)
11. Whether there is sufficient evidence to convict Mr. McCreven of murder in the second degree as either a principal or accomplice? (Assignment of Error No. 11)
12. Whether the trial court erred in calculating his offender score? (Assignment of Error No. 12)
13. Whether cumulative error deprived Mr. McCreven of a fair trial? (Assignment of Error No. 13)

B. STATEMENT OF THE CASE.

Procedural Facts

Mr. McCreven was charged on April 9, 2008 by Original Information and by Amended Information filed on March 13, 2009 with Felony Murder in the

Second Degree with a deadly weapon enhancement and one count of Assault in the Second Degree also with a deadly weapon enhancement. CP 1-2, 59-60.

Prior to trial, Mr. McCreven voluntarily agreed to provide a buccal swab for DNA testing. CP 48-49. The trial court also granted Mr. McCreven's motion for severance/prohibition of joinder of Count III (Unlawful Possession of Firearm in the First Degree charge). CP 39-46, 51-58, 61-62; RP 3/6/09 p. 14. On January 28, 2009. The trial court denied Mr. McCreven's pretrial motions for mandatory and discretionary severance. CP 47; RP 2/6/09 p.2; RP 3/6/09 p. 3, 39; RP 4/17/09 p. 159. The motion for discretionary severance was renewed throughout the trial and at the end of the case and all were denied. RP 1345, RP6/4/09 p. 38-42.

The court heard argument regarding the issues raised in Mr. McCreven's trial brief and motions in limine. CP 70-88. The Court excluded testimony referring to Dana Beaudine as a "victim", also excluded testimony regarding weapons recovered from the homes of the co-defendant/co-appellants, and ruled that that evidence regarding motorcycle club membership would be limited to items pertaining to clothing allegedly worn the night of April 5, 2008. RP 137-138, 134, 128. The trial court denied Mr. McCreven's motion to exclude in court and out of court identification. CP 89-112. RP 4/20/09 p. 58.

On April 15, 2009 Defense Counsel filed its response to the State's motions in limine and sought to introduce evidence of Mr. Beaudine's violent reputation and drug use. CP 114-123. The court excluded evidence of Beaudine's drug use (RP

4/20/09 p. 81) and restricted character evidence to reputation for quarrelsome or violent behavior, but would not allow evidence regarding specific instances, such as that proffered by the defense in its offer of proof of Ms. Hutt's testimony. RP 4/20/09 p.85-87, 94. Defense attempts to modify this ruling after Ms. Ford testified about Beaudine being a happy and social person (RP 1000) and the court admitted an in life photo (RP 973) that showed Beaudine in child's party hat at a child's birthday party were unsuccessful. RP 2395-2400, 2505-21.

The order to seal juror questionnaires was filed on April 13, 2009. CP 113. On May 5, 2009 Defense Counsel filed a motion to dismiss for prosecutorial misconduct and discovery violations. CP 124-137. On May 21, 2009, at the end of the State's case in chief Defense Counsel for Mr. McCreven argued a motion to dismiss for insufficiency of the evidence. RP 2278 – 2283. The motion was also denied. RP 2303. During the trial several motions to dismiss or for a mistrial were made after repeated violations of the court's pretrial rulings, all were denied. RP 1502, 1507, 1597. Again on June 2, 2009, Defense Counsel filed a motion to dismiss pursuant to CrR 8.3(b). CP 138-149. It was also denied.

Another defense motion to sever was made and denied on June 1, 2009. RP 2311 – 2313. On June 4, 2009, Defense Counsel renewed its motion to sever at the end of the State's case and also renewed its motion to dismiss based on prosecutorial misconduct. RP 6/4/09 p. 38-53. These motions were denied without any findings of fact or conclusions of law. RP 6/4/09 p. 42, 53. On June 5, 2009, Defense Counsel

filed its proposed jury instructions as well as supplemental proposed jury instructions. CP 165-217, 151-164, CP 314-315. 316-319.

On June 15, 2009 Mr. McCreven was found guilty of Murder in the Second Degree with a deadly weapon enhancement and not guilty of Assault in the Second Degree as charged in Count II. CP 309-311. Following the verdict, Defense Counsel filed a motion for arrest of judgment, new trial and/or relief from judgment and supplemented this brief with additional authority on July 20, 2009. CP 320-332. This motion was denied. CP 333. On this same date an order on the pre-trial motions in limine was also filed. CP 333-335.

Mr. McCreven disputed the State's offender score calculation and after argument, the trial court Mr. McCreven was sentenced to 269 months. CP 337-350, 354-368. On August 19, 2009 Mr. McCreven's notice of appeal was timely filed as well as the order of indigency. CP 377-392, 369-371.

Substantive Facts

On April 5, 2008, after enjoying a spaghetti dinner at Rebecca Dobiash's residence in Yelm, Mr. McCreven and his friend Jim Stilton rode their motorcycles to the Bulls Eye Sports Lounge in Spanaway to meet up with several other members of the Hildago Motorcycle Club. RP 1489-1491. According to Rebecca Dobiash's testimony both Mr. McCreven and Mr. Stilton were wearing their riding leathers – black leather jackets and black leather chaps. RP 1490. Mr. McCreven was wearing a red bandana she had made for him. RP 1490, 1492.

She indicated that Mr. McCreven rode with several friends in a club called the Hidalgos as well with others not in the riding club, including Jim Stilton and Reyna Blair and Vince James. RP 1480, 1491, 1494. The club did things together like barbeques, toy runs and social events with wives and significant others. RP 1491. Mr. McCreven was employed at Ft. Lewis and was an airplane painter for McCormick Air. RP 1486. The last plane he painted was red and yellow. RP 1488-89. Ex 288. He was wearing the same boots that were confiscated by the police under the belief they had what appeared to be blood on them. RP 1489.

She testified that while her home was being searched she was not allowed inside and that items had been moved in apparently in order to be photographed. RP 1499, 1493.

Also present at the Bulls Eye on this night were Dana Beaudine, Shannon Ford, Vince James and Reyna Blair, who had come from Beaudine's and S. Ford's residence where they and Otto Holz had been working on Beaudine's motorcycle and drinking. RP 975-979.

Ms. Ford, described Beaudine was about 5' 11" with a muscular build, a shaved head and a goatee. RP 1161. He also had a tattoo on one arm of a skull and a knife with a banner, which according to Ms. Ford was a Special Forces tattoo, and on the other arm had tattoos depicting demonic angels. RP 1161-1162. Ms. Ford testified Mr. Beaudine had Special Forces training, which is a more elite force in the military. RP 1162. On the night of April 5, 2008, Beaudine was wearing hoop

earrings with studs, a silver ring with a skull on it, a long sleeved black shirt with Harley Davidson on it and jeans. RP 1163. According to her testimony on direct examination, on April 5, 2008, Mr. Beaudine was a “happy and social” guy, “and that’s how he is”. RP 1000. Ms. Ford also was wearing jeans and a black Harley Davidson zip up sweatshirt with the Harley Davidson logo on it. RP 1163. Ms. Ford described Vincent James as about the same height as Beaudine with a slim build but could not remember his hair type or length or his facial hair if any or what he was wearing on April 5, 2008. RP 1070, 11-1165.

According to Ms. Ford’s testimony, the “biker” jackets being worn by Mr. McCreven and the three or four others at his table were black leather jackets with long sleeves with patches on the back that said “Hildalgos” on top and “Pierce County” on bottom. RP 1009, 1071-1072. Ms. Ford testified that one man, Barry Ford, at the table with Mr. McCreven and the others was not wearing the above described jacket but instead was wearing gray-type denim pants and a long-sleeved sweater and appeared “more clean cut” with a clean shave and shorter haircut. RP 1010. Ms. Ford described Terry Nolan as unshaven with blondish hair and a long goatee. RP 1010. Ms. Ford also described a fifth person as being at the same table as Mr. McCreven and the others who also had on a black leather jacket and was “more clean cut” meaning he didn’t have a scruffy look. RP 1011. Ms. Ford testified that Mr. McCreven was wearing a black bandana. RP 986.

In addition to these two groups of people, Joy Hutt was working as a bartender. RP 2389-2390. Gary Howden, an off duty D.J., was also present. RP 179. Also present was Heather Diamond with a friend and separate from them was Kathryn Baccus and Jennifer Abbott with their friends who were at the Bulls Eye for a bachelorette party. RP 343, RP 454-455.

According to Shannon Ford's testimony at trial, when she and Beaudine, Mr. James, and Ms. Blair arrived at the Bulls Eye Tavern, Ms. Blair and Mr. James acknowledged Mr. McCreven's presence at another table by smiling at him and/or saying "hello." RP 984-985, RP 1000-1001; 1168. Ms. Blair also told Ms. Ford that she knew Mr. McCreven. RP 1001. In fact, Ms. Ford testified that as they were leaving Bulls Eye, Mr. McCreven was still inside the bar and Mr. James acknowledged Mr. McCreven's presence with a smile. RP 1001.

During their time inside the Bulls Eye, Ms. Ford testified that she noticed some members of the table at which Mr. McCreven was present "glaring" at her. RP 1002 - 1004. Although she testified that this "glaring" was done by more than one person at the table, Ms. Ford testified that she most clearly remembered Terry Nolan "glaring" and did not testify that Mr. McCreven ever "glared" at her. RP 1002-1004, 1138, RP 1173.

According to Ms. Ford's testimony, following this "glaring" she saw Terry Nolan turn to Barry Ford who picked up his cell phone and either made or received a phone call. RP 1006, 1122. Ms. Ford testified that within minutes of this, she told the

rest of her table she wanted to leave but did not tell them about the “glaring.” RP 1008-1009, 1138.

Ms. Ford testified that Ms. Blair exited first, followed by Mr. James, then Ms. Ford and finally Mr. Beaudine. RP 1017. Ms. Ford testified that once outside the Bulls Eye she and Mr. Beaudine went to her truck (a Tahoe) and Ms. Blair and Mr. James went to their truck. RP 1017. Ms. Ford testified that Ms. Blair and Mr. James’ truck was parked about five spaces away from her Tahoe with other vehicles parked in between. RP 1017.

Once outside, Ms. Ford testified she did not hear anyone shouting or yelling or anything. RP 1021. She went to the driver’s door of her vehicle and Mr. Beaudine went to the passenger side. RP 1021. According to Ms. Ford when Mr. Beaudine got to the passenger side of the Tahoe she saw out of the corner of her eye a man approaching Dana with his fist cocked like he was going to throw a punch. RP 1021-1022. Ms. Ford identified this man as Carl Smith and stated that he was about Mr. Beaudine’s height, weighed about 200 pounds with a stocky build, scruffy facial hair and was wearing a black leather jacket with the Hidalgo patch on it and a bandana with skulls on it. RP 1025-1026, 1082. Ms. Ford testified that Mr. Beaudine blocked the punch with raised arms. RP 1026. The next thing she testified to remembering is someone came up behind Mr. Beaudine and grabbed him by the shoulder area. RP 1026 - 1027. Ms. Ford then remembered seeing the fight going back behind her truck more towards the coffee stand. RP 1027. At trial, Ms. Ford was not able to

describe the person she said was grabbing Mr. Beaudine by the shoulder area other than to say he was smaller than Carl Smith and Mr. Beaudine and she did not remember if he had on a jacket. RP 1028. On cross examination however Ms. Ford was asked to go through the descriptions she provided to Detective McCarthy of the individuals involved in the fight in the order in which they may have been involved and when she was asked about “number two” (most likely the one who grabbed Mr. Beaudine by the shoulders), she had described as wearing a grayish shirt and kind of grayish jeans. RP 1083. She also said she did not know who this person was and had never been able to identify him. RP 1108, 9RP 1170.

On cross examination Ms. Ford admitted that when she was interviewed by Detective McCarthy she told her that when Mr. Beaudine reached the passenger side of the Tahoe five men jumped on him. RP 1077, 1088.

According to her testimony, the next thing Ms. Ford remembered was there were many people intermingled on the ground rolling around, rumbling. RP 1029. Ms. Ford admitted on cross examination that she didn't see them go to the ground or who took who to the ground. RP 1112. Ms. Ford testified that she then went to the pile and tried to pull someone off. RP 1030. Ms. Ford describes grabbing someone and getting pushed. RP 1031. At this point in the rumble Ms. Ford stated that she could not tell where Mr. Beaudine was on the ground. RP 1031. This rumbling occurred right near the coffee stand. RP 1031. Ms. Ford could not say whether anyone involved in the scuffle, other than Mr. Beaudine, was not wearing a black

leather jacket. RP 1035. Ms. Ford describes the scene as “chaotic.” RP 1035. She did not see anyone else come to join the group on the ground. RP 1035. She also could not say if the people on the ground were the five people dressed in biker clothing she had seen inside the Bulls Eye. RP 1115.

After being pushed Ms. Ford testified that she stepped back apparently to the back end passenger side of the Tahoe and saw someone walk to a burgundy motorcycle which had side bags and metal flares coming out from the front. RP 1032 - 1033. Ms. Ford testified that she saw this individual grab something out of his right hand saddle bag. RP 1036. This person then went pushing past Ms. Ford and joined the group on the ground. RP 1037 – 1038. Ms. Ford testified that this someone was Terry Nolan. RP 1039.

On cross examination, Ms. Ford admitted that while she was watching Mr. Nolan go to his motorcycle she was not watching what was happening on the ground and did not know who was on top of whom or how many people were involved in the fight at that time or what Mr. Beaudine was doing. RP 1089, 1093.

After Mr. Nolan rejoined the group on the ground, Ms. Ford said she next remembered someone yelling about the police coming. RP 1040. Ms. Ford said the group went scrambling and Mr. Beaudine was standing at the front of her truck with Mr. James and Ms. Blair with a jacket on his neck. RP 1040. Ms. Ford also described this period as chaotic. RP 1040. Ms. Ford said she next remembers motorcycles leaving. RP 1040. Ms. Ford admitted that she did not know if or how many other

people may have left the parking lot as she was focused on the motorcycles. RP 1127. Ms. Ford testified that she knew specifically one of the men on the motorcycles was the one that started the fight, however, she later admitted when she described all the assailants as being in biker jackets, she was merely talking in “generalities”. RP 1041, 1128. The last person she saw leave the parking lot was Mr. McCreven. RP 1041. Ms. Ford never identified Mr. McCreven as being part of the fight. RP 1172, 1181.

Before testifying at trial, Ms. Ford had attended the arraignment for the four individuals being charged in this matter. RP 1006. Although she said that when each defendant was brought up and arraigned she recognized them, she also said she attended the arraignment so that she could see who they were. RP 1007. Ms. Ford said that at the arraignment in addition to seeing who each defendant was she also learned what they were charged with and what their bail amount was. RP 1007. Before testifying at trial, Ms. Ford also attended a private meeting with Prosecutor Sunni Ko during which she was shown four photographs – one for each individual charged in this case. RP 1056. Mr. McCreven had objected to her in and out of court identifications and also objected at trial to the admission and identification of Mr. McCreven from a booking photo. RP 1014.

Reyna Blair is Vincent James’ girlfriend and was present at Mr. Beaudine’s on April 5, 2008 with Ms. Ford and Mr. James. RP 693-697. Ms. Blair testified that while at Mr. Beaudine’s house she was drinking. RP 697. At some point in the

evening, Ms. Blair said that they left Mr. Beaudine's house and went to the Bulls Eye. RP 697. She rode with Ms. Ford and left her purse in the front passenger seat area of Ms. Ford's Tahoe because she did not want to lose it because she was "pretty lit." 6RP 703. Ms. Blair testified that while at the Bulls Eye she had a few more drinks. RP 702.

Ms. Blair testified that at some point she, Mr. James, Mr. Beaudine and Ms. Ford all decided it was time to go home. RP 705. Ms. Blair testified that she did not recall saying good-bye to anyone at the Bulls Eye other than the bartender, Joy Hutt. RP 706. Ms. Blair testified that once outside the Bulls Eye she gave Ms. Ford and Mr. Beaudine a hug in front of their truck while Mr. James was standing on the sidewalk most likely talking to someone whom Ms. Blair did not identify. RP 706, 708. Ms. Blair did not hear any yelling or screaming while walking out of the Bulls Eye. RP 708. Ms. Blair said that after she gave Ms. Ford and Mr. Beaudine a hug, Mr. Beaudine instantly got beaten up by a few people. RP 709 – 710. Ms. Blair testified that because it all happened so fast she did not know how many people were involved. RP 710. Ms. Blair said she then yelled at Mr. James and she ran away. RP 711. Ms. Blair testified she was not sure what she saw other than "fighting" and Mr. Beaudine surrounded by people. RP 712. Ms. Blair testified that she did not see the men who were beating Mr. Beaudine before the fight started. RP 712. Ms. Blair said that she heard Ms. Ford yelling and ran to Mr. James on the curb and told him Mr. Beaudine was getting beat up. RP 713, 714. According to Ms. Blair, Mr. James then

ran over to see what was going on. RP 714. On cross examination, Ms. Blair did admit that at one point during the fight she actually went over to it and pulled Mr. James away and told him to stay out of it. RP 766. On cross examination Ms. Blair also stated she did not recall telling police that another man named Cameron helped her at the scene of the fight pull Mr. James away despite what was recorded in her statement given on April 5, 2008. RP 767.

Ms. Blair was not clear about how many people were at the scene of the fight as “there were so many people out there everywhere.” RP 716. Ms. Blair said she next saw Mr. Beaudine lying down with Ms. Ford near him. RP 717. She did not pay attention to see if anyone left. RP 717. Ms. Blair testified that she did not see any of the men beating Mr. Beaudine wearing a Hidalgo jacket and only told the police she did because that is what other people were saying. RP 718. Despite her statement to the contrary to police on April 5, 2008, Ms. Blair testified that she did not tell the police that she recognized one of the men as Mike and that she did not recall much of what she said to police as she was pretty drunk and heard a lot of things that night outside. RP 718 – 719. Ms. Blair refused at trial to admit that she knew Mike McCreven and simply restated that she knows and rides with a lot of Mikes. RP 719 – 720.

During this line of questioning, Ms. Ko, the prosecutor, began to ask Ms. Blair if she had in fact told police that she was afraid of the defendants and would only identify if them if put somewhere safe. RP 721. Defense Counsel for Mr.

McCreven objected in the middle of this question, argument was heard and the objection was overruled. RP 721 – 732. Ms. Blair was then allowed to be repeatedly questioned about whether or not she had told the police that if she was put somewhere where they could not see her she would be able to pick out one of the men involved. RP 732 – 736. During this line of questioning, Ms. Blair at one point stated that if had to pick out any killer, she wouldn't want to be known because she has kids. RP 733. Defense Counsel for Mr. McCreven objected and moved to strike which was granted. RP 733 – 734. During this line of questioning, Ms. Blair was also repeatedly asked by the State if she was concerned about confronting these men (the defendants). RP 734 – 735. Defense Counsel for Mr. McCreven and other defense counsel objected but the objections were overruled. RP 734 – 735.

Ms. Blair testified that she did not remember much of what she saw or said on April 5, 2008 because she was “pretty wasted” or “pretty lit.”. RP 736, 738.

On cross examination, Ms. Blair stated that people often wore leathers to the Bull's Eye but she could not remember what Mr. James or Mr. Beaudine were wearing on April 5, 2008. RP 742 – 743. Ms. Blair also stated on cross examination that while Mr. Beaudine was surrounded she could see what he was doing in the fight. RP 745.

During Ms. Blair's cross examination, it was noticed by Mr. McCreven's Defense Counsel that the copy of Ms. Blair's transcript which she had been provided to refresh her recollection while testifying by the State was not, in fact, a clean copy

but had notes written in by one of the prosecutors which were not neutral notes but were actually notes that named the possible defendants that matched her descriptions given to the police. RP 746 and Exhibit 263. The trial court simply asked for a clean copy and remarked it as Exhibit 263A. Defense moved for a dismissal based on this misconduct. RP 824-25. CP 124-137.

Despite her statement to the police on April 5, 2008, that she knew Mike and didn't know if he was in on it, Ms. Blair continued to deny knowledge of that statement. RP 750 – 751.

Following Ms. Blair's testimony, the parties were notified that one of the jurors, number 7, had informed the judicial assistant that other jurors were discussing Ms. Blair's testimony. RP 776. Juror Number 7 was brought into the courtroom outside the presence of the other jurors and said that several other jurors, five or six, were discussing Ms. Blair's inability to remember and making jokes about her drinking. RP 778. Each juror was then questioned in open court but outside the presence of the other jurors and for the most part each either denied that such discussion had occurred, or demonstrated their utter lack of understanding of the court's opening instruction and then stated that it would not affect their ability to be fair and impartial. RP 785 – 816. Two of the jurors, numbers 11 and 13, both expressed some belief or thought that Ms. Blair was not testifying truthfully or completely because she was afraid or fearful despite the fact that this testimony had

been stricken by the court. RP 806, 812. Defense Counsel for Mr. McCreven asked to have these jurors excused but this motion was denied. RP 817, 823.

Following this issue, Defense Counsel for Mr. McCreven renewed its concerns that witnesses were being provided with annotated copies of transcripts and reports by the State to refresh their recollections and asked the court to dismiss the charge. RP 824 – 825 and Exhibits 193, 199, 257 and 263. The court did not rule on his motion so that Defense Counsel could submit additional briefing on it. RP 833. On May 5, 2009, Defense Counsel for Mr. McCreven submitted a written brief in support of its motion to dismiss based on CrR 8.3(b) and asked to have Exhibits 193, 199, 257 and 263 made a part of their record for purposes of the motion. RP 850. CP 124-137. Argument was heard on this motion with Ms. Ko, one of the prosecutors, saying that although it was “stupid” and “dumb” of her not to make sure clean copies were provided to the witnesses it was not intentional even though the writing was that of her co-counsel. RP 856 - 857. The court denied the motion. RP 861.

Vincent James, Ms. Blair’s fiancée, testified that he met Mr. Beaudine on a bike ride. RP 2207. Before going to the Bulls Eye on April 5, 2008, Mr. James testified that he was at Mr. Beaudine’s house helping him fix his motorcycle with Ms. Blair. RP 2208. Similar to Ms. Blair, he testified that he had a lot to drink. RP 2208. Following that, he and Ms. Blair and Shannon Ford and Mr. Beaudine went to the Bulls Eye. RP 2209. Mr. James did not recall noticing any bikers who may have been wearing their patches nor did he indicate that anything occurred between his

table and any other group in the bar. RP 2212. Mr. James said that all of them at his table just decided it was time to leave. RP 2243. Mr. James did remember talking to someone outside the Bulls Eye for a while when he was leaving but could not remember who it was. RP 2213, 2245. Mr. James did not know what Mr. Beaudine, Ms. Ford and Ms. Blair were doing at this time and wasn't paying attention to them. RP 2213, 2251.

Mr. James testified that he next remembered hearing somebody screaming in the parking lot and he went to investigate. RP 2214 – 2215. While he did not see the beginning of the fight, he said he saw Mr. Beaudine lying on the ground by himself getting beat up. RP 2215, 2235. Mr. James said that he saw Mr. Beaudine's feet and while he could not say how many people were there he did say it was more than one. RP 2216. Mr. James also testified that he did not remember telling the police that the men beating up Mr. Beaudine were flying their colors or what color motorcycles he said he saw. RP 2223, 2224. Mr. James testified that he tried to jump in there and grab Mr. Beaudine's feet and pull him out. RP 2216. Mr. James testified that while trying to pull Mr. Beaudine out he may have been slapped on the back of the head once. RP 2217. He said he did not see who slapped him on the back of the head and that he didn't remember much of it. RP 2218. Mr. James testified that he had reviewed his interview transcript multiple times (RP 2218) however, he also said that it had been a long time and he was very inebriated. RP 2217.

Mr. James said that everyone stopped beating up on Mr. Beaudine all at once and then everybody left. RP 2219-21. He did not know what mode of transportation the individuals left on or in. RP 2219 - 2221. Mr. James said he picked up Mr. Beaudine and tried to put him the SUV. RP 2225.

When asked about Mike McCreven, Mr. James said he knew a lot of Mikes and said he did not recognize anyone in the courtroom. RP 2226. On cross examination Mr. James did say that it was possible he could have seen someone he recognized at the Bulls Eye on April 5, 2008, and said "hi" but he couldn't remember because it would not have been all that memorable. RP 2230. Mr. James went on to say that if he had said that he said "hi" to a Mike in the Bulls Eye then at that time it would have been fresh in his mind. RP 2230. When asked if he remembered telling the police on April 5, 2008, that Mike didn't have anything to do with it, Mr. James admitted that while he didn't remember saying that, his testimony in court was simply what he remembered now of the night of the incident. RP 2231. Mr. James said he was not wearing his leather jacket on April 5, 2008, but usually wore a black or blue jacket when not riding. RP 2234. Mr. James was also not sure what facial hair he may have had on April 5, 2008, but sometimes he "go goatee" and always has a mustache. RP 2254.

Jennifer Abbott was also at the Bulls Eye on April 5, 2008 attending a bachelorette party. RP 454. She arrived there with her sister around 7:30 or 7:45 p.m. RP 455. According to Ms. Abbott's testimony there were maybe five, six or seven

males wearing leather jackets and/or chaps spread out through the Bulls Eye. RP 459. Ms. Abbott testified that that while she could not remember if all of these men had patches on their jackets she did remember seeing a patch that covered most of the back and was mostly red with some dark yellow on it but could not recall if there as a picture or anything. RP 460. Ms. Abbott was able to describe one of these men as taller than her by a few inches, dark haired with some facial hair wearing some sort of hat or a bandana and leathers. RP 462. Ms. Abbott was not able to identify that individual as being present in the courtroom at trial. RP 462. The second person Ms. Abbott described as being at the Bulls Eye on April 5, 2008, was a little bit taller than her with sandy hair with a little bit of red, medium length with a goatee wearing a bandana and a leather vest or jacket. RP 463. Ms. Abbott identified this individual as Terry Nolan. RP 463. Ms. Abbott was not able to provide a description of the third man she remembered seeing. RP 462.

According to Ms. Abbott, at one point in the evening when she outside smoking a cigarette, she saw a “group of bikers” run from the front area of the bar across the parking lot to where a woman was screaming and another man, possibly a couple of others, were there and then the fight broke out. RP 466. Ms. Abbott was only certain that she saw Terry Nolan running from the bar. RP 469. Ms. Abbott stated that the others, maybe four or five or so, she saw running from the bar were wearing dark clothing and most if not all had leather vests, jackets, pants on. RP 470,

471. Ms. Abbott did not hear any shouting or yelling out of the ordinary while standing outside the bar. RP 478.

After this, Ms. Abbott reports that she only saw a big group of people just throwing punches. RP 471. Ms. Abbott did testify that she saw a figure being punched by at least one or two of the “bikers.” RP 472. On cross examination Ms. Abbott admitted that she told the police earlier that she could not see the fight very well because it was behind a vehicle. RP 507.

According to Ms. Abbott’s testimony she saw Mr. Beaudine standing there being punched and one person either holding him or pulling him back. RP 472. On cross examination Ms. Abbott admitted that she never told this to police during her initial interview with them. RP 497. Ms. Abbott testified that she could hear a woman screaming but was not sure why because it did not seem there was reason to scream like that. RP 472 – 473. Ms. Abbott testified that the fight lasted a couple of minutes until someone said something about getting the bouncers. RP 473. Ms. Abbott testified that she told the police that the security guards or bouncers went over to the fight to break it up. RP 494. Ms. Abbott said she then heard several, three or four, motorcycles start up and leave. RP 474 – 475.

Ms. Abbott referred to the deceased as the “victim” in violation of the motion in limine and Defense Counsel for Mr. McCreven objected and moved to strike and that motion was granted. RP 472. Following Ms. Abbott’s testimony

Defense Counsel for Mr. McCreven asked the trial court to remind the State of its obligation to inform its witnesses of the rulings on the motions in limine. RP 518.

Kathryn Baccus testified that she was at the Bulls Eye on April 5, 2008, for a bachelorette party and arrived around 7:30 p.m. RP 2317, 2319. Ms. Baccus states that she notice people in the Bulls Eye dressed in motorcycle attire meaning leather jackets and vests with red and gold patches. RP 2323, 2346. Ms. Baccus testified she believed there were about six to ten of them in the same group with one or two women. RP 2346.

While outside the Bulls Eye Ms. Baccus said she noticed a fight going on. RP 2326. Ms. Baccus said she first saw a couple guys, one bald and the other with brown hair wearing a leather vest, coming out of the door yelling at each other followed shortly after by a girlfriend. RP 2328 – 2329 2362. Ms. Baccus testified that she believed that the man coming out with the bald man was someone the other girls in the bachelorette party had earlier gotten a chest hair from. RP 2352. According to Ms. Baccus as the two men worked their way into the parking lot the confrontation became more physical and the girlfriend was screaming. RP 2329. Ms. Baccus said that the first fist was thrown before the two men got to the parked cars. RP 2330. After these three people got further into the parking lot more people, roughly six to ten whom she described as bikers, started coming out. RP 2331 – 2332, 2355. According to Ms. Baccus, “it was not like one guy was clearly jumped by a whole mob of them, it was just kind of a big mess of people.” RP 2332 – 2333.

Ms. Baccus later described it as a “whole bunch of commotion” and “a big group of chaos.” RP 2356. Ms. Baccus said that once the fight was in the parking lot by the espresso stand it was pretty hard to see as it was dark and cars were in the way but the people on the curb were kind of having a discussion about it even though they were not focused on it to the degree that they could have identified anything specific. RP 2333 – 2334. Ms. Baccus said that “it didn’t look as the bald man was being held and everyone was taking pot shots at him. It didn’t look like that all.” RP 2357.

Ms. Baccus testified that at some point the fight worked its way back to the parked cars and at that point “it was still pretty much just the two guys.” RP 2334. Ms. Baccus testified that the first “bouncer” came out and tried to break up the fight but was hit in the face a few times and fell to the ground and then the second “bouncer” came out and everybody left. RP 2336.

Ms. Baccus said that there were five or six motorcycles parked by the Radio Shack which immediately left after the fight was over. 17RP 2335 – 2336.

Gary Howden testified he arrived at the Bull’s Eye between 10:00 and 10:30 pm on April 5, 2009. 2RP 177, 178, 179. He saw two acquaintances, Reyna Blair and Vincent James, whom he knew as long time bar patrons. 2RP 204. Mr. Howden testified that he believed he saw four or five men sitting alone at a buddy bar. 2RP 230, 256. His testimony indicated you could not see the buddy bar from the table location where Ms. Blair, Mr. James and Ms. Ford and Mr. Beaudine were sitting. RP 232, RP 275, 278, and CP Exhibit 11.

He later saw Ms. Blair and Mr. James leave with another couple, whom he learned were Dana Beaudine and Shannon Ford. RP 205. He described Beaudine as wearing a black Harley-Davidson jacket. RP 205. He testified he was inside the bar at the beginning of the altercation. RP 206, 215. He reports that learning there was a fight happening outside, he stepped outside onto the sidewalk with the bar security guards under the "Little Tokyo" sign. RP 239-240. He did not know who initiated the fight or what precipitated it. RP 279 – 280. Because of parked vehicles he did not have a clear view of events. RP 241, 243.

His descriptions of the participants included Beaudine, his friend Vince, a big stocky male with bushy brownish red hair in a white shirt, another shorter male with blonde curly hair, another large male that possibly had a crew cut and one that he said, "I really don't remember at all." RP 208-09. Mr. McCreven does not match any of the individuals for whom he gave a description. Mr. Howden describes Mr. Beaudine, his acquaintance, Vince, and four other guys as fighting. RP 208. He was not sure if he remembered seeing the words "Hidalgos" on the jackets of individuals leaving on their motorcycles and admitted that neither it or nor "red and gold" colors were mentioned by him in his earlier statements. RP 272-273, 317. He believed the three individuals involved in the fight were the same people that left on motorcycles, even though he did not see where the men went that had been near the fighting. RP 216. The men on the motorcycles did not appear to be in a hurry to leave. RP 217. He indicated the men in the fight had jackets with the word "Hidalgos" but again on

cross, and re-direct, admitted he was not sure of this information and did not provide this information to investigating law enforcement at the time of the events. RP 272-273, 317. He indicated his attention was focused on an individual in a white shirt (Carl Smith) and Beaudine. RP 282-83. He stated admitted that he was not paying attention to other the men wearing darker clothing and was not sure what they were doing. RP 282-83. The scene was “chaotic.” RP 282. By his estimate, there were 35 to 40 people outside watching the fight. RP 302.

He never saw a weapon during the fight, did not see any wounds or blood until afterward and was not aware of the gravity of the injuries until after the fight was over. RP 214, 221, 253-4, RP 333. He obtained the license plate number of the car of one of the individuals involved in the altercation with Beaudine. RP 217 -218. On direct he said a lot of punches were thrown but he admitted that other than Carl Smith, he cannot say what anyone else was doing. RP 339. His attention was focused on an individual in a white shirt fighting with Beaudine. RP 282. He also indicated his memory was hazy – saying, “It’s been a year – I don’t know my exact notes.” RP 244. When the events were fresh in his mind he told the police two people were fighting – the man in the white shirt and Beaudine. RP 248. He described other individuals wearing biker vests with patches but did not describe the colors of the patches or any words or logos. RP 273. He testified he had no idea what the other people were doing or where they were while the fight continued between the two men. RP 249-50. He never saw Carl Smith with a weapon. RP 295.

He acknowledged he learned certain information after the fact that he incorporated into his testimony. RP 269-70. During his testimony, despite defense objections, he and the prosecutor, repeatedly referred to Beaudine as the “victim”. RP 219, 319, 324.

Heather Diamond testified that she and four other friends were at the Bull’ Eye on April 5, 2008 sitting at a table with four guys. RP 345, 349. She did not recall any patches or motorcycle insignia on the clothing worn by the men sitting at the table with her party. RP 347. She had never been shown a montage or a line up of the defendants but identified the four men from the bar as the defendants. RP 356.

She reported being outside near the Little Tokyo sign when she saw a man in a Harley Davidson shirt walk across the parking lot and scream “Fuck your colors”. RP 358, 361. She indicated that the four men from her table were also outside, further down the sidewalk and at the screaming insult, two men walked across the parking lot towards the man with the dark Harley Davidson shirt. RP 362. This testimony was directly contradicted by her report on the night of the incident to law enforcement in which she described *two* men as fighting, not as two men going to engage in a fight with a third. RP 398. She claims the two men she saw go across the parking lot were from her table, but could not say which two of the four went. RP 363-364. She describes two more men joining the fight, but again cannot say which persons these were. RP 364. She claims she never saw anyone else join in – indicating she was unaware that at least one of the people engaged in the fight was

Vince James and did not see or recognize Ms. Ford in the fight. RP 366. She describes the scene as “lots of commotion” and a lot of people from the bar were outside. RP 367, 371. She testified that she went inside to tell the bouncer that there was a problem outside, but the bouncer was already on his way out. RP 366.

Ms. Diamond reports that two or three people eventually left on motorcycles but does not know if they were part of the fight. RP 367. She also saw a number of cars leave but does not know if they were individuals involved in the fight either. RP 368.

On cross examination she admitted that when she wrote her statement for investigating law enforcement she reported that two men went towards the coffee stand and began fighting. RP 373. She also told investigating law enforcement that she could not see much of the fight because vehicles blocked her view. RP 375. She could not recall who else was outside. RP 404.

Joy Hutt was the night manager/bartender at the Bulls Eye on April 5, 2008. RP 2389. Ms. Hutt testified that she knew Mr. Beaudine had been drinking that night and saw him go over to the table where Mr. McCreven and others were seated and make a comment about their colors being stupid and grab at one of their jackets. RP 2525, 2527. Ms. Hutt also heard Mr. Beaudine inside the bar telling everyone that he was H.A. meaning Hells Angels. RP 2526, 2527. Later Ms. Hutt heard a there was a disturbance outside and when she went out she saw Mr. Beaudine and another male in a white shirt and both had blood on their shirts and both saying that the other one

started it. RP 2023-2025, 2529-2531, 2546. Ms. Hutt, who has worked as a bartender in the area for over twenty years, was also prepared to testify as to Mr. Beaudine's reputation for belligerence and threatening behavior when intoxicated but was precluded by the trial court from doing so. RP 2395-2399, RP 2504-21, 2534.

Deputy Simmelink with the Pierce County Sherriff's Department arrived at the Bulls Eye Sports Lounge on April 5, 2008, at approximately 9:59 p.m. 5RP 555-556. Deputy Simmelink testified that she saw what appeared to be blood at the scene. RP 564. Deputy Simmelink did not collect any samples of this supposed blood and could not say if in fact it was blood or whom or whose blood it was. RP 589, 612. Deputy Simmelink also took photographs of the scene; including a knife located on the ground near the espresso stand. RP 566-567. She testified that she did not and could not take any photographs from directly outside of the Bulls Eye through the parking lot because cars were obscuring her view and therefore she had to take those photographs from outside the Radio Shack at the end of the strip mall. RP 588. Deputy Simmelink received a "sap" from witness Gary Howden and entered it into evidence. RP 567-568.

In addition to the sap, Gary Howden provided Deputy Simmelink with a license plate number for a car that he saw leave the scene which he believed was associated with the incident. RP 579. She testified that of the several other people she spoke with at the Bulls Eye some said that the suspects were wearing red biker jackets with "Kid Lo" on them. RP 594. According to Deputy Simmelink's

testimony Gary Howden told her that five subjects “jumped” Mr. Beaudine, even though he was not present for the start of the fight. RP 603. According to Deputy Simmelink Mr. James also told her that five people were involved. RP 604. Deputy Simmelink’s notes about her conversation with Mr. James do not indicate that he ever mentioned the Hildalgos being in this incident. RP 628.

Forensic Investigator Loree Barnett with the Pierce County Sherriff’s Office arrived at the Bulls Eye Tavern on April 5, 2008, at 10:50 p.m. RP 1852. Officer Barnett did know how many people or vehicles were there before she arrived and was not tasked with contacting any of the people still present at the scene. RP 1883. Officer Barnett photographed and collected the knife with its blade extended, which had been covered with a paper bag, that was located by the espresso stand. RP 1866. She later processed the knife for fingerprints with negative results. RP 1867. Officer Barnett used all of her training, knowledge and experience expertise to collect and package the knife she recovered. RP 1886, 1890-1892.

Per the State’s request, the knife was sent to the Washington State Patrol Crime Lab where it was tested for DNA by forensic scientist William Dean on December 3, 2008. RP 1932. According to Mr. Dean’s testimony, based a conversation he had with Sunni Ko, one of the prosecutors assigned to this case, they decided that the appropriate focus in this case was on “handler DNA” from the rough side of the knife’s handle. RP 1951. According to Mr. Dean’s testimony, “handler DNA” is DNA from someone who handled the knife. RP 1935. The primary reason

for focusing on the rough side of the knife's handle was because the rough surface provides areas where cellular material could deposit. RP 1938. He intentionally avoided any areas of suspected blood or that had unidentified staining. RP 1938. Mr. Dean was able to recover DNA from the knife handle and compared with all four co-defendants in this case and Mr. Beaudine. RP 1939. The "handler DNA" on the knife was a one in one quintillion match for Mr. Beaudine with no mixed profile. RP 1940. Mr. McCreven's DNA was not recovered from the knife. RP 1970. Mr. Dean did not do any tests on Mr. McCreven's boots. RP 1971.

Eric Kiessel, chief medical examiner for Pierce County, testified that he performed the autopsy on Mr. Beaudine. RP 1651. Dr. Kiessel testified that he could not tell what order the wounds to Mr. Beaudine occurred in or what position he or anyone else was in when he received them, nor could he how many people were involved in the fight or the death of Mr. Beaudine. RP 1656, 1764, RP 1780. Dr. Kiessel testified that while he could not say what weapon caused the stab wounds to Mr. Beaudine, the knife with Mr. Beaudine's handler DNA could have inflicted such wounds. RP 1658, 1764. Dr. Kiessel testified that based on a toxicology screen Mr. Beaudine's blood alcohol level was a .18 at the time of his death. RP 1768, 1785. He explained that alcohol slows down your thinking, lowers your inhibitions and may make one become violent. RP 1788-1791. Dr. Kiessel also testified that while clippings from Mr. Beaudine's fingernails were taken, it is not his responsibility to

have that evidence further testified. RP 1782-1784. Dr. Kiessel determined that Mr. Beaudine died as a result of stab wounds to the neck and torso. RP 1693.

Deputy Laliberte with the Pierce County Sheriff's Department testified that arrived at the Bulls Eye Sports Lounge at approximately 11:30 p.m. on April 5, 2008. RP 1712. Once there, he spoke with approximately ten or eleven people inside the Lounge but was not "tasked" with talking to the fifteen to twenty people still outside in the parking lot despite the fact that the goal was to obtain witness information. RP 1713, 1735-1736. Deputy Laliberte interviewed both Kathryn Baccus and Jennifer Abbott via audio recording after speaking with them off the record. RP 1714-1715. He also spoke with bartender/manager Joy Hutt. RP 1720. Deputy Laliberte went to Ms. Hutt's residence and showed her one photo montage including only Carl Smith but Ms. Hutt was not able to select any individual from the photo montage. RP 1720-1722. Deputy Laliberte did not show Ms. Hutt any photographs or montages of Mr. McCreven. RP 1723.

Deputy Laliberte was also present for the search of Ms. Dobiash's residence in Yelm. RP 1731. His primary responsibility in the search was to catalogue the evidence collected by the other officers. RP 1739. Deputy Laliberte stated that he did not catalogue the finding of any vests, jackets, shirts, chaps or other leg wear with blood on them at the Yelm residence although he did recall finding a pair of men's of boots. RP 1734. Based on the evidence collection report Deputy Laliberte testified

that nothing in the collection report stated that the boots had anything on them that appeared to be blood. RP 1740.

Deputy Messineo arrived at the Bulls Eye Sports Lounge at approximately 9:56 p.m. on April 5, 2008. RP 1816. He secured the “crime scene” by putting up crime scene tape and not allowing anyone to enter or exit that area. RP 1816. According to Deputy Messineo he found a knife near the coffee stand. RP 1818. He left the knife where it lay. RP 1818. Deputy Messineo described the knife he saw near the coffee stand as a folding knife that would fit in your pocket when folded up. RP 1827. Of the fifteen to twenty people still inside the Bulls Eye at his arrival, Deputy Messineo spoke with four. RP 1823-1824. Deputy Messineo did not know how many people may have left the scene before he arrived or if other people left from the area outside the “crime scene.” RP 1826.

Detective Donlin arrived at the Bulls Eye on April 5, 2008 at about 10:48 p.m. RP 1568, 1595. After walking through the scene, Detective Donlin spoke with Otto Holz, Reyna Blair and Vincent James. RP 1571-1572. Detective Donlin testified that he spoke with Ms. Blair in his vehicle for about fifteen minutes and at some point he recorded his interview with her. RP 1572. Detective Donlin described Ms. Blair’s demeanor as upset, in shock and disbelief. RP 1572. According to Detective Donlin, Ms. Blair described three individuals but said four to five were involved. RP 1573. Ms. Blair provided Detective Donlin with the name Mike and said she knew him. RP 1573. Ms. Blair described Mike as about forty, having darker than blond

hair, with a scrawny build wearing a jacket or vest with a patch on the back. RP 1574-1575. According to Detective Donlin, Ms. Blair said all the individuals she described had this patch on their clothing. RP 1575. Although Detective Donlin testified that Ms. Blair said the patch said, "Hidalgos," he did admit on cross examination that actually she said something like "Kalagos" or "Legos" and it was he who told her that it was Hidalgo. RP 1575, RP 1622. On cross examination Detective Donlin also admitted that Ms. Blair told him that she did not even know if Mike was in on it. RP 1622.

Detective Donlin testified that he spoke with Vincent James in his vehicle and also recorded that interview. RP 1576. Detective Donlin described Mr. James demeanor as upset and later irate as he had been sitting in the patrol car for a while but could see other people walking around. RP 1576. Mr. James also told Detective Donlin that he knew Mike. RP 1623-1624. According to Detective Donlin's testimony, Mr. James was wearing a black leather motorcycle jacket on April 5, 2008 and had some blood on his jeans. RP 1625. According to Detective Donlin's testimony, Mr. James originally told him that he believed the motorcycle patches he saw said something like the "Delagos" or "Gelagos" and did not tell him what the colors of the patches were. RP 1636-1637, 1639.

On April 7, 2008, Detective Donlin was also responsible attempting to recover surveillance video from the Radio Shack located in the same strip mall as the Bulls Eye Sports Lounge. RP 1610. The following day Detective Donlin testified

that he spoke with a loss prevention officer from Radio Shack but did not recover any surveillance video. RP 1612. Detective Donlin also spoke with a barista at the espresso stand but was not able to locate any surveillance video from that business either. RP 1613. Additionally, Detective Donlin spoke with the branch manager of the Wells Fargo bank located in the strip mall parking lot and while there was video surveillance he never collected it. RP 1614- 1615, 1618. Detective Donlin then followed up with a member of Wells Fargo Security who was able to provide him with stills of the parking lot but in Detective Donlin's assessment they were not of evidentiary value. RP 1616-1617. Detective Donlin did not collect these still images. RP 1617.

Deputy Corey Olson arrived at the Bulls Eye on April 5, 2008, just before midnight and was responsible for mapping the scene. He used a tape measure. RP 522 – 523. Deputy Olson did not measure the height of the vehicles parked in the parking lot nor did he measure or diagram any sight lines from the sidewalk area where witnesses reported congregating during the fight through the parking lot to where the fight was said to have occurred. RP 541. Defense investigator, Kristin O'Leary actually measured the distances from where the witnesses reported standing. RP 2635. The distance from the sidewalk to the location of Ms. Ford's Tahoe was 82 feet. RP 2637. The distance from the sidewalk to the coffee stand was 127 feet. RP 2637.

Deputy Delgado was paged to go to the Bull's Eye at about 11:30 pm. RP 837. Once there he contacted Jennifer Abbot and Kathryn Baccus. RP 838. He learned that Kathryn Baccus had a camera that she had taken pictures with at the Bulls Eye on April 5, 2008. RP 840. Deputy Delgado testified that he met with Ms. Baccus one to two weeks later to view the pictures but did not collect them because in his assessment, he did not believe they showed anything. RP 841.

In the early morning hours of April 6, 2008, he went to the residence shared by Vince James and Reyna Blair. RP 842-843. He showed Mr. James a single montage that included a photograph of Carl Smith to Vince James, and possibly to Ms. Blair. RP 843. Mr. James was not able to identify any one from the montage. RP 843. He did not show anyone a montage that included Mr. McCreven. RP 927.

Deputy Delgado also assisted in the search of Mr. McCreven's girlfriend's (Rebecca Dobiash) residence in Yelm on April 10, 2008. RP 872. Deputy Delgado was then allowed to testify about "blood" that he saw on Mr. McCreven's boots that were found at Ms. Dobiash's residence. RP 908. The court refused to give a defense proffered limiting instruction on substances that appeared to be blood. RP 899. Deputy Delgado did not send these boots to the lab for any testing. RP 931. He also testified about two leather vests and several photographs he found at this residence. RP 913-915, 933-934 – 68. Deputy Delgado testified that he did not locate any chaps at the Dobiash residence although on cross examination he was shown two photographs from the Dobiash residence depicting leather chaps and riding jackets,

with the leather vests he did collect. RP 915, 933-34 and Exhibits 104 and 84. Ms. Dobiash provided these chaps and they were brought into court by defense investigator, Ms. O'Leary. RP 2639-2640. The court again failed to give a requested limiting instruction on the use of the photographs showing articles of clothing with associational information. RP 889-91.

Deputy Delgado did not search Mr. Beaudine's residence for anything, including evidence of affiliations or photographs. RP 935-36.

When Deputy Fernando arrived at the Bulls Eye on April 5, 2008, at about 9:56 p.m. he spoke with Ms. Ford who told him that five people were involved in the incident whom she described as wearing jackets with yellow and gold Hidalgos emblems on the back. RP 633, 638, 640. According to Deputy Fernando, Ms. Ford told him that when she and Mr. Beaudine were outside by their car they were contacted by these five individuals and when Mr. Beaudine tried to get away they caught him and began to assault him by beating him. RP 642 - 643. According to Deputy Fernando Ms. Ford said that the five individuals were wearing black skull caps. RP 644.

Deputy Fernando also spoke with Ms. Blair on April 5, 2008. RP 644. According to Deputy Fernando, Ms. Blair told him that she knew Mike as a white male about 5'8" weighing about 150 pounds wearing a black skull cap and a leather jacket with a yellow and gold Hidalgo patch. RP 645 - 646.

On April 6, 2008, Detective Denny Wood received a telephone call from an officer at the Sprinker Substation informing him that Mr. McCreven wanted to speak with him. RP 1/30/09 p.137. Apparently, Mr. McCreven had first gone to the South Hill Precinct in Puyallup but found it closed, so he called a dispatcher who directed him to the Sprinker Substation. RP 1/30/09 p.163. From the Sprinker Substation, Mr. McCreven was transported to the Pierce County City Building by a Pierce County Sherriff. RP 1/30/09 p. 137. Mr. McCreven said he came in as a witness and wanted to provide a statement. RP 1/30/09 p. 138. According to Detective Wood’s testimony, Mr. McCreven was cooperative and pleasant. RP 1/30/09 p. 138. Mr. McCreven was immediately arrested after voluntarily giving a statement. RP 1/30/09 p. 145.

C. **ARGUMENT.**

Issue No. 1: The Trial Court Erred In Admitting Irrelevant, Prejudicial Evidence That Infringed On McCreven’s Constitutionally Protected Rights of Free Speech and Association.

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Under the due process clause, an accused person “is entitled to have his [or her] guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.” *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d. 468 (1978); U.S. Const. Amend. XIV.

Constitutional error is presumed to be prejudicial; to overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Gonzales Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008). Where an error infringes on a defendant's constitutional right, the reviewing court will presume prejudice and must reverse unless it is satisfied beyond a reasonable doubt that the jury would have convicted the defendant absent the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Accordingly, constitutionally protected behavior cannot be the basis for criminal punishment and it is error to consider such evidence for the purpose drawing an adverse inference from the exercise of a constitutional right. *State v. Rupe*, 101 Wn.2d 664, 704-706, 683 P.2d 571 (1984) (citations omitted),

Evidence of protected associational rights is also analyzed under ER 404(b). A reviewing court will reverse trial court error in admitting or rejecting evidence if the ruling prejudices the defendant. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). And a reviewing court will find prejudice if the defendant can show a reasonable probability the trial court's ruling materially affected the trial outcome. *State v. Neal*, 144 Wn. 2d 600, 611 (2001) as amended July 19, 2002, quoting *State v. Smith*, 106 Wn.2d 727, 780 (1986). The prejudice standard applicable to an

evidentiary error does not require that the evidence be considered in the light most favorable to the State. *See Neal*, 144 Wn.2d at 611.

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 than it would be without the evidence.” ER 401 Evidence that is not relevant is not admissible. ER 402. Under ER 403, the court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. In this case, the court limited the motorcycle attire evidence to what clothing was the evening of April 5, 2008 under the identity exception to ER 404(b) but that evidence to show “flat out membership for the sake of membership” or to show that the defendants were part of an organization was not admissible. RP4/9/09 Pgs. 120, 128; CP 334-336. T

Accordingly, the State stipulated to not introducing any gang evidence. RP 4/9/09 p. 133. If requested, the trial court must give the jury a limiting instruction regarding proffered ER 404(b) testimony. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Washington courts have recognized that gang association evidence is “inherently” prejudicial. See, e.g., *State v. Scott*, 151 Wn. App. 520, 213 P.3d 71 (2009)(gang evidence); *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, 1155-56 (2009)(gang evidence); *State v. Ra*, 144 Wn. App. 688, 700-01, 175 P.3d 609 (2009)(gang evidence). Such evidence is inadmissible and excluded because of the

grave danger of unfair prejudice unless the State establishes a sufficient nexus between the crime charged and the defendant's gang affiliation. *State v. Ra*, 144 Wn. App. at 700-01; *State v. Boot*, 89 Wn. App. 780, 788-89, 950 P.2d 964 (1998); *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995).

In *State v. Johnson*, 124 Wn.2d 57, 873 P.2d 514 (1994), our Supreme Court held that affiliation with a gang may be an aggravating factor at sentencing when the crime that was committed was gang motivated. The court cautioned, however, that "[I]f the evidence were not relevant to the issues at trial and at sentencing, the punishing would then constitute a violation of the First Amendment right of freedom of association." *Johnson*, 124 Wn.2d 57, 67 (1994) (citing *Dawson v. Delaware*, 503 U.S. 159, 165, 117 L. Ed. 2d 309, 112 S. CT. 1093 (1992)). The *Dawson* court concluded that it was error to admit evidence of the defendant's gang membership because there was nothing to show that his beliefs and association with the group were in any way connected to the murder, and therefore, the evidence was irrelevant and was protected by the constitutional rights of freedom of association and freedom of speech. See also *United States v. Singleterry*, 646 F.2d 1014, 1018 (5th Cir. 1981) (a defendant's guilt may not be proven by showing he associates with unsavory characters, and admission of evidence of bad conduct of relatives or friends is error because it is a highly prejudicial attempt to taint defendant's character through "guilt by association"); *U.S. v. Roark*, 924 F.2d 1426 (8th Cir. 1991) (Association with

Hell's Angels Motorcycle Club not cured by instruction to jury to disregard, appellate court reversed and remanded for a new trial.)

Here there was no gang aggravator or motive alleged and not a single witness testified that any of the co-defendants was wearing Bandidos themed attire, yet the trial court admitted, over defense objection photographs depicting Mr. McCreven and his co-defendants/co-appellants with items associated with the Bandidos motorcycle club, despite the court's pre-trial ruling that evidence of association with motorcycle clubs would not be admissible unless it was evidence of clothing worn that evening. RP 4/13/09 p. 128-129, 131; RP 871, 877-78, 879, RP 1261; 1263. Exhibits 85, 131, 205, 268 A,B,C; 269 A, B, C.

Additionally, despite the State's repeated protestations it was not using the evidence to show any association, its actions belie these statements. RP 120, 137-138, 881, 1259-1263. For example, the State had the testimony from bar patrons regarding who was at the Bull's Eye the evening in question and what attire was worn by whom and testimony from Becky Dobiash regarding Hidalgos motorcycle club attire. RP 205, 208-209, 345-349, 459-463, 1009-1011, 1163, 1416-1420, 1489-1491, 2323, 2346. The State also had photos of Mr. McCreven's motorcycle showing its design, color and saddlebag configuration that did not include a Bandidos decal (CP Exhibits 87, 88, 288), yet the only one the State published to the jury was the one taken specifically by the investigating officers to emphasize a Bandidos decal. RP 1264; CP Ex 86. Similarly, the State entered not one but two

pictures of co-defendant/co-appellant Ford wearing a black vest that did not have *any* Hidalgos insignia but rather had a “Support the Bandidos” patch visible. RP 916, CP Exhibits 131, 205. *See also Exhibits* 268A, B, C, 269A, B, C; 86, 159 for photos of co-defendants and others in Bandidos garb or motorcycles displaying Bandidos decals. Defense objected to the admission of these items. RP 870-879, 885-86, 889-91; 893-94, 898-905 (defense objections and proposed limiting instruction). Similarly, Deputy Simmelink was allowed to testify that Vince James told her the participants were, “Hidalgos;” even though he could not or had not provided descriptions of the individuals or their clothing. RP 2267.

In arguing for their admission, the State indicated they were now needed, not to establish the clothing worn on the evening in question to establish identity, but rather to show the “bond” between the co-defendants – precisely what was disavowed earlier and precisely what is carefully protected by our constitution. *Dawson v. Delaware*, 503 U.S. 159, 166-67, 117 L. Ed.2d 309, 112 S. Ct. 1093 (1992); *State v. Campbell*, 78 Wn. App.813, 822, 901 P.2d 1050 (1995). RP 892. This acknowledgement tied into the State’s theme that Hidalgo membership, and its association with the Bandidos, rather than identification of a person wearing Hidalgo attire, was the true purpose for this evidence. This true purpose was born out in its failure to advise Ms. Dobiash of the court’s ruling in limine of “gang” evidence and its extensive questioning on Hidalgo club membership and its deliberate interjection into the trial that Ms. Blair was not testifying truthfully

because she was fearful for herself and her children, RP 1415, 1457, 1463-67, 1501-03; 733.

By introducing the Bandidos related evidence, the prosecuting attorney did not use the evidence of motorcycle association for its purported purpose. Instead of using the evidence to establish the clothing defendants were described wearing that night, the prosecuting attorney used the evidence to generate a theme throughout the trial that the association of Mr. McCreven with motorcycle clubs proved he was the kind of person who would partake in the fight that lead to Beaudine's death, an impermissible use of the evidence.¹

Despite defense objections, the trial court, permitted the State to violate the court's own pretrial ruling and in spite of defense counsel's objections, the prosecuting attorney directed the jury to consider the associational evidence not necessary to prove what clothing was worn on the evening of April 5, 2008 or whether the defendant was wearing motorcycle attire with "Hidalgo" insignia but rather to prove McCreven's alleged association with a notorious outlaw motorcycle club and to infer that being a "Hidalgo" was akin to belonging to a notorious outlaw

¹ Even if defense counsel had not objected, because counsel addressed the issue pre-trial, that defense counsel was not required to request a limiting instruction regarding the ER 404(b) evidence in order to preserve his argument for appellate review. This court has held the losing party to a pretrial evidentiary ruling "is deemed to have a standing objection where a judge has made a final ruling on the motion, '[u]nless the trial court indicates that further objections at trial are required when making its ruling.'" *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (alteration in original) (quoting *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)).

motorcycle club. Furthermore, that membership corresponded with a criminal propensity to commit assault or to be an accomplice to an assault, to which the admission, over objection, the booking photo contributed. RP 1014. Even though defense counsel argued that a limiting instruction would not cure the harm (RP 898-899, 902, 904) this error was exacerbated when the Court declined to give defense-offered limiting instructions, both during the trial and in the court's instruction packet to the jury. RP 889-91, 2784-85; CP 159², 160³ advising the jury on the limits of using such information.

The State's opening and closing arguments emphasized that status as a member of the Hidalgo motorcycle club established accomplice liability because it established they acted in unity. CP 137, 229-230. It was this improper association theme, rather than a limited argument as to what clothing was worn, was promoted to

² Instruction No. _ Evidence has been introduced in this case on the subject of defendant's association with The Hidalgo motorcycle club. The mere association with a motorcycle club is a protected constitutional right. Constitutionally protected behavior cannot be the basis of criminal punishment. You must not consider this evidence for the purpose of drawing adverse inferences from the exercise of a constitutional right. Any discussion of the evidence during your deliberations must be consistent with this limitation. Cited to: Wa. Const. art. 1, § 22, 2nd Amend., U.S. Const.; *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984); *Hess v. Indiana*, 414 U.S. 105 38 L.Ed.2d 309, 94 S. Ct. 326 (1973); *Zant v. Stephens*, 462 U.S. 862, 77 L.Ed.2d 235, 103 S. Ct. 2733 (1983); *United States v. Jackson*, 390 U.S. 570 20 L.Ed.2d 138, 88 S.Ct. 1209 (1968); *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981); *State v. Johnson*, 124 Wn.2d 57, 873 P.2d 514 (1994); *Dawson v. Delaware*, 503 U.S. 159, 117 L.Ed.2d 309, 112 S.Ct. 1093 (1992); *United States v. Singletery*, 646 F.2d 1014, (5th Cir. 1981); *United v. Roark*, 924 F.2d 1426 (8th Cir. 1991).

³ Instruction No. _ Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of photographs depicting motorcycle garb and/or club affiliation and maybe considered by you for the purpose of their appearance on the night of the incident and not for purposes of their association with any club or organization, or any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation. Based on WPIC 5.30

the jury in closing when the State argued that there were four Hidalgos and four co-defendants. RP 2932.

Where, as here, an error infringes on a defendant's constitutional right, the reviewing court will presume prejudice and must reverse unless it is satisfied beyond a reasonable doubt that the jury would have convicted the defendant absent the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Also, under the ER404(b) standard, the reviewing court will find prejudice if the defendant can show a reasonable probability the trial court's ruling materially affected the trial outcome. Here both standards of review are met requiring a reversal of Mr. McCreven's conviction.

No testimony was presented indicated that support for the Bandidos was relevant to this case. No one described anyone at the Bull's Eye as sporting Bandidos attire, consequently the admission of numerous of photographs demonstrating an association with the Bandidos motorcycle club was prejudicial error, and an error that infringed on Mr. McCreven's First Amendment right to association and free speech and under the Fourteenth Amendment due process clause the conviction must be reversed.

The effect of this improper associational evidence allowed and enabled the jury to misapply the accomplice liability instruction and assume that if one of the "club" was involved then they were all involved even if they could not tell who did what, if anything at all. Accomplice liability has always been a difficult concept for

lawyers, yet alone the jurors, to understand. As the jury was instructed mere presence is not enough but presence and some unclear degree of readiness to assist is. Despite the fact the jury was also instructed that it was to consider each count and each defendant separately, the lack of a clear limiting instruction on the use of associational evidence and the State's repeated and cumulative use of associational evidence in this case, and the Court's allowance of it, enabled the jury to disregard the evidence and find Mr. McCreven guilty of murder in the second degree based merely on his association with the Hildalgo motorcycle club and its possible association with the Bandido motorcycle club, rather than the probative evidence presented.

Issue No. 2: The State Committed Prosecutorial Misconduct Which Deprived McCreven Of A Fair Trial

The law in Washington is clear, prosecutors are held to the highest professional standards. *See State v. Huson*, 73 Wn. App. 660, 663, 440 P.2d 192 (1968). A prosecutor has a duty as an officer of the court to seek justice as opposed to merely obtaining a conviction. *State v. Huson, supra.*

A prosecutor must always remember that he or she does not conduct a vendetta when trying any case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided. We recognize that the conduct of a trial is demanding and that if prosecutors are to perform as trial lawyers, a zeal and enthusiasm for their cause is necessary. However, each trial must be conducted within the rules and each prosecutor must labor within the restraints of the law to the end that defendants receive fair trials and justice is done. If

prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means. Court must not permit this to happen, for when it does the freedom of each citizen is subject to peril and chance.

State v. Torres, 16 Wn.App. 254, 263, 554 P.2d 1069.

In cases of professional misconduct, the touchstone of a due process analysis is fairness, i.e., whether the misconduct prejudiced the jury, thereby denying the defendant a fair trial guaranteed by the Fourteenth Amendment and Art.1 § 3 due process clauses. *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984). As well, both the federal and state constitutions guarantee a defendant the right to trial by an “impartial jury.” U.S. Constitution, Sixth Amendment; Wa. Const. Art. 1, § 22 (amend. 10). If the prosecutor lays aside impartiality to seek a conviction through improper means, then he or she ceases to properly represent the public interest. *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Multiple incidents of prosecutorial misconduct deny the defendant a fair trial if the cumulative effect of the misconduct materially affected the outcome of the trial. *State v. Henderson*, 100 Wn. App. 794, 804-805, 908 P.2d 907 (2000).

A prosecutor has a special duty to act “impartially in the interests of justice and not as a heated partisan.” *State v. Smith*, 71 Wn.App. 14, 18, 856 P.2d 415 (1993); see *State v. Huson*, 73 Wn.2d 660, 662, 440 P.2d 192 (1968) *cert. den.*, 393 U.S.1096, 21 L.Ed.2d, 787, 89 S. Ct. 886 (1969); *State v. Stover*, 67 Wn.App. 228, 232, 834 P.2d 671 (1992), *review denied*, 120 Wn.2d 1025 (1993). A criminal

defendant's right to a fair trial is denied when the prosecutor makes improper comments. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) ("Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial."); *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1935) (the remarks of the prosecutor are reversible error if they impermissibly prejudice the defendant); Sixth Amendment, U.S. Constitution.; Washington Constitution. Art.1 § 22(amendment 10). Misconduct objected to below compels reversal when there is a "substantial likelihood" that it affected the verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Even with no objection, reversal is still required when the misconduct is so flagrant and ill intentioned that it could not have been cured by instruction. *Id.*

"The State must convict on the merits, and not by way of misstating the nature of reasonable doubt, misstating the role of the jury, infringing on the right to remain silent, and improperly shifting the burden of proof to the defense." *State v. Fleming*, 83 Wn.App. 209, 214-216, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997).

Here, the State shifted the burden of proof, commented on a defendant's right to remain silent and, misused constitutionally protected rights of association and free speech in addition to repeatedly violating the court's ruling on motions in limine.

a. The Prosecutor Violated McCreven's Right To Silence During Closing Argument.

The Fifth and the Fourteenth amendments forbid the prosecutor from commenting on an accused's silence. *Griffith v. California*, 380 U.S. 609, 615, 14 L.Ed.2d 106, 85 S. Ct. 1229 (1965). Both the United States and Washington Constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. U.S. Const. amend. V; Wash. Const. art. I, § 9. Washington courts interpret the two provisions similarly, and liberally construe the right against self-incrimination. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). The right against self-incrimination prohibits the State from using a defendant's constitutionally protected silence as substantive evidence of guilt. *Easter*, 130 Wn.2d at 236, 922 P.2d 1285. The State may not use a defendant's silence to "suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Normally, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the misconduct affected the verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). However, when the prosecutor's misconduct affects a constitutional right, such as the right against self incrimination, the court undertakes a separate analysis; the constitutional harmless error analysis. *See State v. Easter*, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996). Under this review, the error is harmless only if reviewing court is convinced

beyond a reasonable doubt that the jury would have reached the same result. *Easter*, 130 Wn.2d at 242.

Here, by arguing to the jury that Mr. McCreven did not testify regarding acting in self defense, suggested that his silence was an admission that he did not really act in self defense and was therefore guilty of the charged crimes. RP 2933, 2937.

Despite objections to the State's comments, the trial court did nothing to correct the misstatements of the law. RP 2938. The trial court's response was merely, "The jury has been instructed on the law of the case. You can take up any objection at the conclusion of the closing arguments." RP 2938. After the State concluded its argument, defense counsel again objected to the argument and asked for a mistrial. RP 2954-2956. The court denied the motion RP 2957-60. This mirrored the trial court's response to similar objections – in which the trial simply indicated that the jury had been instructed on the law without taking any action to safeguard the defendant's rights. Of concern, is this tepid response to the objections has the effect of being an endorsement of the misconduct. *See*, Judge Jerome Frank, in *U.S. v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2nd Cir. 1946).

In fact, since the State had the burden to disprove self defense beyond a reasonable doubt, the jury did not need to hear from defendants in order to acquit. The jury had to acquit if it was not convinced beyond a reasonable doubt of the absence of self defense. The jury could have reached this conclusion even without

fully accepting the defense's version of events. By telling jurors that they could not acquit unless they heard from the defendants or and that the defendants had the burden of proving self defense, the State deprived Mr. McCreven of his constitutional right to have every element of the crime proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S. Ct. 1068 (1970).

Because violation of this fundamental rule during the State's closing argument constituted an impermissible comment on Mr. McCreven's right to remain silent, the State bears the burden of showing the error was harmless beyond a reasonable doubt. *Easter*, 130 Wn.2d at 242, 922 P.2d 1285. A constitutional error is harmless if the reviewing court is convinced that any reasonable jury would have reached the same result, absent the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). The court only looks at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Guloy*, 104 Wn.2d at 426, 705 P.2d 1182.

In this case the untainted evidence is not overwhelming. There is significant confusion as to who actually participated in the fight. RP 208-209, 330 (not sure what was happening), 282 (chaotic) 363-64, 367 (not sure if people on motorcycles were part of the fight), 466, 1035, 1112, 716, 2328-29 (two guys fighting) 2332-33 (a big mess of people) 1072 (Mike not in the fight), 1181. There is substantial evidence that Mr. Beaudine started the fight. RP 358-361, 2524, 2543, 2530, 2578. And Dana

Beaudine was conclusively identified by scientific DNA evidence as having handled the knife. RP 1940. This court should find that that the prosecutor's comment was prejudicial and reverse his conviction.

b. The Prosecutor Misstated The Law and Impermissibly Shifted the Burden Of Proof to McCreven.

The prosecutor committed misconduct in misstating the law and shifting the burden of proof. First, the prosecutor wrongly and repeatedly told the jury that to convict McCreven and his co-defendants/co-appellants all the State had to prove was “That the Defendant or an accomplice assaulted, or attempted to assault Dana Beaudine either with a deadly weapon, or assaulted or attempted to inflict substantial bodily harm, and in the course of that assault, caused the death of Dana Beaudine.” RP 2802. The State failed to mention that it also had to disprove self –defense beyond a reasonable doubt. Moreover, the State argued that McCreven had the burden of convincing them he acted in self defense. As the State argued, “What I want to say is this, for the State to disprove self-defense, first there must be proof of self defense.” And “Ladies and gentlemen, there is nothing to disprove that because there is no evidence of it.” “And likewise, also, there is no evidence that the Defendant has proved by a preponderance that he did not aid ...and “ So if there is no evidence of self-defense, how is it they get to argue it? “RP 2935, 2936, 2937. This repeated argument unconstitutionally shifted the burden of proof from the State to Mr. McCreven and his co-defendants/co-appellants.

When any evidence of self defense is presented, the State *must* disprove self defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984); *State v. McCullum*, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983). Here, the trial court obviously agreed that the evidence in this case supported self defense instructions and agreed to instruct the jury on justifiable homicide. The evidence the trial relied upon included testimony regarding Mr. Beaudine's belligerent and intoxicated behavior and the handler DNA recovered from the knife. RP 1768, 1785, 358,361, 2525-26, 2543, 1939-40.

Furthermore, on rebuttal, when the defense had no opportunity to respond to the improper arguments, the State argued the jury had to determine "The truth, and what happened that night, the truth in what each of these defendants did that night...": RP 2925. Defense timely objected on the grounds of misstating the law and shifting the burden of proof. RP 2926. The court again merely responded that his ruling was "the jury has been instructed on the law of this case." RP 2926. Emboldened no doubt by the court's acquiescence, the prosecutor continued with the "truth" argument and included disparaging remarks against defense counsel by arguing, "That word truth, it's in the instructions. The law you have been given, and truth does not involve game play, or loopholes or trickery. It's the law" RP 2926.

It is misconduct for a prosecutor to make statements which mislead the jury as to the law. *See State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)(For the prosecutor to misstate the law to the jury "is a serious irregularity

having the grave potential to mislead the jury”). As recently found by this division in *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009) requests that a jury determine the truth are improper. As stated by the *Anderson* court, “A jury’s job is not to “solve” a case. It is not, as the State claims, to ‘declare what happened that day in question. . . . Rather the jury’s duty is to determine whether the State has proved its allegations beyond a reasonable doubt.” *Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). Moreover, it is misconduct to disparage defense counsel and imply the defense case is a sham. *United States v. Sanchez*, 176 F.3d 1214, 1224-1225 (9th Cir. 1999). Such tactics violate a defendant’s Sixth and Fourteenth Amendment rights to effective representation by counsel.

Finally, as so amply demonstrated by the State’s closing argument power point presentation (CP 218-230) - at its core, the prosecutor’s argument that association with a motorcycle club was equivalent to being an accomplice was an attempt to convict Mr. McCreven not on the evidence but on character, and as a person who associated with other members of a motorcycle club and rode under the colors of red and gold, must be guilty, must be acting in unison simply because he may hold the same beliefs or associate with those who hold the similar beliefs . Such arguments are highly improper. *See ER 404*. Further in making the argument that association with a motorcycle club, the State asked the jury to punish McCreven for exercising his constitutional right of association and free speech. *See, e.g. State v. Rupe*, 101 Wn.2d 664, 708, 683 P.2d 571 (1984).

As discussed above, a constitutional error is presumed prejudicial and the State has the burden of showing the error is harmless. *State v. McDaniel*, 155 Wn. App. 829, 230 P.3d 245 (2010). An error is harmless if the reviewing court is convinced that any reasonable jury would have reached the same result, absent the error. *State v. Guloy*, 104 Wn.2d at 425, The court only looks at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Guloy*, 104 Wn.2d at 426. Here, the prosecutors' complete misstatements of the law on self defense, commenting on the defendant's rights to remain silent and protected association rights (See argument 1) were such serious irregularities that entwined improper arguments and evidence that it cannot be said that they were harmless beyond a reasonable doubt. Independently, and in combination with the repeated burden shifting arguments, these irregularities require reversal. By declaring multiple times that Mr. McCreven had not proved self defense and that they had not heard from the defendants, the prosecutor improperly told them it was Mr. McCreven and his co-defendants/co-appellants, not the State, who had the burden of proof.

c. The Prosecuting Attorney Repeatedly Violated The Courts Pre-Trial Rulings in Limine.

Before trial the Mr. McCreven moved to exclude evidence and testimony concerning, among other things, weapons, gang/motorcycle club affiliation and use of the term "victim" for the deceased. CP 94-112. Pre-trial motions in limine were

heard and ruled on by the court. The trial court excluded evidence of weapons, use of the term “victim” to refer to the deceased and evidence of motorcycle club associations not specifically tied to identifying clothing or items with Hidalgo insignia that the defendant was wearing on April 5, 2008. CP 334-336, RP 4/13/10 p. 134 (weapons); RP 128, 137-140 (cannot use term victim can refer to him as deceased); 131 (motorcycle attire for purposes of identification only).

“The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice [his or her] presentation.’ “*A.C. v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 525, 105 P.3d 400 (2004) (internal quotation marks omitted) (quoting *State v. Sullivan*, 69 Wn. App. 167, 170, 847 P.2d 953 (1993)). A prosecutor’s violation of a ruling in limine may constitute misconduct warranting a mistrial. *State v. Clemmons*, 56 Wn. App. 62, 782 P.2d 219 (1989) review denied, 114 Wn.2d 1005 (1990). *State v. Escalona*, 49 Wn. App. 251, 254-56, 742 P.2d 190 (1987).

During the State’s case several witnesses’ testimony violated the Court’s pre-trial rulings on motions in limine – such as Gary Howden’s repeated use of the word, “victim.” RP 219, 319, 323. Jennifer Abbot also calling Beaudine the “victim”. RP 472. The trial court declined to give defense proffered limiting instruction and merely instructed all trial counsel to follow the court’s ruling in limine. RP 351-352, RP 517. In violation of the motions in limine Deputy Laliberte also referred to the

deceased as “victim” during cross examination. RP 1751. The court also struck this answer. RP 1751.

Also in violation, Detective Donlin testified that he found weapons (knives) in co-defendant’s Smith’s vehicle RP 1596, and Ms. Dobiash was asked about the search warrant and responded that the officers were looking for gang related items and weapons. RP 1457, 1501-03. The prosecutor admitted she had not informed the witness of the court’s rulings. RP 1503. As noted above, these violations of the trial court’s pretrial rulings constitute prosecutorial misconduct. After Officer Donlin’s violation the trial court denied the motion for a mistrial and instructed the jury to disregard the answer, 1597 - 1604.

Mr. McCreven also objected to the violation of the court’s ruling when the State’s witness Ms. Dobiash was asked what the officers were searching for at her home and she replied she thought they were searching for weapons and evidence of motorcycle gang associations. RP 1457, 1501-1503, again, the court merely instructed the jury to disregard, and denied Mr. McCreven’s motion to dismiss for prosecutorial misconduct. RP 1457, 1503.

Based on the continuing violations of the court’s ruling Defense Counsel renewed its motion to dismiss for repeated violations of the motions in limine. RP 1757. Finally, Mr. McCreven moved for a dismissal and new trial post verdict based on the trial errors, which was also denied. RP7/23/09 p.49 CP 320-331.

d. The Prosecutor Committed Misconduct By Providing And Coaching Witnesses With Annotated Police Reports.

The criteria for the use of notes or other memoranda to refresh a witness' recollection are (1) that the witness' memory needs refreshing, (2) that opposing counsel have the right to examine the writing, and (3) that the trial court be satisfied that the witness is not being coached-that the witness is using the notes to aid, and not to supplant, his own memory. *State v. Little*, 57 Wn.2d 516, 521, 358 P.2d 120, 22 (1961).

During the course of direct examination by the State of key eye witness Garry Howden; the second officer to respond to the scene, Tara Simmelink; the detective tasked with getting witness descriptions of the individuals believed to be involved and of taking the statement of Ms. Shannon Ford, Detective McCarthy; and eye witness Reyna Blair, the state had marked for identification reports and transcripts of taped statements that were annotated by the State with information regarding the identification of the defendants and the like. Sup. CP Exhibits 193, 199, 257, 263; RP 822 to 832. Upon learning of the use of the annotated exhibits defense objected and again moved for mistrial and addressed the impropriety of giving of investigative materials to witnesses. CP 124-137; RP 850-852, 858-59. (CrR 4.7(h) requirement of exclusive custody of materials).

The State conceded that such annotations are improper but argued they did not influence the witnesses' testimony, stating, "I understand they are livid. I think it

was just stupid of me not to make sure that none of the exhibits that were used to refresh the witnesses' recollections were clean copies. And it was very dumb of me not to do that. And I can see why they are upset. I would be as upset if the situation were reversed." RP 856. The trial court denied McCreven's motion to dismiss. RP 861. Of concern to Mr. McCreven, and presumably the court, is the impact such information had the testifying witnesses. Of special concern is the impact of showing such a statement to Mr. Howden who testified as to his recollection of the individuals involved the incident. Mr. Howden testified he met with prosecutors and reviewed his statements before testifying. Moreover, also unbeknownst to the defense, the State had supplied Mr. Howden with Ex. 193 to assist in his trial preparation in violation of CrR 4.7(h). RP 858-859.

Prejudice is established because, unbeknownst to defense counsel, the State was providing to testifying witnesses copies of documents to refresh their recollection that contained very pertinent notations/comments by one of the prosecutors herself. Such documents consisted of transcripts of the witness' taped interview with such notations as naming which defendant the prosecutor believed a description fit with and copies of police reports annotated documents to its testifying witnesses, without access to this information; the trial was been tainted from the outset. *State v. Little*, 57 Wn.2d 516, 358 P.2d 120 (1961). Defense counsel was deprived of the opportunity to investigate and cross examination the witnesses on the impact of such annotations and effectively represent Mr. McCreven as required

under the 6th, 8th and 14th Amendment to the United States Constitution, *Brady v Maryland*, 373 U.S. 83, 87, 10 L.Ed2d 215, 83 S. Ct. 1194 (1963); *United States v Bagley*, 473 U.S. 667, 676, 87 L. Ed.2d 481, 105 S.Ct. 3375, 3380 (1985); *Kyles v Whitley*, 514 U.S. 419 (1995).

e. The State Improperly Questioned The Witnesses To Bolster Or Undercut Their Credibility.

Mr. McCreven argues that the State engaged in misconduct when it elicited testimony from its lay witness Jennifer Abbott the statement “You’re not making this up?” RP 513, 514. Additionally, that there was misconduct when the State interjected into the proceedings that Reyna Blair was not testifying truthfully because she was afraid that identifying any Hidalgo would endanger herself or her children when there was no evidence she was ever threatened or contacted by anyone associated with this case. RP 728, 733-34 Counsel objected and the testimony was stricken but not before the damage was done. RP 733-34.

With reference to Ms. Dobiash, the State improperly questioned the lead detective in the case, Detective Wood her about her cooperation with the State by asking the detective if she only participated in a second interview with law enforcement after ordered to do so by the trial court even though no such order was ever made or entered. CP 138-149. RP 2148. The State said, “The follow up interview with Ms. Dobiash, did that occur before after a court order requiring her to do so?” The objection to the untrue question was sustained. RP 2148. In fact on

April 2, 2009, Ms. Dobiash's attorney indicated she would be cooperating with law enforcement and met voluntarily with them. RP 4/2/09 p. 4-5. In addition at one point during Ms. Dobiash's testimony also commented on her veracity by prefacing a question with "other than your word...?" RP 1917. It was immediately objected to as improper and as shifting the burden to Mr. McCreven to present evidence. The court overruled the objection. RP 1920.

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997); *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). However, a prosecutor cannot bolster a witness' testimony by eliciting a statement from the witness to show the witness is fearful of testifying, without an attack on the witness' credibility. *State v. Bourgeois*, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997). The evidence is impermissible on direct examination since it could lead the jury to view a witness' fear as substantive evidence of guilt (that the defendant has somehow threatened the witness.). *Id. at 400*. As stated by the *Bourgeois* court, "While we feel certain that the testimony of a witness regarding his or her fear or reluctance to testify might have a bearing on a juror's evaluation of that witness's credibility, such evidence might also have another effect. It could lead the jurors to conclude that the witness is fearful of the defendant. In that sense, the testimony would have to be viewed as substantive evidence of the defendant's guilt because evidence that a defendant threatened a witness is normally

admissible to imply guilt. *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945).” *Id.* at 400. “A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). Neither Mr. McCreven nor any of his co-defendants/co-appellants was charged with witness tampering or intimidation and there was no evidence that any improper conduct on the part of Mr. McCreven or his co-defendants/co-appellants took place, but the interjection of information suggesting she was afraid falsely suggest to the jury that Ms. Blair’s evasive testimony was the result of fear of reprisal from the defendants.

Moreover, asking witnesses if they are telling the truth or not is another form of improper vouching or impeachment. *State v. Green*, 119 Wn. App. 15, 24, 79 P.3d 460 (2003) citing, *State v. Jessup*, 31 Wn. App. 304, 316, 641 P.2d 1185 (1982).

Furthermore, the State’s misrepresentation to the jury regarding Ms. Dobiash that she only cooperated with a second taped interview with law enforcement because there was a court order requiring her to do so when in fact no such order existed and the State knew, or at a minimum should have known, this violated RPC 3.3(a)(1); (4); 3.4(e). Although the trial did provide a limiting instruction regarding this issue, it is Appellant’s position that Ms. Dobiash’s, and by clear inference as his girlfriend, Mr. McCreven’s credibility were improperly and unjustly attacked by the State based on the State’s lie and fabrication. The prejudicial effect of this misconduct

is extreme and cannot be undone with a curative instruction and denied Mr. McCreven his constitutional right to a fair trial.

Unlike *Bourgeois*, the evidence was not harmless because the State's case hinged on the jury's determination of the credibility of the witnesses, especially Ms. Blair who initially told police Mr. McCreven had nothing to do with "it" and Ms. Dobiash who was Mr. McCreven's girlfriend. So unlike the unlike situation in *Bourgeois* where the reviewing court found the three witnesses that the State had improperly bolstered were not central to the State's case, the same cannot be said here.

It is an unreasonable and manifestly untenable ruling to hold that disregard of a court's ruling does not constitute misconduct. See e.g. *State v. Ra*, 144 Wn. App. 688, 700, 175 P.3d 609 (2008); *State v. Gregory*, 158 Wn.2d 759, 866-67, 147 P.3d 1201 (2006)(Pierce County prosecutor closing argument regarding prison conditions and possibility of escape in violation of court order issued on prosecutor's own motion, was reversible misconduct.) Governmental misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997) quoting *Blackwell*, 120 Wn.2d at 831). Testimony that violates a ruling in limine is grounds for a mistrial if it prejudices the jury. *State v. Escalona*, 49 Wn.App. 251, 254-56, 742 P.2d 190 (1987).

Thus, if the reviewing court finds misconduct, the determination to be made is whether it prejudiced the jury thereby denying the defendant a fair trial. *State v.*

Farr-Lenzini, 93 Wn. App.453,470;970 P.2d 313 (1999) *Davenport*, 100 Wn.2d at 762; *State v. Fleming*, 83 Wn. App. at 215-16. Here, deliberate disregard for the trial court's pretrial rulings on the exclusion of certain testimony and evidence and failure to inform its law enforcement witness of the exclusion as well as the use of their own notes to improperly "refresh the recollection" or shape the testimony of their witnesses, reinforcing irrelevant fear testimony and misleading the jury with a false statement cumulatively and individually prejudiced Mr. McCreven and requires this court to reverse Mr. McCreven's conviction.

Issue No. 3: The Trial Court's Denial Of His Motions To Dismiss Denied Mr. McCreven His Right To A Fair Trial And Was An Abuse Of Discretion.

a. CrR 8.3 Standard.

CrR 8.3(b) reads:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

To support a CrR 8.3(b) dismissal, a defendant must show both "arbitrary action or governmental misconduct" and "prejudice affecting [his or her] right to a fair trial." *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997) (citing *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). "Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial." *State v. Farr-Lenzini*, 93 Wn. App. 453, 470, 970 P.2d 313 (1999) quoting *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A

trial court's decision under CrR8.3(b) is reviewed under the abuse of discretion standard, that is whether a trial court has abused its discretion by making a decision that is manifestly unreasonable or based on untenable grounds. *Michielli*, 132 Wn.2d at 240 (citing *Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). In general the appellate courts have taken a strong stand against prosecutorial misconduct which affects a defendant's right to a fair trial, and have not hesitated to reverse where the misconduct was a comment on a constitutional right, or the cumulative effect was so prejudicial that it could not be cured by any instruction. See, e.g., *State v. Brooks*, 140 Wn.App. 375, 203 P.3d 397 (2009), *State v. Jones*, 144 Wn.App. 284, 183 P.3d 307 (2008)(reversing where three instances of prosecutorial misconduct cumulatively deprived the defendant of a fair trial); *State v. Boehning*, 127 Wn.App. 511, 111 P.3d 899 (2005); *State v. Thomas*, 142 Wn. App. 589, 174 P.3d 1264 (2008) (reversing conviction where prosecutor improperly argued that his refusal to return to the crime scene and talk with police was evidence of his guilt, and the other evidence was not sufficient to render this constitutional error harmless). Here, as argued above, similar constitutional error exists. During closing argument the State shifted the burden of proof, and commented on Mr. McCreven's right to remain silent

In addition to constitutional error, discussed above, evidentiary error requires a reversal. In *Brooks, supra, Michielli, supra,* and *State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990), the dismissals were supported by evidence of misconduct which prejudiced the defendants' right to a fair trial. The dismissals were therefore

neither manifestly unreasonable nor exercised on untenable grounds. Such is the case here as well, not only was there insurmountable prejudice to the defendant by the improper introduction of evidence but the prosecutor also violated the court's orders specifically excluding the evidence and the obligation of the State to inform each and every of its witnesses of the Court's rulings, misled the jury about Ms. Dobiash only cooperating with law enforcement after being ordered to do so by the court, and using annotated police reports to refresh witness recollections.

b. The Curative Instructions Did Not Un-Ring The Bell.

Here the Court's failure to give curative instructions when requested, and the instructions given to the jury at the end of the case and its admonitions to the jury to disregard the last answer in response to repeated violations was insufficient to protect McCreven's right to a fair. In this case no reasonable fact finder could find that a curative instruction would have "un-rung" the bell. RP 889-891, CP 159-160.

While ordinarily an error in the admission of evidence is remedied by an instruction directing the jury to disregard it, the rule is by no means of universal application. Each case must rest upon its own facts, and in some instances the error may be so serious that an instruction, no matter how framed, will not avoid the mischief.

State v. Morsette, 7 Wn. App. 783, 789, 502 P.2d 1234 (1972), quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.584 (1917).

The Court had already ruled on Defendant's motions in limine and had granted them because was precisely the type of inherently prejudicial information which "could not be expected to be erased by an instruction to disregard it."

Morsette, 7 Wn. App. at 789.⁴ As in the *Miles* case, the prejudicial effect of the State elicited testimony could not be removed by an instruction; *See also State v. Suleski*, 67 Wn.2d 45, 48-49, 406 P.2d 613 (1965).

Because the type of improper information which had been excluded by the court in its rulings on motions in limine was repeatedly put before the jury is “inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors” (*Miles*, 73 Wn.2d at 71) it cannot be assumed that the jury could disregard the testimony. Likewise, the State’s misrepresentation that Ms. Dobiash had to be forced via a court order to cooperate with Detective Woods is the type of evidence that is prejudicial and not likely to be dismissed with an admonition to do so. The trial court abused its discretion in finding that the defendant was not prejudiced by multiple violations of the court’s pretrial rulings, misleading the jury, and coaching witnesses.

The trial abused its discretion in failing to dismiss the criminal charges in the furtherance of justice under CrR 8.3(b) when the defendant amply demonstrated (1) government misconduct or arbitrary action that (2) prejudiced the defendant’s right to a fair trial. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

⁴ As stated by the *Morsette* Court, “To think that the jury could have forgotten is a strain on credulity and highly dubious. . . . We conclude . . . that the testimony of the officer and expert in this case ‘was so prejudicial in nature that its effect upon the minds of the jurors could not be expected to be erased by an instruction to disregard it.’ Further, any doubt as to whether the error was cured must be resolved in favor of the accused.”

In this case the State committed misconduct and the trial court exacerbated the error by when it found that it had not when they failed to comply multiple times with the trial court's pretrial orders, improperly influenced their witnesses' testimony, interjecting opinions of fear into Ms. Blair's testimony and misrepresenting to the jury Ms. Dobiash's cooperation with investigating police officers. Cumulatively, prosecutorial misconduct permeated the trial.

Issue No. 4: Juror Misconduct Deprived Mr. McCreven Of His Right To A Fair Trial.

Under the Sixth Amendment to the United States Constitution and Art. 1 §§ 21 and 22 of the Washington Constitution, a defendant is entitled to a determination by a fair and impartial jury. Article I, § 21 of the Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate...." The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989); *Smith v. Kent*, 11 Wn. App. 439, 443, 523 P.2d 446, *review denied*, 84 Wash.2d 1007 (1974).

Pre-deliberation deliberation results in denial of fundamental fairness. *United States v. Resko*, 3 F.3d 684 (3rd Cir 1993) (Conviction for conspiracy to distribute cocaine and heroin reversed and remanded for a new trial where jurors admitted to premature deliberations; *People v. Romano*, 8 A.D. 3d 503 (N.Y. App. Div. 2004) (Affirming lower court decision setting aside jury verdict where evidence

established that the jurors discussed trial testimony before deliberations commenced); *State v. Cherry*, 20 S.W.3d 354 (Ark. 2000) (new trial granted in first degree murder case where seven of 12 jurors admitted to either participating or overhearing conversations about the case); *State v. Eagan*, 582 P.2d 1195 (Mont. 1978) (conviction for mitigated deliberate homicide reversed and remanded for a new trial. Juror reported joking about the case).

Pre-deliberation deliberation appears to be an issue of first impression in this State. However, it is a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body. *See* WPIC 1.01. Here, the trial court specifically instructed the jurors that were not to discuss the cases with each other or anyone else until after closing arguments when they would start what he defined for them as deliberations. RP 24.

Reasons supporting the prohibition against pre-deliberation deliberations include:

There are a number of reasons for this prohibition on premature deliberations in a criminal case. *See generally* Lillian B. Hardwick & B. Lee Ware, *Juror Misconduct* § 7.04, at 7-27 (1988). First, since the prosecution presents its evidence first, any premature discussions are likely to occur before the defendant has a chance to present all of his or her evidence, and it is likely that any initial opinions formed by the jurors, which will likely influence other jurors, will be unfavorable to the defendant for this reason. *See Commonwealth v. Kerpan*, 508 Pa. 418, 498 A.2d 829 (1985). Second, once a juror expresses his or her views in the presence of other jurors, he or she is likely to continue to adhere to that opinion

and to pay greater attention to evidence presented that comports with that opinion. Consequently, the mere act of openly expressing his or her views may tend to cause the juror to approach the case with less than a fully open mind and to adhere to the publicly expressed viewpoint. See *Winebrenner v. United States*, 147 F.2d 322, 328 (8th Cir.1945); *State v. Joyner*, 289 S.C. 436, 346 S.E.2d 711, 712 (1986).

Third, the jury system is meant to involve decisionmaking as a collective, deliberative process and premature discussions among individual jurors may thwart that goal. See *Winebrenner*, 147 F.2d at 329; *Kerpan*, 498 A.2d at 831. Fourth, because the court provides the jury with legal instructions only after all the evidence has been presented, jurors who engage in premature deliberations do so without the benefit of the court's instructions on the reasonable doubt standard. See *Winebrenner*, 147 F.2d at 327. Fifth, if premature deliberations occur before the defendant has had an opportunity to present all of his or her evidence (as occurred here) and jurors form premature conclusions about the case, the burden of proof will have been, in effect, shifted from the government to the defendant, who has "the burden of changing by evidence the opinion thus formed." *Id.* at 328.

Finally, requiring the jury to refrain from prematurely discussing the case with fellow jurors in a criminal case helps protect a defendant's Sixth Amendment right to a fair trial as well as his or her due process right to place the burden on the government to prove its case beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

U.S. v. Resko, 3 F.3d 684, 689-690 (C.A.3 Pa. 1993).

McCreven bears the burden of showing that the alleged misconduct occurred. *State v. Barnes*, 85 Wn. App. 638, 668-69, 932 P.2d 669 (1997) (failure to disclose information during voir dire). The determination of whether misconduct has occurred lies within the discretion of the trial court. *Id.* citing *State v. Havens*, 70 Wn. App. 251, 255-56, 852 P.2d 1120, review denied, 122 Wn. 2d 1023, 866 P.2d 39

(1993). Misconduct is established in this case when as here the judicial assistant was approached by Jury No. 7 who reported that other jurors were discussing Ms. Blair's testimony. RP 776-779. The court then interviewed the jurors separately regarding their discussion. RP 784-815. Here, Jurors 3, 4, 5, 7, 9, 10, 11, 12, 13, 15 admitted to hearing or participating in conversations regarding Ms. Blair's testimony. RP 787-88, 791-92, 793- 94, 797-98, 800, 802—03, 804-06, 807, 810 812, 814-15. Juror No.1 denied saying anything but Juror No. 7 indicated 1 had been involved in the discussions. RP 785, 798.

While counsel did not locate any cases directly addressing pre-deliberation deliberations, Washington cases addressing juror misconduct have encompassed, among other things, withholding information during voir dire and interjection extraneous evidence into deliberations. *State v. Young*, 89 Wn.2d 613, 629, 574 P.2d 1171, 1181 (1978) (Defendant's attorney filed a supplemental affidavit alleging that one of the jurors had a preconceived belief that defendant was guilty which belief was not disclosed in voir dire.) In *State v. Johnson*, a juror withheld information during voir dire in rape case that her daughter had been a rape victim. *State v. Johnson*, 137 Wn.App. 862, 868, 155 P.3d 183, 187 (2007). The juror interjected this information and her personal experience about rape victims not being believed into the jury deliberation discussion. *Id.* at 869-70. The reviewing court found that the defendant was likely prejudiced by the injection of the juror's personal undisclosed information into deliberations. *Id.* The *Johnson* court held "Juror

misconduct involving the use of extraneous evidence during deliberations will entitle a defendant to a new trial if there are reasonable grounds to believe a defendant has been prejudiced.” *Johnson*, 137 Wn. App. at 869 citing *Briggs*, 55 Wn.App. at 55, 776 P.2d 1347 (citing *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)). Any doubt that the misconduct affected the verdict must be resolved against the verdict. *Id.* at 869-70 citing *Briggs*, 55 Wn.App. at 55, 776 P.2d 1347 (citing *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973)). This is an objective inquiry into whether the extraneous evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence. *Briggs*, 55 Wn.App. at 55-56, 776 P.2d 1347. The question is whether the unrevealed or extraneous information could have affected the jury's determinations, not whether it actually did. *State v. Briggs*, 55 Wn. App. at 55, 776 P.2d 1347; *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651 (1962), 60 Wn.2d 836, 379 P.2d 918 (1963); see *Richards v. Overlake Hosp. Med. Center*, 59 Wn.App. at 270, 796 P.2d 737. A new trial must be granted unless “it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.” *Briggs*, 55 Wn.App. at 56, 776 P.2d 1347 (quoting *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir.1981)); *State v. Johnson*, 137 Wn.App. 862, 869-870, 155 P.3d 183, 187 (2007). *State v. Tigano*, 63 Wn.App. 336, 341, 818 P.2d 1369 (1991), review denied, 118 Wn.2d 1021, 827 P.2d 1392 (1992). In that context the court determined prejudice by asking whether the withheld or

extraneous information could have affected the jury's deliberations. *Tigano*, 63 Wn.App. at 341, 818 P.2d 1369.

The trial court instructed the jury not to discuss the case and repeatedly admonished them during the course of the trial not to discuss the case RP 24, however 10 of the 15 jurors admitted to discussing witness Reyna Blair's testimony in the jury room immediately after her testimony. Jurors 11 and 13 specifically commented on her apparent fear even though the Court struck this testimony. The discussion is significant because Ms. Blair's fear related to questioning about identifying Mike McCreven as one of the participants to the fight. RP 728. The State persisted with asking Ms. Blair if her memory would be refreshed by reading a transcript of her testimony, to which she responded if I had to pick out any killer, I wouldn't want to be known, because I have kids at home." RP 730. Defense moved to strike and the objection was sustained, however, based on the revelations from the jurors, it is clear they were unable to follow the court's instruction, to Mr. McCreven's prejudice.

Mr. McCreven asked that these jurors be removed, however the trial court declined to do so. RP 819, 823. Not only was this improper conduct on the part of the jury, but here the issue is of great significance in that the reviewing court may rely on the maxim that jurors are presumed to follow their instructions in deciding other issues raised in his appeal, but as this incident established, these jurors either could not or would not follow explicit, repeated instructions from the court.

Here, Mr. McCreven established there was misconduct, 10 jurors admitted to discussing Ms. Blair's demeanor and testimony. The misconduct amply demonstrated that the jury could not follow the court's instructions, and the topic of discussion – Ms. Blair's apparent reluctance to testify truthfully and her fear of identifying Mike McCreven were prejudicial. Additionally, because such pre-deliberation discussions infringe on a defendant's right to fair trial, Mr. McCreven has further established prejudice. Because the jury engaged in pre-deliberation deliberations regarding a witness who the State was trying to demonstrate feared Mr. McCreven, Mr. McCreven's conviction must be reversed and his case remanded for a new trial.

Issue No. 5: The Trial Court Abused Its Discretion In Denying Mr. McCreven's Motion For A Separate Trial.

While the courts in this State do not favor separate trials in cases involving co-defendants, if the defendant demonstrates specific prejudices outweighing concerns for judicial economy, severance is required. Generally, a defendant demonstrates specific prejudice by showing

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants. *Oglesby*, 764 F.2d at 1276 (citations omitted).

State v. Canedo-Astorga, 79 Wn.App. 518, 528, 903 P.2d 500, 506 (1995); *see also State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994) (citing *State v. Grisby*, 97 Wash.2d 493, 506, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983)). A trial court's denial of a motion to sever is reviewed for a manifest abuse of discretion. *Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). An appellant has the burden of demonstrating that a joint trial " 'would be so manifestly prejudicial as to outweigh the concern for judicial economy.' " *State v. Medina*, 112 Wn. App. 40, 52, 48 P.3d 1005 (quoting *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990)), *review denied*, 147 Wn.2d 1025, 60 P.3d 93 (2002).

"Specific prejudice may be shown by a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt..." as well, as well as by showing " 'antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusiveor a or gross disparity in the weight of the evidence against the defendants.' " *State v. Canedo-Astorga*, 79 Wn.App. 518, 528 (1995) quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985). Although antagonistic defenses seem to be a well-recognized ground for a separate trial, nevertheless the cases examined have revealed an apparent reluctance on the part of trial courts to grant a severance upon this ground and an apparent reluctance by appellate courts to find reversible error in the denial of severance by the trial court.

State v. Johnson, 147 Wn.App. 276, 284, 194 P.3d 1009 (2008) (citing *Grisby*, 97 Wn.2d at 507, 647 P.2d 6), *review denied*, 165 Wn.2d 1050, 208 P.3d 555 (2009); *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 712, 101 P.3d 1 (2004). However, in *People v Simms* 10 Cal App 3d 299, 89 Cal Rptr 1 (1970), the court pointed out that in the exercise of sound discretion, upon a timely demand for a separate trial, a court should separate the trials of codefendants where there are conflicting defenses *or there is a prejudicial association* with a codefendant. *See also People v Massie* 66 Cal 2d 899, 59 Cal Rptr 733, 428 P.2d 869, (1967), and *People v Graham* 71 Cal 2d 303, 78 Cal Rptr 217, 455 P.2d 153 (1969).

Mr. McCreven's pre-trial motion alleged inconsistent defenses and the potential for adverse associational inference arising from his and the others motorcycle club membership would prejudice him. 3/6/09 RP 33, 39. Mr. McCreven also requested a severance due to the requirement that he share six peremptories with co-defendants. 4/17/09 RP 159. It was also denied when Mr. McCreven wanted to introduce evidence that other defendant's objected to (RP 1345) and again at the close of the case. 6/4/09 RP 38-42; RP 2312.

McCreven's defense was a general denial of any involvement in the crime and that he was a bystander to the fight between Beaudine, Beaudine's friend Vince James, and co-defendants or at best he acted in the defense of others. Ford's defense attempted to shift the blame to McCreven, Nolan and Smith, and in pursuit of the defense Ford's attorney acted as an additional prosecutor, misstated testimony, sought

to reinforce the associational ties of the co-defendants/co-appellants and interjected facts not in evidence into the proceedings to the utmost prejudice of Mr. McCreven. RP 157, 257, 333, 1410-11, 2911. With respect to co-defendants Nolan and Smith, the evidence was grossly disproportional and by using the forbidden associational evidence Mr. McCreven was unduly and unfairly prejudiced. Mr. Smith was identified as the individual actively fighting with Mr. Beaudine. RP 1021-22, 1039 and the license plate number of his car was provided to the police as being the car driven by one of the participants to the fight. RP 218. Mr. Nolan acknowledged being in the fight and using a sap as a weapon. RP 168, Mr. McCreven was not identified as being part of the fight. RP 1172.

Evidence from four homes was introduced, included items that were prejudicial to Mr. McCreven - including photographs establishing associational interest in the outlaw motorcycle club the Bandidos recovered from Mr. Ford's and Mr. Smith's home.

It is clear that given the insufficient evidence upon which the jury found Mr. McCreven guilty, the State's reliance on associational evidence as accomplice liability and the trial court's allowance of such, the jury was not able to separate the evidence for each defendant and make an independent determination of guilt or innocence for each defendant, including Mr. McCreven, as required for a fair trial. See Argument 1, 11.

Accordingly, Mr. McCreven was denied his right to a fair trial and the trial court abused its discretion when it denied his motions for a separate trial.

Issue No. 6: The Trial Court Erred In Sealing The Jury Questionnaire Without Conducting The Required Analysis.

Whether a trial court procedure violates the right to a public trial is a question of law we review de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

In this case the public never had access to the completed jury questionnaires. The questionnaires were distributed to the venire in the afternoon of April 9, 2009. RP 4/9/09 p. 105, 149. That after noon the court recessed until Monday morning, April 13, 2009. RP 4/9/09 p. 151. On April 13, 2009 the court reconvened and entered the order sealing the questionnaires. CP 113.

Judicial proceedings, including the jury selection process, are presumptively open to the public. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)); *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212, *rev. granted*, 236 P.3d 206 (2010). The defendant is guaranteed a right to a public trial by both article I §§ 10, 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. *Brightman*, 155 Wn.2d at 514. Article I, § 22 of the Washington Constitution states: "In criminal prosecutions the accused shall have the right ... to have a speedy public trial." Similarly, the Sixth Amendment to the United

States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." Moreover, art.1 § 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay."

These constitutional provisions assure a fair trial and foster trust in the judicial system. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982)

In *Ishikawa*, the court set the framework for determining whether a competing interest will allow the trial court to restrict public access to court proceedings. The trial court must weigh the following factors before sealing any court records or closing any portion of court proceedings:

1. The proponent of closure or sealing must make some showing of the need for doing so, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993) (citing *Ishikawa*, 97 Wn.2d at 37-39).

The Supreme Court later held in *Bone-Club* that the trial court must analyze these same five factors to determine whether a competing interest will allow the trial court to restrict public access in opposition to the article I, § 22 rights of a defendant in a criminal trial. *Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The

Bone-Club analysis recognizes that the public's article I, § 10 open access right and the defendant's article I, § 22 public trial right "serve complementary and interdependent functions in assuring the fairness of our judicial system." *Id.* at 259.

In *Waldon*, the court held that the same analysis applies to the sealing of court documents. *Waldon*, 148 Wn.App. 952, 967, 202 P.3d 325 (2009). In *State v. Coleman*, the court held that a *Bone-Club* analysis is required before sealing juror questionnaires, which are considered court records. *State v. Coleman*, 151 Wn.App. 614, 620, 214 P.3d 158 (2009); see *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 152, 2002-Ohio-7117, 781 N.E.2d 180 (2002) (observing that "virtually every court having occasion to address this issue has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness").

The guarantee of open criminal proceedings extends to jury selection, which is important "not simply to the adversaries but to the criminal justice system." *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter.*, 464 U.S. at 505, 104 S.Ct. 819).

Here the Court, on its own motion, ordered the jurors' questionnaires (CP 113) be sealed without undertaking the required analysis and they were never available for public scrutiny, thus the order sealing constituted a structural error, requiring a new trial. *Paumier*, 230 P.3d at 216, 217 (acknowledging the court's "seeming retreat from precedent but still holding that structural error requires a new trial in "State v.

Momah, 167 Wn.2d 140, 217 P.3d 321 (2009)); *State v. Strode*, 167 Wn.2d 222, 227-30, 217 P.3d 310(2009).

Issue No. 7. Instruction 34, The “To Convict” Instruction For Felony Murder In The Second Degree, Omitted The Essential Element The State Must Prove The Absence Of Self-Defense Beyond A Reasonable Doubt.

a. Jury Instructions On Self-Defense Must Make The Relevant Legal Standard “Manifestly Apparent” To The Jurors.

Where self-defense is raised, jury instructions must more than adequately convey the laws of self-defense. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), abrogated on other grounds, *State v. O’Hara*, 167 Wn.2d 91, 104, 217 P.3d 756 (2009). The instructions, “read as a whole, must make the relevant legal standard ‘manifestly apparent to the average juror.’” *Id.* (quoting *State vs. Allery*, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984) and *State v. Painter*, 27 Wn. App. 708, 713, 620 P.2d 1001 (1981)). A jury instruction misstating the law of self-defense or relieving the State of its burden of proving the absence of self-defense is an error of constitutional magnitude and is presumed prejudicial. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *LeFaber*, 128 Wn.2d at 900. When the error is unpreserved the State Supreme Court has recently held, “To be logically consistent, we hold appellate courts should analyze unpreserved claims of error involving self-defense instructions on a case-by-case basis to assess whether the claimed error is manifest constitutional error.” *State v. O’Hara*, 167 Wn.2d 91, 104, 217 P.3d 756,

763 (2009). In this case, the defense objected to the court's instruction. RP 2785-2786.

b. Where The Issue Of Self-Defense Is Raised, The Absence Of Self-Defense Becomes An Element Of The Offense.

Principles of due process require the State to prove the essential elements of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *City of Seattle v. Norby*, 88 Wn. App. 545, 554, 945 P.2d 269 (1997); U.S. Const. amend. 14; Const. art. 1, § 22. When any evidence of self defense is presented, the absence of self-defense becomes an essential element of the offense which the State must prove beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 619 621-23, 683 P.2d 1069 (1984).⁵ See *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007). The jury instructions must unambiguously inform the jury that the State has the burden of proving absence of self defense beyond a reasonable doubt. *Acosta*, 101 Wn.2d at 621.

c. The Trial Court Improperly Omitted The Absence Of Self-Defense Element From The "To Convict" Instruction For The Charged Offense.

The trial court instructed the jury on what the State needed to prove to convict Mr. McCreven of Murder in the Second Degree in Instruction 34, as follows:

⁵ This burden is distinct from the statutory defense to the charge that if the accused is not the only participant in the underlying crime and the defendant establishes by a preponderance of the evidence that he (i) did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and (ii) was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and (iii) had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and (iv) had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

INSTRUCTION NO. 34

To convict the defendant, MIKE MCCREVEN, of the crime of Murder in the Second Degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt.

(1) That on or about the 5th day of April, 2008, the defendant or an accomplice committed or attempted to commit the crime of Assault in the Second Degree against Dana Beaudine;

(2) That the defendant or an accomplice caused the death of Dana Beaudine in the course of and in furtherance of such crime or in immediate flight from such crime;

(3) That Dana Beaudine was not a participant in the crime of Assault in the Second Degree or an attempt to commit Assault in the Second Degree; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 282.

Defense objected to the giving of Instruction 34 (RP 2785-2786) and offered an instruction that combined the self-defense requirement in the “to convict” instruction but court declined to give it. (CP 180-81). To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Moreover, as discussed in *O’Hara*, the “constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule.” *State v. Fowler*, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990) (citing *Scott*, 110

Wn.2d at 689, 757 P.2d 492 (1988), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). This requirement also applies to a self-defense jury instruction, to the extent that the instruction creates an additional fact the State must disprove beyond a reasonable doubt. *See State v. LeFaber*, 128 Wn.2d at 898, 913 P.2d 369; *State v. McCullum*, 98 Wn.2d at 488, 656 P.2d 1064; *State v. Acosta*, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984) (stating “the test is whether the jury was informed, or could understand from the instructions as a whole, that the State bears the burden of proof”). *State v. O’Hara*, 167 Wn.2d 91, 105, 217 P.3d 756, 764(2009).

The failure in the “to convict” instruction that to include all the elements was especially egregious here because the State misled the jury by shifting the burden of proof on the State’s burden of disproving self-defense and conflated the self defense burden with the statutory defense found at Instruction 31. CP 279, RP 2785-2786. The State’s power point presentation that accompanied their closing argument never once includes neither the element of self defense nor their burden to disprove self defense beyond a reasonable doubt. CP 21 (to convict slide does not include obligation to disprove self defense), CP 228 (burden on defendant).

Our Supreme Court has recognized that in Washington, the right to trial by jury is broader and provides greater substantive protections to criminal defendants than are afforded under the federal constitution. *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 941 (2003); Const art. 1, §§ 21, 22. The “inviolate” right to an impartial trial

by jury in Washington is one that is “deserving of the highest protection.” *Id.* at 150 (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656 771 P.2d 711, 780 P.2d 260 (1989)).

The scope of the jury trial right in the Washington Constitution is defined by “Washington law that existed at the time of the adoption of our constitution.” *Smith*, 150 Wn.2d at 151. In 1890, shortly after the state adopted its constitution, the Court found fundamentally unfair a jury instruction that omitted a necessary element of conviction. *McClaine v. Territory*, 1 Wash. 345, 352, 25 P. 453 (1890). By giving an incomplete essential elements instruction, “the rights of the defendant were not wholly protected.” *Id.* at 354. The *McClaine* Court found the defendant “had a right to have the law governing his case plainly, explicitly, and correctly stated. This was not done. It follows that the judgment must be reversed . . .” *Id.* at 355.

This fundamental principle has guided Washington’s modern-day jurisprudence on the right to an accurate and complete elements instruction. “A ‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Moreover, a reviewing court may not rely on other instructions to supply the missing element from the “to convict” instruction. *Id.* at 262-63. Reversal of the conviction is required if the omission or misstatement in the jury instructions relieves the State of its burden of proving every essential element of the crime. *State v. Brown*, 147, Wn.2d 330, 339, 58 P.3d 889 (2002).

d. The Omission Of This Essential Element Was A Structural Error That Requires Reversal Of The Conviction.

The Washington Supreme Court has held that the omission of an essential element from the “to convict” instruction is a structural error that requires reversal of the conviction. *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.2d 1000 (2003) (agreeing that some errors in jury instructions, such as when the court fails to instruct the jury on all the elements of the crime, are structural and require automatic reversal of the conviction) (citing *Brown*, 147 Wn.2d at 339 and *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)); *see also State v. Eastmond*, 129 Wn.2d 497, 503, 919, P.2d 577 (1996) (holding the omission of an element of the crime from the “to convict” instruction produces a “fatal error” by relieving the State of its burden of proving every essential element beyond a reasonable doubt). Although in *State v. Hoffman*, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), the Court rejected the contention that the absence of self-defense had to appear in the “to convict” instruction, this holding has been substantially abrogated by *Smith*, *Brown*, *Eastmond*, and *DeRyke*.

The absence of self-defense was an essential element of the crime of assault in the second degree that the State had to prove beyond a reasonable doubt. *Acosta*, 101 Wn.2d at 621-23; *Woods*, 138 Wn. App. At 198. This Court should conclude the omission of this element from the “to convict” instruction was a structural error requiring reversal of McCreven’s conviction.

- e. **Alternatively, The Omission Of This Essential Element From The “To Convict” Instruction Was Prejudicial Beyond A Reasonable Doubt.**

Even assuming *arguendo* that this Court does not agree the omission of an essential element from the “to convict” instruction is structural error, as noted, a jury instruction that relieves the State of its burden of proving the absence of self-defense beyond a reasonable doubt is of constitutional magnitude, and presumed prejudicial. *Walden*, 131 Wn.2d at 473; *LeFaber*, 128 Wn.2d at 900, abrogated as to unreserved error by *State v. O’Hara*, 167 Wn.2d 91, 104-05, 216 P.3d 756 (2009) which held that *unreserved* errors in self defense instructions are to be reviewed on a case by case basis to assess whether the error is manifest constitutional error. Here, the State may claim that the omission of the absence of self-defense element from the “to convict” instruction for the charged crime was not prejudicial because other instructions explained this burden. This claim should be rejected, especially when the court considers the State’s conflating their burden with the statutory defense and shifting of the burden in closing argument.

A single instruction explained the State’s burden with respect to self-defense as follows:

INSTRUCTION NO. 24

It is a defense to a charge of Murder in the Second Degree that the homicide was justifiable as defined in this instruction.
Homicide is justifiable when committed in the lawful defense of the defendant or any person in the defendant’s presence or company when;
(1) The defendant reasonably believed that the person killed or others whom the defendant reasonably believed were acting in concert with the person killed intended to commit a felony or to inflict death or great personal injury;

(2) The defendant reasonably believe that there was imminent danger of such harm being accomplished; and

(3) The defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the defendant, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State had not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 272.

Although this instruction explained the State's burden of proof, it did not make the relevant legal standard "manifestly apparent: because it did not emphasize that the absence of self-defense was an element of the charged offense and was separated from the to convict instruction found at Instruction No. 34 by ten intervening instructions, and unfortunately, the statutory defense was given in between the two at Instruction No. 31. CP 282, 279. Indeed, read in conjunction with the "to convict" instruction, this statement of the State's burden found at Instruction 24 was likely to confuse the jury. CP 272. The "to convict" instruction told the jurors it was their duty to convict if they found the State had proved the elements of murder in the second degree beyond a reasonable doubt without reference to the absence of self-defense. CP 282. At the same time, Instruction 34 told the jurors that the State, as the plaintiff, "has the burden of proving each element of the crime beyond a reasonable doubt." CP 282.

Additionally, Instruction No. 24 simply characterized self-defense as a “defense” without explaining that a self-defense claim became an element of the charged crime that the State bore the burden of disproving. CP 272. While the instruction alone did not misstate the law, in light of the deficient “to convict” instruction, it failed to make the relevant legal standard “manifestly apparent.” *LeFaber*, 128 Wn.2d at 900. And in this case, the statutory defense to an assault involving accomplices further complicated the jury’s understanding of the State’s obligations, accordingly, the to convict given by the court did not make the State’s obligations “manifestly apparent” requiring reversal of the conviction. So, unlike the situation presented in *Hoffman, supra*, in which the reviewing court found that giving separate instructions was adequate, the same cannot be said here.

In sum, the State was required to prove the absence of self-defense beyond a reasonable doubt as an element of the charged offense, and that the trial court improperly relieved the State of this burden is an error of constitutional magnitude. *State v. Woods*, 138 Wn.App. 191, 198-99, 156 P.3d 309 (2007). Because the crime of assault involves an element of intent, “proof of self-defense may negate an element of the crime,” namely this intent element. *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). In light of the statutory defense found at Instruction 31 (CP 279) and the improper argument in this case by the prosecutor shifting the burden of proof of self defense to the appellant, illustrates the danger of the practice approved in *Acosta*, 101 Wn.2d at 622, of using a separate instruction to explain the

State's burden on self defense rather than listing self defense in the to convict instruction.

Here, the trial court's "to convict" Instruction No. 34 did not list absence of self defense as an element the State had to prove beyond a reasonable doubt. CP 282. Although the separate self defense instruction, CP 272, attempted to place the burden on the State, the prosecutors' repeated improper argument ensured the jury that the jury was not unambiguously informed of the State's burden. Moreover, the trial court's failure to properly address this issue after defense objection further exacerbated the error. RP 2934. Finally, in this case the trial court departed from its usual practice and permitted the jurors to take notes during closing argument, presumably incorporating the improper arguments. RP 2789.

In cases involving inadequate self-defense instructions, Washington courts have reversed the conviction. *See e.g. LeFaber*, 128 Wn.2d at 903 (rejecting State's claim that instructions sufficiently permitted defendant to argue his theory and reversing conviction); *Acosta*, 101 Wn.2d at 624-25 (concluding that "[a]lthough petitioner's self-defense claim may appear doubtful in this case, this court will not substitute its judgment for the jury on factual matters"); *Woods*, 138 Wn. App. At 201-02 (finding despite defendant and victim's conflicting versions of events that faulty self-defense instruction required reversal of the conviction); *State v. Rodriguez*, 121 Wn. App. 180, 188, 87 P.3d 1201 (2004) (finding in first-degree assault

prosecution based on a stabbing that erroneous instructions reduced the State's burden and required a new trial).

The evidence here included testimony that Dana Beaudine was drunk (RP 1768, 1785), hostile (RP 358, 361, 2525-2526, 2543 and introduced a knife into the fight (RP 1939-1940). This Court should conclude that under these facts, the State cannot prove the deficient jury instructions were harmless beyond a reasonable doubt.

Issue No. 8. Instruction 24, The "Justifiable Homicide" Instruction Did Not Make The Subject Standard Of Standing In The Defendant's Shoes Manifestly Clear.

As well, in Washington, "[e]vidence of self-defense is evaluated 'from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.'" *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (quoting *Janes*, 121 Wn.2d at 238, 850 P.2d 495). This approach incorporates both subjective and objective elements to determine whether a defendant acted in self-defense. The subjective element requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him, whereas the objective element requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. *Walden*, 131 Wn.2d at 474. Self-defense is proper when a person reasonably believes he is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than necessary. RCW 9A.16.020. The degree of force used in

self-defense “is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” *Walden*, 131 Wn.2d at 474.

The legal standard the reviewing courts apply to jury instructions is: “Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and when read as a whole properly inform the jury of the applicable law.” *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007) citing *State v. Rodriguez*, 121 Wn. App. 180, 184-85, 87 P.3d 1201 (2004) quoting *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). However, self defense instructions are subjected to heightened appellate scrutiny: “Jury instructions must more than adequately convey the law of self defense.” *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). “Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror.” *State v. Walden*, 131 Wn.2d at 473. Further, an objected to “jury instruction misstating the law on self defense amounts to an error of constitutional magnitude and is presumed prejudicial.” *LeFaber*, 128 Wn.2d at 909; *State v. O’Hara*, 167 Wn.2d 91, 104-05, 216 P.3d 756 (2009)(addressing unpreserved error). Here, the defense offered two instructions that the court declined to give that clarified that the jury should evaluate a defendant’s actions from the view point of standing in his shoes. CP 167, 180.

Second, the prosecutor wrongly sought to convince the jurors to apply an objective standard of reasonableness in evaluating self defense. The prosecutor stated : “Lets assume That Dana had the knife, and someone took that knife away

from him. That person can use force that a reasonable prudent person would use under same or similar circumstances. Not my words. That's the law. And the force has to be necessary force..." RP 2940.

In fact, it has long been the law in Washington that a jury may find self defense on the basis of the defendant's *subjective* reasonable belief of imminent harm; a finding of actual imminent harm is not required. *State v. LaFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996) (emphasis added). Moreover, the subjective standard must be manifestly apparent to the average juror. *Id.* at 900.

Like the instruction in *Warrow*, the prosecutor here misstated the law by implying that the jury should measure McCreven's and his co-defendants/co-appellants' conduct based on what they themselves believed was reasonable, rather than determining whether Mr. McCreven's or his co-defendants/co-appellants beliefs were subjectively reasonable based on all the facts and circumstances.⁶

Although the court gave an instruction which attempted to incorporate the subjective standard, (CP 272, Instruction No. 24), this instruction did not unambiguously inform the jury that the standard to apply was, in fact, subjective. Therefore, the prosecutors' argument in favor of an objective standard ensured that that the correct standard was not manifestly apparent to the jurors who determined Mr. McCreven's fate.

⁶. See Opening Brief of Co-Appellant Nolan- Issue No 1 regarding Beaudine's reputation for violence- adopted per RAP 10.1(g).

This highlights the court's error in failing to give the defense offered instruction that that included the language "standing in his shoes" to emphasize the subjective nature of the standard. The trial court erred in failing to give this instruction and coupled with the State's arguments violated the clear law of Washington.

Issue No. 9: Instruction 15 Defining Recklessness Violated Mr. McCreven's Fourteenth Amendment Right to Due Process Because The Court's Instruction Created A Mandatory Presumption That Relieved The State Of Its Burden To Prove Mr. McCreven Recklessly Inflicted Substantial Bodily Harm.

Under the Fourteenth Amendment's Due Process Clause, criminal defendants are presumed innocent, and the State must prove guilt beyond a reasonable doubt. U.S. CONST. AMEND.XIV; *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). An omission or misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of an offense violates due process and is reversible error. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); *State v. Hayward*, 152 Wn. App. 632, 641-42, 217 P.3d 354 (2009).

A jury instruction that misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Jury instructions must be manifestly clear because juries lack the tools of statutory construction

available to courts. *See e.g. State v. Harris*, 122 Wn. App. 547, 554, 90 P.3d 1133 (2004);

In *Hayward*, the court held that the instruction defining “recklessness” should have read, “Recklessness is also established if a person acts intentionally *to cause substantial bodily harm.*” 152 Wn. App. 632, 644(emphasis in the original). As in *Hayward*, jury instruction 15 permitted the jury to find that McCreven or an accomplice recklessly inflicted substantial bodily harm if it found that he or an accomplice intentionally assaulted Beaudine. *Hayward*, 152 Wn. App. at 645. Also, as in *Hayward*, the presumption created by the second paragraph of jury Instruction 15⁷ (CP 263) violated McCreven’s due process rights because it relieved the State of its burden to prove that Mr. McCreven or an accomplice recklessly inflicted *substantial bodily harm*, a separate element of the alleged crime. *Hayward*, 152 Wn. App. at 645, *citing State v. Thomas*, 150 Wn.2d at 844. Here, the instruction did not adequately limit the mental state to the specific element at issue – infliction of substantial bodily harm and the instruction violated McCreven’s constitutional right to due process by creating a mandatory presumption and relieved the State of its burden to prove McCreven recklessly (or intentionally) inflicted substantial bodily harm. *Hayward*, 152 Wn. App. 632, 646.

⁷ Instruction 15: A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a substantial deviation from conduct that a reasonable person would exercise in the same situation. When recklessness as to particular result is required to establish an element of the crime, that element is also established if a person acts intentionally as to that result.

An erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis. *Hayward*, 152 Wn. App. at 646-47 *citing* *Thomas*, 150 Wn.2d at 844 (*citing Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999)). “Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” *Hayward*, 152 Wn. App. at 646, *citing State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In cases involving “omissions or misstatements of elements in jury instructions, “the error is harmless if that element is supported by uncontroverted evidence.” *Hayward*, 152 Wn. App. at 646-47, *citing Thomas*, 150 Wn.2d at 845 (*quoting State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

Here the instructional error was not harmless. The uncontroverted evidence is that Dana Beaudine died from a stab wound to the neck from a knife bearing only Beaudine’s handler DNA and that Beaudine and the codefendants/co-appellants had also been drinking that evening. These facts are not sufficient to support a finding that McCreven or an accomplice recklessly inflicted substantial bodily harm.

Issue No. 10. The Identification Procedure Used In This Case Violated Due Process Because It Was Impermissibly Suggestive In Several Respects And The Totality Of The Circumstances Does Not Establish That Ford’s Identification Of McCreven Was Reliable.

- a. **Research Establishes Certain Protocols Should Be Used To Minimize Suggestibility, However, None Of The Protocols Were Used In This Case.**

Since “reliability is the linchpin in determining the admissibility of identification testimony,” *Manson v. Brathwaite*, 432 U.S. 98, 97, 114 S.Ct. 2243, 53 L.Ed. 2d 140 (1997), the circumstances surrounding the administration of identification are critical.

A large body of research on eyewitness identifications now recommends certain protocols be followed to enhance reliability: (1) using “sequential” lineup⁸; (2) informing the witness not to assume that the suspect is in the spread; (3) using “double-blind” procedures in which no one involved in administering a photo spread knows who the suspect is; (4) training police and prosecutors about the risks of providing corroborating details after identification that may dispel any doubts a witness may have. National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999). The American Bar Association Criminal Justice Section August 2004 Report to the House of Delegates likewise acknowledges that the risk of error in eye witness identifications is so high that safeguards are needed to minimize the risk. The Report concludes, just as the NIJ report does, that the research unequivocally supports the above suggested protocols. See also, *California Commission On The Fair Administration Of Justice Report And recommendations*

⁸ See R.C.L. Lindsay & Gary L. Wells, “Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation,” 70 J. APP. PSYCH. 556 (1985). See, e.g., Brian L. Cutler & Stephen D. Penrod, *Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation*, 73 J. APP. PSYCHOL. 281 (1988); R.C.L. Lindsay et al., *Sequential Lineup Presentation: Technique Matters*” 76 J. APP. PSYCHOL. 741 (1991); Siegfried Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups*, 78 J. APP. PSYCHOL. 22 (1993).

Regarding Eye Witness identification Procedures, April 13, 2006. None of these safeguards were employed in this case.

b. The Identification Procedures Used In This Case Were Unnecessarily Suggestive, Calling Into Question The Reliability Of Ford's Out-Of-Court Identification.

Both empirical evidence and real life experiences have shown that the type of identification procedures used in this case leads to unreliable results.⁹ Significantly, here, the State pursued the most demonstrably error-prone procedure for identification. Not a single safeguard known to reduce the error rate of false identifications was employed. Because Ms. Ford was shown only a single photograph of each defendant/co-appellant by the prosecuting attorney after Ms. Ford observed the defendants being arraigned, the procedure was, as a matter of law unduly suggestive. RP 1056. *State v. Maupin*, 63 Wn.App. 887, 896, 822 P.2d 355 (1992) (citing *Manson v. Braithwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)).

First, before she was ever able to independently identify any of the defendants by name or particularized description she was able to see each defendant being individually identified by the State and the Court while being charged with the specific crimes for which Ms. Ford was a key State's witness. RP 1006-1007. As she testified, when she gave the descriptions she was only talking in "generalities" and

⁹ See for example: Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 L. & Human Behav. 523 (2003); Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 Wis. L.Rev. 529; Gary L. Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277 (2003); Tiffany Hinz & Kathy Pezdek, *The Effect of Exposure to Multiple Lineups on Face Identification Accuracy*, 25 L. & Human Behav. 185 (2001); U.S. Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Appl. Psych. 360 (1998); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Human Behav. 603 (1998); U.S. Department of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, (1996), available at: <http://www.ncjrs.org/pdffiles/dnaevid.pdf>.

that she had assumed the five men she saw in the parking lot were the five men she had seen at the table. RP 1128. Moreover, this witness was not able to give a description of Vincent James, a man she had met on two occasions and who was seated across a table from her two hours. RP 1070, 1163.

Second, following this and the only time she was shown a single photograph of each defendant was under the direction and presence of one the prosecutors handling this very case in which she was only shown four photos – one for each defendant. 4/20/09 RP 46; RP 1168-69(shown photos of the four defendants closely before the trial.

Defendant McCreven met his threshold burden of showing the identification procedures used were impermissibly suggestive and the trial court's ruling to the contrary was error. RP 4/20/09 p.58.

c. The Totality Of The Circumstances Do Not Establish That Ford's Identification Of McCreven Is Reliable Under The *Biggers/Manson* Test.

When the five *Biggers/Brathwaite* reliability factors are applied to the unnecessarily suggestive circumstances of this identification, it is clear that Mr. McCreven's right to due process was violated by Ford's in- or out-of-court identifications at trial.

First, Ford did not have a full opportunity to view the suspects as the incident lasted only minutes and occurred at night outside of a tavern. She describes her focus being away from the fight at times. RP 1092-93.

Second, her degree of attention to their appearances was not great, as again the incident lasted only minutes, occurred at night outside of a tavern. And even when involved in the fight herself she was too distracted to get a good look at the participants. RP 1113 (not sure who she was grabbing); 1114 (not sure what type of clothing); 1115 (can't say who else in fight besides Smith, cannot describe their clothing or where they came from). In fact her ability to observe is suspect, in that she could not even provide a description of Vince James, an acquaintance she had met more than once and spent several hours with that very evening, or provide descriptions of the several people she believed were involved in the fight. RP 1115. Her inability to provide particularized descriptions demonstrates that her identification of Mike McCreven as one of the people involved in the fight is not reliable in this respect.

Third, as she testified she was only giving the investigating officers "generalities based on her assumption that the five men she saw inside in the bar were involved in the altercation with Beaudine. RP 1115. As she stated, she could identify Smith as fighting with Beaudine, she saw Nolan walk to his motorcycle and come back past her, and while it seemed like more people were involved in the fight, she cannot describe and does not know where they came from. RP 1115.

Fourth, her level of certainty is suspect, where the only times she can identify the persons involved are after seeing them at court at arraignment and after being shown each of their pictures by Ms. Ko. *See State v. McDonald*, 40 Wn. App. 743, 700 P.2d 327 (1985)(level of certainty by victim who did not initially identify one of 2 codefendants and later said that it was a “toss up” between the one identified and the one not identified held too questionable to admit in-court identification).

Finally, although the length of time between the homicide and Ms. Ford’s presence at arraignment was not great, it was approximately one year between the homicide and her in court identification at trial. This delay and greatly enhanced the risk of error in admitting an in- or out-of-court identification, especially in light of her knowledge that these very men were being charged with the crime of assaulting her fiancé that lead to his death.

d. The Unnecessarily Suggestive Procedures Used For The Out-Of-Court Identification And The Totality Of Circumstances Apply To Render An In-Court Identification In Violation Of Due Process.

The *Biggers/Manson* test applies to in-court identifications as well, and the same analysis is employed as for out-of-court identifications. *See State v. McDonald*, 40 Wn.App. at 746-47. That is because when an improper identification procedure is used prior to trial, “the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.” *Simmons v. United States*, 390 U.S. 377, 383, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968).

A witness's in-court identification is therefore relevant, admissible evidence only if it can be established that she has an origin independent of the improper identification procedure. See *State v. Hilliard*, 89 Wn.2d 430, 439, 573 P.2d 22 (1977); *State v. Folkerts*, 43 Wn. App. 67, 69, 715 P.2d 157 review denied, 105 Wn.2d 1020 (1986).

Here, not only was she asked to identify the defendant in court, but was given a booking photo as well. RP 1014. Defense objected to this procedure. RP 1014. Moreover, the one-year time period between the homicide and trial is significant especially when considered together with Ms. Ford's out-of-court identifications, which was rife with flaws in protocol and suggestibility. Where Ms. Ford could not specifically identify any of the suspects beyond vague, non-specific descriptions, the in-court identification could have no origin independent of the out-of-court identification. Moreover, as Stated in *U.S. v. Williams*, 436 F.2d 1166 (9th Cir. 1970) "When asked to point to the robber, an identification witness – particularly if he has some familiarity with courtroom procedures – is quite likely to look immediately at counsel table, where the defendant is conspicuously seated in relative isolation. Thus the usual physical setting of a trial may itself provide a suggestive setting for an eye witness identification." Here, not only was Mr. McCreven conspicuously seated at defense counsel table, but Ms. Ford had an in court preview of him at arraignment – a procedure in which he was formally accused of the crime of murder in the second degree of Ms. Ford's fiancé. Finally, the State, rather show

her montages of photos containing the four co-defendants/co-appellant along with an appropriate admonition, showed her a single photograph of him, further reinforcing the State's identification of him as one the accused. Therefore, the trial court erred in failing to suppress any in court identification and the trial court's ruling failed to avoid creating a substantial likelihood of irreparable misidentification, in violation of Mr. McCreven's right to due process.

Issue No. 11: There Is Not Sufficient Evidence To Convict Mr. McCreven For Murder In The Second Degree Either As A Principal Or An Accomplice.

McCreven next argues that the State presented insufficient evidence that he acted either as a principal or an accomplice to the felony murder of Dana Beaudine because no witness ever testified or gave a statement to police that indicated they heard or observed McCreven say anything or do anything to in any way demonstrate his participation, assistance or actual involvement in the assault or murder of Mr. Beaudine.

To prevail on a challenge to the sufficiency of the evidence, McCreven must show that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Allen*, 159 Wash.2d 1, 7, 147 P.3d 581 (2006); *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct 2781 (1979). All reasonable inferences from the evidence are drawn in favor of the State. *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995); *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). *State v. Gregory*, 158 Wash.2d 759, 817, 147 P.3d

1201 (2006); *State v. Clark*, 143 Wash.2d 731, 769, 24 P.3d 1006 (2001)). “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638 (1980). Although determinations of the credibility of witnesses are for the trier of fact and will not be reviewed on appeal, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), this court can review whether the jury, after hearing all of the facts, could have rationally found guilt beyond a reasonable doubt. *See State v. Hundley*, 126 Wn.2d 418, 421-422, 403 P.2d 403 (1995).

Due process however requires the State to prove beyond a reasonable doubt every element of the crime charged. *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984); *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S. Ct. 1068 (1970); *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

Under RCW 9A.32.050 and the charging document in this case to prove principal liability for murder in the second degree, the State had to prove beyond a reasonable doubt that McCreven committed or attempted to commit the crime of Assault of in the Second Degree and either in the course of and in furtherance thereof or in immediate flight there from he or another participant caused the death of Dana Beaudine.

Under RCW 9A.08.020 to prove accomplice liability for murder in the second degree, the State had to prove beyond a reasonable doubt that McCreven knew his actions would promote or facilitate the crime, that he was present and ready

to assist in some manner, and that he was not merely present at the scene with some knowledge of potential criminal activity. The law is well settled that mere presence is not sufficient to prove complicity in a crime. *State v. Roberts*, 80 Wn.App. 342, 355-56 (1996).

Accomplice liability requires an overt act. *State v. Matthews*, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime, instead he must do or say something that carries the crime forward. *State v. Peasley*, 80 Wash. 99, 100, 141 P.2d 316 (1914). In *Peasley*, the State Supreme Court distinguished between silent assent and an overt act as follows:

To assent to an act implies neither contribution nor an expresses concurrence. It is merely a mental attitude which, however, culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.

Peasley, 80 Wash. at 100, see also *State v. Everybodytalksabout*, 145 Wn.2d 456, 39 P.3d 294 (2002) (physical presence and assent alone are insufficient for conviction as an accomplice.) Similarly, in *Renneberg*, the State Supreme Court approved the language, “to aid and abet may consist of words spoken or acts done ...”*State v. Renneberg*, 83 Wn.2d 735, 739, 522 P.2d 854 (1967).

Here, as in *Everybodytalksabout*, there is no legitimate untainted evidence that Mr. McCreven was acting as an accomplice beyond his mere presence at the Bull’s Eye Sports Lounge on the evening of April 5, 2008. He was specifically seen inside the bar by Ms. Ford when she was leaving with her party. RP 1001. And he

was later seen driving away from the bar. RP 1047. This is not sufficient evidence for conviction as an accomplice.

The evidence presented in this case showed merely that Mr. McCreven was a “member” of the Hildalgo motorcycle club. There was no evidence presented that any of the events which later unfolded, including being in the same bar as Mr. Beaudine, were in any way planned or even known in advance to any of the defendants, including and especially Mr. McCreven.

While several lay witnesses discussed motorcycle clothing and seeing Hildalgo patches, most if not all of the witnesses describing the “fight” also testified to only seeing black or dark clothing on those involved (save for Carl Smith who most witnesses described as wearing a white long john shirt). RP 282-83, 470-72, 2529. For example, Ms. Abbot did not identify Mr. McCreven in the fight but rather said she saw a group of bikers. RP 466. Ms. Baccus described a big “mess” of people, “a lot of commotion” and a big group of “chaos”. RP 2356. Ms. Diamond says she saw two men, and she was not sure which, from inside the bar walk across the parking lot and join the fight and then two others join it, but again cannot say which men these were. RP 363-64. She identified the defendants from being inside the bar. RP 356. She never saw any one join the fight, meaning she did not realize that Vince James, who was in biker leathers (RP 205, 1625, 2547) and Ms. Ford who was in the fight while wearing a black zip up jacket (RP1171), were in the fight or she could not distinguish them from the “bikers”. She also said there was a “lot of

commotion". RP 367-71. Gary Howden, who was not outside at the start of fight and does not know what or who caused it (RP 206, 279-280), described several participants, but none of the individuals he could describe matched Mr. McCreven. RP 208-209. He also described a lot of punches being thrown, but could not tell who was doing it. RP 211, 242-43, 246 (only guy in white shirt throwing punches). He also described it as "chaotic" scene. RP 282.

Ms. Ford testified she cannot say the men involved in the fight were the same five men in biker garb she saw inside the bar. RP 1127. As she said on the stand, when she told the police all the assailants were wearing motorcycle jackets she was only talking in generalities. RP 1041. As she said, she is not sure who was wearing what because it was so chaotic. RP 1035.

Most if not all witnesses were not sure how many people were either at the "Hidalgo" table in the bar or involved in the fight. RP 459 (5, 6, or 7 men spread throughout the bar in biker garb); RP 2346 (6-10 bikers with 2 women). It should be noted that the testimony at trial indicated that Ms. Ford, Mr. Beaudine and Mr. James were also dressed in dark clothing and were also active participants in the fight. RP 243, 1100, 1171, 208.

More importantly, those witnesses who knew or knew of McCreven never testified that they saw him involved in the assault that led to Mr. Beaudine's death. RP 1172, 1181. For instance, Reyna Blair and Vincent James both told police on the night of the incident that they knew Mike McCreven and he was not involved. RP

1622, 2231. Shannon Ford, Mr. Beaudine's fiancé, who knew of Mike McCreven by sight as she was present when that night Ms. Blair and Mr. James exchanged friendly greetings and goodbyes with him, testified that the only time she recalled seeing McCreven outside the bar is when he was driving out of the Bulls Eye parking lot. RP 1041 Moreover, by her own testimony Ms. Ford was for a least for some part actually involved in the fight, if not at least closer to it than the other witnesses who only observed it from the sidewalk some one hundred and twenty-seven feet away (RP 2637) and did not testify that she saw McCreven involved in the fight. RP 1171.

Finally, there is the handler DNA which clearly excludes Mr. McCreven and indicates Beaudine was the individual who introduced the knife into the fight. RP 1935, 1940, 1970.

In addition to its reliance on associational evidence for accomplice liability in this case which has also been raised as an issue in this appeal, the State, in an effort to overcome the lack of evidence of McCreven's guilt, harped on and played to the jury's sense of baseless speculation of "evidence of a guilty conscience." Such distractions as, where are the "bloody" chaps or the Hildalgo patched jacket or vest, and why were they not recovered by police during the search of Ms. Dobiash's residence, or why did McCreven leave the Bulls Eye before police arrived if not because he was involved in the criminal act are not, based on the evidence actually presented, reasonable inferences or that there was blood on his boots. To the contrary, they are baseless speculations and therefore cannot and should not

constitute proof beyond a reasonable doubt as to his guilt. *State v. McDaniel*, 155 Wn. App. 829, 230 P.3d 245 (2010). As was testified to at trial, photographs taken by the police at the time of the search of Ms. Dobiash's residence show several pieces of motorcycle clothing of Mr. McCreven's present. RP 1493-94; CP Exhibits 84, 104. When Ms. Dobiash was actually requested by the State to do so she did provide McCreven's chaps as evidence, despite the fact that the police chose to leave them behind. RP 2639, 2640, 2641. As was also testified to McCreven was not the only individual to leave the Bulls Eye on April 5, 2008, before the police arrived, especially once everyone outside the Bulls Eye was told to do so by Joy Hutt, bar manager. RP 2529. In fact, it is a reasonable inference based on her testimony that the only time Joy Hutt saw Mr. McCreven outside the Bulls Eye during her observation of the fight was when he standing on the sidewalk by the Radio Shack with Barry Ford smoking a cigarette. RP 2546 (description matches Mr. McCreven.)

As it did at trial, the State may attempt to make a lot out Ms. Dobiash's statement and testimony that when she saw Mr. McCreven later in the night on April 5, 2008, she recalled him saying something like "we were in a fight" or "there was a fight." However Ms. Dobiash was never clear about which of these very different statements she believes Mr. McCreven may have made to her. RP 1469, 1507. Even assuming in favor of the State that Ms. Dobiash is to be believed to have said that Mr. McCreven told her that "we were in a fight" - this alone or even when coupled with

the evidence presented at trial, cannot and should not be sufficient for proof of guilt for murder in the second degree beyond a reasonable doubt.

Even construing the evidence cited in the facts above in the light most favorable to the State, there was insufficient evidence for a reasonable jury to find the State proved McCreven acted either as a principal or an accomplice to the felony murder of Dana Beaudine because no witness ever testified or gave a statement to police that indicated they heard or observed McCreven say anything or do anything to in any way demonstrate his participation, assistance or actual involvement in the assault or murder of Mr. Beaudine. Because the State failed to establish each and every element of the crime charged beyond a reasonable doubt McCreven's conviction for one count of murder in the second degree with a deadly weapon enhancement must be reversed.

Issue No. 12: The Trial Court Erred In Sentencing Mr. McCreven By Miscalculating His Offender Score.

On June 15, 2009, McCreven was convicted after jury trial of Murder in the Second Degree with a deadly weapon enhancement. The State argued that McCreven's offender score was a six. The Defense maintained that McCreven's offender score was a three with a corresponding standard range of 154-254 months. CP 355-368, RP 8/10/09 p. 1, 14.

The court sentenced McCreven to 245 months plus 24 months for the deadly weapon enhancement based on an offender score of a six which included four

prior adult felony convictions and one prior juvenile conviction which counted as two points. CP 337-351. In doing so, the court, after hearing argument from both parties, stated that it believed “the legislature has decided that just everything that’s happened in the past now gets counted.” RP 19 (August 10, 2009). This is not correct. RCW 9.9A.530(2) provides that a court may rely on no more information that is admitted, acknowledged or proven. *See also, State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 1136 (2009) and RCW 9.9A.525(3.) addresses the use of foreign convictions and the RCW 9.94A.525(2) addresses when an old conviction washes.

At issue in McCreven’s sentencing hearing were a “conviction” for Burglary in the First Degree as a juvenile from Thurston County (incident date of 4/19/78 and disposition date of 7/18/78) and a conviction for Unlawful Possession of a Controlled Substance for Sale from Sacramento, California (incident date of 2/13/91 and disposition date of 4/2/91). Sup. CP. Sentencing Ex. 1, 2. Mr. McCreven challenged the inclusion of these offenses in his offender score.

Use of a prior conviction in the offender score is constitutionally permissible only if the State carries its burden of proving the existence of the prior conviction by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999) and *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719 (1986). The State must provide reliable evidence establishing the accuracy of the offender score calculation. *State v. Ford*, 137 Wn.2d at 482. The best evidence of a prior conviction is a certified copy of the judgment, although the State may also introduce other

comparable documents of record or transcripts of prior proceedings to establish the defendant's criminal history. *Ford* at 480 and *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). However as emphasized in *Personal Restraint of Connick*, 144 Wn.2d 442, 455-458, 28 P.3d 729 (2001), documents such as uncertified or unauthenticated photocopies of apparent or purported court records that do not meet the authentication test under ER 901 and 902, RCW 5.44 or CR 44 may not be relied on to establish a fact in dispute absent a stipulation or order from the court to accept the documents for what they purport to be.

Likewise, where prior out-of-state convictions are used to increase an offender score, it is the State, not the defendant, who bears the burden of proving the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of the evidence. *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004) (citing *State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1999) and *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999)). To fulfill this burden, the State must introduce evidence to prove the out-of-state conviction would be a felony under Washington law. *Ford* at 480. Although the best evidence is a certified copy of the judgment and sentence, the State may also introduce other comparable documents of record or transcripts of proceedings as long as the evidence introduced indicates some minimal indicia of reliability and truth. *Ford* at 480-81.

To properly classify an out-of-state conviction according to state law, the sentencing court must compare the elements of the out-of-state offense with the

elements of potentially comparable state crimes as defined **on the date** the out-of-state crime was committed. *In re Crawford*, 150 Wn. App. 782, 793-94, 209 P.3d 507 (2009) citing *State v. Morely*, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). This process is known as “legal comparability,” if the elements of the foreign conviction are comparable to the elements of a Washington state offense on their face, the foreign conviction counts in the defendant's offender score. West's RCWA 9.94A.525(3); *In Re Personal Restraint of Crawford*, 150 Wn. App. 787, 209 P.3d 507 (2009) citing *State v. Morley*, 134 Wn.2d 588, 605, 952 P.2d 167 (1998); *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005)..

For purposes of using an out-of-state conviction for sentencing, in cases where the elements of the state crime and the foreign crime are not identical, or if the foreign statute is broader than the state definition of the comparable crime, sentencing courts may look to the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable state statute; however, the elements of the charged crime remain the cornerstone of the comparison and facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial. West's RCWA 9.94A.525(3). *Id. citing Morley*, 134 Wn.2d at 606, 952 P.2d 167. Accordingly, any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction proves problematic and

where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot be said to be comparable. *In re Lavery*, 154 Wn.2d 249, 258 (2005). The court is cautioned that “[f]acts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.” *Morley*, 134 Wn.2d at 606, 952 P.2d 167 (1998). “Where the foreign statute is broader than Washington’s, [the factual] examination may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense.” *Lavery*, 154 Wn.2d at 257, 111 P.3d 837; *see also State v. Ortega*, 120 Wn.App. 165, 84 P.3d 935 (2004), *review granted in part and remanded*, 154 Wash.2d 1031, 119 P.3d 852 (2005). This process is known as factual comparability. *Lavery*, 154 Wn.2d at 255, 256, 111 P.3d 837 (2005).

In sum, in determining whether a foreign conviction should count as a conviction under Washington law and therefore be included in a defendant’s offender score for sentencing purposes, the first step is to compare the elements of the crime of conviction in the out-of-state statute to those of the comparable Washington statute in effect at the time the crime was committed. If the elements are the same, the prior conviction is included in the offender score. If not, or if the foreign statute is broader than Washington’s, the sentencing court may look into the record to determine whether or not such conduct would have violated the comparable Washington statute. *Ford* at 455 (citing *State v. Morley*, 134 Wn.2d 588, 601, 605-06, 952 P.2d

167 (1998)). However, the any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction cannot be used to establish factual comparability and where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot be said to be comparable. *State v. Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

As for the court's inclusion in McCreven's offender score of an alleged prior conviction for Burglary in the First Degree as a juvenile from 1978, the documents provided by the State did not prove even by a preponderance of the evidence that this was in fact a conviction or an adjudication of guilt and/or that person named in the document was in fact the same McCreven as was being sentenced nor did the documents establish a knowing and voluntary waiver of constitutional rights. "Constitutionally invalid on its face" means a conviction which without further elaboration evidences infirmities of a constitutional magnitude. *In re Thompson*, 141 Wn.2d 712, 718, 10 P.3d 380 (2000) citing *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719, 718 P.2d 796 (1988); The phrase "on its face" has been interpreted to mean those documents signed as part of a plea agreement. *Thompson*, 141 Wn.2d at 718. No documents were provided to establish a facially valid plea to the pre-SRA charge of burglary in the first degree. Sup. CP. Sentencing Ex 1. The only documents that the State provided to the court with regard to McCreven's alleged prior juvenile

conviction for Burglary in the First Degree consisted of an “order” captioned In Re the Welfare of Michael McCreven and an uncertified and unauthenticated photocopy entitled “DISCIS STATEWIDE DATA - Juvenile Offender Sentencing Worksheet” purported to be printed on April 7, 2008, which also stated “verify data for accuracy.”

The DISCIS printout cannot suffice for or add to any proof at any level of burden for a prior conviction as not only is it uncertified and unauthenticated but it actually advises the viewing party that the data contained therein must be verified for accuracy and there was no indication anyone did any verification. See Sup Sentencing Exhibit 6. Should such unsubstantiated documentation be sufficient to prove a defendant’s prior criminal history then the State would effectively have no burden of proof and the defendant’s constitutional right to the imposition of sentence based on a correct offender score would be meaningless.

As for the “order” captioned In Re the Welfare of Michael McCreven, this document should not serve as sufficient for proof of a prior valid conviction or adjudication of guilt for a crime. Facially, it is not clear from the document that the McCreven who was being sentenced is the same McCreven as was involved in the delinquency proceeding referenced in this document. Apart from the name of Michael McCreven and a date of birth that was contained on other documents, there is no indication such as fingerprints or even a signature from which to conclude by even a preponderance of evidence that the Michael McCreven named in the delinquency order is the same McCreven who was being sentenced.

What is clear from looking at the face of the delinquency document is that it is not an adjudication of guilt but a delinquency action and that based on this and juvenile law at the time (pre-Juvenile Justice Act), the majority of important due process and constitutional trial rights did not apply and were not used or followed in finding a child delinquent. Nowhere in the document does it indicate that a prosecutor was present for the hearing on this order, nor is there any indication that the delinquent child involved in this document was ever advised about any of his constitutional rights to a trial, albeit even a bench trial, appeal or other rights such as confrontation of witnesses or his right to remain silent. In fact it appears from the document that the only parties present for entry of this delinquency order were a court commissioner, a probation counselor, a Michael McCreven, and his parent. No attorney for Michael McCreven was present as it appears that he “waived” this right. There is no indication this “waiver” of attorney conforms to any of the constitutional notice requirements. *City of Tacoma v. Bishop*, 82 Wn. App. 850, 920 P.2d 214 (1996). In addition, although the document references that the facts as contained in the petition are “true beyond a reasonable doubt” no petition was provided for the court to make a well-informed or well-reasoned determination as to whether or not these “facts” were sufficient for a conviction or adjudication of guilt of the crime of Burglary in the First Degree as defined in 1978 or that the juvenile McCreven knowingly and voluntarily waived his constitutional trial rights on this issue or any

other constitutional rights to trial, including the right to confront witnesses or have witnesses appear on his behalf or his right to appeal. Sup. CP Ex. 1.

McCreven argues that even if his, this 1978 juvenile “conviction” was not constitutionally valid, and only a constitutionally valid conviction can be considered for sentencing purposes. See *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). A plea form that does not state a defendant was advised of all his constitutional rights renders the conviction invalid. *State v. Cruz*, 91 Wn. App. 389, 400, 959 P.2d 670 (1998), *reversed on other grounds*, 139 Wn.2d 186, 985 P.2d 384 (1999); see also *State v. Burton*, 92 Wn. App. 114, 117, 960 P.2d 480 (1998) (citing *Marussier, supra*; and *State v. Ammons*, 105 Wn.2d 175, 188-89, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986)). Likewise, a requirement of facially valid plea is that the defendant be informed of the requisite elements of the crime charged. *In re Thompson*, 141 Wn.2d 712, 10 P.3d 380. Unlike today, delinquency proceedings pre-dating the effective date of the Juvenile Justice Act were so informal that the juvenile did not even have to be informed of the criminal statute or ordinance they supposedly violated. *In Re the Matter of Simmons v. State*, 75 Wn.2d 208, 212, 449 P.2d 809 (1969).

The delinquency order relied on by the court for proof of a 1978 burglary “conviction” pre-dates the effective date of the Juvenile Justice Act and does not comply with the constitutional mandates for a valid conviction embodied by the Juvenile Justice Act. In 1977 the legislature saw fit to overhaul the juvenile justice

system in what is referred to as the Juvenile Justice Act. It would have to be acknowledged that to a large extent the purpose of this new legislation was to ensure that juveniles, and to some degree parents of those juveniles involved in the juvenile system, were afforded some, if not all, the requirements of due process and other constitutional protections. This Act required new processes for the juvenile system such as actual plea forms and advisement of all the constitutional rights one gives up when entering a plea of guilty. This is evident by the difference in the forms used pre-enactment of the 1977 Juvenile Justice Act and those used after its effective date of July 31, 1978.

While it does not appear that there is a current case where a defendant's pre-Juvenile Justice Act juvenile delinquency finding has been allowed or even sought to be used in that defendant's offender score, as is discussed in *In Re the Welfare of Forest v. State*, 76 Wn.2d 84, 87 (1969), pre-Juvenile Justice Act juvenile delinquency hearings were "informal" and conducted before a juvenile judge only and as was recognized under *Estes v. Hopp*, 73 Wn.2d 272, 438 P.2d 185 (1968), a hearing to determine delinquency was not a criminal proceeding. It is also worth noting that under the pre-Juvenile Justice Act law in effect when the delinquency order in question was entered, and even today, RCW 13.04.240 states that "an order adjudging a child delinquent or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime." As noted in *State v. Frederick*, 93 Wn.2d 28, 30, 604 P.2d 953 (1980), this provision was not repealed by the Basic

Juvenile Court Act enacted in 1977. Although *Frederick* was later overturned on other grounds, it also not clear that the defendant's standing in that case was similar to the one presented here as according to the timeline in *Frederick* that defendant pleaded guilty in August of 1978, post enactment of the Juvenile Justice Act as opposed to here where there is no evidence that this McCreven pleaded guilty to this or any "crime" and it is clear that the order of delinquency was entered before the Juvenile Justice Act was enacted.

The question of comparability is also necessary for classification of pre-SRA crimes, see *State v. Failey*, 165 Wn.2d 673, 201 P.3d 328 (2009). Under the pre-SRA 1978 RCW defining Burglary in the First Degree the crime required unlawful entrance or remaining in a "dwelling." RCW 9A.52.020¹⁰ The current term "building" was not codified until 1995. RCW 9A.52.020. Thus the 1978 offense of burglary in the first degree is not legally comparable to the current offense of burglary in the first degree. Based on 1978 definition of burglary in the first degree, it is possible that the offense alleged in the purported delinquency petition may have only been comparable to the current crime of Residential Burglary, RCW 9A.52.025¹¹ – a Class B felony, which even if a prior conviction of McCreven's, may well have

¹⁰ In 1978 9A.52.020 defined Burglary in first degree as (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in *dwelling* and, if, in entering or while in the dwelling or in the immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person therein. (emphasis added)

¹¹ RCW 9A.52.025 (1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.. (2) residential burglary is class B felony.

washed. RCW 9.94A.525(2)(b). (B felonies wash if have 10 years crime free)
Because no documentation was provided by which to ascertain the facts as contained
in the delinquency petition at issue, the important next step of assessing factual
comparability with a current offense cannot be done.

As for the court's inclusion in McCreven's offender score of an alleged 1991
prior conviction from Sacramento Municipal Court in California for Unlawful
Possession of a Controlled Substance for Sale, the documents relied upon by the
court were the complaint which, while it states the charge does not recite any
allegations or facts upon which that charge is based but merely lists a violation of
Section 11378 of the Health and Safety Code, a minute order and order of probation
which also facially indicates the charge but does not provide any information in
factual support of the order or the charge, the felony order of magistrate which again
indicates the charge but contains no factual allegation or basis for it, and finally a
request for request for modification of sentence which also states the charge but does
not contain any factual basis for it. No plea of guilty form was admitted that would
establish a facially valid plea and the factual basis supporting the change of plea. See
Sup. CP Ex. 2. According to the California Penal Code in effect at the time of this
alleged conviction, all that was required was that one be in possession of a controlled
substance for sale¹² and therefore based on a plain reading of the statute it does not

¹² Section 11378 of the Californian Health and Safety Code in effect in 1991 provides in
relevant part: Possession for sale; punishment: Except as otherwise provided in Article 7
(commencing with Section 4211) of Chapter 9 of Division 2 of the Business and

appear there is any mental element involved; unlike Washington's possession with intent to deliver statute. RCW 69.50.401(a) (1991)¹³. This case is unlike *State v. Winings*, 126 Wn. App. 75, 95, 107 P.3d 141 (2005) in which the appellate court found the defendant's stipulation to comparability was sufficient evidence to establish the 1992 California possession for sale statute was equivalent with our possession with intent to deliver statute found at RCW 69.50.401(1). Here McCreven did not so stipulate and asserted that the mental status element required by our statute is lacking in the California statute and thus the California statute is broader than the Washington statute and therefore not comparable to the 1991 Washington statute of unlawful possession with intent to deliver (RCW 69.50.401(a) (1991)). In addition, based on the lack of factual basis for this charge and/or alleged conviction and the case law in Washington regarding what is and is not sufficient evidence of possession with intent, such as amount of drugs alone is not enough, the Court cannot make the required determination that this alleged conviction is factually comparable such that it should have been included in McCreven's offender score.

Even if the court were to find the 1991 California conviction comparable to the 1991 Washington unlawful possession with intent to deliver based on the dicta in

Profession Code, every person who possesses for sale any controlled substances which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, ...

¹³ RCW 69.50.401 in effect in 1991 provides in relevant part (a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver or possess with intent to manufacture or deliver, a controlled substance. (1) any person who violates this subsection with respect to: (ii) any other controlled substance classified in schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for **not more than five years**, fined not more than ten thousand dollars, or both. (Note section 1 relates to schedule I or II substances that are narcotic drugs).

State v. Winings, 126 Wn. App. at 96, the conviction washes. RCW 9.94A.525(2)(c). In 1991, the Washington statute classified the first conviction for manufacture, possession or possession with intent to deliver methamphetamine as a Class C felony, with a five year maximum sentence. The wash provision on Class C felonies holds that these crimes do not count in the offender score if, after the date of release from confinement on the conviction, the individual has 5 consecutive years in the community without committing any crime. The California minute entry provided indicates that on March 5, 1991, the Sacramento municipal court imposed 120 days, with credit for 3 days served to commence on 4/16/91. According to the criminal history provided by the State, Mr. McCreven has no misdemeanor or felony convictions until 12/1/98 when he was arrested for two misdemeanors - a DWLS 3 and a Hit and Run Attended, thus he had over 7 years consecutive time in the community without committing a crime for which he was subsequently convicted surpassing the five years crime free required. See Sup CP. Sentencing Ex. 6.

Issue No. 13: Cumulative Error Deprived Mr. McCreven Of A Fair Trial.

An accumulation of non-reversible errors may deny a defendant a fair trial. *State v. Perrett*, 86 Wn. App. 312, 322, 936 P.2d 426 (1997); *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004). . Even if none of the errors alleged by the defendant on appeal alone mandate reversal, where it appears reasonably probable that the cumulative effect of those

errors materially affected the outcome of the trial, a reversal of the convictions is required. *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998), citing *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); see also *State v. Coe*, 101 Wn.2d 772, 789, 694 P.2d 668 (1984); *State v. Oughton*, 26 Wn. App. 74, 85, 612 P.2d 812 (1980); *State v. Greiff*, 141 Wn.2d 910, 10 P.3d 390 (2000)..

The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. In re Pers. Restraint of Lord, 123 Wn.2d 27 296, 332, 868 P.2d 835, 870 P.2d 964, cert. denied, 513 U.S. 849 (1994).

A cumulative error analysis depends on the nature of the error. Constitutional error requires reversal unless we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Welch*, 115 Wash.2d 708, 728, 801 P.2d 948 (1990). Constitutional error is harmless when overwhelming evidence supports the conviction. *Welch*, 115 Wash.2d at 728, 801 P.2d 948. Nonconstitutional error requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. *State v. Halstien*, 122 Wash.2d 109, 127, 857 P.2d 270 (1993). Because this case involves both constitutional and non-constitutional errors, the reviewing court applies the more stringent constitutional error standard in evaluating the cumulative effect of any errors.

Mr. McCreven argues that cumulative error deprived his right to a fair trial. Here, for the reasons argued in the preceding sections of this brief, even if one of the

issues standing alone does not warrant a reversal of his conviction, the cumulative effect of these errors materially affected the outcome of his trial, and his conviction should be reversed, even if each error examined on its own would otherwise be considered be harmless. *State v. Coe*, 101 Wn.2d at 789. The admission of evidence of motorcycle gang affiliation, the innuendo of witnesses being afraid and the shifting of the burden by the prosecuting attorney during closing argument improperly allowed the jury to infer that he was a bad character who associated with bad characters and thus more likely to have been an accomplice to the stabbing of Beaudine.

The repeated violations of pre-trial rulings by the State's witnesses unfairly increased the probability that the jury would infer guilt from the scant circumstantial evidence of guilt. Finally, during the State's rebuttal closing, Mr. McCreven's counsel made several objections based on misstatement of the law and/or misstatement of the evidence. These objections were neither sustained nor overruled. Instead, the trial court simply stated that the jury had either been instructed on the law, or that they had heard the evidence in this case. While it is true that the jury is instructed that the court's instructions are the law and the remarks made by the attorneys are argument, it is also true that they are instructed that the remarks made by the attorneys are intended to help them understand the law and apply the evidence. This instruction enables the jury to listen and in this case take notes of what the attorneys said during closing arguments. Given the trial court's lack of clear instruction when an objection

was made during the State's rebuttal, the jury was allowed to rely on what the State said even when it was a misstatement of the law and/or evidence.

In this case the untainted evidence is so entangled with the State's use of improperly admitted evidence as to be inextricable. With the trial court's allowance, the State relied so extensively on the improperly admitted evidence and misstatements of both the law and the evidence that this court is unable to determine whether the jury verdict would have been the same absent the errors. It is reasonably possible that the improperly admitted evidence took away reasonable doubts that the jury may have had about Mr. McCreven's guilt. Absent the erroneously admitted evidence and improper argument, there was not overwhelming evidence of Mr. McCreven's guilt of murder in the second degree. Rather, the jury reasonably could have reached a different outcome in this almost wholly circumstantial case. Thus, this court must reverse and remand for a new trial.

E. Pursuant To RAP 10.1(g), McCreven Adopts And Arguments Applicable To His Case As Raised By Defendants/Co-Appellants Nolan, Ford, and Smith. Incorporates His Co-

RAP 10.01(g) provides:

Briefs in Consolidated Cases and in Cases Involving Multiple Parties. In cases consolidated for the purpose of review and in a case with more than one party to a side, a party may (1) join with one or more of the parties in a single brief, or (2) file a separate brief and adopt by reference any part of the brief by another.

Pursuant to this rule, Mr. McCreven adopts and incorporates by his reference those arguments presented by his co-defendants/co-appellants Nolan, Ford and

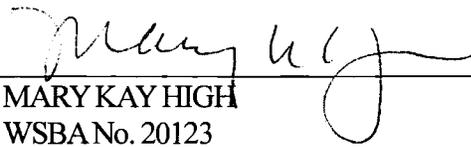
Smith applicable to his case. In particular, but not limited to Mr. Nolan's Assignments of Error 1, 2, 3, 4, 5, 6, 7, and 8 and the arguments thereto and Mr. Ford's Assignments of Error 3, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 20 Arguments thereto.

D. CONCLUSION.

For the arguments put forth above and incorporating the arguments of the co-defendants' appellate counsel, Mr. McCreven respectfully requests this court to reverse his conviction.

DATED this 20 of September, 2010.

Respectfully submitted,

By 
MARY KAY HIGH
WSBA No. 20123


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CERTIFICATE OF SERVICE

Mary Kay High hereby certifies under penalty of perjury under the laws of the State of Washington that on the 20th day of September, 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. Mike Robert McCreven
DOC # 802726
Washington State Penitentiary
1313 N. 13th Ave.
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And, I hand delivered a true and correct copy of the Brief of Appellant and the Report of Proceedings to which this certificate is attached, to

Ms. Kathleen Proctor
Pierce County Dep. Pros. Atty.
946 County-City Building
Tacoma, WA 98402

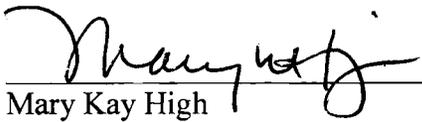
And I delivered via email this brief to the Office of Public Defense;

Jennifer M. Winkler;

Lise Ellner; and

Kathryn Russell Selk

Signed at Tacoma, Washington this 20th day of September, 2010


Mary Kay High

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