

NO. 39598-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BARRY FORD

Appellant.

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

The Honorable Brian Tollefson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Mr. Ford of murder in the second degree as a principal where there was no evidence of actual participation in the fight

2. There was insufficient evidence to convict Mr. Ford of murder in the second degree as a principal where there was no evidence that Mr. Ford assisted in any manner.

3. Mr. Ford was denied his right to a unanimous jury verdict when the state failed to elect between separate means of committing assault as the underlying felony for the murder charge.

4. The trial court's refusal to sever Mr. Ford's case from the other co-defendants denied Mr. Ford due process because of the great disparity of evidence and the massive and complex nature of the case.

5. Mr. Ford was denied his right to a fair trial by the introduction and use of irrelevant associational evidence of membership in a riding club.

6. Mr. Ford was denied his right to a fair trial by the introduction and use of irrelevant associational evidence of Bandidos paraphernalia

7. The prosecutor committed prejudicial misconduct in opening and closing argument by arguing facts not in evidence to create a case against Mr. Ford when none existed.

8. The prosecutor committed prejudicial misconduct by coaching four separate witnesses with annotated transcripts of their testimony that answered questions the witnesses were unable to answer on their own.

9. The prosecutor committed prejudicial misconduct by misleading the court regarding prior proceedings.

10. The prosecutor committed prejudicial misconduct by misstating the law to the jury.

11. The trial court abused its discretion by failing to dismiss two jurors who believed that witness Blair was not testifying truthfully and discussed this with a number of other jurors in the middle of the trial proceedings.

12. The trial court abused its discretion by failing to suppress a witness's fear of the defendants.

13. Mr. Ford was denied his right to a fair trial when the trial court refused to grant a new trial following prejudicial and inadmissible testimony in violation of a motion in limine.

14. Defense counsel was ineffective for failing to move for a mistrial after a witnesses testified that she was afraid to testify truthfully

15. Defense Counsel was ineffective for failing to move for a mistrial following prejudicial juror misconduct.

16. The trial court erred by excluding evidence of the complainant's reputation for violence.

17. The trial court erred in denying a motion for a mistrial following an officer violating an order in limine and discussing weapons found in one of the co-defendant's homes.

18. Mr. Ford was denied his right to a fair and unbiased jury trial by juror misconduct involving bias against a key witness.

19. Cumulative error denied Mr. Ford his right to a fair trial.

20. In re PRP of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), must be overruled because it leads to absurd and unjust results in Mr. Ford's case.

21. The trial court erred in refusing to grant Mr. Ford's half time motion to dismiss for lack of sufficient evidence of the crime charged.

22. The trial court erred in refusing to grant Mr. Ford's motion for arrest of judgment for lack of sufficient evidence of the crime charged.

Issues Pertaining to Assignment of Error

1. Did the state prove beyond a reasonable doubt that Mr. Ford was guilty of murder in the second degree where there was no evidence of actual participation in the fight or assistance of any sort in the fight?

2. Was Mr. Ford denied his right to a unanimous jury verdict when the state failed to elect between multiple acts of assault as the underlying felony for the murder charge?

3. Was Mr. Ford denied due process by the trial court's refusal to sever his case from his co-defendants based on an inadmissible and prejudicial co-defendant statement?

4. Was Mr. Ford denied his right to a fair trial by the introduction and use of irrelevant associational evidence of membership in a riding club?

5. Was Mr. Ford denied his right to a fair trial by the introduction and use of irrelevant associational evidence of Bandidos paraphernalia?

6. Did the prosecutor commit prejudicial misconduct in opening and closing argument by arguing facts not in evidence to create a case against Mr. Ford when none existed?

7. Did the prosecutor commit prejudicial misconduct by coaching four separate witnesses with annotated transcripts of their

testimony that answered questions the witnesses were unable to answer on their own?

8. Did the prosecutor commit prejudicial misconduct by misleading the court regarding prior proceedings?

9. Did the prosecutor commit prejudicial misconduct by misstating the law to the jury?

10. Did the trial court abuse its discretion by failing to dismiss two jurors who believed that witness Blair was not testifying truthfully and discussed this with a number of other jurors in the middle of the trial proceedings.

11. The trial court abused its discretion by failing to grant a mistrial after a witnesses testified that she was afraid to testify truthfully?

12. Was Mr. Ford denied his right to a fair trial when the trial court refused to grant a new trial following prejudicial and inadmissible testimony in violation of a motion in limine?

13. Was defense Counsel was ineffective for failing to move for a mistrial following prejudicial juror misconduct?

14. Did the trial court err by excluding evidence of the complainant's reputation for violence?

15. Did the trial court err in denying a motion for a mistrial following an officer violating an order in limine and discussing weapons found in one of the co-defendant's homes?

16. Was Mr. Ford denied his right to a fair and unbiased jury trial by juror misconduct involving bias against a key witness?

17. Was Mr. Ford denied his right to a fair trial by cumulative error?

18. Must this court ignore and challenge In re PRP of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), because it leads to absurd and unjust results in Mr. Ford's case.

19. Did the trial court err in refusing to grant Mr. Ford's half time motion to dismiss for lack of sufficient evidence of the crime charged?

20. Did the trial court err in refusing to grant Mr. Ford's motion for arrest of judgment for lack of sufficient evidence of the crime charged?

B. STATEMENT OF THE CASE

1. Procedural Facts Specifically Related to Issues on Appeal

Barry Ford was charged with murder in the second degree under RCW 9A.32.050(1)(b) and convicted by a jury, judge Brian Tollefson presiding. CP 433-434; 553-558; 625-638. Mr. Ford moved for severance from his co-defendants. RP 21 (February 6, 2009) CP 573-622. The motion was denied. RP 2-3 (February 6, 2009); RP 740; 1345-1347; 1349; CP 623. Mr. Ford moved for a mistrial after multiple acts of prosecutorial misconduct which denied him his right to a fair trial. RP 1503, 1596, 2955, 2957. These motions were denied. RP 1596-1604, 2958-2960.

The court granted the defense motion to suppress use of the term "victim". RP 137-139, 141 (April 9, 2009). The state repeatedly violated this order in limine and the court refused to give curative instruction. RP 209-210 (April 21, 2009); RP 141, 173-173 (April 22, 2009); RP 472, 505 (April 23, 2009); RP 1757. The court denied all of the defense motions for severance and for an arrest of judgment. CP 573-622, 669; RP 623. This timely appeal follows. CP 669.

2. Substantive Facts

Carl Smith stabbed Dana Beaudine to death outside the Bull's Eye

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<sup>1</sup> RP refers to the main volume of proceedings which are numbered sequentially throughout many volumes. All references to other volumes of the RP will be followed by

Tavern after he and two to six men got into a fight. As Mr. Beaudine walked by the group of men he yelled "fuck your colors" and two men went after Mr. Beaudine and pushed him. RP 361, 363. The initial fight began with Dana Beaudine, Vincent James, Mr. Beaudine's friend and four or five other men behind the second row of cars in the Tavern parking lot. RP 208, 215. Mr. Howden described the men in the fight as all were wearing motorcycle jackets or vests with red and gold patches, except for Mr. Smith who wore a white long john shirt/ After the fight Mr. Smith drove off in a car with a license plate number 750 RCA' the others drove motorcycles. RP 208-209, 211, 212, 217, 223, 1544.

During the fight Terry Nolan hit Mr. James on the head with a sap, but Mr. James managed to escape the fight, aided by his girlfriend who grabbed him. RP 208, 210, 215, 605, 767, 1474. Mr. Howden alone saw an unidentified man who might have had a crew cut, put up his hand and speak a few words to Mr. James after he left the fight. RP 210. Mr. Howden did not know what the man was wearing but believed that he wore a black biker jacket with red and gold patches. RP 246, 260. Mr. Howden did not know if the man was involved in the fight. RP 256.

Barry Ford was wearing gray jeans slacks, a long sleeved sweater or shirt and was clean cut with shorter hair professionally cut, and a clean

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the date of the proceedings.

shaven face. RP 1010, 1124, 1125. Barry Ford was not involved in the fight, but he had been inside the Tavern with Mr. Smith, Mr. Nolan, and Mr. McCreven, and others who wore motorcycle garb that night and were identified as being in the fight with Mr. Beaudine. RP 470-71, 485-86, 1026, 1105-06.

The state called the following eight eyewitnesses to testify in their case: Gary Howden a DJ at the Bull's Eye (RP 176); Heather Diamond who met a friend at the Bull's Eye on April 5, 2008 (RP 164); Jennifer Abbot who was at the Bull's Eye attending a bachelorette party (RP 440-441); Reyna Blair, the girlfriend of Vincent James, who was an acquaintance of Mr. Beaudine's (RP 706-707); Shannon Ford, Mr. Beaudine's fiancé (RP 991); and Vincent James, Mr. Beaudine's acquaintance (RP 2206-2207). None of the witnesses observed Mr. Ford engaged in or near any fighting. RP 30 ( June 4, 2009). None of the witnesses identified Mr. Ford as participating or assisting in the fight in any manner. RP 208, 256, 260.

Shannon Ford

Shannon Ford (hereafter S. Ford), Mr. Beaudine's fiancé, Reyna Blair and Vincent James were drinking heavily at S. Ford's home during the day of the incident and later at the Bull's Eye the evening of the incident. RP 977-979. RP 1162. Mr. Beaudine and Mr. James drank a case

of beer before going to the Bull's Eye Tavern on April 5, 2008. RP 993, 1200, 2208, 2222. Mr. Beaudine had a tattoo on his arm that looked like a Nazi symbol with a skull, a knife and a banner.

Once inside the Bull's Eye Tavern, S. Ford saw four or five biker guys wearing leather motorcycle jackets with "Hidalgos" and "Pierce County" patches. RP 981, 1009, 1120, 1134, 1180. Mike McCreven was one of the guys in biker gear also wearing a bandanna over his long hair RP 984-86, 1168. S. Ford identified Mike McCreven as wearing a motorcycle jacket with Hidalgo patches as having been in the fight and having left on his motorcycle. RP 1057

S. Ford testified that Mr. Nolan alone glared at her table. RP 1002, 1004, 1005-1006, 1008, 1072; 1122, 1136-1138 RP, 1191, 1195, 1207. S. Ford did not know any of the defendants and only learned their names at the arraignment. RP 1007; 1116, 1118, 1168-1169. S. Ford described a fifth man at the bar with the defendants who was not present at trial. RP 1010. S. Ford described this man as wearing a black leather motorcycle jacket, and was clean cut. RP 1011. S. Ford did not see this man leave, but at some point he was not sitting at the table with the four other guys. RP 1011.

At the end of the evening a group of biker guys were outside the Tavern when S. Ford and her group left the Tavern. RP 1196-97. S. Ford testified that once outside, as Mr. Beaudine approached the passenger side

of S. Ford's SUV, a man came up and tried to punch Mr. Beaudine, but Mr. Beaudine successfully blocked the punch. RP 1021-23.

S. Ford testified that Carl Smith or Mike McCreven, who left on a motorcycle started the fight and punched Mr. Beaudine, and that Mr. McCreven who was scruffy with facial hair and was wearing a black leather jacket and a bandanna, weighed about 200 pounds at 5'11". RP 1025, 1026, 1057, 1105-06, 1171. Heather Diamond a patron of the tavern rather than S. Ford disclosed that Mr. Beaudine yelled "fuck your colors" as he walked past the group of men. RP 361.

After the fight began, Terry Nolan retrieved something from his motorcycle and pushed S. Ford out of the way to get back into the fight. RP 1032-1037, 1038-1039. All of the men in the fight were wearing black skull caps and black leather motorcycle jackets; Barry Ford was not in biker clothes, rather he looked clean cut. RP 671, 674, 1150-1156. S. Ford never saw Mr. Ford in the fight, rather she just recognized him from the bar. RP 1057, 1172-73, 1205.

#### Gary Howden

Gary Howden was the DJ the night of the incident. He is a friend of Mr. James and Ms. Blair. RP 195, 226, 244. Mr. Howden saw two fights. RP 244. After the first fight died down, Mr. Howden saw two people start to fight: Mr. Beaudine and Mr. Smith. RP 238, 1025, 1026, 1057, 1105-06,

1171. Mr. Howden was certain that three of the guys in the fight had on leather biker jackets and left on motorcycles, and the fourth guy Mr. Smith had on a white long john shirt and was 6'1". RP 211-213, 257, 304, 334. Mr. Smith left in a car with a license plate 750 RCA. RP 216 217, 223. Mr. Howden did not know how the fights began because his vision was obscured by cars in the parking lot. RP 242-43.

Mr. Howden testified that during the fight he saw a person put their hand up and speak with James, and his friend Mr. James who had been in the fight and left the fight did not go back into the fight after speaking with the man who put up his hand.

Vince was getting – had his head down, and he was getting punched in the back of the head like he was trying to back away, and eventually he did back away.

RP 208. Ms. Blair grabbed Mr. James as he was getting out of the fight. RP 767. Mr. Howden thought the man who spoke to Mr. James might have been big and stocky guy with a crew cut or short hair. RP 208-209, 305-06. Mr. Howden could not identify this man, but was relatively certain that he was wearing patches and insignia and was one of the guys who left on a motorcycle. RP 246, 256, 260, 2226, 2248. Barry Ford was not wearing a black leather jacket with insignia: he was wearing casual dress clothing. RP 967, 1010, 1124, 1125, 2535, 2591, 2602.

Jim Stilton, wore a black leather jacket with insignia and drove a motorcycle and rode his motorcycle to the Tavern on April 5<sup>th</sup> with Mr. McCreven after having dinner with Mr. McCreven and his girlfriend Rebecca Dobiash. 1487, 1489, 1522, 2072-73, 2085-2086, 2132-2133. Mr. Stilton is very similar in size to Mr. Ford, who is 5'10, 235 pounds. RP 2132, 2203-2204, 2811. Mr. Stilton is a 20 year friend of Mr. McCreven's and rode with him to Hidalgo's meetings. RP 1423-25. The Hidalgo's, are a small group of guys who ride motorcycles and do toy drives and barbeques. RP 1491. Rebecca Dobiash made the red and gold patches for the group. RP 1492.

#### Vincent James

Mr. James could not remember anything about the fight because he was too drunk. RP 2208, 2222. He could not recognize any of the defendants or describe any one who had been involved in the fight, or anything about the fight or if he spoke with any one during the fight. RP 2246.

#### Reyna Blair

Ms. Blair told the police that Mr. James told her that Cameron was at the tavern that night. RP 768, 1768. Cameron weighed 250 pounds and had short hair. RP 767. Ms. Blair grabbed Mr. James as he was getting out of the fight. RP 767. Ms. Blair was clear that all of the men in the fight

were wearing vests or jackets with Hidalgo's patches and that three of the four fighters left on motorcycles and the fourth left in a car. RP 1630-1631.

Ms. Blair grabbed Mr. James to pull him out of the fight as he was being hit on the head. RP 767.

#### Heather Diamond

Heather Diamond was at the Bull's Eye to meet a friend. RP 343. Ms. Diamond testified that she saw a group of four guys wearing leather jackets and vests inside the bar sitting together, but she was not paying much attention to them and did not know who they were as she and the guys came and went throughout the evening and the guys all had their backs to the bar. RP 343, 344, 356, 380-385, 401, 411. Ms. Diamond identified Mr. Ford and the other co-defendants as some of the guys who were inside the bar sitting together. RP 356, 411.

While Ms. Diamond and a group of guys in motorcycle gear were outside smoking, Mr. Beaudine walked by and told them to fuck their colors as he walked past the group. RP 349-350, 358, 361. Thereafter, two of the group of four men went over to Mr. Beaudine and pushed him. RP 362. Ms. Diamond could not identify the men but all were dressed alike from the waist up and believed that four or five men were in the fight. RP 388, 398-399, 403. Ms. Diamond was certain that Barry Ford was not one of the men in the fight. RP 411-413.

Jennifer Abbott

Jennifer Abbott who was inside the bar at a bachelorette party saw five, six or seven biker type guys wearing leathers inside the bar. RP 454, 459-60. Outside smoking, Ms. Abbott saw four or five biker guys running toward a fight. RP 470-71, 482. Abbott recognized Mr. Nolan as one of the men in the fight, but could not identify the others, except to indicate that they had on leather vests and jackets, and the second man to enter the fight had hair past his ears showing from beneath a hat or bandanna and he had a goatee. RP 470-71, 485-86. S. Ford identified Mike McCreven as one of the guys in biker gear wearing a bandanna over his long hair RP 984-86, 1168. Ms. Abbott did not know if the men involved in the fight were the same men from inside the bar sitting at her table; she just assumed that they were the same. RP 470.

Ms. Abbott described another man at the bar who was wearing leathers and was wearing a hat or bandanna, who was not present at the trial. RP 485. Ms. Abbott did not see any non-biker types involved in the fight. RP 512-13.

Joy Hutt

Joy Hutt was the night manager-bartender for the Bull's Eye on April 5, 2008. RP 2389. Ms. Hutt did not see how the fight started, but

knew that Mr. Beaudine had been drinking that night. RP 2527. Ms. Hutt went outside to investigate a disturbance and saw Mr. Beaudine and another man with blood on their shirts; both men told Ms. Hutt that the other guy started the fight. RP 2529 RP 2023-2025, 2530; RP 30-31, 2546 (January 4, 2009).

Ms. Hutt knew Mr. Ford as "Sarge" and referred to him as Sarge because she knew him. RP 2593. Earlier in the evening when Ms. Hutt saw Mr. Ford she gave him a hug and he showed her pictures of his grandchildren. RP 2353. Mr. Ford was not wearing a vest with patch the night of the fight. RP 2538. The other men with Ford all had on leather biking wear: chaps, riding gear, and leather jackets or vests. RP 2541. There were also others in bar with riding gear and leathers. RP 2542. Ms. Hutt never before saw the other guys with Mr. Ford but one guy in particular at the Tavern with the defendants was tall clean cut and not wearing leathers. RP 2554-2555.

During the evening, inside the bar, Ms. Hutt saw Mr. Beaudine walk by Mr. Nolan, Mr. Smith, Mr. McCreven and Mr. Ford and mouth off at them. Mr. Beaudine said something like their patches were stupid or a joke. Mr. Beaudine grabbed at one of the jackets. RP 2525. When Mr. Beaudine commented on the motorcycle jacket colors, the guys did not react to Mr. Beaudine because they were more focused on the bachelorette

party. RP 2531

Ms. Hutt also heard Mr. Beaudine telling everyone at the bar that he was "H.A.", in a voice loud enough for people around him to hear. RP 2526. "H.A." means Hells Angels. Ms. Hutt observed that Mr. Beaudine appeared to have been drinking that night. RP 2527. When Ms. Hutt heard that there was a disturbance outside she went outside and yelled for everyone to leave because she was calling 911. RP 2529. Ms. Hutt described the suspects and made clear that Barry Ford was not in the fight; he was standing on the curb and was not disheveled. RP 2023-2025, 2536, 2581, 2593.

Ms. Hutt described a man she did not know as one of the guys in the fight. Ms. Hutt described James Stilton to Wood as being 44 years old, 5'10' 220 pounds. RP 2132, 2203-2204. Mr. Stilton was also incorrectly described as being 6'2, 280 pounds with short clean cut hair styles. ( RP 12 January 4, 2009). Detective Wood conceded that Mr. Ford and Mr. Stilton have the same physical description: big, clean cut looking guys. RP 2133, 2203-2204.

The evidence indicated that Mr. McCreven, Mr. Nolan and Mr. Stilton went to the Bull's Eye on motorcycles and that all three left on motorcycles at the same time, suggesting that Mr. Stilton left with Mr. McCreven and Mr. Nolan. RP 2203. RP 2202. There was no evidence

suggesting that Mr. Ford rode a motorcycle to the Bull's Eye, rather Detective Wood testified that Mr. Ford owns a Maroon pickup truck; Mr. Ford who was not dressed in riding gear likely drove his truck to the Bull's Eye. RP 2136.

#### Katherine Baccus

Katherine Baccus was at the Bull's Eye on April 5, 2008. She was outside and saw the fight with some difficulty. RP 2328, 2329, 2333. Ms. Baccus described the men in the fight as wearing leathers and gold patches. RP 2341-2346.

#### Carl Smith Sentencing

During his allocution, co-defendant Carl Smith took responsibility for killing Mr. Beaudine and apologized to Mr. Ford and the other co-defendants and their spouses. RP 46 (December 11, 2009).

### C. ARGUMENTS

1. BARRY FORD WAS CONVICTED OF MURDER IN THE SECOND DEGREE BASED ON INSUFFICIENT EVIDENCE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

- a. Summary

The facts at their worst do not establish beyond a reasonable doubt, by reasonable inference or directly, the elements of murder in the second

degree by the predicate crime of assault as charged in count I. The facts establish that Carl Smith killed Dana Beaudine and that Terry Nolan hit Vincent James over the head with a sap, while 2-3 other men dressed in black motorcycle jackets or vests with Hidalgo's patches joined in the fight. A man who was never identified, was observed by a single witness, putting up his hand and speaking to Vincent James, a friend of Mr. Beaudine's who escaped the fight with the assistance of his girlfriend Reyna Blair. After being hit on the head. Mr. James did not re-enter the fight.

The only description of the man who put up his hand was a big and stocky guy with a crew cut who might have worn a black leather motorcycle jacket. There were several big men at the Bull's Eye Tavern who fit this description. A man named Cameron, an unknown man and Jim Stilton a friend of Mr. McCreven's who rode his motorcycle to the Bull's Eye with Mr. McCreven after having dinner with him. These men were all built similarly to Mr. Ford, but unlike Mr. Ford, they were all in motorcycle gear. RP 208, 209, 305, 206, 967, 1010, 1124, 1125, 2353, 2591, 2602.

The state's theory of its case against Mr. Ford was that he was the man who put his hand up and spoke to Mr. James, and even though there was no evidence that Mr. Ford was that man and even though there was no physical contact or restraint and no one knew what was discussed, the state argued that the unidentified man's act of putting up a hand and speaking was

sufficient to establish Mr. Ford's accomplice liability to felony murder. RP 208, 767.

b. Standard of Proof

When determining questions of insufficient evidence to establish a crime, the appellate Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Asaeli, 150 Wn. App. 543, 567, 208 P.3d 1136 (2009); State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). This rule follows from the Winship doctrine that due process requires the government prove every element of a crime upon which a defendant is convicted beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed. 2d 368 (197)..

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “In determining the sufficiency of the evidence, circumstantial evidence is as reliable as direct evidence.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The appellate Court will defer to the trier of fact on any issue that involves “conflicting testimony, credibility of witnesses, and the persuasiveness of

the evidence.” State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

c. Felony Murder

Second degree felony murder under RCW 9A.32.050(1)(b) provides in relevant part:

(1) A person is guilty of murder in the second degree when:

.....  
(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants;

Id.

To prove Mr. Ford was guilty of felony murder, the State had to prove beyond a reasonable doubt that: (1) Mr. Ford or an accomplice assaulted Mr. Beaudine and that (1) that Mr. Ford or an accomplice, caused the death of Mr. Beaudine in furtherance of the assault. CP 526 (Jury instruction 37); RCW 9A.32.050(1)(b).

(i) No Evidence Barry Ford Involved in Actual Physical Altercation as Principal

All of the witnesses described all of the guys in the fight to be wearing motorcycle jackets or vests with red and gold patches except for later identified Carl Smith who had on a white long john shirt who drove off in a car with license plate 750RCA. RP 211-212, 218, 257, 304, 1026,

1083, 1105, 1106. Mr. Howden described the fight as beginning and then stopping and re-starting with just two people: Smith and Beaudine. RP 211-212, 218, 238-244, 257, 1046, 2025, 2056. Mr. Smith confessed to stabbing Mr. Beaudine and apologized to Mr. Ford and Mrs. Ford and the other co-defendants and their spouses. RP 46 (December 11, 2009).

A smaller person wearing a motorcycle jacket with Hidalgo patches that S. Ford could not identify approached and grabbed Mr. Beaudine. RP 1169-70. Several witnesses identified Mike McCreven as one of the fighters wearing a motorcycle jacket with Hidalgo patches, who left on his motorcycle after the fight. RP 466, 470-471, 480, 485-486, 497, 512, 984-986, 1057. Ms. Abbott also recognized Mr. Nolan as one of the fighters. Id.

Carl Smith was one of the first people to fight with Mr. Beaudine. RP 1083. Mr. Schwartz, during cross examination told S. Ford that she told the police that a man in gray jeans and a gray shirt was the second man in the fight. RP 1083-1084. Ms. Ford was very clear that this was not correct. S. Ford has never been able to identify this second man in the fight man, and she knew that Mr. Ford was wearing dress clothes and was not one of the men in the fight. . RP 1108, 1170.

Ms. Abbott described the second man to enter the fight as having hair past his ears showing from beneath a hat or bandanna and he had a

goatee. RP 470-71, 485-86. S. Ford identified Mike McCreven as one of the guys in biker gear wearing a bandanna over his long hair RP 984-86, 1168.

The third guy was Mr. Nolan associated with the burgundy motorcycle. RP 1037, 1172. The fourth guy was described as a smaller person wearing a skull cap. RP 1088. The fifth person was described as a white guy with a jacket on. RP 1088. S. Ford admitted that she did not know how many people were in the fight. RP 1126. And almost everyone from inside the bar was outside during the fight, presumably including all of the other guys in the bar who wore biker gear to the biker bar. RP 330-331, 459-60, 1172. All of the witnesses described the fighters as biker guys in leather biker jackets and a long john short with bandannas and head gear. RP 403, 412, 413, 470, 471, 485, 486, 511-513, 671, 674, 1057, 1172, 1173, 1205, 1630, 1631.

S. Ford only saw Mr. Ford once when she first walked in to the bar. RP 1123. The second time S. Ford saw Mr. Ford was at the arraignment. RP 1123. S. Ford knew that Mr. Ford was wearing gray colored dress cloths and was not in biker garb the night of April 5, 2008. RP 1125. Ms. Ford was certain that Mr. Ford man was not wearing any leather jacket of any sort. RP 433. S. Ford did not describe Mr. Ford's build. RP 424. S. Ford was also certain that all of the men in the fight were wearing black

skull caps and black leather motorcycle jackets and that Barry Ford was not in biker cloths, rather he looked clean cut. RP 671, 674. Mr. Ford was standing on the curb next to Ms. Hutt during the fight. RP 2025, 2530, 2546, 2581, 2593. Mr. Ford never had any blood on his clothing, he was not disheveled, he did not look like he had been in a fight; he was just standing outside. RP 2595. Ms. Hutt stated that Mr. Ford was not in the fight and that he was not one of the suspects she described. RP 2536, 2581.

Jim Stilton, who is very similar in size to Mr. Ford, also has a short, clean cut hair cut, and was at the Bull's Eye on April 5, 2008. Mr. Stilton wore a black leather jacket with insignia and drove a motorcycle to the Bull's Eye the night of the stabbing RP1487, 1522, 2072-73, 2085, 2132-33.

None of the witnesses identified Barry Ford as having been in the fight because he was not in the fight. RP 211-213, 304, 334. There simply was insufficient evidence to prove that Mr. Ford participated in the fight as a principal.

(ii) No Evidence Ford Assisted in Assault

There was insufficient that Mr. Ford was involved in the fight on any level. The state argued that the man Mr. Howden described as putting up his hand was Mr. Ford. The state also argued that this man stopped Mr.

James from re-entering the fight and thus this man was an accomplice to the murder by aiding in the assault of Mr. Beaudine. The state's arguments fail for lack of sufficient evidence from which a jury could reasonably infer that Mr. Ford was in any manner involved in the fight or that the unidentified man in any manner interfered with Mr. James ability to re-enter the fight. RP 208-209, 305-06. The fight ended almost immediately after Mr. James was struck. 31RP 2257-58. Ms. Blair, Mr. Vincent's girlfriend testified that she "grabbed him" (James) and pulled him out of the fight. RP 766. Ms. Blair was certain that no one helped her get James out of the fight. RP 767. Mr. James then helped Mr. Beaudine to his feet. RP 2219, 2225-26, 2247.

Gary Howden described the man who put up his hand as follows:

he put his hand out. I don't know what he said, but he put his hand out like that, and Vince backed off.

....

When asked what the person looked like, Howden responded:

That was the one that had the crew cut, the you know, tall stocky, and I believe that he had a crew cut. I am just trying to remember. It's been a long time.

RP 210, 256. During cross examination by Mr. McCreven's counsel, Mr. Howden agreed with counsel's description of the man who put up his hand as being a "very large person in a black leather jacket. RP 305-06,485, 1009-1011, 1487, 1522, 2072-73, 2085, 2132-33. But Mr. Howden could

not identify this man and was not sure about the leather jacket. RP 246, 256, 260, 2226, 2248. Jim Stilton is 5'10' 220 pounds with a short haircut.

RP 2132, 2203-2204. Wood conceded that Ford and Stilton have the same physical description: big, clean cut looking guys. RP 2133, 2203-2204.

S. Ford, Ms. Abbott, Ms. Hutt, and Mr. James described a fifth man at the bar who was not present at trial, that was big, clean cut and wore a black leather jacket. RP 454, 59-460, 485, 767, 768, 1010-1011, 2554-2555. Based on all of the witness testimony presented during the trial, several big men were described who fit the general description of a big guy with a crew cut wearing a black leather jacket. This man could have been Jim Stilton or any of the other guys described by the witnesses. RP 454, 459-460, 780, 1010, 1011, 1487, 1522, 2072-2073, 2085, 2132-2133, 2554-2555. All of these other men were described as clean cut, wearing motorcycle jackets and/or motorcycle gear. Mr. Ford was universally described as wearing casual dress clothing that was explicitly described as not being motorcycle clothing. RP 671, 674, 1110, 1124, 1125, 1150, 1156, 2805.

The evidence taken in the light most favorable to the state revealed that perhaps at some point a large man held up his hand and spoke to Mr. James. This man did not restrain Mr. James, nor did he did threaten Mr.

James. Rather after Mr. James escaped the fight and some man spoke with him. RP 208-209, 305-06. Based on this testimony it is not possible to determine the identity of the man who put up his hand, what if anything he said to Mr. James, or if this man in any manner interfered with Mr. James' decision not to re-enter the fight. Ms. Blair alone grabbed Mr. James as he was getting out of the fight. RP 767.

In State v. Manderville, 37 Wn. 365, 367-374, 79 P. 977 (1905), an old murder case, the defendant was charged with engaging in a fist fight with the deceased inside a bar. Witnesses differed as to who started the fight or how it started. But ultimately the deceased was stabbed with a knife that Manderville got from the deceased. Manderville and the deceased did not like each other and after the fight Manderville told someone that he hoped that he killed the deceased in the fight. *Id.*

In Manderville even though it was unclear who attacked whom first and it was unclear where the knife came from, the defendant's own statements supported the conviction. *Id.* Mr. Ford's case stands in stark contrast. In Mr. Ford's case there was no evidence of his participation in a fight and there were no admissions from Mr. Ford, Rather Mr. Smith alone took responsibility for the killing. Manderville stands as a clear example of the basic evidence needed to establish guilt of murder. No such evidence exists in Mr. Ford's case because Mr. Ford was not involved in the murder

of Mr. Beaudine.

(iii) Authority: Insufficient Evidence To Establish of Guilt of Felony Murder as a Principal or As an Accomplice.

To prove Mr. Ford guilty of felony murder as an accomplice, the state had to prove beyond a reasonable doubt that Mr. Ford acted with knowledge that his conduct would promote or facilitate the commission of the murder. Waddington v. Sarausad, 77 U.S.4056, 129 S. Ct. 823, 832, 172 L.Ed.2d 532 (2009). In summary, jury instruction #20 defined accomplice liability as follows:

.....

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime [murder], he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime [murder]; or

(2) aids or agrees to another person in planning or committing the crime [murder].

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice. A person who is an accomplice in the commission of a crime [murder] is guilty of that crime [murder] whether present at the scene or not.

CP 509 (language in brackets added for clarification following Sarausad, 129 S. Ct. at 832; RCW 9A.08.020).

In Mr. Ford's case, there was no evidence from which a jury could reasonably infer that Mr. Ford did anything with knowledge that it would facilitate a murder, or that he in any manner solicited, aided, encouraged or planned a murder.

Asaeli, supra, is directly on point and controls the outcome of this case. In Asaeli, Mr. Vaielua a co-defendant, was charged with felony murder in the second degree by direct and accomplice liability. Asaeli, 150 Wn.2d at 549. As in Mr. Ford's case, there was no evidence of direct involvement in the fight, rather in both cases, the state presented evidence that Mr. Ford and Vaielua respectively were accomplices. Asaeli, 150 Wn.2d at 568-570

In Asaeli, the evidence established that Vaielua went to a bar with his codefendants, that he was present at the park where the shooting took place, that he drove Williams, the person who approached Blaac Fola (the deceased) and asked him to fight, and that Vaielua was aware that some members of the group he was with were was trying to locate Fola. As Williams, sought out Fola, and challenged him to a fight, Asaeli, believing Fola was going to shoot Williams, shot Fola and killed him. Vaielua was standing nearby talking to a friend of Fola's. Asaeli, 150 Wn.2d at 568-70.

The Court held that this evidence failed to show that Asaeli was planning to kill Blaac or that Vaielua was present at the scene with more than mere knowledge of some potential interaction with Fola. Asaeli 150 Wn2d at 568.

At best, this evidence is sufficient to suggest that Vaielua and the others agreed to meet at the park after the bar closed and that Vaielua may have known that someone from his group was trying to locate Fola. But the record contains no evidence, direct or indirect, establishing that Vaielua was aware of any plan, by Asaeli, Williams, or anyone else, to assault or shoot Fola.

Asaeli, 150 Wn.2d at 568-569.

The Court in Asaeli affirmed that 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, 908 P.2d 892 (1996). The state’s theory that Vaielua was acting as a guard to prevent Fola from entering the fight was rejected. Rather, Vaielua was merely present at the scene with knowledge that others who were with him were looking for Fola. This evidence was not sufficient to support a reasonable inference that Vaielua was an accomplice to an underlying assault. Asaeli, 150 Wn.2d at 568-570.

Mr. Ford’s case is strikingly similar to Vaielua’s case in Asaeli. Mr. Ford was out at a bar with Mr. McCreven, Mr. Nolan and Mr. Smith, among others, just as Mr. Vaielua was out at a club with his co-defendants. RP 901-902; Asaeli, 150 Wn.2d at 568. There was no evidence that

anyone in either case planned a fight, although the state in Asaeli made that argument, the Court of Appeals rejected it. Asaeli, 150 Wn.2d at 568-70.

A group of four or five men in biker gear who were outside talking as Mr. Beaudine walked by and yelled at them to “fuck their colors”. While the men from this group went after Mr. Beaudine, Mr. Ford was somewhere outside the Tavern talking to another person. RP 2546, 2595; RP 30-31 (January 4, 2009). No one identified Mr. Ford or anyone who looked like Mr. Ford as being in the fight.

The only evidence (contrasted from the prosecutor’s arguing facts not in evidence) remotely suggesting the Mr. Ford was involved came from Mr. Howden who described a big and stocky with a crew cut who put up his hand and spoke to Mr. James. The state argued that the big stocky guy was Mr. Ford even though no one identified this person as Mr. Ford; and there was no evidence that the man who put up his hand prevented Mr. James from re-entering the fight.

This evidence is like the evidence deemed insufficient in Asaeli where Vaielua drove the accomplices to the park and knew that they were looking for Blaac and stood nearby while the shooting took place. In Mr. Ford’s case, the state speculated, without evidence that Mr. Ford was involved in the fight as an accomplice. However, the evidence suggested

that Mr. Ford was just outside with the rest of the people from the bar. As in Asaeli, Mr. Ford did not participate in the fight as a principal or as an accomplice; he was just present.

Moreover, even if for the sake of argument the unidentified man, who put up his hand was Mr. Ford, he could not be considered an accomplice because there was no evidence from which a jury could reasonably infer that this man interfered with Mr. James decision not to reenter the fight. A single witness testified that the unidentified man put up his hand and spoke to Mr. James as Mr. James was escaping the fight while Ms. Blair grabbed him to get him out of the fight. The state's theory that Mr. Ford was this man or that the man prevented MR. James from re-entering the fight is based on sheer speculation.

Speculation based on scant evidence does not fit within the meaning of a "reasonable inference". "Reasonable" means:

Fair, proper, just, moderate, suitable under the circumstances, for and appropriate to the end in view. Having faculty of reason; rational governed by reason; under the influence of reason; agreeable to reason.

Henry Black, Black's Law Dictionary, p. 1138 (5<sup>th</sup> ed. 1979). "Inference", means:

In the law of evidence, a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. . .

Inferences are deductions or conclusions which with the reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Black's Law Dictionary, p. 700 (5<sup>th</sup> ed. 1979).

In State v. Ray, 130 Wn.2d 673, 680, 926 P.2d 904(1996), a child molestation case involving the corpus delecti rule, the court held that the following facts were insufficient to permit a reasonable inference of guilt:

At approximately one in the morning, three-year-old L.R. came to her parents' bedroom and asked for a glass of water. Ray, probably nude, accompanied his daughter back to her room. Ray later returned to his room upset and crying. Ray awakened his wife and talked to her. His wife became upset and rushed to check on L.R. After further discussion with his wife, Ray, who was still upset, placed an emergency call to his sexual deviancy counselor.

Id. The Court held that one could only speculate that something criminal occurred rather than reasonably infer criminality. Ray, 130 Wn.2d at 680-681. The Supreme Court dismissed the charges. Ray, 130 Wn.2d at 682.

Similarly, in Miller v. Likins, 109 Wn. App. 140, 147, 34 P.3d 835 (2001), the court held that a mere possibility that guardrails could have prevented a pedestrian car accident ("might") was no more than mere speculation and not a reasonable inference. Id.

In Mr. Ford's case, as in Ray, where the evidence was insufficient to establish molestation where a sex offender got up during the night and went to his daughter's bedroom and returned upset and called his sex

offender therapist; in Mr. Ford's case the fact that some unidentified man put up his hand and spoke unknown words to Mr. James, when there were several other men identified as fitting the description of this man, does not establish, even in the light most favorable to the state, a fair, proper, just, or logical inference that Mr. Ford was that man, or that the man actually interfered with Mr. James' decision not to re-enter the fight.

The truth of the state's case is that an unidentified big man with a crew cut put up his hand and spoke to Vincent James. The only reasonable inference from this evidence is that an unidentified big man with a crew cut put up his hand and spoke to Vincent James and Mr. James decided not to re-enter the fight.

No matter the identity of the man, the simple act of putting up a hand and speaking without more is insufficient to infer that the man was acting as an accomplice. Particularly, where the man did not restrain Mr. James, there was no evidence of any threats and Mr. James was trying to get out of the fight on his own to escape the beating he was talking from being hit on the head with the sap. This evidence like the minimal evidence in Asaeli, was insufficient establish that Mr. Ford was an accomplice to felony murder by the predicate crime of assault.

The state failed to prove beyond a reasonable doubt that Mr. Ford is guilty of felony murder by any means or under any analysis. To serve

justice and satisfy due process, this Court must reverse the charges and dismiss with prejudice.

2. FORD WAS DENIED DUE PROCESS AND JURY UNANIMITY WHERE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF EACH ALTERNATE MEANS OF ASSAULT RELIED ON TO ESTABLISH MURDER IN THE SECOND DEGREE, AND DID NOT PROVIDE A UNANIMITY INSTRUCTION OR ELECT WHICH OF THE ALTERNATE MEANS TO RELY ON IN FINDING GUILT.

Mr. Ford was charged with felony murder by the alternate means of “RCW 9A.36.020(1)(a) or (b)”. Section “(b)” is clearly an error intended to refer to section “(c)”. Section (c) refers to assault with a deadly weapon and (b) refers to assault of a child.” CP 433; RCW 9A.36.020. The jury instructions describe subsections (a) and (c), consistent with the charging document. CP 501. The state argued that the fist fight and the knife fight and the use of the sap were separate acts of assault constituting the predicate felony to the felony murder charge. RP 2800-2801. “The State has to prove an intentional assault against another that either recklessly inflicts substantial bodily harm or intentionally assault another with a deadly weapon, a knife, a sap.” RP 2801. 2

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2 The only evidence of use of a sap involved Mr. Nolan assaulting Mr. James. Mr. Ford was acquitted of assaulting Mr. James with a sap. CP 439, 440, 2977, 2979.

The unanimity defect in Mr. Ford's case is based on insufficient proof of Mr. Ford's participation in either of these alternative means (fist fight or knife fight) of committing the predicate assault to felony murder.

a. No Evidence Anyone Knew of the Knife Fight

There was no evidence that Mr. Ford ever struck anyone; there was no evidence from which a jury could reasonably infer that Mr. Ford was the person who held up his hand; and there was no evidence that Mr. Ford knew that Mr. Beaudine pulled a knife that was eventually obtained by Mr. Smith and used to stab Mr. Beaudine. Not a single witness knew that a knife was involved or that Mr. Beaudine was injured by a knife during the fight. RP 191, 228, 214, 254, 365, 369, 406, 473, 476, 515.

Gary Howden could not see any blood during the fight. RP 214 (April 21, 2009). He also was unaware that a knife was involved in the fight. RP 254; RP 191, 228 (April 22). Heather Diamond saw fists flying but did not know that anyone was injured RP 365, 369. (April 22, 2009). Ms. Diamond described the incident as just a big fight. RP 406. Jennifer Abbott saw people throwing punches. RP 473. Ms. Abbott did not learn that a fight had occurred until after the fight had stopped and the police had arrived. RP 476. Reyna Blair described the men as "just fighting". RP 712. Blair did not know that anyone was injured during or after the fight. RP 717. S. Ford was

unaware that Mr. Beaudine was injured until after the fight ended. RP 1040-1043.

Moreover, the only evidence regarding ownership of the knife indicated that Mr. Beaudine owned the knife and pulled it out to use against the men in the fight. This evidence is insufficient to establish beyond a reasonable doubt that Mr. Ford was an accomplice to the alternate means of assault with a deadly weapon where Mr. Ford did know that a weapon was used in the fight.

b. Standard of Review

A unanimous jury verdict is required in all criminal cases. Const. art. 1, sec. 21; Ortega-Martinez, 124 Wn.2d at 707. Where a crime may be committed by alternative means and there is insufficient evidence on one of the alternate means, jury unanimity as to the means by which the defendant committed the crime is necessary. State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); State v. Linehan, 147 Wn.2d 638, 645, 56 P.3d 542 (2002); Ortega-Martinez, 124 Wn.2d at 707-08; ); Arndt, 87 Wn.2d at 377.

"Sufficient evidence is evidence adequate to justify a rational trier of fact to find guilt beyond a reasonable doubt." Ortega-Martinez, 124 Wn.2d at 708, Accord, State v. Pirtle, 127 Wn. 2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 135 L. Ed. 2d 1084, 116 S. Ct. 2568

(1996).

The trial court's failure to give a unanimity instruction denied Ford his constitutional right to a unanimous jury verdict on Count I charging second degree murder as a principal or as an accomplice. Defense counsel did not object to the jury instructions, and did not request a unanimity instruction. This Court may however, decide this issue without an objection. RAP 2.5(a); Wash. Const. art. I, §21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993).

c. Alternate Means

Alternative means statutes identify a single crime and provide more than one means of committing that crime. In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006); State v. Arndt, 87 Wn.2d 374, 376-377, 553 P.2d 1328 (1976). In reviewing an alternative means case, the Court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. Id.

Criminal assault is an alternate means crime. Smith, 159 Wn.2d at 784. "As promulgated by the legislature, the second degree criminal assault statute articulates a single criminal offense and then provides six separate subsections by which the offense may be committed. RCW

9A.36.021(1)(a)-(f). Each of these six subsections represents an alternative means of committing the crime of second degree assault.” Smith, 159 Wn.2d at 784, 786. Accord, Linehan, 147 Wn.2d at 647 (alternative means of committing criminal assault are not provided for in the common law definitions, but rather “are provided in the statutes delineating the degree of assault.”).

In Smith the defendant was charged with only one means (use of a deadly weapon) of committing assault in the second degree; it did not matter how many different ways the instructions described and defined that means, because ultimately it represented only a single means of assault. Smith, 159 Wn.2d 787, 790.

We would readily agree with Smith that this is an alternative means case requiring sufficient evidence to support each of the alternative means presented to the jury if the State had alleged that Smith committed second degree assault by more than one of the means listed in RCW 9A.36.021(1).

Smith, 159 Wn.2d at 790.

Smith is distinguishable from Mr. Ford’s case because in Mr. Ford’s case, unlike in Smith, Mr. Ford was charged by statutorily defined alternate means of committing assault: with either a deadly weapon or by the reckless infliction of substantial bodily injury. RCW 9A.36.021(1)(a) and (c); CP 502. In Mr. Ford’s case a unanimity instruction was necessary

because there was insufficient evidence to evidence of guilt beyond a reasonable doubt to support either means. Smith, 159 Wn.2d at 790. 3

In Mr. Ford's case, the state did not elect which means of assault it would rely on in trying to establish felony murder. Rather the to-convict instruction merely recited assault in the second degree without delineating which of the two means the state was going to proceed under. CP 502, 527(Instructions 12 and 37).

The court did not provide a unanimity instruction and there was insufficient evidence to support each alternate means of committing assault in the second degree. "If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if we can determine that the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means." State v. Fleming, 140 Wn.App. 132, 136, 170 P.3d 50 (2007).

In Mr. Ford's case the evidence, viewed in the light most favorable to the State, leaves doubt about whether Mr. Ford knew of the assault with a knife. The evidence did not conclusively show that the jury could only have believed that Mr. Ford knew of the fist fight alone or that he knew of

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3 This issue is distinguishable from an instruction that defines a single means, which is referred to as a "means within a means scenario" that does not require a unanimity instruction. Smith, 159 Wn.2d at 790 n. 9, citing, State v. Richardson, 24 Wn. App. 302, 304, 600 P.2d 696 (1979), and State v. Gallo, 20 Wn. App. 717, 730, 582 P.2d 558 (1978).

the knife fight or participated in wither fight. Since there is doubt that the verdict was based on only one of the alternative means of assault, this Court cannot be certain that there was no danger that the verdict was not unanimous. Fleming, 140 Wn.App. at 136.

In State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980), the defendant was charged with a single count of assault against two people. The evidence demonstrated that the defendant directed his action at both men but did not establish beyond a reasonable doubt that he assaulted both men. Under these facts it was possible to determine that Mr. Stephens only assaulted one of the men. For this reason, the Court held that the error in failing to provide a unanimity instruction was not harmless beyond a reasonable doubt. Stephens, 93 Wn.2d at 191-192.

In Ford's case, as in Stephens there was insufficient evidence to support the means of assault as an accomplice under either means charged. The jury was ultimately permitted to pick and choose from two means of committing assault without needing to be unanimous as to the means. This Court cannot determine that absent the error the jury would have reached the same result. This denied Mr. Ford his right to a unanimous jury because there was insufficient evidence of each means.

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The failure to give a unanimity instruction under these circumstances was not harmless error.

d. Error Not Harmless

Violation of a defendant's constitutional rights is presumed to be prejudicial. State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Mr. Ford had a constitutional right to a unanimous jury. Wash. Const. art. I, §21. Moreover, an error of constitutional proportions will not be held harmless unless the appellate court is "able to declare a belief that it was harmless beyond a reasonable doubt." . . ."error did not contribute to the verdict Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 24 A.L.R.3d 1065 (1967); State v. Jennings, 111 Wn. App. 54, 64, 44 P.3d 1 (2002), citing, Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); accord, State v. Johnson, 71 Wn.2d 239, 244-45, 427 P.2d 705 (1967).

Even though the jury was instructed that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.", CP 497 (Jury Instruction # 7). This instruction did nothing to clarify the need for unanimity as to the means of committing the assault. Additionally, even though the jury was instructed "to deliberate in an effort to reach a unanimous verdict" these instructions were too generic to

correct the lack of unanimity instructions. Bruton v. United States, 391 U.S. 123, 126, 135-136, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968).

In Bruton, 391 U.S. at 126, 135-136, the United States Supreme Court held that there are no limiting instructions capable of protecting against violations of fundamental constitutional rights because the risk is always too great that the jury will not follow the generic or limiting instructions. *Id.* The lack of a unanimity instruction in Mr. Ford's case violated his constitutional right to a unanimous jury. Like Stephens, the error in Mr. Ford's case was not harmless. The remedy is reversal and remand for a new trial.

3. THE ADMISSION OF ASSOCIATIONAL MEMBERSHIP IN A MOTORCYCLE GROUP WITH UNPROVEN, AND UNRELENTING UNDERTONES OF AFFILIATION WITH A CRIMINAL ORGANIZATION, THE "BANDIDOS", VIOLATED MR. FORD'S FIRST AMENDMENT RIGHTS AND HIS RIGHT TO A FAIR TRIAL

Barry Ford is not a gang member; he does not belong to a motorcycle gang, rather he has ridden his motorcycle with a small group of guys who formed a group called the Hidalgos, which means "honorable man" RP 46 (December 11, 2009). The group is dedicated to riding motorcycles, attending barbeques and conducting toy drives for children. RP 1491. The court ruled in limine that evidence of association with this group the

Hidalgos, or the Bandidos was not permitted. RP 131, 136 (April 9, 2009).

The court ruled in limine that the state could introduce what the defendants were wearing to prove identity but “[t]o just show flat-out membership for the sake of showing flat-out membership, that part of the motion is granted.” RP 128-129 (April 9, 2009). “[T]hat they’re members of an organization, is inadmissible”, based on United States v. Roark, 924 F.2d 1426. RP 129, 136 (April 9, 2009). The court cited to State v. Boot, 89 Wn. App. 780, as well to indicate that associational membership was inadmissible unless the state proved that it was related to motive. RP 129 (April 9, 2009). The state stipulated to not introducing any gang evidence. RP 133 (April 9, 2009). RP 116-117, 121-126, 128. Mr. Ford was not wearing Hidalgos or any other type of riding gear.

The state presented a theory of its case that the Hidalgos were a membership club that supported a criminal gang called the “Bandidos” and argued to the court that it should be able to introduce photographs of the defendants wearing Hidalgos and Bandidos paraphernalia, not to argue association, but to show the defendants willingness to work together. The state’s admitted purpose is improper associational evidence.

The state introduced over defense objections exhibits 268A 268B and 268C which depicted: (1) Mr. Smith in a T-shirt with “Bandidos” written on it; (2) Mr. McCreven and Mr. Smith together each with a

support the Bandidos; (3) a picture of Mr. Smith in a bloody hooded sweatshirt and a skull cap; (4) photographs of Mr. Ford wearing a vest with a Bandidos button posing with other co-defendants and other photographs depicting the co-defendants wearing Hidalgos patches, and (5) a close up photograph of a Mr. McCreven's motorcycle depicting Bandidos and Hidalgo's decals. RP 893-895, 912-921, 966-972; CP 475-489; Ex 205, 268A, B, C. The Bandidos are a known outlaw motorcycle gang that has nothing to do with the incident or the defendants. RP 879, 885.

The photo of Mr. Ford wearing a Bandidos button was an old, undated photograph taken in New Hampshire. RP 884-886, 893-895, 912-921, 966-972; CP 475-489; Ex 205, 268A, B, C.

The state conducted extensive examination of Ms. Dobiash regarding how members "earned" their Hidalgos patches. RP 1463-1467. The state used witness Dobiash to establish membership in the Hidalgos club without explaining the type of club, but indicating that to join the club, one had to "earn a patch". This left the jury to speculate that the club was a gang like organization, particularly because of the relentless attempt to connect the Hidalgos with the Bandidos. RP 1415, 1463-1467, 1468-1485, 1491. The court permitted Ms. Dobiash to testify that Mr. Ford was a Hidalgo member and that she had seen him wear riding gear which included a long sleeved black leather riding jacket with a red and gold

Hidalgos patch. RP 1141-1142. The court ruled on April 9, that no such evidence would be admissible against Mr. Ford because he was not dressed in biker gear the night of the incident. RP 116-117, 121-126, 128.

The defense objected on grounds of relevance and prejudice to the defendants on grounds that viewing the defendants together in Hidalgos or Bandidos gear would sway the jury to consider their guilt as a group rather than as individual defendants. RP 886-893.

The defense asked the court to reconsider the admissibility of the photographs and argued that under ER 403 and 404 the photographs were irrelevant and unduly prejudicial. RP 901-904. The photographs individually and cumulatively did not establish or support any element of the crime. Neither did the photographs establish Mr. Ford's identity. The prosecutor admitted that she did not want the evidence for identity but rather wanted it to prove guilt by association. RP 905. The court admitted EX 268A, B, C, 84, 91-93, 104, 108-112, 181A, B. RP 905-906. The prosecutor argued:

“[T] fact that they are pictured together shows a bond that is more than just a casual or a stranger type relationship. The fact they have chosen to memorialize this bond over a period of time and on more than one occasion shows that, in fact, that bond, and the jury can draw inferences from that, that these individuals are willing to work together to back each other up because of this bond that they have memorialized through the photographs.”

RP 892-893. The prosecutor again argued:

This is not a situation where you have four random individuals from a bar that all of a sudden someone is saying they ran outside and jumped Dana Beaudine. There is a stronger bond here, the jury can give whatever weight that it chooses to that bond, but they can certainly consider it as it relates to their readiness, and willingness to work in concert, and work together.

RP 897-898.

In spite of the prosecutor's admissions that she sought to introduce the motorcycle group evidence to establish that the defendants were guilty because of their association with the club, the court admitted the evidence because in its words, "identity is still a big issue". RP 900, 905. Since Mr. Ford did not wear a motorcycle jacket with *Hidalgos* or *Bandidos* insignia, identity was not an issue as to Mr. Ford. The admission of any evidence depicting or discussing Mr. Ford's association with the *Hidalgos* violated the order in limine and Mr. Ford's first amendment rights. RP 128-129 (April 9, 2009); Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992).

The court stated that it would consider a limiting instruction on the constitutional right to association. RP 899. Citing, U.S. v. Roark, and Dawson v. Delaware, the defense argued that a limiting instruction would not and did not cure the prosecutor's improper goal of using the photographs of the defendants together in riding gear or *Bandidos* T-shirts to establish

guilt by association. RP 898-899, 902, 904. The state tried and obtained a conviction of Mr. Ford in violation of his first amendment rights. RP 902, 904. Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992).

The court also admitted the above exhibits and Ex 181A and 181B, the photomontages of the defendants in jail garb that were shown to Mr. James who could not identify them. RP 886-888. During direct examination of Rebecca Dobiash, the state elicited the term “gang” in violation of the motion in limine when the prosecutor asked Ms. Dobiash to read what the search warrant was looking for. RP 1457. 1501-1503. The defense moved for a mistrial on grounds that the prosecutor violated the motion in limine when she asked the witness what the search warrant was looking for, which the court denied. RP 1501-1503. The prosecutor admitted that she never admonished the witness not to discuss anything gang related. RP 1503.

The Prosecutor again violated a motion in limine when she asked witness Reyna Blair if she has ever heard of the Hidalgos, to which she answers “yes”. RP 718. Ms. Blair testified that she did not notice if the men beating Mr. Beaudine were wearing Hidalgo jackets. RP 718. Ms. Blair denied ever seeing the defendants before. RP 721.

The prosecutor sought to explain to the jury that Ms. Blair was not

being truthful because she was afraid that Mike McCreven would kill her, so she would not identify him in court. RP 728. Mr. Ford objected to this line of questioning on grounds that the prosecutor was trying to use the associational evidence with the Hidalgos to explain the witness's fear which prejudiced Mr. Ford. RP 722, 724, 725, 727. The court ruled that the prosecutor could ask Ms. Blair about not wanting to confront the defendants because "this does not bias or prejudice, as far as the rules, so I will allow it. RP 730.

The prosecutor asked Ms. Blair if reading a transcript of her interview would refresh her memory. Ms. Blair testified, "If I had to pick out any killer, I wouldn't want to be known, because I have kids at home." RP 733. The defense moved to strike and the objection was sustained. RP 734.

The prosecutor compounded the prejudice from the admission of impermissible association evidence by impermissibly arguing in closing guilt by association:

The prosecutor argued: "Do you really have a reasonable doubt as to whether or not the State got the right four guys? Do you believe that there are four other Hidalgos members out there running around in Washington that the State has not apprehended?"

RP 2932. This argument criminalized all Hidalgos members. Again the prosecutor argued guilt by association:

How could counsel stand up here and tell you that Barry Ford left in a truck, when there was absolutely no evidence of that. You know why he told you that? Do you know why he insisted on telling you that over and over? Because if you believe that Barry Ford was in the parking lot, if you believe that he got on that motorcycle, and that he was wearing a jacket that said Hidalgos, then Mr. Bernberg knows that Barry Ford is guilty, as guilty as everyone else. And that's why he has to insist, and he has to have you believe, that Ford left in a truck, when he knows that there is no evidence of it.

RP 2929.

There was no evidence at all that Mr. Ford rode a motorcycle to the Tavern and no one identified Mr. Ford in motorcycle clothing or having ridden a motorcycle. RP 2135-2136. Rather, Detective Wood testified that Mr. Ford owns a maroon pick up truck. RP 2136. Therefore it was reasonable to infer that Mr. Ford drove a truck to the tavern. The prosecutor's argument was not based on reasonable inference, rather it was an argument of guilt by association.

The state argued in closing that Mr. Ford's ownership of a Hidalgo's jacket depicted in the photograph "corroborated" his guilt in this case. RP 2810. These arguments and the state's evidence in this regard violated Mr. Ford's first amendment right to free association.

During examination of a state's witness, the state also elicited the term "gang" in violation of its stipulation not to introduce such evidence. RP 133 (April 9, 2009); RP 1457, 1501-1503. This testimony compounded

the prejudice to Mr. Ford. The Hidalgos are a social group not a gang. RP 1491.

During opening argument the prosecutor argued the fact that the defendants were not present when the police arrived was “unified consciousness of their unified guilt” RP 137. Cumulatively, the prosecutor’s use of inadmissible associational evidence against Mr. Ford violated his first amendment rights and denied him a fair trial.

a. Issue Preserved for Appeal.

Generally defense should object to the admission of the allegedly inadmissible evidence in order to preserve the issue for review, unless the prosecutor deliberately disregards the order or if “an objection by itself would be so damaging as to be immune from any admonition or curative instruction by the trial court.” State v. Weber, 159 Wn.2d, 252 272, 149 P.3d 646 (2006) quoting, State v. Sullivan, 69 Wn.App. 167, 173, 847 P.2d 953 (1993).

The evidence of membership in the Hidalgos club was introduced over defense objections and in violation of the court’s orders in limine on many occasions. RP 893-895, 912-921, 966-972; CP 475-489; Ex 205, 268A, B, C. Because the trial court ruled in limine that the above associational evidence was inadmissible, and Mr. Ford objected, the matter is preserved for review regardless of whether Mr. Ford objected to every

instance when the prosecutor deliberately disregarded the order on limine.

Id.

b. First Amendment Freedom of Association

Membership in a church, social club, or community organization, or affiliation with a gang is protected by the First Amendment right of freedom of association. Dawson v. Delaware, supra. Any evidence of church, social club, or community organization, or affiliation with a gang is not admissible in a criminal trial when it is used to indicate a person's beliefs or associations. Dawson v. Delaware, 503 U.S. at 166-167. Moreover, for such evidence to ever be admissible, “[t]here must be a connection between the crime and the organization before the evidence becomes relevant.” Dawson v. Delaware, 503 U.S. at 166, 168; accord, State v. Scott, 151 Wn.App. 520, 526-527, 213 P.3d 71 (2009).

Washington state courts have adopted this “connection” test for determining the admissibility of associational evidence. Scott, 151 Wn. App. at 526-527; State v. Johnson, 124 Wn.2d 57, 67, 873 P.2d 514 (1994). In short, “to admit gang affiliation evidence there must be a nexus between the crime and gang membership.” Scott, 151 Wn. App. at 526-527, quoting, State v. Campbell, 78 Wn.App. 813, 822, 901 P.2d 1050, review denied, 128 Wn.2d 1004, 907 P.2d 296 (1995).

The admission of association with a motorcycle group violated Mr. Ford's First Amendment right to the freedom of association because it was designed to establish guilt by association as a member of a riding club. This is impermissible evidence of an abstract belief the state wished the jury to believe each of the defendants possessed. Delaware, 503 U.S. at 164-67 (gang membership inadmissible to prove abstract belief because it is protected by constitutional rights of freedom of association and freedom of speech); Campbell, 78 Wn. App. at 822.

Gang affiliation is both highly prejudicial and implicates constitutional rights of freedom of association and freedom of expression. Gang is essentially synonymous with criminal behavior. "Gang" is defined as: "a group of persons associated for some criminal or other antisocial purpose". Webster's Encyclopedic Unabridged Dictionary, (Gramercy 1989 Ed). at p. 583. Gang evidence carries a great danger of unfair prejudice, especially where, as here, there is no evidence that Mr. Ford ever acted in any manner associated with any gang or group.

The term "gang" is not a required talisman to inflict prejudice on a defendant. Rather it is the presentation of any and all evidence that suggests guilt by association with a group of people perceived to be undesirable. Delaware, 503 U.S. at 166, 168; accord, Scott, 151 Wn.App. at 526-527.

In Mr. Ford's case, the prosecutor inferred and argued that the Hidalgos were a group of criminals; that Mr. Ford was a Hidalgo; and that Mr. Ford was therefore responsible for the actions of Mr. Smith, Mr. Nolan and Mr. McCreven. The prosecutor hammered to the jury that the Hidalgos were associated with the Bandidos: criminals. The witnesses were allowed to repeatedly refer to the Hidalgos, to express their fear, and the jury was flooded with images of the defendants and their motorcycles containing Hidalgo and Bandido's insignia. None of this evidence was relevant or admissible, it was highly prejudicial, and violated Mr. Ford's first amendment rights.

c. Associational Evidence Inadmissible  
Under ER 404(b).

Admission of associational evidence is also analyzed under the standards of ER 404(b). State v. Boot, 89 Wn.App. 780, 788-790, 950 P.2d 964, review denied, 135. In Asaeli, the Court analyzed the admission of the associational evidence of the Kushman Blok neighborhood club under the evidentiary error standard to determine the presence of unfair prejudice. Asaeli, 150 Wn. App. at 579 citing, State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (evidentiary error is grounds for reversal only if the error is prejudicial).

The standard for determining prejudicial error is whether “within reasonable probabilities, had the error not occurred, [would] the outcome of the trial [ ] have been materially affected.’ ” State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), as amended (Jul. 19, 2002) (internal quotation marks omitted) quoting, State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Under the “reasonable probability” standard, the evidence is not considered in the light most favorable to the State, rather the evidentiary error is prejudicial if, ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’ ” Smith, 106 Wn.2d at 780.

Evidence of associational affiliation is considered prejudicial. Scott, 151 at 527; Asaeli, 150 Wn. App. at 580. Admission of such evidence is measured under the specific standards of ER 404(b). State v. Boot, 89 Wn.App. at 788-790; State v. Yarbrough, 151 Wn.App. 66, 210 P.3d 1029 (2009).

ER 404(b) prohibits a court from admitting “[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith.” *Id.* This prohibition encompasses *any* and all evidence offered to “show the character of a person to prove the person acted in conformity” with that character at the time of a crime. Asaeli, 150 Wn. App. at 576, citing, State v. Foxhoven, 161 Wn.2d 168,

174-75, 163 P.3d 786 (2007) (alteration in original), quoting State v. Everybodytalksabout, 145 Wash.2d 456, 466, 39 P.3d 294 (2002). A trial court may admit such evidence for other legitimate purposes “such as proof of motive, plan, or identity.” Foxhoven, 161 Wash.2d at 175, 163 P.3d 786.

Whenever the state seeks to introduce such evidence, under an exception to ER 404(b), “the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.” Pirtle, 127 Wn.2d at 648-49. This analysis must be conducted by the court on the record. Pirtle, 127 Wn.2d at 650. “Preponderance of the evidence means that considering all the evidence, the proposition asserted must be more probably true than not.” State v. Ginn, 128 Wn.App. 872, 878, 117 P.3d 1155 (2005)

“ER 404(b) is not designed ‘to deprive the State of relevant evidence necessary to establish an essential element of its case,’ but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” State v. Ra, 144 Wn.App. 688, 701-702, 175 P.3d 609, review

denied, 164 Wn.2d 1016, 195 P.3d 88 (2008), citing, Foxhoven, 161 Wn.2d at 175, State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

Generally it is reversible error to fail to conduct a 404(b) analysis on the record. Foxhoven, 161 Wash.2d at 175. In Asaeli, the court did not conduct an analysis on the record. Rather the court simply adopted the state's argument. While this is not the preferred method, in Asaeli, citing, Pirtle, 127 Wn. App. at 650, the Court found reversible error on substantive grounds under ER 404(b) rather than on this procedural failure. Asaeli, 150 Wn. App. at 576, 579-580. In Mr. Ford's case, the court did not conduct an ER 403 analysis or adopt the state's reasoning. RP 892-893, 897-898, 900, 905.

Evidence of other bad acts is only admissible under ER 404(b) when a trial court identifies a significant reason for admitting the evidence and determines that the relevance of the evidence outweighs any prejudicial impact. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The decision to admit or deny admission of ER 404(b) evidence is reviewed for abuse of discretion. Lane, 125 Wn.2d at 831. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In Asaeli, this Court reversed and remanded defendant William's conviction even though there was substantial evidence of guilt because

evidence of gang affiliation was considered too prejudicial. In Asaeli there was considerable question about whether or not the putative gang in fact existed. Asaeli, 150 Wn.App. at 580.

In Scott, the Court similarly held that the gang related evidence had no relationship to the crimes because Scott was the only person involved in the crimes that was known to be gang-involved. The evidence was used to establish that Scott was a “bad person”. Scott, 151 Wn. App. at 529. The Court in Scott made clear that ER 404(b) was designed to prevent the state from introducing this type of associational evidence. Scott, 151 Wn. App. at 529. In Scott, The Court held that the failure to connect the gang evidence to the state’s theory on motive and as a basis for demonstrating concerted activity presented a significant probability that the error was not harmless. Scott, 151 Wn. App. at 530.

In Ra, 144 Wn.App. at 701-702, without ever establishing that the crimes charged: attempted murder and drive by shooting were gang related, the prosecutor questioned the Detective about his gang unit and why the case was assigned to him. The prosecutor also questioned a witness Bun about his and the defendant’s groups’ gang-like behavior. Finally, in closing, the prosecutor argued that Ra belonged to a culture of violence and that he elevated his status in his group, becoming the ‘baddest of the bad,’ by carrying a firearm and shooting someone.” This

Court held that the prosecutor's questions to the witness and argument to the jury were unduly prejudicial where there was no established connection between the crimes and the gang-like behavior. The Court reversed the convictions. Ra, 4 144 Wn. App. at 701-702.

In Scott, supra; Asaeli, supra, Ra, supra, there was no connection between any defendant's group associational affiliation and the charged offenses. In each of these cases, the admission of the gang-like evidence was found to be prejudicial error. Scott, 151 Wn. App. at 528-529; Asaeli, 150 Wn. App. at 579-80; State v. Ra, 144 Wn.App. at 701-702.

Courts may admit gang affiliation evidence to establish the motive for a crime or to show that defendants were acting in concert. Yarbrough, supra; Boot, supra; Campbell, supra. In each of these cases, unlike in Mr. Ford's case, Scott, supra; Asaeli, supra, Ra, supra, "there was a connection between the gang's purposes or values and the offense committed." Scott, 151 Wn. App. at 527. In the instant case, since there was no issue regarding motive and no connection between the murder and the Hidalgos, the club evidence was inadmissible.

The following two federal cases are legally and factually on point. In Roark, 924 F.2d at 1434, the defendant and three others, all of whom

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4 In Ra, the prosecutor asked the improper gang related questions in such a manner and the court never engaged in a 404(b) analysis, therefore there was no determination of

were Hells Angels, were charged with conspiracy to manufacturing methamphetamines. Over defense objections, the state introduced evidence that Roark was a member of the Hells Angels motorcycle club, and that club had an "institutional criminality" and involvement in drug manufacturing and distribution. *Id.* at Roark, 924 F.2d 1430, 1434. The judge gave a strongly worded instruction to disregard the evidence. Roark, 924 F.2d at 1432-33.

“[T]he government improperly inject[ed] the Hells Angels Motorcycle Club into the case, virtually as an uncharged defendant”. Roark, 924 F.2d at 1434. The jury was informed that the defendant was a member of the Hell's Angel's motorcycle gang and then heard substantial, damaging testimony about the gang's illicit activities. The trial court observed, the testimony was largely an indictment of the motorcycle gang and "did not go really to the guilt or innocence" of the defendant. Roark, 924 F.2d at 1433 (internal quotation marks omitted). The Court of Appeals held the entire theme of the trial was "guilty by association" that could not be cured by an instruction, and ordered a new trial due to the prosecution's "relentless attempt to convict [the defendant] through his association with the motorcycle club." Roark, 924 F.2d at 1433-1434.

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relevance. RA, 144 Wn. App. at 702.

In U.S. v. Street, 548 F.3d 618 (8<sup>th</sup> Cir. 2008), the Court agreed with the Court in Roark that “even in that situation where a member of a gang allegedly engaged in conduct which conformed to the gang's reputation, it was inappropriate to expose the jury to such evidence because it would be “inherently and unfairly prejudicial” and would “deflect[ ] the jury's attention from the immediate charges and cause [ ] it to prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged.” U.S. v. Street, 548 F.3d at 632, quoting, Roark, 924 F.2d at 1433-1434.

In Street, the Court of Appeals concluded similarly to Roark, that the gang reputation evidence had no connection to the murder charges and Street was not a gang member nor ever had been. Street, 548 U.S. at 632-633. Street was not a member of El Forasteros motorcycle club or any other motorcycle gang. Rather, Street's associates were gang members who “occasionally provided Street with precursor chemicals for his drug operation and purchased the finished methamphetamine.” *Id.*

In Street, the state did not connect Street to the gang via any evidence that Street believed in the Forasteros or subscribed to their philosophy, yet argued during its closing that Street's casual associations with a few El Forasteros members was sufficient for the gang's anti-snitch code “to rub off on [him].” Street, 548 U.S. at 632-633.

The Court held that the testimony about “outlaw motorcycle gangs and El Forasteros was excessive, unduly prejudicial, and in great part completely irrelevant to the charged offenses. The district court thus abused its discretion in allowing this evidence. Moreover, we cannot conclude that the error was harmless. This was a close case.” Street, 548 U.S. at 633.

In Mr. Ford’s case, as in Street, the evidence about the Bandidos like the evidence about the Forasteros was as excessive, unduly prejudicial, and completely irrelevant to the charged offenses. It served no other purpose than to establish guilt by association. Just as in Roark, the use of Hell’s Angels was designed to establish guilt by association.

In Roark, Street, Asaeli, Scott, and Ra, the state’s cases against these defendants was as weak as it was in Mr. Ford’s case where the state’s entire case was designed to prove guilt by association. The state’s introduction of Hidalgos and Bandidos evidence was “inherently and unfairly prejudicial” and designed to deflect the jury’s attention from the weakness of the state’s case against Mr. Ford. Street, 548 F.3d at 632, quoting, Roark, 924 F.2d at 1433-1434.

The testimony and photographs had no legitimate purpose to establish identification because Mr. Ford was never described as wearing any motorcycle clothing. Rather the evidence was an indictment of the

motorcycle club and "did not go really to the guilt or innocence" of Mr. Ford. Roark, 924 F.2d at 1433. Even the prosecutor in an unwitting moment disclosed to the Court that her design and intention to use the evidence of Hidalgos and Bandidos associations to prove that Mr. Ford and his co-defendants were guilty. RP 892-893, 9897-898.

This was a blatant and intentional violation of the state's stipulation, the court's orders in limine, and the first amendment right to free association and ER 404(b).

Under ER 404(b), the evidence was not relevant and it was highly and unduly prejudicial. Scott, 151 Wn. App. at 527; Asaeli, 150 Wn. App. at 580; ER 404(b). The Court in Scott made clear that ER 404(b) was designed to prevent the state from introducing this type of associational evidence. Scott, 151 Wn. App. at 529.

In Mr. Ford's case, there was no evidence of gang association but rather very thin and irrelevant Hidalgo association as a "support" club for the Bandidos, which had nothing to do with the murder of Mr. Beaudine. The Hidalgos and Bandidos evidence was irrelevant and prejudicial.

d. Association Evidence Not Harmless Error

Evidentiary errors, such as erroneous admission of ER 404(b) evidence, require reversal when the error, "within reasonable probability, materially affected the outcome." Everybodytalksabout, 145 Wn.2d at 469,

quoting, State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Errors are only harmless if insignificant against the backdrop of all of the evidence presented. Everybodytalksabout, 145 Wn.2d at 469, citing, Bourgeois, 133 Wn.2d at 403. If the outcome of the trial would have differed without the evidence it is not harmless. Scott, 151 Wn. App. at 528-529; Asaeli, 150 Wn. App. at 579-80; State v. Ra, 144 Wn.App. at 701-702.

In Mr. Ford's case as in Scott, Asaeli and Ra, Roark, and Street, the evidence was not harmless because, within reasonable probability, the evidence materially affected the outcome. Without the prejudicial evidence and testimony, the jury would have clearly understood that the state did not have a case against Mr. Ford. Without the offending evidence and testimony in violation of the First Amendment and ER 404(b), there was more than a reasonable probability that the outcome would have differed. For these reasons, reversal and remand for a new trial is required.

4. THE PROSECUTORS' COMMITTED PREJUDICIAL MISCONDUCT IN OPENING ARGUMENT, IN THEIR CASE-IN-CHIEF, IN CLOSING AND REBUTTAL ARGUMENTS. AND BY VIOLATING MOTIONS IN LIMINE, BY VOUCHING FOR THE CREDIBILITY OF THE STATE, BY ATTACKING DEFENSE COUNSEL, BY MIS-STATING THE LAW TO THE JURY, BY MISLEADING THE COURT AND BY ARGUING FACTS NOT IN EVIDENCE

TO MAKE A CASE AGAINST MR. FORD  
WHERE NONE EXISTED.

a. Prosecutor Argued Facts Not in Evidence to  
Make Its Case Against Mr. Ford.

The prosecutor told the jury that the four men in the fight included Barry Ford. RP 2806. There was no such evidence. The prosecutor argued that the fact that there were no leathers found at Mr. Ford's house, but he was depicted in a single, undated photograph wearing a leather vest and he owned a motorcycle "corroborated" his involvement in the fight. RP 2810. There was no evidence that Mr. Ford got rid of his jacket, or that he owned a jacket with patches at the time of the incident. There was no objection. The prosecutor again stated that each of the defendants wore motorcycle clothing. RP 2818. This is untrue. No witness saw Mr. Ford in a motorcycle jacket. The prosecutor argued that the defendants were unified in guilt because they left one after the other after the fight. RP 2819-20. There was no evidence that Mr. Ford left the scene. The defense did not object.

The prosecutor argued that Barry Ford was the big guy with a crew cut described by Howden as having put up his hand. RP 2811. The prosecutor argued that no one else matched the description. RP 2811. This was a mis-statement of fact because Jim Stilton and others who were not identified, matched Mr. Ford's description and were wearing leathers the night of the incident. RP 1487, 1522, 2072-73, 2085, 2132-33.

The prosecutor argued facts not in evidence when she stated that Heather Diamond testified that Mr. Ford was wearing a leather jacket. RP 2811. Ms. Diamond could not remember what Mr. Ford was wearing, and so testified. RP 356, 411. The prosecutor argued that Ms. Diamond saw Mr. Ford outside standing with the other defendants. RP 2811. This is untrue. Ms. Diamond testified that she did not know which men were involved in the fight because she was not paying attention. RP 412. Ms. Diamond just assumed that the group of men outside were the same as the men inside because they were dressed similarly. RP 412. Ms. Diamond did not identify or describe anyone in the fight that resembled Mr. Ford. RP 412-413. The prosecutor argued facts not in evidence when she stated that Ms. Diamond identified Mr. Ford as being in the fight. RP 2930.

Without objection, the prosecutor argued facts not in evidence when she repeatedly told the jury that Shannon Ford would testify that Barry Ford glared at her table inside the Tavern. RP 154, 157 (April 21, 2009). Shannon Ford testified that Barry Ford never glared at her table. RP 1122, 1136, 1138, 1191, 1207.

b. General Authority

Prejudicial prosecutorial misconduct denies a defendant his constitutional right to a fair trial. Washington Constitution Article 1 § 22; United States Constitution, Sixth and Fourteenth Amendments; State v.

Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1992).

We realize that attorneys, in the heat of a trial, are apt to become a little over-enthusiastic in their remembrance of the testimony. However, they have *no right to mislead the jury*. This is especially true of a prosecutor, who is a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial.

(Emphasis added in Davenport) Davenport, 100 Wn.2d at 763, quoting, State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955)

In Washington State prosecutors have a special duty in trial to act impartially in the interests of justice and not as a "heated partisan". State v. Stith, 71 Wn. App. 14, 18, 856 415 (1993), citing, State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984), quoting, People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899).

To establish prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's closing remarks were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), cert. denied, 77 U.S. 3575, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009). In analyzing prejudice, the reviewing court looks at the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Where the defendant shows that there is a substantial likelihood that the prosecutor's statements

affected the jury's verdict, prejudice will be found. Brown, 132 Wn.2d at 561.

A new trial is required when misconduct is prejudicial. Misconduct is viewed against the backdrop of the entire argument. Stith, 71 Wn. App. at 19, citing, State v. Graham, 59 Wn. App. 418, 426, 428, 798 P.2d 314 (1990). Arguments that are designed to inflame the passions and prejudice are improper and prejudicial. State v. Torres, 16 Wn. App. 254, 264-65, 554 P.2d 1069 (1976). Arguments that are based on facts not in evidence and that mislead the jury are equally as improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); Davenport, 100 Wn.2d at 760; State v. Rose, 62 Wn.2d 309, 312 382 P.2d 513 (1963). In closing argument, the State may only draw **reasonable inferences** from the evidence. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). The state may not argue facts not in evidence under the guise of a “reasonable inference”. Belgarde, 110 Wn.2d at 509.

Prejudicial error occurs when it is “clear and unmistakable” that counsel is expressing a personal opinion, and not arguing an inference from the evidence. Brett, 126 Wn.2d at 175, quoting, State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

This Court may review prosecutorial misconduct without an objection at trial when the misconduct was so flagrant and ill intentioned

that no instruction could erase the prejudice engendered by it. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Dunaway, 109 Wn.2d 207, 221, 743 P.2d 1237, 749 P.2d 160 (1987). Reversal is required if unchallenged misconduct was so inflammatory that an instruction would not have cured the misconduct and if there is a substantial likelihood that the misconduct affected the jury's decision. Belgarde, 110 Wn.2d at 509-10; Barrow, 60 Wn. App. at 876.

c. Law Applied to Prosecutor Arguing Facts Not in Evidence.

The prosecutor hammered facts not in evidence to make a case against Mr. Ford. There was no evidence that Mr. Ford wore motorcycle clothing or that he rode a motorcycle. There was no evidence that Mr. Ford was in the fight. There was no evidence that Mr. Ford was the man who put up his hand. The evidence established that Mr. Ford wore dress clothing, was in the bar with the co-defendants and did not participate in the fight.

The prosecutor's arguments were designed to convince the jury that Mr. Ford was guilty based on the prosecutor's creation of evidence rather than on the actual evidence presented, in a trial that was so lengthy that the jury was likely to lose track of the actual facts.

In Rose, the prosecutor committed reversible error by arguing

prejudicial facts not in evidence when he referred to the defendant as a “drunken homosexual”. Rose, 62 Wn.2d at 316. The immediate purpose was to inflame the passion and prejudice of the jury so that they would find guilt based on thin evidence. The Supreme Court reversed Rose’s conviction and remand for a new trial without an objection because the misconduct was intentional and designed to appeal to the passions and prejudices of the jury. *Id.*

In Mr. Ford’s case, creating a picture of Mr. Ford as a motorcycle riding, criminal-type committed to working together in a criminal endeavor with the Hidalgos; arguing that Mr. Ford was indistinguishable from his co-defendants and that he committed acts that were not established is far worse than calling a person a drunken homosexual. Rose, 62 Wn.2d at 316. In Rose, the prosecutor wanted the jury to dislike the defendant. Here in Mr. Ford’s case, the prosecutor did not have a case against Mr. Ford so she made up facts (violated motions in limine) misrepresented the evidence, and attacked the character of defense counsel. Under Rose, reversal and remand for a new trial is required.

In Belgarde, the State Supreme Court reversed a defendant’s first-degree murder convictions because of prosecutorial misconduct in closing argument. Five witnesses testified that the defendant had confessed to the crimes, but all of these people were in some way related to another

suspect, and two of them did not tell the police their stories until approximately three weeks after the crimes. Belgarde, 110 Wn.2d at 175. The two latter witnesses testified that they delayed coming forward because the defendant threatened to use the American Indian Movement (AIM) against them. *Id.* In summation, the prosecutor argued that the defendant said he was “strong in AIM”, that AIM was analogous to Sean Finn of the Irish Republican Arm and Kadafi, and that AIM is a “Deadly group of madmen” whom people feared. The prosecutor argued that AIM was something to be frightened of. Belgarde, 110 Wn.2d at 175.

The Court in Belgarde held that the remarks were grounds for reversal even though there was no objection because the remarks were ill-intentioned and highly prejudicial. Belgarde, 110 Wn.2d at 176. In Belgarde, the prosecutor’s argument that Belgarde was strong in AIM was not a fact in evidence; the argument that AIM was analogous to Sean Finn and Kadafi were not facts in evidence. The argument that AIM was to be feared was not a fact in evidence.

In Mr. Ford’s case, as in Belgarde, the prosecutor argued facts not in evidence to sway the jury into believing that Mr. Ford was a motorcycle riding, dangerous man, who like his co-defendants should be feared. As in Rose and Belgarde, there was no evidence to support the prosecutor’s outrageous arguments, rather, the prosecutor relied on her own fabrications

to make a case against Mr. Ford. This was ill-intentioned and prejudicial requiring reversal and remand for a new trial.

d. Prosecutor Violated Motions in Limine

After the court ordered that the state would not be permitted to introduce any evidence of association with the Hidalgos or Bandidos except to show identity which did not apply to Mr. Ford because he was dressed in casual dress clothing and not motorcycle gear, the state intentionally introduced paraphernalia and clothing associated with the Hidalgos and Bandidos. RP 893. All of the defendants objected to these photographs, EX 286A, B, C. RP 893-894, 2818.

The defense also moved to suppress use of the term “victim”. RP 137-139 (April 9, 2009). The court granted the motion. RP 141 (April 9, 2009). On multiple occasions, the state elicited the term “victim” in violation of the order in limine. RP 1757. Three times Mr. Howden referred to Mr. Beaudine as “the victim”. RP 209-210 (April 21, 2009); RP 141 (April 22, 2009). The fourth violation came from state’s witness Heather Diamond who referred to Mr. Beaudine as the “victim”. RP 173 (April 22, 2009). The court refused to give a curative instruction. RP 173-174 April 22, 2009). The fifth violation came from state witness Jennifer Abbott who also used the term victim to refer to Mr. Beaudine., RP 472, 505 (April 23, 2009).

The state stipulated to not introducing any gang evidence. RP 133 (April 9, 2009). The prosecutor violated her own stipulation and the court's order on numerous occasions. RP 1457. During direct examination of Rebecca Dobiash, the state elicited the term "gang" in violation of an order in limine when the prosecutor asked Ms. Dobiash to read what the search warrant was looking for. RP 1457. 1501-1503.

The state also violated the order in limine barring testimony regarding weapons found at the codefendants' homes, Detective Timothy Donlin testified he found "several knives and vehicles" in Smith's outbuildings. RP 1596. The court denied the defense motion for dismissal or a mistrial but instructed jurors to disregard the answer. RP 1596-1604.

e. Prosecutor Vouched For Credibility of State

The prosecutor argued the state always gets it right:

Do you really have a reasonable doubt as to whether or not the State got the right four guys? Do you believe that there are four other Hidalgos members out there running around in Washington that the State has not apprehended?

RP 2932. Counsel for Mr. Nolan objected. The court simply said, "The jury has been properly instructed on the law of the case." Id. The prosecutor commented on the defendants' right to remain silent when she argued that the defendants had to admit that they committed the assault to raise self-defense. RP 2933. Again the court reiterated its standard, "I have already

instructed the jury on the law of this case, and I think that they are properly instructed.” RP 2933.

f. Law Applied to Violations of Motion in Limine and Vouching for Credibility of the State.

In Stith, the Court addressed misconduct similar to the misconduct in Mr. Ford’s case. In Stith, the prosecutor argued in violation a motions in limine suppressing past crimes that appellant “was just coming back and he was dealing again”. Stith, 71 Wn. App. at 21, The prosecutor later argued in rebuttal that the criminal justice system “has incredible safeguards to prevent police officer perjury and that probable cause had already been determined.” Stith, 71 Wn. App. at 22.

The Court in Stith noted that the first argument regarding Mr. Stith dealing again was both a violation of a motion in limine and impermissible opinion “testimony”. Id. The second comment concerning “incredible safeguards” “not only constituted “testimony” as to facts not in evidence but also indicated to the jury that, if there were any question of the defendant's guilt, the defendant would not even be in court.” Id. The Court held that this “testimony” from the prosecutor “ was tantamount to arguing that guilt had already been determined.” Id. The Court held that the comments were both “flagrant[]” and “improper”. Id. Even though the Court in Stith gave a strongly worded curative instruction after objections

from the defense, the Court held that “even though the jury is presumed to follow the instructions of the trial court, State v. Guizzotti, 60 Wn.App. 289, 296, 803 P.2d 808, review denied, 116 Wnh.2d 1026, 812 P.2d 102 (1991), the prosecutorial misconduct was so “prejudicial that it cannot be cured by objection and/or instruction.” Stith, 71 Wn. App. at 23, citing, State v. Powell, 62 Wn.App. 914, 919, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013, 824 P.2d 491 (1992). This is such a case.

The prosecutor’s arguments personally assured the jury that Mr. Stith was guilty because of the safeguards and because of his past inadmissible history. Citing to Belgarde, 110 Wn.2d at 508 the Court held that the prosecutorial misconduct, was prejudicial requiring reversal and remand for a new trial due to the “flagrant, highly prejudicial” [ ] introduction of ‘facts’ not in evidence.” Stith, 71 Wn. App. at 23. In Mr. Ford’s case, as in Stith, the prosecutor’s argument that the state could not have charged the wrong guys and that there could not be any reasonable doubt that Mr. Ford and his co-defendants were guilty because they were Hidalgos members, was flagrant and ill-intentioned misconduct that could not have been cured with an instruction. RP 2932; Stith, 71 Wn. App. at 21-23.

The prosecutor impermissibly vouched for the system and argued that Mr. Ford and his co-defendants were guilty because the state would

not have charged the wrong guys while the guilty ones ran around unapprehended. These arguments like those in were incurable and designed to remove from the jury any doubt about the case. To protect Mr. Ford's right to a fair trial, reversal and remand for a new trial is required.

g. Prosecutor Personally Attacked Defense Counsel

The prosecutor personally attacked Michael Schwartz:

Ladies and gentlemen, have you never in your lifetime closed your eyes so you can recall that moment in time, that poignant moment in time, maybe the first time you held your child, that first kiss, the first time you saw that face. Close your eyes so that in your mind's eye you can relive that moment, because in your mind's eye it is so clear, and it is so vivid. Clearly, Mr. Schwartz has never done so. How sad for him. Maybe he should try it sometime.

RP 2945-2946. Mr. Schwartz objected. Id.

The prosecutor impermissibly attacked defense counsel Mr. Schwartz in a manner that was so prejudicial as to require reversal. Mr. Schwartz objected. RP 2945-2946. The prosecutor told the jury that Mr. Schwartz was sub-human and moved to sway their passion and prejudices against him because of his inability to understand human emotion. Id.

The prosecutor attacked Mr. Bernberg during argument when she told the jury that Mr. Bernberg was lying to protect Mr. Ford.

During rebuttal closing the prosecutor argued:

How could counsel stand up here and tell you that Barry Ford left in a truck, when there was absolutely no evidence of that. You know why he told you that? Do you know why he insisted on telling you that over and over? Because if you believe he got on that motorcycle, and was wearing a jacket that said Hidalgos, then Mr. Bernberg knows that Barry Ford is guilty, just as guilty as everyone else. And that's why he has to insist, and he has to have you believe, that Ford left in a truck, when he knows that there is no evidence of it.

RP 2929. Defense counsel objected. *Id.* This argument was so flagrant and ill-intentioned that no curative instruction could have cured it. Belgarde, 110 Wn.2d at 509-10.

A prosecutor may not launch unfounded attacks impugning the character of defense counsel and implying that the defense case is a sham. Unites States v. Sanchez, 176 F.3d 1214, 1224-1225 (9<sup>th</sup> Cir. 1999). To do so violates the defendant's Sixth and Fourteenth Amendment rights to the effective assistance of counsel. See, Brunno v. Rushen, 721 F.2d 1193, 1195 (9<sup>th</sup> Cir. 1983). It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. Warren, 165 Wn.2d at 30, citing, State v. Brett, 126 Wn.2d 136, 175, 892 P.2d (1995). Logically, it is also misconduct to state a personal belief as to the credibility of defense counsel. Prejudicial error occurs when it is "clear and unmistakable" that counsel is expressing a personal opinion, and not arguing an inference from the evidence. Brett, 126 Wn.2d at 175, quoting, Sargent, 40 Wn.

App. at 344.

In Brunno, the Court affirmed the reversal of a first-degree murder conviction in California State Court where the prosecutor had improperly suggested that a state's witness's consultation with defense counsel caused the witness to repudiate earlier pro-prosecution statements she had made to government investigators. Brunno, 721 F.2d at 1194. The Ninth Circuit said of these comments: "in hopes of destroying the credibility of [the witness's testimony on the stand, the prosecutor has labeled defense counsel's actions as unethical and perhaps even illegal without producing one shred of evidence to support this accusations." Brunno, 721 F.2d at 1194.

The prosecutor in Brunno also attacked "the accused's claims of innocence by openly hinting to the jury [in closing argument] that accused hired counsel was in some way probative of the defendant's guilt." Brunno, 721 F.2d at 1194. The Ninth Circuit found that "the obvious import of [these] comments was that all defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their client's involvement with the alleged crimes," Brunno 721 F.2d at 1194.

The Court in Brunno found that the "insidious attacks on Brunno's exercise of his right to counsel and his attacks on the integrity of defense

counsel were error "of constitutional dimensions" that required reversal of the defendant's first degree-murder conviction. Brunno, 721 F.2d at 1195.

In Reed, supra, the Court addressed similar misconduct and reversed where the prosecutor attempted to influence the jury's assessment of the defendant's expert witness testimony by appealing to the jurors' hometown instincts. In attacking the defendant's diminished capacity defense, the prosecutor remarked,

[W]e've got education down here in the woods....  
He had no more ability to tell you what Gordon Reed intended on the day of the crime than the detective.... Are you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?

Reed, 102 Wn.2d at 143. In Reed, the Court also held that therein, the prosecutor:

clearly violated CPR DR 7-106(C)(4) by asserting his personal opinion of the credibility of the witness and the guilt or innocence of the accused. First, he called the petitioner a liar no less than four times. Next, the prosecutor stated that the defense counsel did not have a case, and that the petitioner was clearly a "murder two". Finally, he implied that the defense witnesses should not be believed because they were from out of town and drove fancy cars.

Reed, 102 Wn.2d at 145-46. The court noted that "[n]o one, not even the prosecutor, question[ed] the impropriety of these comments" and that defense counsel repeatedly objected, moved to strike, and moved for a

mistrial. Reed, 102 Wn.2d at 145-46. The court held that the comments were improper and required reversal. Reed, 102 Wn.2d at 147-48.

In United States v. Frederick, 78 F.3d 1370, 1379 (1996), the trial court sustained the following improper prosecutorial argument:

Finally, [S.F.], on cross-examination, there is no doubt that it is a defense attorney's job to do his best to cross-examine thoroughly the witnesses presented by the Government for the benefit of his client. And you can have admiration for Mr. Jacobson [the defense attorney] because he is a skilled practitioner of that art.

....

It is also not his job to ask you to look at all of the evidence. And he is asking you to look at little bits and pieces. The Government and the Judge will be asking you to consider all of the evidence in making your decision.

Frederick, 78 F.3d at 1379. The Court in Frederick held that the prosecutor's comments about the defendant's lawyer, made after the court had sustained two other objections on the ground that her comments were inappropriate, was prejudicial, reversible error. Frederick, 78 F.3d at 1380.

The Court in Frederick, analogized that case to United States v. Smith, 962 F.2d 923 (9th Cir.1992), wherein the Court reversed for misconduct even though the defense attorney failed to object. In Smith the prosecutor, bolstered the credibility of the government, and implied that

the court was satisfied with the testimony. Smith, 962 F.2d at 933-34.

In Frederick as in Smith, the prosecutor made comments to “establish[ ] his own veracity and credibility as a representative of the government.” Smith, 962 F.2d at 933-34 (“[T]he government's job is to ... ferret through all the smoke screens and lead you to the truth.”). The prosecutor also linked himself to the court by stating “if I did anything wrong in this trial I wouldn't be here. The court wouldn't allow that to happen.” Smith, 962 F.2d at 933-34.

In Frederick, the prosecutor allied herself with the court, and argued that both the government and the court had one view of the jury's responsibilities and the defendant's lawyer another. The Court sustained the objection but did not provide any curative instruction. Frederick 78 F.3d at 1380-1381. The Court analyzed the error under the cumulative error doctrine and held reversal was required based on the: (1) the improper comments by the prosecutor about the defendant's lawyer; the (2) the prosecutor's erroneous representation during closing argument that the government agents had testified that S.F.'s testimony at trial was consistent with her statements during earlier out-of-court interviews; and (3) the testimony by the two government witnesses suggesting the possibility of accusations by other children against Frederick. Frederick 78 F.3d at 1381.

The misconduct in Mr. Ford's case is worse than in Brunno Reed, Stith, Frederick, and Smith because here the prosecutor: (1) told the jury that Mr. Bernberg was lying to protect Mr. Ford; (2) that the truth was that Mr. Ford was guilty; (3) that the state got it right and there was no reasonable doubt to consider; and (4) and that Mr. Schwartz a defense attorney was sub-human. These improper arguments not only disparaged Mr. Ford and his attorney but also injected the prosecutor's personal belief that Mr. Ford was guilty and vouched for the credibility of the state.

Contrary to the state's argument, Mr. Bernberg was entitled to argue that Mr. Ford drove a truck based on the evidence that he was not wearing motorcycle clothing; that men who ride motorcycles do not so in casual dress clothes; and that Mr. Ford owned a truck.

The prosecutor attacked Mr. Schwartz's character in an effort to convince the jury to completely disregard him. Both attacks were designed to convince the jury that Mr. Bernberg and Mr. Schwartz were of poor moral character and therefore not believable and by extension, their client's must be guilty. The design of these arguments was to imply that defense attorneys were not to be trusted.

This misconduct was like the misconduct in Brunno, Smith, Reed, and Frederick and Smith, prejudiced Mr. Ford's right to a fair trial. There exists a great probability that but for the misconduct, the outcome of trial

would not have been the same: reversal is required. For this reason, remand for reversal and a new trial is required.

h. Prosecutor Misstated Law In Argument

The prosecutor argued to the jury that the defense had the burden of proving self defense. RP 2817. The prosecutor argued that:

the Defendants if they want you to believe that they were defending themselves, or defending others, they want to put forth that statutory defense to the murder of Dana Beaudine, have to prove to you by a preponderance of the evidence that it's more likely than not that that particular defendant did not aid in the - - .

RP 2817. Counsel for Mr. Nolan objected on grounds that the prosecutor was shifting the burden of proof. The court responded "The jury has been instructed on the law." RP 2817. The prosecutor repeated,

the defendant has to prove to you by a preponderance that he did not aid in the assault that he was not personally armed with a deadly weapon, that he had no reason to believe that anyone else was armed with a knife, and had no reason to believe that any of his accomplices would engage in conduct that would cause death, or physical injury, to Dana.

RP 2817.

The prosecutor argued at length that the defendants had to prove self-defense and that they failed to "testify" therefore the jury could only assume self-defense. RP 2935-2937. While Mr. Ford did not argue self-defense, he did participate in the objections because they constituted a

comment on his and the other defendants; right to remain silent and shifted the burden of proof. RP 2937-2938, 2954, 2955, 2956. Mr. Ford and the other defendants moved for a mistrial on grounds that the prosecutor committed flagrant and ill-intentioned misconduct. RP 2955. The court acknowledged that Ms. Ko's argument on self-defense "concerned me [the judge]". RP 2958. The court denied the motions and refused to give any curative instructions. RP 2958-2960.

The prosecutor's restatement of the law is improper and prejudicial; it is not merely argument. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). In Callahan a Division Two case, the Court recited the evidence necessary to prove self-defense:

there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable, , State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495, 22 A.L.R.5th 921 (1993); (3) the defendant exercised no greater force than was reasonably necessary, State v. Hendrickson, 81 Wn. App. 397, 400, 914 P.2d 1194 (1996); and (4) the defendant was not the aggressor, State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). RCW 9A.16.020(3).

Callahan, 87 Wn. App. at 929. The standard is the defendant's subjective belief in the danger, not, as misstated in the power point. Id.

The standard for self-defense is well settled. A jury may find self-defense on the basis of the defendant's subjective,

reasonable belief of imminent harm from the victim. A finding of actual imminent harm is unnecessary. Rather, the jury should put itself in the shoes of the defendant to determine reasonableness from all the surrounding facts and circumstances as they appeared to the defendant.

Callahan, 87 Wn. App. at 929; State v. LeFaber, 128 Wn.2d 869, 899, 913 P.2d 369 (1996). The court and not the prosecutor is charged with instructing the jury. When the prosecutor oversteps his bounds, he commits misconduct. Davenport, 100 Wn.2d at 762.

In Davenport, the prosecutor argued an accomplice liability theory even though the trial court did not instruct the jury on accomplice liability. Davenport, 100 Wn.2d at 760. The Supreme Court held that the prosecutor committed prejudicial misconduct when he “introduced to the jury the extraneous matter of accomplice liability, which was not before the jury.” Davenport, 100 Wn.2d at 762. The prosecutor misled the jury by arguing law that was not properly before it. The Supreme Court reversed the Court of Appeals finding of harmless error and remanded for a new trial.

In Asaeli, the prosecutor mis-stated the law in closing argument regarding self-defense, first aggressor instructions and justifiable homicide instructions. Asaeli, 150 Wn. App. at 588- 597. Therein the Court held the error was not prejudicial because of the repeated admonishments that the prosecutor’s comments were not the law, but rather the jury needed to

refer to the instructions. Asaeli, 150 Wn. App. at 588-589. Asaeli is distinguishable.

In Mr. Ford's case, the prosecutor not only mis-stated the law on self-defense but also shifted the burden of proof to the defense. And the trial court did not admonish the jury to ignore the prosecutor's arguments. In Mr. Ford's case, the prosecutor's arguing her version of the self-defense law was also flagrant, ill-intentioned and tantamount to telling the jury that the defense theory was not possible and that the defendants were guilty because prosecutor Ko's law precluded a finding of acquittal.

Like the flagrant and ill-intentioned misconduct in Belgarde, 110 Wn.2d at 508, the court recognized that "[i]nstructions to the jury to disregard the comments cannot cure such prejudice. The mandatory remedy is a mistrial." Stith, 71 Wn. App. at 16. Reversal is required because the improper comments were highly prejudicial and cut to the heart of the defense case. The jury was mis-informed by the state that their defense was impossible and that the defendants were already felons because the state could not possibly have charged the wrong men. No jury instruction could cure such prejudice.

i. Prosecutor Misled the Court and Jury

Another instance of misconduct involved prosecutor Hauger misinforming the jury regarding the court having issued an order compelling

witness Dobiash to meet with the prosecutor's office. And that being the only reason Dobiash agreed to an interview. This was patently incorrect. The court never issued an order and Ms. Dobiash agreed to an interview without court intervention. RP 2163. The false and misleading "flagrant and ill-intentioned" questions impugned the credibility of Ms. Dobiash whose testimony was important to Mr. Ford because she testified that Jim Stilton who was described by many witnesses and who looked like Mr. Ford, rode to the Tavern in riding gear with Mr. McCreven. RP 2163-2164. The defense moved for dismissal of the charges. RP 2164, 2166, 2167, 2169.

By making these assertions to the court and jury, the prosecutor impermissibly impugned Ms. Dobiash's integrity and violated her professional responsibility not to make false statements to the court under RPC 3.3(a)(1) which provides:

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- (a) A lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

Where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors. United States v. Berry, 627 F.2d 193 (9th Cir.1980), cert. denied, 449 U.S. 1113, 101 S.Ct. 925, 66 L.Ed.2d 843 (1981). "This is simply the logical corollary of the

harmless error doctrine which requires us to affirm a conviction if there is overwhelming evidence of guilt.” Id. at 201.

The state’s case against Mr. Ford’s was weak. Mr. Ford was prejudiced by the prosecutor’s relentless misconduct. For this reason, the Court should reverse and remand for a new trial. The individual and cumulative effect of multiple errors was prejudicial in Mr. Ford’s case.

5. COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL FOLLOWING EVIDENCE OF PREJUDICIAL JUROR MISCONDUCT AND FOR FAILING TO MOVE FOR A MISTRIAL FOLLOWING BLAIR’S EXPRESSION OF FEAR OF THE CODEFENDANTS.

- a. Juror Misconduct

Ms. Blair was clear in her testimony that she pulled Mr. James out of the fight on her own and that no other person helped her. RP 767. Ms. Blair’s testimony was critical to Mr. Ford’s case. The jury committed misconduct by discussing at length during trial Ms. Blair’s character as a drunk person who was not honest and feared the Hidalgos. RP 777-780, 784-815. This discussion which involved 5-6 jurors completely undermined Mr. Ford’s right to an unbiased jury. RP 777-778.

Juror # 7 informed the court that he heard several jokes about Ms. Blair regarding her drinking and the need for an IV drip for alcohol. RP 777-778. Another jury talked about Ms. Blair setting up her testimony to

not remember anything except her drinking. RP 779. Juror #7 indicated that essentially the jurors who discussed Ms. Blair did not believe her testimony. RP 780.

Juror #3 discussed with a group of jurors the evasive nature of Ms. Blair's testimony. RP 787-788. Juror #3 thought it was funny the way Ms. Blair testified. Juror #4 heard comments about Ms. Blair's body language and crossed arms but did not participate in the discussion. RP 792-793. Juror #5 made and heard comments about how Ms. Blair could not remember anything and drank too much RP 793-795, 797. Juror #7 remembered a discussion in the jury room where juror# 1 discussed a similar experience on a different jury trial with a similar type witness. RP 797. Juror #1 denied discussing Ms. Blair. RP 785.

Juror # 9 would not discuss specifics but indicated that he heard discussion that Ms. Blair's lack of memory was alcohol related. RP 800-803. Juror #11 heard, discussed and agreed with the other jurors that Ms. Blair was not cooperating on the stand. RP 804-805. Juror # 11 stated that the jurors believed that Ms. Blair was uncooperative because she was afraid to identify anyone. RP 806.

Juror #12 heard a lot of chatter about Ms. Blair being a "hostile witness". RP 807. Juror #13 heard people making jokes about Ms. Blair in the bars drinking. RP 810. Juror #13 indicated that there was a consensus

among the jurors that the reason Ms. Blair was not answering questions was because she was fearful. RP 812. Juror #15 discussed with the other jurors Ms. Blair's character and made jokes about her and other jurors also made comments about Ms. Blair. RP 815-816.

Mr. Bernberg told the court that the problem with the jury was more widespread than the jurors indicated but he did not ask for a curative instruction or move for a mistrial. RP 818. Ms. High moved for dismissal of jurors 11 and 13. RP 817, 820. The court denied the motion to dismiss jurors. RP 823.

b. Legal Authority for New Trial For Juror Bias

The right to trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitution[al] trial." Turner v. Stime, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009), quoting, Alexson v. Pierce County, 186 Wn. 188, 193, 57 P.2d 318 (1936). The trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct. United States v. Villar, 586 F.3d 76 (1st Cir.2009) quoting, United States v. Mikutowicz, 365 F.3d 65, 74 (1st Cir.2004).

In Washington State, the determination of whether a juror is fit to serve is also governed by statute:

It **shall** be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

(emphasis added) RCW 2.36.110. CrR 6.5 requires the judge to seat an alternate juror when another juror is unfit to serve. CrR 6.5 provides in part: "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court **shall** order the juror discharged." Id. (Emphasis added.) "RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." State v. Jorden, 103 Wn. App. 221, 226-27, 11 P.3d 866, rev. denied, 143 Wn.2d 1015, 22 P.3d 803 (2001).

The standard of review for a trial court's decision whether to dismiss a juror is abuse of discretion. State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009); State v. Elmore, 155 Wn.2d 758, 778, 123 P.3d 72 (2005). A court abuses its discretion when its decision rests on facts unsupported by the record. Depaz, 165 Wn.2d at 858.

In Hough v. Stockbridge, 152 Wn. App. 328, 216 P.3d 1077 (2009), a civil defamation case, the trial refused to dismiss a juror who wrote the note suggesting that Mr. Hough had mental or emotional

problems and should be evaluated. Stockbridge, 152 Wn. App at 340. The note is as follows:

Your Honor:

Has Mr. Hough been evaluated by a mental health professional? There is little doubt that this man is delusional & would be diagnosed with obsessive compulsive disorder (OCD). Does the court have authority to order such an evaluation?

Stockbridge, 152 Wn. App at 335. Under RCW 2.36.110, a judge must dismiss “any juror[ ] who[,] in the opinion of the judge, has manifested unfitness as a juror by reason of *bias*, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or Id (emphasis added).

Actual bias is “ the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging” RCW 4.44.170(2). The Court held that in the civil case, that the juror was not biased. Stockbridge, 152 Wn. App at 340-341. The Court of Appeals noted that the note indicated the juror’s belief in the witness’s mental illness rather than demonstrating bias. Id.

Mr. Ford’s case is distinguishable on several grounds. First, this is

a criminal case. Second, at least half of the jurors discussed Ms. Blair, and third, the discussions indicated that those jurors did not believe Ms. Blair. In Mr. Ford's case, the jurors were biased against Ms. Blair, and that bias was prejudicial to Mr. Ford's right to a fair trial.

Trial courts must also grant a mistrial where the irregularity may have affected the outcome of the trial, thereby denying the defendant his right to a fair trial. Davenport, 100 Wn.2d at 762; State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. Johnson, 124 Wn.2d at 76.

In State v. Turner, 153 Wn. App. 581, 222 P.3d 1243 (2009), the petitioner moved for a new trial based on juror misconduct based on racial bias. Therein some of the jurors referred to a Japanese petitioner as "Mr. Kamikazi", Mr. Miyagi" and Mr. Miyashi". Turner, 153 Wn. App. at 588-590. One juror mentioned Pearl Harbor. *Id.* The court held that the names were racially based and under Gardner v. Mahone, 60 Wn.2d at 847, 376 P.2d 651 (1962). there was sufficient misconduct to establish a reasonable doubt that the plaintiff was denied a fair trial. Turner, 153 Wn. App. at 593, citing, Gardner, 60 Wn.2d at 847. The Court upheld the trial court's grant of a new trial for juror misconduct. Turner, 153 Wn. App. at 593.

In Mr. Ford's case, the juror misconduct was similar to the misconduct in Turner in that it involved derogatory discussions of a key witness. In Mr. Ford's case, Ms. Blair was a critical witness. The jury informed the court that the fact that she drank a lot of alcohol made her not credible and a joke. While the jurors indicated that they had an open mind regarding Ms. Blair, their answers to the court's questions indicated that the majority of jurors had already decided that she was not being truthful because she drank too much and because she was afraid.

As discussed above, Blair's statement that she was afraid to identify anyone and the jurors' bias were serious and prejudicial. The irregularity did not involve cumulative evidence. The irregularity involved a key witness for Mr. Ford. Even though, the testimony was stricken, the jury was not told to disregard the evidence and the impact on Ms. Blair's credibility was irreparably damaged.

While juries are presumed to follow the trial court's instructions, this is only so when there is no contradictory "evidence proving the contrary." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The evidence in this case is to the contrary. The jurors discussed the stricken testimony and decided that Ms. Blair did not testify truthfully. The jurors did not follow the instruction. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996).

It does not matter the source or nature of the bias, rather it is the fact of bias that deprived Mr. Ford his right to an unbiased and unprejudiced jury. Turner, 153 Wn. App. at 587. In Mr. Ford's case, as in Turner, the jurors were biased against a critical witness. Based on the jurors improper jokes and comments about Ms. Blair this Court cannot determine beyond a reasonable doubt that this misconduct had no impact on the Mr. Ford's right to a fair trial. Under Turner, this court should reverse and remand for a new trial.

c. Ms. Blair's Expression of Fear.

Counsel was ineffective for failing to move for a mistrial following Reyna Blair's evasive testimony culminating in her exclamation that she was afraid to identify the "killer." 21RP 733. Because there was no valid tactical reason to fail to move for a mistrial, which likely would have been granted, Mr. Ford can demonstrate he was denied effective assistance.

In Mr. Ford's case, counsel merely requested the testimony be stricken. RP 733. But given the devastating impact of the testimony, no competent attorney would have failed to move immediately for a mistrial. In light of the evidence at trial, this was a serious irregularity. Ms. Blair initially attributed her inability to remember to drunkenness, but she also testified that she was afraid of the Hidalgos and most of the jurors remembered and believed this impermissible testimony.

Ms. Blair's statement of fear demonstrated that her evasiveness was do to fear, implying she had seen more than she was saying. While there was no evidence to support Ms. Blair's fear, such as a threat, the jury had no way of knowing that. See Bourgeois, 133 Wn.2d at 400-01 (evidence a witness is afraid to testify may lead jurors to conclude that the witness is fearful of the accused and that he is, therefore, guilty because the witness has been threatened, demonstrating a consciousness of guilt) (citing State v. State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541 (1945).

d. Ineffective Assistance of Counsel

There was no legitimate tactical reason to fail to move for a mistrial following notice of the juror misconduct, particularly after the defense unsuccessfully objected to Ms. Blair's comments about being afraid to testify about the defendants. Had defense counsel moved for a mistrial, the motion should have been granted because the juror misconduct coupled with Ms. Blair's testimony about being afraid so prejudiced Mr. Ford's ability to obtain a fair trial based on his conduct rather than the prosecutor's theme of guilt by association.

A trial court abuses its discretion in denying a mistrial motion when the defendant has been "so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. Although the reviewing court gives some deference to trial counsel's performance, counsel is ineffective when counsel's performance was deficient; and the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. Stenson, 132 Wn.2d at 705. There is a strong presumption that defense counsel's conduct is not deficient. McFarland, 127 Wn.2d at 335. However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. State v. Ahoy, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

For Mr. Ford to prevail on his ineffective assistance claim he must establish prejudice. In the Matter of the Personal Restraint of Pirtle, 136 Wn.2d. 467, 487, 965 P.2d 593 (1998). Mr. Ford suffered prejudice because there is a "reasonable probability" that, but for counsel's error, the result of the trial would have been different. "A reasonable probability is a

probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226, quoting, Strickland, 466 U.S. at 693-94).

In In Re PRP of Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004), defense counsel failed to move to suppress methamphetamine found in a search of the defendant's vehicle. Reichenbach, 153 Wn.2d at 130. The court held that because the consent to search the car by the owner did not encompass seizure of the passenger Reichenbach, and there was no independent basis to seize Reichenbach, the seizure was illegal and the fruits of the involuntary abandonment of that seizure would have been suppressed had a motion been made. Reichenbach, 153 Wn.2d at 130-131 at 136-137. Without the evidence the state would not have been able to prove its case, the failure to move to suppress was prejudicial. The court reversed and remanded for a new trial. Id.

In Mr. Ford's case, although the issue was not a suppression issue, it was a clear cut legal issue regarding juror misconduct and violation of the order in limine not to offer evidence of Ms. Blair's fears. These violations of law impacted Mr. Ford's right to a fair trial. As in Reichenbach, where the methamphetamine was critical evidence to the state's ability to make its case, in Mr. Ford's case, the testimony of Ms. Blair was critical to supporting Mr. Ford's case which focused on the fact that he was not at all involved in the fight.

Mr. Howden was the only witnesses to describe a person who could have been Mr. Ford, and Ms. Blair was the only witness who made clear that no such person as described by Mr. Howden was involved in stopping Mr. James from re-entering the fight. While Reichenbach involved a factually and legally differing scenario, the fundamental holding is on point. When counsel's performance impacts the defendant's right to fair trial, the defendant is prejudiced. Reichenbach, 153 Wn.2d at 130-131.

Here, Mr. Ford's right to a fair trial was prejudiced by counsel's deficient performance. His attorney did not move for a mistrial following Ms. Blair's testimony regarding her fear and Mr. Ford's attorney did not move for a mistrial or removal of biased jurors following their lengthy admissions to the court that a number of jurors had discussed and decided that Ms. Blair was not being truthful. The juror misconduct was in direct violation of their obligation not to discuss or decide matters until the conclusion of the presentation of evidence. The juror misconduct and Ms. Blair's comments deprived Mr. Ford his right to a fair trial.

"Errors that deny a defendant a fair trial are per se prejudicial." State v. Davenport, 100 Wn.2d at 762. A biased jury denies the accused his right to a fair trial. United States v. Hendrix, 549 F.2d 1225, 1229 (9th Cir.), cert. denied, 434 U.S. 818, 98 S. Ct. 58, 54 L. Ed. 2d 74 (1977).

Such a juror is also unfit to serve. Under Strickland, and the cases cited herein, counsel's failure to move for a mistrial was not tactical and it prejudicially denied Mr. Ford his right to a fair trial. The remedy is reversal and remand for a new trial.

6. MR. FORD WAS ENTITLED TO A LESSER INCLUDED INSTRUCTION TO FELONY MURDER BY ASSAULT OF ASSAULT IN THE SECOND DEGREE AND COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST THIS INSTRUCTION

Mr. Ford's trial counsel was ineffective for failing to request a lesser included instruction of assault in the second degree. Mr. Ford was entitled to this instruction under State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978). In re PRP of Crace, 154 Wn. App. 1016, ---P.3d ---, at p. 1, 2010 WL 2935799, page 17 (Wn. App. Div. 2).

a. Ineffective Assistance of Counsel

This Court reviews claims of ineffective assistance of counsel de novo. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). The legal standard for ineffective assistance of counsel is set forth in Argument 8.

b. Mr. Ford Entitled To Lesser Included Instruction

Lesser offense instructions play a critical role in our criminal justice system. First and foremost, lesser crime instructions allow the jury to more closely correlate the verdict to the act committed and thus arrive at

the “true verdict.” *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am.Crim. L.Rev. 445, 449 (1984).

This is particularly true in murder cases where there is often a dead body and the only question is the moral culpability of the defendant. In such case the jury should have access to all the varying lesser degrees of murder. People v. Schleiman, 197 N.Y. 383, 385, 90 N.E. 950, 951 (1910) (“upon the trial of indictments for murder in the first degree it has been the usual practice for the trial judge, even without any request, and certainly when requested, to charge the jury that they might find the defendant guilty of murder in the second degree, or of manslaughter in any of its several degrees....”).

In this respect lesser offense instructions allow the defendant to present his theory of the case, State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980) (“Each side is entitled to have the trial court instruct upon its theory of the case if there is evidence to support that theory[.]”) at least to the extent his theory is compatible with commission of a lesser crime. As the United States Supreme Court has noted, failure to give lesser crime instructions where the evidence supports such instruction puts the jury to an impermissible choice. Keeble v. United States, 412 U.S. 205, 212-213, 93 S.Ct. 1993, 1998, 36 L.Ed.2d 844 (1973) (“Where one of the elements of the offense charged remains in doubt, but the defendant is

plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.”). This fear of a Hobson's choice is substantial enough that erroneous failure to give a lesser crime instruction is reversible error. State v. Warden, 133 Wn.2d 559, 562, 947 P.2d 708 (1997).

In State v. Workman, the Supreme Court set for the test for determining when a defendant is entitled to a lesser included instruction. A defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is necessarily included in the charged offense, and (2) the evidence in the case supports an inference that the defendant committed only the lesser crime. " Crace, at 11, citing, State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given. Beck v. Alabama, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

The two parts of the test are respectively referred to as the " 'legal' " and the " 'factual' " prongs. State v. Rodriguez, 48 Wn.App. 815, 817, 740 P.2d 904 (1987). If the two Workman prongs, are satisfied, "a lesser included offense instruction is required as a matter of right." Crace, ---P.3d ---, at p. 1, quoting, In re Pers. Restraint of Andress, 147 Wn.2d 602, 613, 56 P.3d 981 (2002); State v. Lyon, 96 Wn.App. 447, 450, 979 P.2d 926

(1999), overruled on other ground by *Andress*, 147 Wash.2d at 613-16, 56 P.3d 981.

In the felony murder context, while the underlying crime is an element of felony murder, the defendant is not actually charged with the underlying crime. Rather, the underlying crime functions as a substitute for the mental state that the State would otherwise be required to prove. *State v. Bryant*, 65 Wn.App. 428, 438, 828 P.2d 1121, review denied, 119 Wn.2d 1015 (1992) (citations omitted).

In *Lyons*, the state accused Lyon of committing second degree murder while committing or attempting to commit second degree assault. The state charged Mr. Lyons with felony murder by attempted assault and assault, but the State abandoned the “attempted” language and proceeded to trial based upon the actual commission of a second degree assault. Thus the statutory elements of felony murder as “charged and prosecuted” included a completed second degree assault.

The Court noted that ordinarily, the factual prong of *Workman* would not be met in a felony murder case, however where there is evidence from which a jury could conclude that the death resulted from a later, unrelated assault by another person, such a lesser included is appropriate. Because Lyons was entitled to a lesser included offense instruction on assault in the second degree, but the instruction was not

given, the Court reversed and remand for a new trial. Lyon, 96 Wn. App. at 451.

In Mr. Ford's case, even though the state did not formally abandon the attempted assault, it never presented any evidence or argument on attempted second degree assault. Therefore as in Lyons, the state effectively abandoned the attempted second degree assault. The legal prong is met because assault is an element of the murder charge. test because second degree assault was a necessary element of felony murder by assault.

The facts in Mr. Ford's case are like those in Lyon. In both cases another person committed the assault that killed the complainant. As in Lyons, the state's entire case against Mr. Ford was limited to evidence that the unidentified man put up his hand and spoke to Mr. James. If this man was Mr. Ford, his act of speaking to Mr. James without evidence of any threats or physical restraint was insufficient to establish that he assisted in the assault that caused a death.

The jury could have believed that the man was stopping the assault against Mr. James. Mr. Ford meets the factual prong of the Workman. For these reasons, Mr. Ford was entitled to the lesser included instruction on second degree assault because the felony murder could not have been committed without also proving this crime.

c. Mr. Ford Was Denied Effective Assistance of Counsel

In Crace, this Court reversed for ineffective assistance of counsel when trial counsel failed to request a lesser included instruction of unlawful display of a firearm in an assault in the second degree charge. Crace, at 12-13, 15. The failing to request a lesser included offense is not generally considered a reasonable trial strategy, rather it is deficient performance. In Crace, “[p]ursuing an all-or-nothing strategy in these circumstances was not a reasonable trial tactic.” Crace, ---P.3d ---, at p. 1, citing, State v. Smith, 154 Wn.App. 272, 277-79, 223 P.3d 1262 (2009) (counsel ineffective for failing to request a lesser included jury instruction on first degree animal cruelty).

A defendant meets the prejudice and deficient performance prongs of Strickland; Crace at 12. The prejudice prong is also met when a conviction of only that lesser crime would have resulted in a reduced sentence. Crace at 13, citing, McFarland, 127 Wn.2d at 335.

Mr. Ford was denied effective assistance of counsel to his prejudice by his attorney’s failure to give a lesser included instruction because as in Crace, the standard range sentence for second degree assault, a class B felony is considerably shorter than the standard range sentence for murder, a class A felony. RCW 9A.32.050. The remedy is reversal and remand for a new trial. Crace at 12-13.

7. THE TRIAL COURT'S REFUSAL TO SEVER MR. FORD'S CASE FROM HIS CO-DEFENDANTS' CASES DEPRIVED MR. FORD OF HIS RIGHT TO A FAIR TRIAL DUE TO THE GREAT DISPARITY OF EVIDENCE AND THE MASSIVE AND COMPLEX NATURE OF THE EVIDENCE.

Mr. Ford's attorney did not join in the motion for discretionary severance, rather he stated, "I will defer to the court". RP 18 (March 13, 2009). Mr. Ford moved for mandatory severance of his case from the case against his co-defendants, before, during and at the end of the trial. RP 50-52 (February 5, 2009); RP 25 (February 6, 2009) 740, 1345-1349; CP 573-622.

Mr. Ford moved for severance when the prosecutor sought to explain to the jury that Ms. Blair was not being truthful because she was afraid that Mike McCreven would kill her, so she would not identify him in court. RP 728. Mr. Ford objected that this line of questioning would be inadmissible in Mr. Ford's trial and that the prosecutor was trying to use the associational evidence with the Hidalgos to explain the witness's fear which prejudiced Mr. Ford. RP 722, 724, 725, 727. The court ruled that the prosecutor could ask Ms. Blair about not wanting to confront the defendants because "this does not bias or prejudice, as far as the rules, so I

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5 RP refers to the main volume of proceedings which are numbered sequentially throughout many volumes. All of the references to the "RP will be followed by the date of the proceedings.

will allow it. RP 730. However the juror's discussion of Ms. Blair revealed that the jurors believed Ms. Blair was afraid of the Hidalgos, thus poisoning the defense with impermissible guilt by association

The prosecutor asked Ms. Blair if reading a transcript of her interview would refresh her memory. Ms. Blair testified, "If I had to pick out any killer, I wouldn't want to be known, because I have kids at home.". RP 733. The defense moved to strike and the objection was sustained. RP 734. The court denied Mr. Ford's motion for severance. RP 739-743.

Mr. Ford renewed his motion to sever when the Court in violation of its order of limine permitted the Mr. McCreven's attorney to question S. Ford regarding Mr. Beaudine's rejected application to become a member of the Hidalgo's club. The application was found in a search of Mr. Nolan's possessions. RP 1351. Ms. High argued that the state opened the door by asking S. Ford if Mr. Beaudine was associated with any motorcycle clubs, to which she answered "no". RP 346, 1346-1349. Mr. Ford's attorney did not initially join in the motion until after the court denied the motion for severance at which time Mr. Bernberg stated, "I renew Mr. Ford's motion severance as well" RP 1349.

A court should sever the trials of properly joined defendants where severance is necessary to promote a fair determination of guilt. Where a defendant is prejudiced by a joint trial, it is an abuse of discretion to deny a

severance motion. State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994).

A trial court's denial of a motion to sever is reviewed under the abuse of discretion standard. State v. Phillips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). On appeal, an appellant must show manifest prejudice resulting from a joint trial outweighed concerns for judicial economy. The appellant must point to specific prejudice. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982), cert. denied sub nom., Frazier v., 459 U.S. 1211 (1983). Specific prejudice may be demonstrated by:

(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.**

State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995), rev. denied, 128 Wn.2d 1025 (1996) (Emphasis added), quoting, United States v. Oglesby, 764 F.2d 1273, 1276 (7th Cir. 1985).

Here, severance was necessary because of the gross disparity of substantial evidence against the co-defendants versus the thin evidence against Mr. Ford; and the massive and complex evidence coupled with the state's relentless effort to lump the defendants together as some sort of

motorcycle gang, made it impossible for the jury to segregate and properly allocate the evidence between the co-defendants and Mr. Ford during a very lengthy trial..

The disparity of evidence involved” (1) the evidence of the co-defendants' association with the Hidalgos; (2) the evidence that S. Ford was afraid of Mr. McCreven, a member of the Hidalgos; (3) the volume of evidence against Mr. Smith and Mr. Nolan who were also Hidalgos members and participants in the fight, versus a single witness discussing an unidentified man putting up his hand, and the state arguing that this unidentified man was Mr. Ford. The evidence against some of the co-defendants was overwhelming, while virtually non-existent against Mr. Ford. .

The presentation of the evidence in one trial against four separate co-defendants that the state tried to tie together as an en mass guilty group of motorcycle guys made it impossible for the jury to fairly determine Mr. Ford's guilt or innocence based exclusively on the evidence against him rather than the evidence against the co-defendants. RP 50-52 (February 5, 2009); RP 26 (February 6, 2009) 722-740, 1345-1349; CP 573-622.

Even though the judge gave a limiting instruction that the evidence of Mr. Beaudine's rejection in the Hidalgos was only to relate to Mr. Nolan,

and Ms. Blair's fear was only related to Mr. McCreven, given the volume of Hidalgo related testimony it would have been difficult, if not impossible, for the jury to separate the Hidalgo evidence and not use it against Mr. Ford who was identified, in violation of an order of limine as a Hidalgo member. Additionally, the prosecutor argued in closing that the reason the police did not find a Hidalgo jacket in Mr. Ford's home "corroborated" his guilt. RP 2810.

Mr. Ford's case also presents the classic problems articulated in Oglesby, supra, "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; . . . [and a] gross disparity in the weight of the evidence against the defendants. State v. Canedo-Astorga, 79 Wn. App. at 528, quoting, Oglesby, 764 F.2d at 1276. The evidence led the jury to impermissibly infer that Mr. Ford, like the co-defendants, was a scary member of the Hidalgos who supported the Bandidos and thus was a criminal and guilty of the crime charged.

Because of the complexity and volume of evidence that was admitted against the co-defendants in Mr. Ford's case, and due to the gross disparity of evidence against the co-defendants versus Mr. Ford, it was impossible for the jury to focus only on the evidence against Mr. Ford.

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The prejudice to Mr. Ford outweighed judicial economy, and the severance motions should have been granted. The court therefore abused its discretion in denying the severance motions. Mr. Ford's murder conviction should be reversed. State v. Bythrow, 114 W.2d 713, 717, 790 P.2d 154 (1990).

8. THE TRIAL COURT ERRED BY REFUSING  
TO GRANT THE MOTION FOR A JUDGEMENT  
NOTWITHSTANDING THE VERDICT (JNOV).

After the state rested its case in chief, Mr. Ford moved to dismiss his case for insufficient evidence against Mr. Ford. RP 2287-2291. The trial court denied the motion. RP 2303. The trial court denying Mr. Ford's half-time motion. Mr. Ford also moved for an arrest of judgment at the end of the trial. CP 573, 575-622. The court denied the motion. CP 668.

The state presented evidence that a "short haired bulky tall man" held up his hand and spoke to Mr. James. The state argued that the man could have been Mr. Ford and that the man could have prevented Mr. James from re-entering the fight. RP 2296. Mr. James testified that he escaped the fight because he was being beaten on the head. RP \_\_\_\_.

CrR 7.4(a)(3) authorizes the trial court to arrest judgment for insufficiency of the proof of a material element of the crime. On review of a motion to arrest judgment under CrR 7.4(a)(3) and a half-time motion,

the appellate Court determines " 'whether the evidence is legally sufficient to support the jury's finding.' " State v. Bourne, 90 Wn.App. 963, 967, 954 P.2d 366 (1998) (internal quotation marks omitted), quoting, State v. Robbins, 68 Wn.App. 873, 875, 846 P.2d 585 (1993). "The evidence is sufficient if any rational trier of fact viewing it most favorably to the State could have found the essential elements of the charged crime beyond a reasonable doubt." Robbins, 68 Wn.App. at 968.

On review of the trial court's decision granting a motion to arrest the judgment, the appellate court engages in the same inquiry as the trial court. State v. Longshore, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000).

Mr. Ford's conviction for felony murder by assault required the jury to find that Mr. Ford participated in the assault as a principal or as an accomplice. The state had to prove beyond a reasonable doubt that Mr. Ford or an accomplice committed or attempted to commit the crime of Assault in the Second Degree against Dan Beaudine; and that Mr. Ford or an accomplice caused the death of Dana Beaudine in the course and in furtherance of such crime or in flight from such crime. CP 526 (Jury instruction 37); RCW 9A.32.050(1)(b).

In Mr. Ford's case, the State failed to prove beyond a reasonable doubt that Mr. Ford actively or as an accomplice participated in the assault. No witness identified Mr. Ford as being involved in the direct

fighting and no witnesses identified Mr. Ford as assisting in the fight. Rather, Joy Hutt testified that Mr. Ford was standing on the sidewalk along with the other bar patrons. Mere presence without knowledge that a crime is going to be committed is insufficient to establish accomplice liability to felony murder by assault. Asaeli, supra (dismissal with prejudice for failing to establish Vaielua participated in fight that resulted in death of complainant).

Mr. Howden described an unidentified man who held up his hand after Mr. James escaped the fight and decided not to re-enter the fight. No one knew the man's identity or what if anything the man said to Mr. James; and the man did not restrain Mr. James. This evidence is insufficient to establish that Mr. Ford was an accomplice to the assault. *Id.*

The prosecutor asserted that Mr. Ford "could" have been the man who held up his hand, however "could have been" is not legally insufficient to a conviction. State v. Robbins, 68 Wn. App. at 876-877.

In Robbins, the defendant possessed trace amounts of cocaine that was invisible to the naked eye, unusable and without value. The Court held that there was "no reasonable inference that he intended to deliver such amounts to someone else, and even when viewed most favorably to the State, the evidence was not such that a rational trier could have so found beyond a reasonable doubt." State v. Robbins, 68 Wn. App. at 876-877.

This Court affirmed a directed verdict where the state failed to prove beyond a reasonable doubt the possession of a controlled substance with intent to deliver. *Id.*

In Mr. Ford's case, as in Robbins, the possibility that the man could have been Mr. Ford and the possibility that the man might have said something to discourage Mr. James from reentering the fight were not reasonable inferences from the evidence.

When determining whether evidence is sufficient to establish an element of a crime, the evidence must rise above speculation, conjecture, or mere possibility. Conrad v. Alderwood Manor, 119 Wn. App. 275, 282, 78 P.3d 177 (2003); Reese v. Stroh, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). (the evidence of competing theories was insufficient to establishing proximate cause and did not rise above speculation, conjecture, or mere possibility). In Mr. Ford's case, the evidence of his participation in the assault as a principal or as an accomplice does not rise above the level of speculation.

For this reason, the trial court erred as a matter of law in denying the half-time motion and the motion for arrest of judgment where there was insufficient evidence to establish the crime charged beyond a reasonable doubt. Reversal and dismissal of the charges with prejudice is the remedy. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)

(the Court dismissed the charges where the state accepted venue as an element of crime but failed to prove that element).

9. THE JURY INSTRUCTION REQUIRING UNANIMITY  
IN THE SPECIAL VERDICT WAS ERROR AS A  
MATTER OF LAW.

In Mr. Ford's case, the court provided the jury with instruction number 57 which required the jury to unanimously agree or disagree that the state met the criteria for the special weapons enhancement. This was error under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). In Bashaw, the Court held that a jury instruction which stated that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Bashaw, 169 Wn.2d at 147. Rather, unanimity is only required to find the *presence* of a special finding increasing the maximum penalty. Bashaw, 169 Wn.2d at 147.

In Bashaw, The Court held that the error was not harmless, because "the procedure" was flawed by which unanimity would be inappropriately achieved. Id. The error in Mr. Ford's case as in Bashaw is identical. Bashaw, 169 Wn.2d at 147-148. For this reason, this Court must reverse the special verdict finding.

10. THE TRIAL COURT ERRED IN EXCLUDING  
EVIDENCE OF THE DECEDENT'S  
REPUTATION FOR VIOLENCE.

This issue raised in Mr. Nolan's brief applies equally to Mr. Ford. Pursuant to RAP 10.1(g)(g)(2), Mr. Ford adopts and incorporates by reference the facts and legal argument related to this issue as set forth in Mr. Nolan's brief, Argument number 1.

11. THE TRIAL COURT ERRED IN DENYING MR. FORD'S MOTION FOR A MISTRIAL AFTER AN OFFICER VIOLATED AN ORDER IN LIMINE.

This issue raised in Mr. Nolan's brief applies equally to Mr. Ford. Pursuant to RAP 10.1(g)(g)(2), Mr. Ford adopts and incorporates by reference the facts and legal argument related to this issue as set forth in Mr. Nolan's brief, Argument number 3.

12. CUMULATIVE ERROR DENIED MR. FORD HIS RIGHT TO A FAIR TRIAL

Where multiple errors occur during trial which deny the defendant his right to a fair trial, due process is violated and the defendant is entitled to a new trial. In re Personal restraint of Lord, 123 Wn.2d 269, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). The cumulative error doctrine applies when there are multiple errors at trial, but none standing alone is sufficient to warrant reversal. State v. Hodges, 118 Wn. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1013, 94 P.3d 960 (2004). State v. Coe, 101

Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997).

The prosecutor's committed multiple instances of misconduct and mismanaged Mr. Ford's. Under both the cumulative error doctrine and CrR 8.3(b) reversal and remand for a new trial should be ordered.

The prosecutor misinformed the court and jury that a critical witness to Mr. Ford was not cooperative, implying that she had something to hide. The prosecutor gave four witnesses transcripts with the prosecutor's notes and answers to questions the witnesses could not answer.; Ex 199, 193, 257, 263; RP 746-749, 830, 824.-829, 832. The prosecutor violated her ethical obligation as an officer of the court to present testimony in an honest and un-coached manner. RPC 3.3; RPC 3.4. The state also violated CR 612 which provides that a writing may only be used to refresh a witness memory and "[i]f it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto." CR 612; State v. Heulett, 92 Wn. 2d 967, 969, 603 P.2d 1258 (1979); Little, 57 Wn.2d at 520-521.

The prosecutor violated multiple orders in limine to suppress all associational evidence regarding Mr. Ford. The prosecutor argued facts not

in evidence to create a case against Mr. Ford where none existed. The prosecutor expresses her personal opinion during closing argument and vouched for the credibility of the state.

Under CrR 8.3(b), "the court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to: (1) arbitrary action or governmental misconduct; and (2) prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The purpose of this rule is to see that a defendant is fairly treated. . State v. Michielli, 132 Wn.2d 229, 239-240, 937 P.2d 587 (1997); State v. Whitney, 96 Wn.2d 578, 580, 637 P.2d 956 (1981), citing State v. Satterlee, 58 Wn.2d 92, 361 P.2d 168 (1961); Accord, State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). The standard of review is under the manifest abuse of discretion standard. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

Governmental misconduct, however, "need not be of an evil or dishonest nature; simple mismanagement is sufficient." Blackwell, 120 Wn.2d at 831. CrR 8.3(b) "is designed to protect against arbitrary action or governmental misconduct". State v. Cantrell, 111 Wn.2d 385, 390, 758 P.2d 1 (1988).

In Michielli, the prosecutor amended the information to add charges five days before trial even though it did not have any new information.

Michielli, 132 Wn.2d at 244-247. The Court held that whether ill-intentioned or not, the late amendment was a form of mismanagement which put defense counsel at a disadvantage in not allowing adequate preparation for trial. The Court dismissed the charges. *Id.*

In Brooks, the trial court held that the failure to timely provide voluminous discovery to the defense that was critical to their case and which forced the defense to lose speedy trial constituted prosecutorial misconduct. Brooks, 149 Wn. App. at 286.

In State v. Chichester, 141 Wn. App. 446, 170 P.3d 583 (2007), the state was warned by the court to solve its self-created scheduling problem. The state chose to ignore this order and on the day of trial asked for a continuance. The Court refused and dismissed the charges for government mismanagement because the state was not ready to proceed. Chichester, 141 Wn. App. at 456.

In these cases, the prosecutor's misconduct was mismanagement rather than evil and ill-intentioned. In Mr. Ford's case, the misconduct was extensive and prejudicial to Mr. Ford because she argued that Mr. Ford was the man to put up his hand; that he was wearing a leather Hidalgo jacket, that he was guilty because the police could not find his leather jacket, that he was guilty because he was a member of the Hidalgos and that he was guilty because the state got it right and because Mr. Ford's

attorney was a liar.

Under 8.3(b), the misconduct whether evil or not prejudiced Mr. Ford. For this reason, this Court should remand for dismissal of the charges against Mr. Ford.

[19] ¶ 23

13. ADDRESS SHOULD DISREGARDED AND  
OVERRULED BECAUSE ADDRESS LEADS TO  
AN ABSURD AND UNFAIR RESULT.

In Address, supra, the Washington Supreme Court held that the second-degree felony murder statute did not permit conviction where the predicate felony was assault. The Legislature subsequently amended the felony murder statute, to include assault as a predicate felony for second degree felony murder. See Laws of 2003, ch. 3, §2.

The Address Court held that, if assault were one of the predicate felonies for felony murder, the “in furtherance of” language in the statute would be “meaningless as to that predicate felony,” because the assault is “not independent of the homicide.” 147 Wn.2d at 610. Assuming that the Legislature did not intend this “absurd result,” the Court held that assault could not be the predicate felony for the murder charge. Id.

In amending the statute to include felony murder, the Legislature has now indicated that it does currently intend this “absurd result.” It is now up to the courts of this state to determine whether the new statutory

scheme passes muster.

More importantly, permitting the prosecution the discretion to choose between charging a second degree felony murder with assault as the predicate felony, instead of manslaughter, violates the state and federal rights of equal protection. Article 1, § 12 and the Fourteenth Amendment; Olsen v. Delmore, 48 Wn.2d 545, 550, 295 P.2d 324 (1956); State v. Collins, 55 Wn.2d 469, 470, 348 P.2d 214 (1960).

If a defendant commits an intentional assault and unintentionally but recklessly inflicts substantial bodily harm which results in death, the prosecution can charge either second degree murder or manslaughter, with the resulting differences in punishment and consequence. Similarly, with assault as the predicate felony for second degree felony murder, “a negligent third degree assault resulting in death can be second degree murder,” and can also be second degree manslaughter. See RCW 9A.32.070(1); Andress, 147 Wn.2d at 615.

The unfairness which can result from such discretion is evident and the harshness of punishing an unintentional homicide this way has been recognized by the Supreme Court itself. See Andress, 147 Wn.2d at 612. By giving the prosecution this expansive discretion to charge a higher or lesser crime for the same conduct, RCW 9A.32.050 as currently written violates the prohibitions against equal protection.

In addition, it is time for Washington to reconsider its ill-conceived notion of refusing to follow the vast majority of jurisdictions which have adopted a “merger” rule for felony murder with an underlying assault in order to prevent such drastic unfairness as currently exists in Washington. Under the merger rule, if a person is assaulted and then dies, the assault merges into the resulting homicide and cannot be the predicate felony for felony murder, “because it is not a felony independent of the homicide.” Andress, 147 Wn.2d at 606.

Washington recognizes, as part of the “merger doctrine,” the concept that one crime may be so incidental to another that it does not amount to the independent crime. See State v. Saunders, 120 Wn. App. 800, 816-17, 86 P.3d 1194 (2004). Thus, in Green, 94 Wn.2d at 227, the defendant was charged with aggravated murder with kidnapping as an element of the crime, where the crime involved taking the victim from an alley, moving her about 50 feet, and then killing her. The Court held that the prosecution failed to prove the kidnapping element because, although the child had been moved, that movement was “an integral part of and not independent of the underlying homicide.” Green, 94 Wn.2d at 227.

Applying those principles here, this Court should hold that the predicate assault merged with the death and felony murder does not apply. The purpose of the felony murder rule is to ensure that a person who

commits a homicide which results in a murder may be punished by what is, effectively, “vicarious liability.” State v. Carter, 154 Wn.2d 71, 78-79, 109 P.3d 823 (2005). Proof of felony murder has thus been described as proof both that a person “committed or attempted to commit a predicate felony *and* that he or she, or a co-participant, committed homicide in the course of commission of the felony.” 154 Wn.2d at 78-79 (emphasis in original). Thus, when assault is the predicate felony, to prove second degree murder the prosecution has to prove that the person committed or attempted to commit an assault and that she or a co-participant committed homicide in the course of commission of the felony.

It is nonsensical to speak of a criminal act - - an assault - - that results in death as being part of the *res gestae* of the same criminal act since the conduct constituting the assault and the homicide are all the same. Consequently, in the case of assault there will never be a *res gestae* issue because the assault will always be directly linked to the homicide. . . . In short, unlike the cases where arson is the predicate felony, the assault is not independent of the homicide.

Andress, 147 Wn.2d at 610-611.

Thus, the Supreme Court has declared that a predicate assault effectively merges and is not independent of the homicide. Although Andress did not take the further step and declare adoption of merger in Washington, it clearly indicated its willingness to do so. This Court should follow the path cleared by Andress and should adopt the merger

doctrine in this state to protect against the “absurd result” the Andress Court noted would result from including assault as a predicate felony for felony murder. In addition, this Court should reverse the conviction for felony murder with the predicate of second-degree assault.

14. ADOPTION OF CO-COUNSEL’S ARGUEMNTS

Pursuant to RAP 10.1(g)(g)(2), Mr. Ford adopts and incorporates by reference all relevant facts and legal argument presented in Mr. Smith and Mr. McCreven’s opening briefs.

D. CONCLUSION

Mr. Ford did not commit an assault or participate in the commission of an assault that caused the death of Mr. Beaudine. Mr. Ford has never had any dealings with the law. CP 623-624. Mr. Ford was present when others committed the crime against Mr. Beaudine. The state created a case based on impermissible associational evidence and by arguing facts not in evidence to convince the jury that Mr. Ford was guilty, when no jury could reasonably infer guilt from the actual evidence presented.

The state did not establish beyond a reasonable doubt that Mr. Ford, acted as a principal or as an accomplice to assault or murder. The trial was riddled with legal error and prejudicial prosecutorial misconduct. Mr. Ford respectfully requests this Court reverse his conviction and remand for

dismissal with prejudice. In the alternative, Mr. Ford requests this court reverse and remand for a new trial.

DATED this 16th day of September 2010.

Respectfully submitted

LAW OFFICES OF LISE ELLNER

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Lise Ellner, WSBA No. 20955  
Attorney for Appellant

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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Barry Ford Barry Ford DOC# 332926 WCC PO Box 900 Shelton, WA 98584, a true copy of the document to which this certificate is affixed, on September 16, 2010. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

\_\_\_\_\_  
Signature