

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

STATE OF WASHINGTON,
Respondent

v.

MIKE ROBERT MCCREVEN
Appellant

REPLY BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

	<u>Page</u>
A. ISSUES IN REPLY	1
B. ARGUMENTS IN REPLY.....	1
1. Whether the trial court erred in admitting irrelevant and prejudicial evidence which resulted in violating Mr. McCreven’s protected rights of free speech and association.....	2
2. Whether juror misconduct deprived Mr. McCreven of his right to a fair trial.....	7
3. Whether there is sufficient evidence to convict Mr. McCreven of murder in the second degree as either a principal or an accomplice	7
4. Whether the trial erred in calculating Mr. McCreven’s offender score	27
C. ARGUMENT	2
D. ADOPT AND INCORPORATE.....	33
E. CONCLUSION	34

TABLE OF AUTHORITIES

<u>State</u>	<u>Page No.</u>
<i>Estes v. Hopp</i> , 73 Wn.2d 272 (1968)	30
<i>In re Personal Restraint of Crawford</i> , 150 Wn. App. 787, 209 P.3d 507 (2009)	32
<i>In re Thompson</i> , 141 Wn.2d 712, 718, 10 P.3d 380 (2000).....	29
<i>In re the Welfare of Forest v. State</i> , 76 Wn.2d 84, 87 (1969)	30
<i>Personal Restraint of Connick</i> , 144 Wn.2d 442, 455-458, 28 P.3d 729 (2001)	28
<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	21
<i>State v. Allen</i> , 159 Wn.2d 1, 7, 147 P.3d 581 (2006)	20
<i>State v. Ammons</i> , 105 Wn.2d 175, 186, 713 P.2d 719 (1986), <i>cert. denied</i> , 479 U.S. 930 (1986)	29
<i>State v. Asaeli</i> , 150 Wn.App. 543, 208 P.3d 1136, 1155-56 (2009)	3
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	21
<i>State v. Clark</i> , 143 Wn.2d 731, 769, 24 O.3d 1006 (2001)	21
<i>State v. Craven</i> , 67 Wn.App. 921, 928,841 P.2d 774 (1992)	21
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638 (1980)	21
<i>State v. Everybodytalksabout</i> , 145 Wn.2d 456, 39 P.3d 294 (2002)	22
<i>State v. Failey</i> , 165 Wn.2d 673, 201 P.3d 328 (2009)	30
<i>State v. Ford</i> , 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999)	28
<i>State v. Gentry</i> , 125 Wn.2d 570, 597, 888 P.2d 1105 (1995)	21
<i>State v. Gonzales Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008)	7

<i>State v. Gregory</i> , 158 Wn.2d 759, 817, 147 P.3d 1201 (2006)	21
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)	7
<i>State v. Halstine</i> , 122 Wn.2d 109, 857, P.2d 270 (1993).....	20
<i>State v. Hoffman</i> 116 Wn.2d 51, 804 P.2d 577 (1991)	21
<i>State v. Hundley</i> , 126 Wn.2d 418, 421-422, 403 P.2d 403 (1995).....	21
<i>State v. Huson</i> , 73 Wn.2d. 660, 663, 440 P.2d 192 (1968), <i>cert. denied</i> , 393 U.S. 1096, 21 L.Ed.2d, 787, 89 S.Ct. 886 (1969)	4
<i>State v. Johnson</i> , 124 Wn.2d 57, 873 P.2d 514 (1994)	4
<i>State v. Jones</i> , 144 Wn.App. 284, 183 P.3d 307 (2008)	29
<i>State v. Kilgore</i> , 147 Wn.2d 288, 292, 53 P.3d 974 (2002)	2
<i>State v. Luna</i> , 71 Wn. App. 755, 759-60, 862 P.2d 620 (1993).....	23
<i>State v. Matthews</i> 28 Wn.App. 198, 203, 624 P.2d 720 (1981)	22
<i>State v. Miles</i> , 73 Wn.2d 67, 436 P.2d 198 (1968)	4
<i>State v. Monday</i> , __ P.3d __, 2011 WL277151 (6/9/11)	5
<i>State v. Morley</i> , 134 Wn.2d 588, 952 P.2d 167 (1998)	32
<i>State v. Neal</i> , 144 Wn. 2d 600, 30 P.3d 1255(2001) as amended July 19, 2002	3
<i>State v. Peasley</i> , 80 Wn. 99, 141 P.2d 316 (1914)	22
<i>State v. Ra</i> , 144 Wn.App. 688, 175 P.3d 609 (2009)	4
<i>State v. Renneberg</i> , 83 Wn.2d 735, 522 P.2d 854 (1967)	22
<i>State v. Roberts</i> , 80 Wn.App. 342, 908 P.2d 892 (1996)	22
<i>State v. Robinson</i> , 73 Wn. App. 851, 857, 872 P.2d 43 (1994).....	23
<i>State v. Saltarelli</i> , 98 Wn.2d 363, 655 P.2d 697 (1982)	3

<i>State v. Scott</i> , 151 Wn.App. 520, 213 P.3d 71 (2009)	3
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	20
<i>State v. Venegas</i> , 155 Wn. App. 507, 228 P.3d (2010).....	2,3
<i>State v. Wade</i> , 98 Wn.App 328, 989 P.2d 576 (1999).....	2
<i>State v. Winings</i> 126 Wn. App. 75, 95, 107 P.3d 141 (2005)	31

Federal

<i>Dawson v. Delaware</i> , 503 U.S. 159, 1965, 117 L.Ed. 2d 309, 112 S.Ct. 1093 (1992)	4
<i>In re Winship</i> , 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970)	21
<i>Jackson v. Virginia</i> , 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979)	21
<i>Taylor v. Kentucky</i> , 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d. 468 (1978)	7
<i>U.S. v. Roark</i> , 924 F.2d 1426 (8 th Cir. 1991)	4
<i>U.S. v. Singleterry</i> , 646 F.2d 1014, 1018 (5 th Cir. 1981)	7

State Constitution

Const. Art. I, §21.....	7
Const. Art. I, §22.....	7

Federal Constitution

U.S. Const. Amend. 6	7
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Statutes

RCW 5.44	28
RCW 9A.08.020.....	22

RCW 9A.32.050.....	21
RCW 9A.52.020.....	30
RCW 9A.52.025.....	31
RCW 9.94A.525(2)(b)	31
RCW 13.04.240	30
RCW 69.50.401(1)	31

Rules

CR 44	28
ER 101	2
ER 402	20
ER 403	20
ER 404.....	2
ER 404(b)	3,4,6
ER 901	28
ER 902	28
RAP 10.1(g)	33

A. ISSUES IN REPLY.

No. 1.

The trial court erred in admitting irrelevant prejudicial evidence concerning the Banditos that infringed on Mr. McCreven's constitutionally protected rights of free speech and association and that far exceeded any evidence of Hidalgo membership.

No. 2.

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

No. 3.

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

No. 4.

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

B. ARGUMENTS IN REPLY

1. Whether the trial court erred in admitting irrelevant and prejudicial evidence which resulted in violating Mr. McCreven's protected rights of free speech and association?
2. Whether juror misconduct deprived Mr. McCreven of his right to a fair trial?
3. Whether there is sufficient evidence to convict Mr. McCreven of murder in the second degree as either a principal or accomplice?
4. Whether the trial court erred in calculating his offender score?

C. ARGUMENT.

1. The Trial Court Erred In Admitting Irrelevant, Prejudicial Evidence That Included Evidence Pertaining to The Bandidos Motorcycle Club.

The State seeks to sidestep the introduction of the constitutionally protected Bandidos motorcycle club association evidence under the argument that ER 404(b) permitted the introduction of evidence pertaining to establishing identity of the co-defendants by their clothing, or alternatively was admissible to establish motive or *re gestae*. BOR 64. The trial court ruled clothing that matched the descriptions of clothing given by witnesses would come in to show identity. RP 4/9/09 p. 131, RP 899. Significantly, the trial court did not find that the evidence pertaining to motorcycle evidence was admissible under a *re gestae* or motive exception to ER 404(b). nor did the court conduct the required analysis for admission of such evidence. RP 885; RP 4/9/09 p. 131.

The purpose of the rules of evidence is to secure fairness. ER 101, *State v. Wade*, 98 Wn. App. 328, 332, 989 P.2d 576 (1999). The admission of ER 404(b) evidence is a four-step process. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002); *State v. Venegas*, 155 Wn. App. 507, 525, 228 P.3d 813 (2010). The trial court first must make preliminary findings of fact that the uncharged acts more probably than not took place. *Id.* Next, the court must articulate some reason why the evidence is admissible. *Id.* Then it must find that the acts are relevant to some factual issue the jury will have to resolve. *Id.* Finally, the court must weigh the probative value of the

evidence. *Id.* This analysis must be conducted on the record. *Venegas*, 155 Wn. App. At 525-26. Failure to adhere to the requirements of an evidentiary rule can be an abuse of discretion. *Venegas*, 155 Wn. App. At 526.

The trial court must also give the jury a limiting instruction regarding the proffered ER 404(b) testimony. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). In addition to its failure to conduct the required analysis on the record, the court did not give a limiting instruction as requested by defense. RP 890. The prejudice standard applicable to an evidentiary error does not require that the evidence be considered in the light most favorable to the State. *See Neal*, 144 Wn.2d at 611.

Significantly, the Court never conducted the required analysis for admission of evidence under ER 404(b). RP 4/9/09 p. 131, RP 885. The Court summarily concluded that evidence that established identity of the defendants, such as by jackets they were wearing that night would be admissible RP 4/9/09 p. 131.

Without undertaking the required analysis, the court permitted numerous photographs depicting an association with the Bandidos motorcycle club, to be admissible to establish identity. RP 899. As addressed in McCreven's Opening Brief, the extreme prejudice that attaches to gang type evidence is well understood by the reviewing courts. See, e.g., *State v. Scott*, 151 Wn. App. 520, 213 P.3d 71 (2009)(gang evidence); *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, 1155-56

(2009)(gang evidence); *State v. Ra*, 144 Wn. App. 688, 700-01, 175 P.3d 609 (2009)(gang evidence).

Here, not a single witness testified that they observed any clothing or items associated with the Bandidos motorcycle club, however, the photographs and evidence the State introduced repeatedly emphasized such an association.

A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Because there was no legitimate basis for the introduction of Bandidos related evidence, the introduction of the evidence linking McCreven and his co-defendants to the Bandidos was improper and prejudicial under ER 404(b) and violated his First Amendment right of freedom of association. *State v. Johnson*, 124 Wn.2d 57, 873 P.2d 514 (1994), (citing *Dawson v. Delaware*, 503 U.S. 159, 165, 117 L. Ed. 2d 309, 112 S. CT. 1093 (1992)).

The State also argues this case is unlike *U.S. v. Roark*, 924 F.2d 1426 (8th Cir. 1991) because the State did not offer testimony regarding the criminal propensities of motorcycle club members. BOR 65. The State’s argument ignores the fact that the reputation for criminal behavior associated with notorious “one per center” motorcycle clubs is well known to the average public and needs no expert testimony.

The law in Washington is clear, prosecutors are held to the highest professional standards. See *State v. Huson*, 73 Wn. App. 660, 663, 440 P.2d 192 (1968). This requirement of professionalism and impartiality was recently affirmed

in *State v. Monday*, ___ P.3d ___, 2011 WL277151 (6/9/11). As discussed by the Monday court,

“A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice. *State v. Case*, 49 Wn.2d 66, 70–71, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)). Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *Id.* at 71, 298 P.2d 500.

”*State v. Monday*, 2011 WL 2277151, 5 (2011). As aptly recognized by the *Monday* court, not all appeals to bias need be blatant. Sly and insidious plays by a prosecutor on potential juror bias can be just as harmful, such as was done here with the repetitive display of the wholly irrelevant Bandios associated evidence. Despite the State’s repeated protestations it was not using the evidence to show any association, its actions belie these statements. RP 120, 137-138, 881, 1259-1263. For example, the State had the testimony from bar patrons regarding who was at the Bull’s Eye the evening in question and what attire was worn by whom and testimony from Becky Dobiash regarding Hidalgo’s motorcycle club attire. RP 205, 208-209, 345-349, 459-463, 1009-1011, 1163, 1416-1420, 1489-1491, 2323, 2346. The State also had photos of Mr. McCreven’s motorcycle showing its design, color and saddlebag configuration

that did not include a Bandidos decal (CP Exhibits 87, 88, 288), yet the only one the State published to the jury was the one taken specifically by the investigating officers to emphasize a Bandidos decal. RP 1264;. CP Ex 86. Similarly, the State entered not one but two pictures of co-defendant/co-appellant Ford wearing a black vest that did not have *any* Hidalgos insignia but rather had a “Support the Bandidos” patch visible. RP 916, CP Exhibits 131, 205. *See also Exhibits* 268A, 268B, 268C, 86, 159 for photos of co-defendants and others in Bandidos garb or motorcycles displaying Bandidos decals. Defense objected to the admission of these items. RP 870-879, 885-86, 889-91; 893-94, 898-905 (defense objections and proposed limiting instruction). Similarly, Deputy Simmelink was allowed to testify that Vince James told her the participants were, “Hidalgos;” even though he could not or had not provided descriptions of the individuals or their clothing. RP 2267. Accordingly, as in *Venegas*, 155 Wn. App. At 526, it is not at all clear that a proper balancing of should have resulted in admission.

Under the ER404(b) standard, the reviewing court will find prejudice if the defendant can show a reasonable probability the trial court's ruling materially affected the trial outcome. In addition to establishing the court abused its discretion by not even conducting the analysis necessary for admission of such ER 404(b) evidence and its resulting prejudice under the evidentiary standard, constitutional error is presumed to be prejudicial; to overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that

it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Gorzales Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). By repeatedly introducing evidence that indicated support by the defendants for the Bandidos motorcycle club, not just the identity of the clothing that may have contained Hidalgo insignia, McCreven was denied due process of law, a fair trial and unfairly prejudiced. *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d. 468 (1978); U.S. Const. Amend. XIV. *See also United States v. Singleterry*, 646 F.2d 1014, 1018 (5th Cir. 1981).

Here both standards of review are met requiring a reversal of Mr. McCreven's conviction.

Issue No. 2: Juror Misconduct Deprived Mr. McCreven Of His Right To A Fair Trial.

The State argues that the issue regarding juror misconduct was only raised in passing unsupported by argument. BOR 67. This is incorrect, Mr. McCreven fully briefed the argument at Issue No. 4 of his Opening Brief. Mr. McCreven addressed the issue in the context of the Sixth Amendment to the United States Constitution and Art. 1 §§ 21 and 22 of the Washington Constitution guarantee to a defendant to a determination by a fair and impartial jury. Mr. McCreven supported his argument with citation to the record and controlling law.

No. 3: There Is Insufficient Evidence To Convict Mr. McCreven For Murder In The Second Degree Either As A Principal Or An Accomplice.

The State relies on a misleading and inaccurate recitation of the facts to argue the evidence was sufficient to support his conviction. BOR 83-85. The uncontroverted evidence is that Dana Beaudine died from a stab wound to the neck from a knife he introduced into the fight and bearing only Beaudine's handler DNA.

Not a single witness testified or gave a statement to police that indicated they heard or observed McCreven say anything or do anything to in any way demonstrate his participation, assistance or actual involvement in the assault or murder of Mr. Beaudine. Numerous people left the Bull' Eye after the fight (RP 367-68) and Mr. McCreven was not hiding his motorcycle from the police. RP 1470 (McCreven's sister took motorcycle to her days after the event because she had taken making the payments.) There was no blood recovered from iether his boots or his chaps. RP 1468 (could have ben blood on chaps), RP 908-09.

For example it is not accurate to say that the witnesses described Mr. Beaudine gratuitously being assaulted by individuals all clad in Hidalgos attire, including Mr. McCreven. According to Shannon Ford's testimony at trial, when she and Beaudine, Mr. James, and Ms. Blair arrived at the Bulls Eye Tavern, Ms. Blair and Mr. James acknowledged Mr. McCreven's presence at another table by smiling at him and/or saying "hello." RP 984-985, RP 1000-1001; 1168. Ms. Blair also told Ms. Ford that she knew Mr. McCreven. RP 1001. In fact, Ms. Ford testified that as they were leaving Bulls Eye, Mr. McCreven was still inside the bar and Mr. James acknowledged Mr. McCreven's presence with a smile. RP 1001.

According to Ms. Ford when Mr. Beaudine got to the passenger side of the Tahoe she saw out of the corner of her eye a man approaching Dana with his fist cocked like he was going to throw a punch. RP 1021-1022. Ms. Ford identified this man as Carl Smith who was wearing a black leather jacket with the Hidalgo patch on it and a bandana with skulls on it. RP 1025-1026, 1082. Ms. Ford describes the scene as “chaotic.” RP 1035. She could not say if the people on the ground were the people dressed in biker clothing she had seen inside the Bulls Eye. RP 1115. Ms. Ford testified that when she described all the assailants as being in biker jackets, she was merely talking in “generalities”. RP 1041, 1128.

Ms. Ford testified she remembered Mr. MccCreven was the last person she saw leaving the parking lot. Ms. Ford never identified Mr. McCreven as being part of the fight. RP 1172, 1181.

Reyna Blair was present at the Bull’s Eye Sports Lounge on April 5, 2008 with Ms. Ford, Mr. Beaudine and Mr. James. RP 693-697. Ms. Blair testified that once outside on her way home the Bulls Eye she gave Ms. Ford and Mr. Beaudine a hug in front of their truck. RP 705, 706, 708. Ms. Blair said that after she gave Ms. Ford and Mr. Beaudine a hug, Mr. Beaudine instantly got beaten up by a few people. RP 709 – 710. Ms. Blair testified that because it all happened so fast she did not know how many people were involved. RP 710. Ms. Blair testified she was not sure what she saw other than “fighting” and Mr. Beaudine surrounded by people. RP 712. Ms. Blair testified that she did not see the men who were beating Mr. Beaudine

before the fight started. RP 712. Ms. Blair was not clear about how many people were at the scene of the fight as “there were so many people out there everywhere.” RP 716. Ms. Blair testified that she did not see any of the men beating Mr. Beaudine wearing a Hidalgo jacket and only told the police she did because that is what other people were saying. RP 718.

Vincent James said he remembered talking to someone outside the Bulls Eye for a while when he was leaving but could not remember who it was. RP 2213, 2245. Mr. James did not know what Mr. Beaudine, Ms. Ford and Ms. Blair were doing at this time and wasn't paying attention to them. RP 2213, 2251.

Mr. James testified that he next remembered hearing somebody screaming in the parking lot and he went to investigate. RP 2214 – 2215. While he did not see the beginning of the fight, he said he saw Mr. Beaudine lying on the ground by himself getting beat up. RP 2215, 2235. Mr. James also testified that he did not remember telling the police that the men beating up Mr. Beaudine were flying their colors or what color motorcycles he said he saw. RP 2223, 2224. Mr. James said that everyone stopped beating up on Mr. Beaudine all at once and then everybody left. RP 2219-21. He did not know what mode of transportation the individuals left on or in. RP 2219 – 2221.

Deputy Simmelink's notes about her conversation with Mr. James do not indicate that he ever mentioned the Hildalgos being in this incident. RP 628. Even though her notes indicated that several other people she spoke with at the Bulls Eye

some said that the suspects were wearing red biker jackets with “Kid Lo” on them. RP 594.

Detective Donlin also spoke with Reyna Blair and Vincent James. RP 1571-1572. According to Detective Donlin, Ms. Blair described three individuals but said four to five were involved. RP 1573. Ms. Blair provided Detective Donlin with the name Mike and said she knew him. RP 1573. Ms. Blair described Mike as about forty, having darker than blond hair, with a scrawny build wearing a jacket or vest with a patch on the back. RP 1574-1575. According to Detective Donlin, Ms. Blair said all the individuals she described had this patch on their clothing. RP 1575. Although Detective Donlin testified that Ms. Blair said the patch said, “Hidalgos,” he did admit on cross examination that actually she said something like “Kalagos” or “Legos” and it was *he who told her* that it was Hidalgos. RP 1575, RP 1622. On cross examination Detective Donlin also admitted that Ms. Blair told him that she did not even know if Mike was in on it. RP 1622.

Detective Donlin testified that he spoke with Vincent James in his vehicle and also recorded that interview. RP 1576. Mr. James also told Detective Donlin that he knew Mike. RP 1623-1624. According to Detective Donlin’s testimony, Mr. James was wearing a black leather motorcycle jacket on April 5, 2008 and had some blood on his jeans. RP 1625. According to Detective Donlin’s testimony, Mr. James originally told him that he believed the motorcycle patches he saw said something

like the “Delagos” or “Gelagos” and did not tell him what the colors of the patches were. RP 1636-1637, 1639.

Jennifer Abbott was also at the Bulls Eye on April 5, 2008 attending a bachelorette party. RP 454. According to Ms. Abbott’s testimony there were maybe five, six or seven males wearing leather jackets and/or chaps spread out through the Bulls Eye. RP 459. Ms. Abbott testified that that while she could not remember if all of these men had patches on their jackets she did remember seeing a patch that covered most of the back and was mostly red with some dark yellow on it but could not recall if there as a picture or anything. RP 460. According to Ms. Abbott, at one point in the evening she saw a “group of bikers” run from the front area of the bar across the parking lot to where a woman was screaming and another man, possibly a couple of others, were and then the fight broke out. RP 466. Ms. Abbott stated that maybe four or five or so, she saw running from the bar were wearing dark clothing and most if not all had leather vests, jackets, pants on. RP 470, 471. After this, Ms. Abbott reports that she only saw a big group of people just throwing punches. RP 471. Ms. Abbott did testify that she saw a figure being punched by at least one or two of the “bikers.” RP 472. On cross examination Ms. Abbott admitted that she told the police earlier that she could not see the fight very well because it was behind a vehicle. RP 507.

Kathryn Baccus testified that she was at the Bulls Eye on April 5, 2008, for a bachelorette party and arrived around 7:30 p.m. RP 2317, 2319. Ms. Baccus states

that she notice people in the Bulls Eye dressed in motorcycle attire meaning leather jackets and vests with red and gold patches. RP 2323, 2346. Ms. Baccus testified she believed there were about six to ten of them in the same group with one or two women. RP 2346.

While outside the Bulls Eye Ms. Baccus said she noticed a fight going on. RP 2326. Ms. Baccus said she first saw a couple guys, one bald and the other with brown hair wearing a leather vest, coming out of the door yelling at each other followed shortly after by a girlfriend. RP 2328 – 2329 2362. According to Ms. Baccus as the two men worked their way into the parking lot the confrontation became more physical and the girlfriend was screaming. RP 2329. Ms. Baccus said that the first fist was thrown before the two men got to the parked cars. RP 2330. After these three people got further into the parking lot more people, roughly six to ten whom she described as bikers, started coming out. RP 2331 – 2332, 2355. According to Ms. Baccus, “it was not like one guy was clearly jumped by a whole mob of them, it was just kind of a big mess of people.” RP 2332 – 2333. Ms. Baccus later described it as a “whole bunch of commotion” and “a big group of chaos.” RP 2356. Ms. Baccus said that once the fight was in the parking lot by the espresso stand it was pretty hard to see as it was dark and cars were in the way but the people on the curb were kind of having a discussion about it even though they were not focused on it to the degree that they could have identified anything specific. RP 2333 – 2334.

Ms. Baccus said that “it didn’t look as the bald man was being held and everyone was taking pot shots at him. It didn’t look like that all.” RP 2357.

Ms. Baccus testified that at some point the fight worked its way back to the parked cars and at that point “it was still pretty much just the two guys.” RP 2334.

Ms. Baccus testified that the first “bouncer” came out and tried to break up the fight but was hit in the face a few times and fell to the ground and then the second “bouncer” came out and everybody left. RP 2336.

Gary Howden testified he arrived at the Bull’s Eye between 10:00 and 10:30 pm on April 5, 2009. 2RP 177, 178, 179. He testified he was inside the bar at the beginning of the altercation. RP 206, 215. He reports that upon learning there was fight happening outside, he stepped outside onto the sidewalk with the bar security guards under the “Little Tokyo” sign. RP 239-240. He did not know who initiated the fight or what precipitated it. RP 279 – 280. Because of parked vehicles he did not have a clear view of events. RP 241, 243.

His descriptions of the participants included Beaudine, his friend Vince, a big stocky male with bushy brownish red hair in a white shirt, another shorter male with blonde curly hair, another large male that possible had a crew cut and one that he said, “I really don’t remember at all.” RP 208-09. Mr. McCreven does not match any of the individuals for whom he gave a description. Mr. Howden describes Mr. Beaudine, his acquaintance, Vince, and four other guys as fighting. RP 208. He was not sure if he remembered seeing the words “Hidalgos” on the jackets of individuals

leaving on their motorcycles and admitted that neither it or nor “red and gold” colors were mentioned by him in his earlier statements. RP 272-273, 317. The men on the motorcycles did not appear to be in a hurry to leave. RP 217. He indicated the men in the fight had jackets with the word “Hidalgos” but again on cross, and re-direct, admitted he was not sure of this information and did not provide this information to investigating law enforcement at the time of the events. RP 272-273, 317. He indicated his attention was focused on an individual in a white shirt (Carl Smith) and Beaudine. RP 282-83. He stated admitted that he was not paying attention to other the men wearing darker clothing and was not sure what they were doing. RP 282-83. The scene was “chaotic.” RP 282. By his estimate, there were 35 to 40 people outside watching the fight. RP 302.

He also indicated his memory was hazy – saying, “It’s been a year – I don’t know my exact notes.” RP 244. When the events were fresh in his mind he told the police two people were fighting – the man in the white shirt and Beaudine. RP 248. He described other individuals wearing biker vests with patches but did not describe the colors of the patches or any words or logos. RP 273. He testified he had no idea what the other people were doing or where they were while the fight continued between the two men. RP 249-50. He never saw Carl Smith with a weapon. RP 295.

Heather Diamond testified that she and four other friends were at the Bull’s Eye on April 5, 2008 sitting at a table with four guys. RP 345, 349. She did not recall

any patches or motorcycle insignia on the clothing worn by the men sitting at the table with her party. RP 347. She reported being outside near the Little Tokyo sign when she saw a man in a Harley Davidson shirt walk across the parking lot and scream "Fuck your colors". RP 358, 361. She indicated that the four men from her table were also outside, further down the sidewalk and at the screaming insult, two men walked across the parking lot towards the man with the dark Harley Davidson shirt. RP 362. This testimony was directly contradicted by her report on the night of the incident to law enforcement in which she described *two* men as fighting, not as two men going to engage in a fight with a third. RP 398. She claims the two men she saw go across the parking lot were from her table, but could not say which two of the four went. RP 363-364. She describes two more men joining the fight, but again cannot say which persons these were. RP 364. She claims she never saw anyone else join in – indicating she was unaware that at least one of the people engaged in the fight was Vince James and did not see or recognize Ms. Ford in the fight. RP 366. She describes the scene as "lots of commotion" and a lot of people from the bar were outside. RP 367, 371. She testified that she went inside to tell the bouncer that there was a problem outside, but the bouncer was already on his way out. RP 366.

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

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

Joy Hutt was the night manager/bartender at the Bulls Eye on April 5, 2008. RP 2389. Ms. Hutt heard a there was a disturbance outside and when she went out she saw Mr. Beaudine and another male in a white shirt and both had blood on their shirts and both saying that the other one started it. RP 2023-2025, 2529-2531, 2546.

Per the State's request, the knife recovered from the parking lot was sent to the Washington State Patrol Crime Lab where it was tested for DNA by forensic scientist William Dean on December 3, 2008. RP 1932. According to Mr. Dean's testimony, based a conversation he had with Sunni Ko, one of the prosecutors assigned to this case, they decided that the appropriate focus in this case was on "handler DNA" from the rough side of the knife's handle. RP 1951. According to Mr. Dean's testimony, "handler DNA" is DNA from someone who handled the knife. RP 1935. The primary reason for focusing on the rough side of the knife's handle was because the rough surface provides areas where cellular material could deposit. RP 1938. He intentionally avoided any areas of suspected blood or that had unidentified staining. RP 1938. Mr. Dean was able to recover DNA from the knife handle and compared with all four co-defendants in this case and Mr. Beaudine. RP

1939. The “handler DNA” on the knife was a one in one quintillion match for Mr. Beaudine with no mixed profile. RP 1940. Mr. McCreven’s DNA was not recovered from the knife. RP 1970. Mr. Dean did not do any tests on Mr. McCreven’s boots. RP 1971.

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

For example, it is not accurate to say no chaps were recovered from the McCreven residence, what is accurate and depicted in numerous photographs are chaps that were not collected. It is likewise inaccurate to say that boots belonging to Mr. McCreven had blood on them. BOR 26. Deputy Delgado did not send these boots to the lab for any testing. RP 931. He also testified about two leather vests and several photographs he found at this residence. RP 913-915, 933-934 – 68. Deputy

Delgado testified that he did not locate any chaps at the Dobiash residence although on cross examination he was shown two photographs from the Dobiash residence depicting leather chaps and riding jackets, with the leather vests he did collect. RP 915, 933-34 and Exhibits 104 and 84. Ms. Dobiash provided these chaps and they were brought into court by defense investigator, Ms. O'Leary. RP 2639-2640. A review of the record makes very clear that the testimony by an officer was that the boots had "what appeared" to be blood on them. RP 908-09. This testimony was offered over objection and without the requested limiting instruction tendered by the defense. RP 889. Moreover, the court had previously ruled on Mr. McCreven's motion in limine on this issue. RP 4/16/09 p.10. Based on the evidence collection report Deputy Laliberte testified that nothing in the collection report stated that the boots had anything on them that appeared to be blood. RP 1740.

Mr. McCreven was employed at Ft. Lewis and was an airplane painter for McCormick Air. RP 1486. The last plane he painted was red and yellow. RP 1488-89. Ex 288. He was wearing the same boots that were confiscated by the police under the belief they had what appeared to be blood on them. RP 1489. The State failed to have any testing done on the boots. ER 401 defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under the evidence rules, irrelevant evidence denotes evidence that does not logically tend to

prove or disprove any material fact or proposition. Evidence that at best produces only speculative inference is irrelevant evidence. Irrelevant evidence is not admissible. ER 402, 403. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997) directly addresses the admissibility of such testimony when there has only been a presumptive test but no confirmatory test. In the case where there is visual observation and only a presumptive test the jury must be informed by means of a limiting instruction that that testimony does not establish the presence of human blood. Here, there was not even a presumptive test, thus the State's argument that evidence that there was blood on his boots is without merit. *See State v. Halstine*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993) (law enforcement officer's testimony in a juvenile bench trial that a substance appeared to semen should have been excluded under ER 403 but because nothing in Court's finding indicated the court relied on the testimony the error was harmless.) Here, forensic technicians collected items and in some cases noted what appeared to be blood. None of these items were tested using any presumptive testing techniques or scientifically administered confirmatory tests.

To prevail on a challenge to the sufficiency of the evidence, McCreven must show that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Allen*, 159 Wash.2d 1, 7, 147 P.3d 581

(2006); *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct 2781 (1979). All reasonable inferences from the evidence are drawn in favor of the State. *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995); *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). *State v. Gregory*, 158 Wash.2d 759, 817, 147 P.3d 1201 (2006); *State v. Clark*, 143 Wash.2d 731, 769, 24 P.3d 1006 (2001)). “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638 (1980). Although determinations of the credibility of witnesses are for the trier of fact and will not be reviewed on appeal, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), this court can review whether the jury, after hearing all of the facts, could have rationally found guilt beyond a reasonable doubt. *See State v. Hundley*, 126 Wn.2d 418, 421-422, 403 P.2d 403 (1995).

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

Under RCW 9A.32.050 and the charging document in this case to prove principal liability for murder in the second degree, the State had to prove beyond a reasonable doubt that McCreven committed or attempted to commit the crime of Assault of in the Second Degree and either in the course of and in furtherance thereof

or in immediate flight there from he or another participant caused the death of Dana Beaudine.

Under RCW 9A.08.020 to prove accomplice liability for murder in the second degree, the State had to prove beyond a reasonable doubt that McCreven knew his actions would promote or facilitate the crime, that he was present and ready to assist in some manner, and that he was not merely present at the scene with some knowledge of potential criminal activity. The law is well settled that mere presence is not sufficient to prove complicity in a crime. *State v. Roberts*, 80 Wn. App. 342, 355-56 (1996); *State v. Matthews*, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime, instead he must do or say something that carries the crime forward. *State v. Peasley*, 80 Wash. 99, 100, 141 P.2d 316 (1914); *see also State v. Everybodytalksabout*, 145 Wn.2d 456, 39 P.3d 294 (2002) (physical presence and assent alone are insufficient for conviction as an accomplice.) Similarly, in *Renneberg*, the State Supreme Court approved the language, “to aid and abet may consist of words spoken or acts done ...”*State v. Renneberg*, 83 Wn.2d 735, 739, 522 P.2d 854 (1967).

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

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

The evidence presented in this case showed merely that Mr. McCreven was a “member” of the Hildalgo motorcycle club. There was no evidence presented that any of the events which later unfolded, including being in the same bar as Mr. Beaudine, were in any way planned or even known in advance to any of the defendants, including and especially Mr. McCreven. Washington cases time and again do not allow for accomplice liability where the crimes were not planned but were spur of the moment events. *See State v. Robinson*, 73 Wn. App. 851, 857, 872 P.2d 43 (1994); *State v. Luna*, 71 Wn. App. 755, 759-60, 862 P.2d 620 (1993).

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

that Vince James, who was in biker leathers (RP 205, 1625, 2547) and Ms. Ford who was in the fight while wearing a black zip up jacket (RP1171), were in the fight or she could not distinguish them from the “bikers”. She also said there was a “lot of commotion”. RP 367-71. Gary Howden, who was not outside at the start of fight and does not know what or who caused it (RP 206, 279-280), described several participants, but none of the individuals he could describe matched Mr. McCreven. RP 208-209. He also described a lot of punches being thrown, but could not tell who was doing it. RP 211, 242-43, 246 (only guy in white shirt throwing punches). He also described it as “chaotic” scene. RP 282.

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

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

More importantly, those witnesses who knew or knew of McCreven never testified that they saw him involved in the assault that led to Mr. Beaudine's death. RP 1172, 1181. For instance, Reyna Blair and Vincent James both told police on the night of the incident that they knew Mike McCreven and he was not involved. RP 1622, 2231. Shannon Ford, Mr. Beaudine's fiancé, who knew of Mike McCreven by sight as she was present when that night Ms. Blair and Mr. James exchanged friendly greetings and goodbyes with him, testified that the only time she recalled seeing McCreven outside the bar is when he was driving out of the Bulls Eye parking lot. RP 1041 Moreover, by her own testimony Ms. Ford was for a least for some part actually involved in the fight, if not at least closer to it than the other witnesses who only observed it from the sidewalk some one hundred and twenty-seven feet away (RP 2637) and did not testify that she saw McCreven involved in the fight. RP 1171.

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

In addition to its reliance on associational evidence for accomplice liability in this case which has also been raised as an issue in this appeal, the State, in an effort to overcome the lack of evidence of McCreven's guilt, harped on and played to the jury's sense of baseless speculation of "evidence of a guilty conscience." Such distractions as, where are the "bloody" chaps or the Hildalgo patched jacket or vest, and why were they not recovered by police during the search of Ms. Dobiash's

residence, or why did McCreven leave the Bulls Eye before police arrived if not because he was involved in the criminal act are not, based on the evidence actually presented, reasonable inferences or that there was blood on his boots. To the contrary, they are baseless speculations and therefore cannot and should not constitute proof beyond a reasonable doubt as to his guilt. *State v. McDaniel*, 155 Wn. App. 829, 230 P.3d 245 (2010). As was testified to at trial, photographs taken by the police at the time of the search of Ms. Dobiash's residence show several pieces of motorcycle clothing of Mr. McCreven's present. RP 1493-94; CP Exhibits 84, 104. When Ms. Dobiash was actually requested by the State to do so she did provide McCreven's chaps as evidence, despite the fact that the police chose to leave them behind. RP 2639, 2640, 2641. In fact, it is a reasonable inference based on her testimony that the only time Joy Hutt saw Mr. McCreven outside the Bulls Eye during her observation of the fight was when he standing on the sidewalk by the Radio Shack with Barry Ford smoking a cigarette. RP 2546 (description matches Mr. McCreven.)

Even construing the evidence cited in the facts above in the light most favorable to the State, there was insufficient evidence for a reasonable jury to find the State proved McCreven acted either as a principal or an accomplice to the felony murder of Dana Beaudine because no witness ever testified or gave a statement to police that indicated they heard or observed McCreven say anything or do anything to in any way demonstrate his participation, assistance or actual involvement in the

assault or murder of Mr. Beaudine. Because the State failed to establish each and every element of the crime charged beyond a reasonable doubt McCreven's conviction for one count of murder in the second degree with a deadly weapon enhancement must be reversed.

No. 4 The Trial Court Erred In Sentencing Mr. McCreven By Miscalculating His Offender Score.

Contrary to the State's assertion in its response brief, neither McCreven's alleged 1978 juvenile delinquency "adjudication" nor his 1991 California conviction should have been included in his offender score. **BOR 154-158.**

As for the 1978 juvenile "conviction" for Burglary in the First Degree, the State did not as is stated in its response provide the trial court with a certified judgment and sentence because one does not exist. **BOR 155.** Instead the State submitted a pre-Juvenile Justice Act welfare/delinquency order which as discussed in the trial court and McCreven's appeal does not provide sufficient proof of a prior valid conviction or adjudication of guilt for a crime. Facially, it is not clear from the document that the McCreven who was being sentenced is the same McCreven as was involved in the delinquency proceeding referenced in this document. Apart from the name of Michael McCreven and a date of birth that was contained on other documents, there is no indication such as fingerprints or even a signature from which to conclude by even a preponderance of evidence that the Michael McCreven named in the welfare/delinquency order is the same McCreven who was being sentenced.

In an effort to overcome this problem and because no prior stipulation to this offense signed by McCreven exists, the State submitted an uncertified and unauthenticated photocopy entitled "DISCIS STATEWIDE DATA - Juvenile Offender Sentencing Worksheet" purported to be printed on April 7, 2008, which clearly stated "verify data for accuracy." This DISCIS printout cannot suffice for or add to any proof at any level of burden for a prior conviction as not only is it uncertified and unauthenticated but it actually advises the viewing party that the data contained therein must be verified for accuracy and there was no indication anyone did any verification. See Sup Sentencing Exhibit 6. Such unsubstantiated documentation cannot be sufficient to prove a defendant's prior criminal history or the State would effectively have no burden of proof and the defendant's constitutional right to the imposition of sentence based on a correct offender score would be meaningless. The State must provide reliable evidence establishing the accuracy of the offender score calculation. *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). As emphasized in *Personal Restraint of Connick*, 144 Wn.2d 442, 455-458, 28 P.3d 729 (2001), documents such as uncertified or unauthenticated photocopies of apparent or purported court records that do not meet the authentication test under ER 901 and 902, RCW 5.44 or CR 44 may not be relied on to establish a fact in dispute absent a stipulation or order from the court to accept the documents for what they purport to be.

In addition and as argued in the trial court and his original appeal, this welfare/delinquency order cannot count as a prior conviction because it does not meet constitutional validity on its face. “Constitutionally invalid on its face” means a conviction which without further elaboration evidences infirmities of a constitutional magnitude. *In re Thompson*, 141 Wn.2d 712, 718, 10 P.3d 380 (2000) citing *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719, 718 P.2d 796 (1988). The phrase “on its face” has been interpreted to mean those documents signed as part of a plea agreement. *Thompson*, 141 Wn.2d at 718. No documents were provided to establish a facially valid plea to the pre-SRA charge of burglary in the first degree. Sup. CP. Sentencing Ex 1. The order itself does not indicate or establish an advisement of or a knowing and voluntary waiver of constitutional rights including the right to a trial or confrontation of witnesses. What is clear from looking at the face of the delinquency document is that it is not an adjudication of guilt but a delinquency action and that based on this and juvenile law at the time (pre-Juvenile Justice Act), the majority of important due process and constitutional trial rights did not apply and were not used or followed in finding a child delinquent and therefore cannot meet facial constitutional validity to be included in his offender score as a prior conviction. Contrary to the State’s position in its response, this is different than was the issue in *State v. Jones*, 121 Wn.App. 859, 88 P.3d 424 (2004), where the main issue was whether prior wash-out rules applied.

As was noted in McCreven's original appeal and is discussed in *In Re the Welfare of Forest v. State*, 76 Wn.2d 84, 87 (1969), pre-Juvenile Justice Act juvenile delinquency hearings were "informal" and conducted before a juvenile judge only and as was recognized under *Estes v. Hopp*, 73 Wn.2d 272, 438 P.2d 185 (1968), a hearing to determine delinquency was not a criminal proceeding. Contrary to the State's assertion that McCreven has not and cannot cite any law in favor of his position that pre-Juvenile Justice Act welfare/delinquency orders should not be included in his offender score, it is again worth noting that under the pre-Juvenile Justice Act law in effect when the delinquency order in question was entered, and even today, RCW 13.04.240 states that "an order adjudging a child delinquent or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime." **BOR 156.**

Finally, contrary to the State's position, the question of comparability is also necessary for classification of pre-SRA crimes, see *State v. Failey*, 165 Wn.2d 673, 201 P.3d 328 (2009). **BOR 156.** Under the pre-SRA 1978 RCW defining Burglary in the First Degree the crime required unlawful entrance or remaining in a "dwelling." RCW 9A.52.020¹ The current term "building" was not codified until 1995. RCW 9A.52.020. Thus the 1978 offense of burglary in the first degree is not

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

legally comparable to the current offense of burglary in the first degree. Based on 1978 definition of burglary in the first degree, it is possible that the offense alleged in the purported delinquency petition may have only been comparable to the current crime of Residential Burglary, RCW 9A.52.025² – a Class B felony, which even if a prior conviction of McCreven's, may well have washed. RCW 9.94A.525(2)(b). (B felonies wash if have 10 years crime free) Because no documentation was provided by which to ascertain the facts as contained in the delinquency petition at issue, the important next step of assessing factual comparability with a current offense cannot be done.

As for the improper inclusion of McCreven's 1991 California conviction for Possession for Sale, the State relies in its response on *State v. Winings*, 126 Wn. App. 75, 95, 107 P.3d 141 (2005) in which the appellate court found the defendant's stipulation to comparability was sufficient evidence to establish the 1992 California possession for sale statute was equivalent with our possession with intent to deliver statute found at RCW 69.50.401(1). **BOR 158**. However and as previously argued, McCreven did not so stipulate and asserted that the mental status element required by our statute is lacking in the California statute and thus the California statute is broader than the Washington statute and therefore not comparable to the 1991 Washington statute of unlawful possession with intent to deliver (RCW 69.50.401(a) (1991)). In

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

addition, based on the lack of factual basis for this charge and/or alleged conviction and the case law in Washington regarding what is and is not sufficient evidence of possession with intent, such as amount of drugs alone is not enough, the Court cannot make the required determination that this alleged conviction is factually comparable such that it should have been included in McCreven's offender score.

Finally as to McCreven's argument that this conviction has washed out, to properly classify an out-of-state conviction according to state law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable state crimes as defined **on the date** the out-of-state crime was committed. *In re Crawford*, 150 Wn. App. 782, 793-94, 209 P.3d 507 (2009) citing *State v. Morely*, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). Contrary to the State's assertion in its response, this is not the standard the trial court applied but instead focused its finding for inclusion on the date that the crime being sentenced was committed which is incorrect. **BOR 158**. In 1991, the Washington statute classified the first conviction for manufacture, possession or possession with intent to deliver methamphetamine as a Class C felony, with a five year maximum sentence. The wash provision on Class C felonies holds that these crimes do not count in the offender score if, after the date of release from confinement on the conviction, the individual has 5 consecutive years in the community without committing any crime. The California minute entry provided indicates that on March 5, 1991, the Sacramento municipal court imposed 120 days, with credit for 3 days served to

commence on 4/16/91. According to the criminal history provided by the State, Mr. McCreven has no misdemeanor or felony convictions until 12/1/98 when he was arrested for two misdemeanors - a DWLS 3 and a Hit and Run Attended, thus he had over 7 years consecutive time in the community without committing a crime for which he was subsequently convicted surpassing the five years crime free required. See Sup CP. Sentencing Ex. 6.

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

RAP 10.01(g) provides:

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

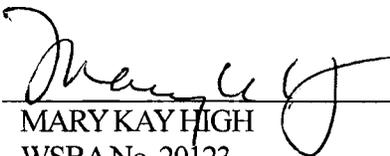
Pursuant to this rule, Mr. McCreven adopts and incorporates by his reference those arguments presented by his co-defendants/co-appellants Nolan, Ford and Smith applicable to his case. In particular, but not limited to Mr. Nolan's Issues in Reply 1, 2, 3, 4, and 5 the arguments thereto and arguments in reply submitted by Mr. Ford and Mr. Smith

D. CONCLUSION.

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

DATED this 27 of July 2011.

Respectfully submitted,

By 
MARY KAY HIGH
WSBA No. 20123


LAURA S. CARNELL
WSBA No. 27860

CERTIFICATE OF SERVICE

Mary Kay High hereby certifies under penalty of perjury under the laws of the State of Washington that on the 27th day of June, 2011, I mailed a true and correct copy of the Reply Brief to which this certificate is attached by United States Mail, to the following:

Mr. Mike Robert McCreven
DOC # 802726
Stafford Creek Correction Center
191 Constantine Way
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And, I ABC Legal Messenger serviced a true and correct copy of the Reply Brief of Appellant to which this certificate is attached, to

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

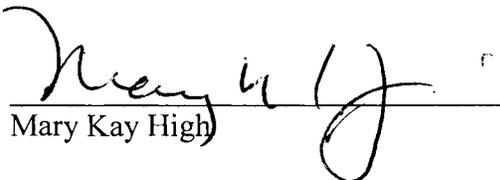
And I delivered via email this brief to the Office of Public Defense;

Jennifer M. Winkler;

Lise Ellner; and

Kathryn Russell Selk

Signed at Tacoma, Washington this 27th day of June, 2011.


Mary Kay High