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Court of Appeals
Division III
State of Washington

NO. 33910-6-III (Consolidated w/33932-7-III)

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOHN W. JENNINGS,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of delivery of a firearm to an ineligible person (Count II).

2. The State failed to prove, beyond a reasonable doubt, that John Jennings was either a principal or an accomplice to premeditated first degree murder.

3. There was a known absolute conflict of interest when attorney Michael Prince appeared as co-counsel for John Jennings. He had previously been representing Adam Jennings in a matter in Okanogan County District Court. Attorney Prince and attorney Melissa McDougall are the Okanogan County Public Defenders. They are in a partnership, share office space and a telephone number. Attorney McDougall was representing Adam Jennings. (Appendix "A"; Appendix "B")

4. Prosecutorial misconduct in closing and rebuttal arguments prejudiced Mr. Jennings.

5. Cumulative error deprived Mr. Jennings of a fair trial.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the State prove, beyond a reasonable doubt, each and every element of the offense of delivery of a firearm to an ineligible person as charged in Count II of the Amended Information? (CP 189)

2. Did the State prove, beyond a reasonable doubt, that John Jennings, as either principal or accomplice, committed the crime of premeditated first degree murder?

3. a.) Did an absolute conflict of interest exist when attorney Prince (who is attorney McDougall's partner) appeared as co-counsel for Mr. Jennings after previously representing Adam Jennings in unrelated proceedings?

b.) Did the conflict of interest, along with other errors, constitute ineffective assistance of counsel?

4. Did the prosecuting attorney commit misconduct in closing and rebuttal arguments by:

a.) Referencing "they" and "the defendants" throughout, instead of pointing to facts to support each individual's guilt;

b.) Making misleading and speculative statements; and

c.) Commenting on constitutional rights?

5. Does cumulative error require reversal of the convictions due to a violation of Mr. Jennings' constitutional right to a fair and impartial trial?

STATEMENT OF THE CASE

Michael Carrigan was hunting on the east side of Cow Camp Road in the Pontiac Ridge area of Okanogan County on September 2, 2013. (Beck RP 272, ll. 15-22; RP 276, ll. 7-9; ll. 14-22)

John Jennings, and his son Adam Jennings, were living on the west side of Cow Camp Road in a ramshackle cabin. The area is well treed. (Beck RP 513, l. 25 to RP 514, l. 3; Exhibit 102; Exhibit 184)

George Stover, a friend of Michael Carrigan's, remained with their pickup (PU) while Mr. Carrigan was hunting in the field. Tim Carrigan, Mr. Carrigan's brother, was hunting in a different area at that time. Mr. Stover heard a gunshot from the right side of the road. He believed it came from the area of the Jennings' cabin. He did not see anyone outside. (Beck RP 448, ll. 10-13; RP 453, ll. 11-16; RP 487, ll. 10-11; RP 498, ll. 13-14; RP 500, ll. 5-17)

Michael Carrigan went to the ground after the shot. He then got up and started back toward the PU. Mr. Stover saw blood on Mr. Carrigan's hands. A second shot rang out and Mr. Carrigan fell again. He went to his knees and rolled over onto his back. (Beck RP 500, l. 19 to RP 501, l. 22)

Mr. Stover drove to an area where he could make a 911 call. Deputies from the Okanogan County Sheriff's Office responded. Deputy Holloway observed Michael Carrigan lying on his back in the field. He waited for additional officers to arrive before approaching Mr. Carrigan. (Beck RP 271, ll. 1-3; RP 277, ll. 19-20; RP 279, ll. 1-13)

After the other deputies arrived a loudspeaker was used requesting the people in the cabin to come out. Mr. Jennings and his son then came out to where the deputies were located. They were both using canes as they walked to the deputies. (Beck RP 279, ll. 17-21; RP 280, ll. 11-14; RP 298, ll. 9-17)

The deputies did not find any indication of any other persons who were in the area at the time. (Beck RP 281, ll. 4-5)

John Jennings advised the deputies that he heard two (2) shots and immediately got on the floor. He had been preparing tea for himself and his son. He stated that he didn't have anything to do with the shooting.

(Beck RP 362, ll. 14-24; RP 364, ll. 2-3; RP 383, l. 20 to RP 384, l. 7; RP 694, ll. 21-25)

Neither Mr. Jennings nor his son were arrested at that time. The deputies drove them to a motel for the night. (Beck RP 362, ll. 12-13)

A search warrant was obtained for the Jennings' cabin on September 3, 2013. (Beck RP 374, ll. 4-11)

Detective Behymer located a spent .22 casing on the porch. A .22 revolver and ammunition were also recovered by her. (Beck RP 387, ll. 14-20; RP 399, ll. 4-9; ll. 20-25; RP 401, ll. 9-14)

Sergeant Mudgett found a key to a gun safe in Adam Jennings bedroom. It was in a drawer under the bed. (Beck RP 539, ll. 13-19; RP 542, ll. 2-12)

Sergeant Richmond of the Washington State Patrol operated a total station to provide an overview of the incident scene. (Beck RP 515, ll. 14-19; RP 524, l. 3 to RP 525, l. 7; Exhibit 115)

Deputy Kinman provided Mr. Jennings a ride back to the cabin after the search warrant had been executed. Mr. Jennings stated he did not want to talk about the incident any more. (Beck RP 371, ll. 9-14; RP 380, ll. 5-10)

Dr. Fino, a forensic pathologist, conducted an autopsy on Mr. Carrigan on September 4, 2013. Initial x-rays revealed metal fragments near his heart. (Beck RP 592, ll. 3-13; RP 603, ll. 4-13; RP 610, ll. 19-21)

Dr. Fino located an entrance wound from a gunshot in Mr. Carrigan's right upper back. There was no soot or stippling around the wound. The path of the bullet was from the back to the front, right to left, and slightly downward. She recovered a bullet from the tissue around Mr. Carrigan's heart. (Beck RP 614, ll. 19-23; RP 618, ll. 2-6; RP 623, ll. 3-12; RP 626, ll. 3-11)

There was also an abrasion on Mr. Carrigan's lower back. Dr. Fino described it as a concentric contusion **suggestive** of impact by a projectile; **but not conclusive**. She opined that it could also be a blunt impact injury when Mr. Carrigan's body struck the ground. (Beck RP 619, ll. 10-17; RP 620, ll. 1-9; ll. 14-20). (Emphasis supplied.)

On November 19, 2013 Mr. Jennings and his son were arrested during execution of a second search warrant. The key to the gun safe was again in Adam Jennings' bedroom. Numerous firearms were seized including .22 rifles and revolvers (one (1) each in the respective bedrooms). A large cache of .22 ammunition was also seized. (Beck RP 546, l. 23 to RP 547, l. 6; RP 552, ll. 13-25; RP 670, ll. 5-20; RP 674, l. 23 to RP 675, l. 6; RP 680, ll. 11-15; RP 736, ll. 12-17)

During the course of the search Detective Heyen observed bar marks on a window sill in the southeast corner of the cabin. A pair of binoculars was located on a barrel in that room near the window. (Beck RP 637, ll. 3-7; RP 657, ll. 10-15; RP 659, ll. 8-10; RP 660, ll. 1-6; Exhibit 33)

John Jennings was interviewed by Detective Heyen. He described the same events as he had before with some more detail. He was making tea, heard a loud bang which he recognized as a gunshot, and dropped to the floor. He heard additional gunshots. Some were closer and some were not as loud as the first shot. Mr. Jennings further described the gunshots as being from a shotgun (loud) and single shot (quieter). (Beck RP 694, ll. 21-25; RP 695, ll. 1-5; RP 700, ll. 3-24)

According to Mr. Stover, Mr. Carrigan fired his shotgun twice. Mr. Stover then heard two (2) additional shots. (Beck RP 496, ll. 21-24; RP 498, ll. 22-24; RP 501, ll. 12-15)

Mr. Jennings is blind in one eye. He needs a scope to be able to even shoot one hundred and fifty (150) yards. He is also on oxygen. He continued to suffer medical problems during trial. (CP 177; Beck RP 708, ll. 10-12; RP 1026, l. 25 to RP 1027, l. 23; RP 1028, ll. 2-14; RP 1043, l. 22 to RP 1046, l. 3)

Mr. Jennings stated that all of the firearms in the house belonged to him. He did admit that his son used the guns for target shooting. (Beck RP 710, ll. 14-24; RP 713, ll. 2-20).

Detective Heyen determined that seven (7) of the firearms recovered were registered to Mr. Jennings. There were more than seven (7) firearms in the cabin. Detective Heyen explained that the Department of Licensing does not require that all firearms be registered. (Beck RP 734, l. 25 to RP 736, l. 17; RP 749, l. 18 to RP 750, l. 14)

Some of the firearms were sent to the Washington State Patrol Crime Lab (WSPCL) for analysis. The bullet recovered from Mr. Carrigan's body was also forwarded to the WSPCL. The bullet was identified as a .22 long rifle (CCI brand - Stinger). (Beck RP 757, ll. 313; RP 767, ll. 5-10; RP 768, ll. 11-15; RP 773, ll. 3-7)

Richard Wyant, the WSPCL firearm examiner, excluded the rifles as being the weapon that fired the fatal bullet. (Beck RP 779, l. 21 to RP 780, l. 14)

Mr. Wyant could not eliminate one (1) of the .22 revolvers. The results were inconclusive. There were no individual marks observable on the fired bullets. There were only similar class characteristics. He opined that another weapon altogether may have fired the fatal bullet. (Beck RP 780, ll. 17-24; RP 784, ll. 18-24)

Mr. Wyant was then asked to examine the fatal bullet in relation to other test fired bullets. He filed a report dated January 15, 2014. He was unable to identify any bullets fired by the revolver as being the same as the fatal bullet. The results were again inconclusive. (Beck RP 786, ll. 15-25; RP 787, ll. 16-22)

Finally, Mr. Wyant was asked to determine the range and penetration capability of the High Standard revolver. (Exhibit 85)

He used the sights on the revolver to target a gel test dummy. He determined that the revolver could penetrate a human body at a hundred and fifty (150) yards. (Beck RP 789, ll. 1-22; RP 791, ll. 22-25; RP 795, ll. 2-3)

Mr. Wyant and Matthew Noedel, a forensic consultant retained by the defense, agreed that the fatal bullet did not reflect slippage and gas erosion. However, the bullets test fired from the revolver did show slippage and erosion. (Beck RP 809, l. 20 to RP 810, l. 24; RP 957, l. 21 to RP 958, l. 2; RP 972, ll. 8-20; RP 1007, ll. 18-20; l. 22)

No cartridge cases were submitted to the WSPCL for comparison. Detective Behymer had recovered a .22 cartridge on the porch of the cabin. (Beck RP 814, ll. 5-7)

Officer McCormick of the Department of Fish and Wildlife created an overview of the incident scene reflecting the location of the cabin and Mr. Carrigan's body. (Exhibit 103; Beck RP 408, l. 22 to RP 409, l. 2)

Sergeant Christensen of the Department of Fish and Wildlife identified the window in Exhibit 33 as Adam's window. He further indicated that a line of sight measurement, using a laser range finder, from the shotgun lying in the field to the southeast cabin window, was a hundred and thirty-four (134) yards. (Beck RP 423, ll. 11-17; RP 439, ll. 8-9; RP 445, ll. 3-14)

Sergeant Richmond observed that the trees between the cabin and the site of the body did not block line of sight from the cabin window. (Beck RP 528, l. 5 to RP 529, l. 10)

Detective Sloan interviewed Adam Jennings. Adam denied shooting Mr. Carrigan. He said his father did not shoot Mr. Carrigan. (Beck RP 886, ll. 12-20).

When Detective Sloan interviewed Adam Jennings he requested contact with attorney Michael Prince. Detective Sloan said he did not know any attorney named Prince. Mr. Prince was representing Adam Jennings in Okanogan County District Court. (Steinmetz RP 296, l. 17 to RP 297, l. 5; RP 299, ll. 9-16; RP 301, ll. 4-9; RP 305, ll. 15-24)

Bonnie Scott, who works at the Chesaw General Store, was present when Mr. Jennings apparently stated "if any hunters come on my property I will shoot them." (Beck RP 839, ll. 6-7; ll. 24-25; RP 843, ll. 20-24)

An Information was filed on November 18, 2013 charging John Jennings with one (1) count of premeditated murder in the first degree and unlawful delivery of a firearm. He was charged as both a principal and/or accomplice. (CP 264)

Mr. Jennings' case was joined with that of his son pursuant to agreement between the attorneys. The joinder occurred on December 17, 2013. (CP 254)

The original trial date of December 7, 2013 was continued on multiple occasions pursuant to either a waiver or agreement. (CP 210; CP 219; CP 221; CP 224; CP 225; CP 230; CP 240; CP 250; CP 251; CP 253; CP 353)

An Amended Information was filed on November 16, 2015. The charges remained the same. (CP 139)

Mr. Jennings was found guilty of both offenses. A special verdict form (being armed with a firearm) was answered in the affirmative. (CP 90; CP 92)

Judgment and Sentence was entered on November 24, 2015. (CP 2)

A Notice of Appeal was filed on December 2, 2015. (CP 1)

SUMMARY OF ARGUMENT

John Jennings is not guilty of unlawful delivery of a firearm to an ineligible person. The State failed to establish, beyond a reasonable doubt, that Mr. Jennings had reasonable cause to believe that his son was ineligible to possess firearms due to a prior serious felony conviction. The State did not impute any knowledge of the ineligibility factors to Mr. Jennings and failed to show he was present at the time of his son's sentencing. It can only be inferred that the stipulation relating to the serious felony was used by the jury to convict John Jennings. (Beck RP 833, l. 4 to RP 837, l. 6; RP 897, l. 4 to RP 898, l. 9; RP 952, ll. 7-11; RP 1082, ll. 5-7; RP 1104, l. 22 to RP 1105, l. 2; Exhibit 297)

Mr. Jennings is not guilty of premeditated first degree murder. The State did not establish, beyond a reasonable doubt, any overt act by Mr. Jennings resulting in the death of Michael Carrigan.

The State did not produce a murder weapon. The evidence is indicative of Mr. Jennings' inability/unlikelihood of firing the fatal shot.

The conflict of interest inherent in having two (2) attorneys from the same public defender office representing co-defendants in a first de-

gree murder trial violated the respective rights of the co-defendants to a fair and impartial trial under the due process clauses of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3.

Mr. Jennings was also deprived of effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22. Pursuing a common defense under the facts and circumstances of this case was neither reasonable nor necessary. It precluded the valid pursuit of an independent defense whereby the prosecuting attorney could not hang two (2) individuals with the same rope.

Prosecutorial misconduct during rebuttal argument constitutes a due process violation, which when considered with the other errors, requires reversal of Mr. Jennings convictions.

ARGUMENT

I. COUNT II - UNLAWFUL DELIVERY OF A FIREARM

RCW 9.41.080 states:

> No person may deliver a firearm to any person whom he or she has reasonable cause to believe is ineligible under RCW 9.41.040 to possess a firearm. Any person violating this section is guilty of a class C felony, punishable under Chapter 9A.20 RCW.

There is no definition of the following in Chapter 9.41 RCW:

1. "Deliver";

2. "Reasonable cause to believe."

The Instructions relating to unlawful delivery of a firearm state:

> A person commits the crime of unlawful delivery of a firearm when he or she **delivers** a firearm to any person who he or she has **reasonable cause to believe** would be guilty of unlawful possession of a firearm in the first degree.

(Instruction 16; CP 75) (Emphasis supplied.)

Instruction 17 states:

> To convict the defendant, John Jennings, of the crime of unlawful delivery of a firearm, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 2, 2013, the defendant **delivered** a firearm to Adam Jennings;
> (2) That the defendant had **reasonable cause to believe** that Adam Jennings was ineligible to possess a firearm because he was previously convicted in this state or elsewhere of a serious offense; and
> (3) That the delivery occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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

(CP 76) (Emphasis supplied.)

There was a stipulation presented at trial to the effect that Adam Jennings had previously been convicted of a serious offense. However, the State failed to prove that John Jennings had any knowledge of the nature of that conviction.

There is no dispute that there were numerous firearms and ammunition in the cabin.

There is no dispute that Adam Jennings had firearms in his bedroom.

There is no dispute that Adam Jennings had the key to the gun safe.

There is no dispute that Mr. Jennings admitted that his son used the firearms for target shooting.

The sole evidence linking Mr. Jennings to the phrase "reasonable cause to believe" is testimony from Detective Heyen that Mr. Jennings and his son were living together at the time of Adam Jennings' prior conviction. (Beck RP 952, ll. 7-21)

Mr. Jennings contends that in the absence of a showing that he had knowledge of the exact nature of his son's conviction, and of the prohibitions relating to that conviction, that the State failed to prove the "reasonable cause to believe" element of the offense.

There was no evidence that Mr. Jennings attended his son's prior trial, if there was a trial.

There is no evidence that Mr. Jennings was present when his son pled guilty, if and when he pled guilty to a serious offense.

There is no evidence that Mr. Jennings ever saw a copy of his son's judgment and sentence.

There is no evidence that Mr. Jennings knew of the firearm prohibition.

Mr. Jennings has been unable to locate a Washington case interpreting the phrase "reasonable cause to believe." However, that clause has been interpreted by the 10th Circuit in *United States v. Saffo,* 227 F.3d 1260 (2000). The Court ruled at pp. 36-37 as follows:

> … We hold that the "knowing or having reasonable cause to believe" standard in 21 U.S.C. § 841(d)(2) imposes a constitutionally sufficient *mens rea* requirement. In so holding, we note that the standard involves a subjective inquiry that looks to whether the particular defendant accused of the crime knew or had reasonable cause to believe the listed chemical would be used to manufac-

> ture a controlled substance. **This requires scienter to be evaluated through the lens of this particular defendant, rather than from the prospective of a hypothetical reasonable man. In this context, the "reasonable cause to believe" standard is one akin to actual knowledge**. *See State v. Smith,* 123 A.2d 369, 64-65 N.J. (1956) (stating, in the context of a discussion of a statute's "reason to believe" standard, that the "[k]nowledge within the meaning of the law … may consist of credible information of material facts and circumstances sufficient in content and quality to generate a reasonable belief.") (Citation omitted.). The "reasonable cause to believe" standard thus comports with the subjective "guilty mind" or "guilty knowledge" requirement for imposing criminal liability. As further stated in *Smith*'s discussion of a "reason to believe" statutory standard:
>
> > Guilt is personal; the determinant here is the reasoned conviction of the mind of the accused, a subjective inquiry, not a theoretical, vicarious belief of the hypothetical reasonable man, as the State and the accused would have it, akin to the standard governing reparation in damages for the civil wrong occasioned by negligence.

(Emphasis supplied.)

The State failed to provide sufficient information for any reasonable juror to come to the conclusion that Mr. Jennings had "reasonable cause to believe" that his son was ineligible to possess a firearm.

Furthermore, the State and defense counsel failed to propose an instruction on the word "deliver." There is no standard instruction for delivery of a firearm. In the absence of a statutory definition the common definition of "deliver" is:

> **(1)** To carry and turn over … to the intended recipient or recipients … **(2)** To give in to another's possession or keeping; surrender … - **Syn. 1.** Hand over, transfer, cede, yield ….

WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.)

Mr. Jennings contends that the fact that there were firearms in the cabin; some of those firearms being registered to him; others being unregistered; his son having a key to the gun safe; and the admitted use of the firearms by his son fails to meet the constitutional standard of proof beyond a reasonable doubt that a delivery occurred.

Mr. Jennings' conviction on Count II should be reversed and dismissed due to the insufficiency of the evidence. *See: State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

II. ACCOMPLICE LIABILITY

RCW 9A.08.020 provides, in part:

> (1) A person is guilty of a crime if it is committed by the conduct of another

> person for which he or she is legally accountable.
> (2) A person is legally accountable for the conduct of another person when:
> …
> (c) He or she is an accomplice of such other person in the commission of a crime.
> (3) A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it; or
> (4) His or her conduct is expressly declared by law to establish his or her complicity.

There is no indication that RCW 9A.08.020(4) has any application to the facts and circumstances of Mr. Jennings' case.

The critical evidence presented by the State against Mr. Jennings was the testimony of Bonnie Scott. On the Saturday prior to September 2, 2013 Ms. Scott indicated that Mr. Jennings made the following statement while at the Chesaw Store: "If any hunters come on my property we'll shoot them." (Beck RP 841, ll. 11-17; RP 843, ll. 20-24)

The State did not present any evidence that Mr. Jennings solicited, commanded, encouraged, or requested his son to shoot Michael Carrigan.

The issue is whether or not Mr. Jennings aided or agreed to aid his son in planning or committing the crime of premeditated first degree mur-

der. In addition, another issue is whether or not Mr. Jennings is the principal actor.

The likelihood of Mr. Jennings being the principal actor is minimal. He is blind in one (1) eye. He needs the use of an oxygen tank. He has other medical issues requiring him to use a cane when he walks.

The closest that the State came to identifying a firearm which may have been used was the inconclusive results on the .22 High Standard revolver.

A review of Exhibits 33, 102, 103 and 184 establish the fact that it would be nigh on to impossible for Mr. Jennings to have fired the fatal shot.

> In this state when it cannot be determined which of two defendants actually committed a crime, and which encouraged or counseled, it is not necessary to establish the role of each. It is sufficient if there is a showing that **each defendant** was involved in the commission of the crime, **having committed at least one overt act** ….

State v. Baylor, 17 Wn. App. 616, 618, 565 P.2d 99 (1977); *see also: State v. McCreven,* 170 Wn. App. 444, 477, 284 P.3d 793 (2012). (Emphasis supplied.)

QUERY: What overt act did John Jennings commit?

QUERY: Does the statement allegedly made by Mr. Jennings to Bonnie Scott constitute an overt act?

The phrase "overt act" has been defined in caselaw involving an attempt to commit a crime.

> … (A]n overt act is sometimes described as a direct, ineffectual act done toward commission of a crime and, where the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt.

State v. Nicholson, 77 Wn.2d 415, 420, 463 P.2d 633 (1969).

It is clear that there must be an act, it must be direct, and it must have been done with the intent to commit a crime.

The State did not establish that Mr. Jennings pulled the trigger.

The State did not establish that Mr. Jennings did anything on September 2, 2013 directed toward the death of Michael Carrigan.

> … '[A]s a general rule, every crime must contain two elements: (1) an *actus reus* and (2) a *mens rea*.' *Eaton* [*State v. Eaton,* 143 Wn. App. 155, 177 P.3d 157 (2008)] at 160 (citing *State v. Utter,* 4 Wn. App. 137, 139, 479 P.2d 946 (1971)). "*Actus reus*" is defined as "'[t]he wrongful deed that comprises the physical components of a crime,'" *Id.* (alteration in original) (quoting BLACK'S LAW DICTIONARY 39 (8th ed. 2004)), and the "*mens rea*" is "'[t]he state of mind that the prosecution … must prove that a defendant had when committing a crime.'" *Id.* (alterations in original) (quoting BLACK'S, *supra,*

> at 1006). At common law it was said that "to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will." 5 WILLIAM BLACKSTONE, COMMENTARIES *21. ….

State v. Eaton, 168 Wn.2d 476, 480-81, 229 P.3d 704 (2010).

The State failed to prove, beyond a reasonable doubt, any overt act on the part of John Jennings.

> **Mere presence of the defendant without aiding the principal - despite knowledge of the ongoing criminal activity - is not sufficient to establish accomplice liability**. *State v. Parker,* 60 Wn. App. 719, 724-25, 806 P.2d 1241 (1991). Rather, the State must prove that the defendant was ready to assist the principal in the crime and that he shared in the criminal intent of the principal, thus "demonstrating a community of unlawful purpose at the time the act was committed." *State v. Castro,* 32 Wn. App. 559, 564, 648 P.2d 485 (1982); *see also State v. Collins,* 76 Wn. App. 496, 501-02, 886 P.2d 243 (1995) ("Aid can be accomplished by being present and ready to assist."); *State v. Rotunno,* 95 Wn.2d 931, 933, 631 P.2d 951 (1981) ….

State v. Truong, 168 Wn. App. 529, 540, 277 P.3d 74 (2012). (Emphasis supplied.)

The State only established that Mr. Jennings was present in the cabin when the shooting occurred.

There was no evidence that Mr. Jennings had knowledge of ongoing criminal activity.

In order to establish that Mr. Jennings was an accomplice to the crime the State needed to establish that there was an agreement between he and his son and that he aided his son in fulfilling that agreement.

As noted in *State v. Asaeli*, 150 Wn. App. 543, 568, 208 P.3d 1136 (2009):

> To prove Vaielua was an accomplice to Fola's murder, the State had to prove beyond a reasonable doubt that Vaielua (1) knew his actions would promote or facilitate this crime, (2) was present and ready to assist in some manner, and (3) was not merely present at the scene with some knowledge of potential criminal activity. … Taking the evidence in the light most favorable to the State, we conclude that, although there was evidence that Vaielua was present at the park, that he drove Williams and others to the park, and that he was aware that some members of the group he was with were trying to locate Fola, the evidence failed to show that Vaielua was present at the scene with more than mere knowledge of some potential interaction with Fola.

Mr. Jennings asserts that the State did no better than the prosecution in the *Asaeli* case in its attempt to establish accomplice liability. It clearly failed to present any evidence that Mr. Jennings was the principal.

"The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof, though they are not favored in criminal law." *State v. Cantu,* 156 Wn.2d 819, 826, 132 P.3d 725 (2006).

The State, in Mr. Jennings' case, attempted to pull a rabbit out of its hat. The State was attempting, through inferences, to implicate him in commission of the offense.

The State proceeded against both Mr. Jennings and his son because they could not determine who actually pulled the trigger. Nevertheless, the State was still required to prove, beyond a reasonable doubt, that Mr. Jennings was either a principal or an accomplice. It did not do so.

Mr. Jennings recognizes that

> … A jury is not required to determine which participant acted as a principal and which participant acted as an accomplice. *State v. Hoffman,* 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991). **The jury need only conclude unanimously that both the principal and accomplice participated in a crime**. *Hoffman,* 116 Wn.2d at 104-05.

Personal Restraint of Heggney, 138 Wn. App. 511, 524, 158 P.3d 1193 (2007). (Emphasis supplied.)

Again, the State failed to present sufficient evidence that Mr. Jennings was either the principal or an accomplice in this case.

The prosecuting attorney, in closing argument, could not point to any act by Mr. Jennings which was an overt act. Thus, his argument continuously used the terms "they" and "the defendants."

- … The defendant's shot and killed Michael Carrigan. (Beck RP 1079, l. 16)
- The defendants in this case told people … "We'll shoot them." The defendants' murder of Michael Carrigan was premeditated. (Beck RP 1079, ll. 21-25)
- … They thought about it, they thought between the first and second shot. They thought -- beforehand. (Beck RP 1083, ll. 18-20)
- In this case -- both defendants were involved in various aspects of the crimes charged. We're really talking (inaudible) crime -- murder (inaudible). (Beck RP 1086, ll. 15-17)

- … In this case, the evidence does show beyond a reasonable doubt the defendants murdered Michael Carrigan …. (Beck RP 1087, ll. 16-18)
- Now, in this case, -- how do we know the defendants were involved? How do we know the defendants murdered Michael Carrigan?

  In addition to their statement a couple of days before they prepared for this. You have a pretty good sense of the mindset, through the testimony, through the physical photographs. They prepared. They armed themselves.

  And -- you'll see these photographs when you go back -- you look and there's a lot more than that. They armed themselves with the weapons, the caliber, the type of

ammunition specifically they killed Michael Carrigan. (Beck RP 1089, ll. 6-16)

- They armed themselves. They had modified weapon -- I'm sorry, modified ammunition. They had ammunition …

  … They practiced. (Beck RP 1089, l. 24 to RP 1090, l. 7)

- They also had -- a line of sight. And (inaudible), "well, gee, they had -- they had a view." They had a specific line of sight. (Beck RP 2090, ll. 170-19)

- They had logs stacked up -- defensive positions. They had material up here, solid material, before you got over to the stacked log defensive type of position. (Beck RP 1093, ll. 15-18)

- Does that exclude the defendants? Absolutely in now (*sic*) way. The defendants had multiple weapons. They had weapons that we know could not be accounted for. (Beck RP 1095, l. 24 to RP 1096, l. 1)
- The defendants in this case had between, the least, being very conservative, an hour and a half, upwards of two hours, from the time Michael Carrigan was shot until the time they finally came out at the call of law enforcement. Nobody else around them. Nobody else seeing what they're doing. They had plenty of time to do whatever they wanted. (Beck RP 1096, ll. 7-12)
- … T[]hey're armed, how they were set up. They had the intent and they had the opportunity and they took it. (Beck RP 1097, ll. 21-22)

- … [T]hey were prepared for it. They were going to defend themselves. They had basically done all of these things to protect themselves. The log stacks, the … speakers, the lights, … kept to themselves. They shot all this time. They practiced. They had everything ready. They had loaded weapons ready and accessible, -- at all times. They were armed when they left their house. (Beck RP 1098, ll. 1-8)
- And they practiced. And they practiced. Mr. Carrigan was that opportunity, and they took it. (Beck RP 1099, ll. 1-2)
- The defendants killed Michael Carrigan. (Beck RP 1100, l. 5)

The State was obviously in a quandary. They couldn't prove principal liability as to either Mr. Jennings or his son. Thus, the argument was directed essentially along the lines of accomplice liability. The problem is

that in trying to establish accomplice liability as to each of the defendants the State overstepped its bounds and accused each of them of being the principal.

The investigation would indicate that the fatal shot was fired from the southeast window of the cabin. This is where there were marks on the windowsill. A barrel containing ammunition was present. A pair of binoculars was on it.

Line of sight from the southeast window to the location where Michael Carrigan was shot (four hundred and two (402) feet) was out the window, through the trees, over fences, and across the road. Mr. Jennings asserts that all of the evidence is indicative of the fact that he could not have fired the fatal shot. His guilt would have to be determined strictly under an accomplice liability theory.

The State failed to establish, beyond a reasonable doubt, that Mr. Jennings committed any overt act to implicate him as an accomplice to the murder of Mr. Carrigan.

III. CONFLICT OF INTEREST

ABA Standard 4-3.5(c) provides:

> Except for preliminary matters such as initial hearings or applications for bail, **defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal**

> **case if the duty to one of the defendants may conflict with the duty to another**. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented and, in either case, that:
>
> (i) the several defendants give an informed consent to such multiple representation; and
> (ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.

(Emphasis supplied.)

Melissa McDougall and one (1) of her associates represented Adam Jennings. John Jennings was represented at trial by Michael Prince and Myles Johnson. Michael Prince is a partner of Ms. McDougall. They are in the same firm. They are the co-contractors on the Okanogan County Public Defender contract. Mr. Johnson is an independent attorney appointed to represent John Jennings after two (2) prior attorneys had with-

drawn. (CP 213; CP 215; CP 233; Steinmetz RP 210, ll. 11-12; RP 226, ll. 17-19; RP 227, l. 24 to RP 228, l. 12; RP 236, ll. 15-16; RP 384, ll. 12-14; Beck RP 46, ll. 1-4)

Moreover, attorney Prince previously represented Adam Jennings in Okanogan County District Court on driving while license suspended third degree. Adam Jennings considered Mr. Prince his attorney at the time he was arrested on the charges involved in this case.

John Jennings contends that attorney Prince's association with attorney McDougall created a direct conflict of interest between himself and his son. It created a further conflict of interest between attorney McDougall and attorney Prince. This becomes particularly apparent when considering that the serious felony stipulation relating to Adam Jennings' prior conviction was obviously used by the jury to convict John Jennings of Count II.

Neither attorney Prince nor attorney Johnson seemed to have recognized the significance between Adam Jennings' prior serious felony conviction and the need for John Jennings to know and understand its implications with regard to future firearm possession.

Either John Jennings or Adam Jennings fired the fatal bullet that killed Michael Carrigan. Only one (1) bullet was recovered. Two (2)

shots may have been heard; but there was inconclusive evidence that a second shot struck Mr. Carrigan.

Mr. Jennings raised the issue of inappropriate representation in a letter to the Court on May 25, 2015. The letter also raised an issue of a conflict of interest with his son. The trial court denied Mr. Jennings' request to have independent counsel review his then current attorney's performance. (Steinmetz RP 141, l. 23 to RP 144, l. 23; CP 220)

The commentary to ABA Standard 4-3.5 provides, in part:

> Criminal defendants have a constitutional right to conflict-free counsel. **This Standard is based upon the belief that conflicts of interest are either present or potentially present in the great majority of criminal cases where codefendants are represented by the same lawyer or law firm**, but that there are instances when such common representation is either not likely to create a conflict or when common representation is, indeed, potentially advantageous to each codefendant as part of a "common defense."

(Emphasis supplied.)

Even though there was a common defense of denial by both defendants, it was inappropriate for attorney Prince to represent Mr. Jennings when attorney McDougall, from the same firm, was representing Adam Jennings.

Defense counsel has the obligation to bring forth all evidence with regard to potential defenses. Since only one (1) of the Jennings's could have fired the fatal bullet, and there were significant issues concerning accomplice liability, John Jennings did not receive the necessary defense guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

As the commentary to ABA Standard 4-3.5 continues, it provides:

> **Frequently**, however, **the differences or conflicts are more subtle but still make counsel's effective, zealous representation of all defendants difficult, if not impossible**. During the plea negotiation stage, for example, a lawyer cannot urge identically favorable plea agreements for all of the defendants unless all are identically situated. The presence of **even slight differences** in the backgrounds of defendants or **in their cases** (*e.g.*, one defendant held a gun while the other served as a lookout) **means the strong advocacy to the prosecutor on behalf of one co-defendant necessarily undermines, by comparison, the position of the other defendants**. Similar problems are experienced by counsel during trial, whether the issue is deciding what questions to ask on direct examination or cross-examination, which witnesses will testify, or what evidence to introduce. Questions, testimony, or evidence that are particularly beneficial may indirectly reflect adversely upon other defendants. … Unless the prosecutor's evidence against the defendants and their defenses is identical, attempts by counsel to exploit weaknesses in evidence against one

> defendant necessarily make the case against other defendants appear stronger.

See: Glasser v. United States, 315 U.S. 60, 70, 86 L. Ed. 680, 62 S. Ct. 457 (1942). (Emphasis supplied.)

The record reflects that neither attorney McDougall, attorney Prince, nor attorney Johnson elected to have one co-defendant point the finger at the other co-defendant. It is John Jennings' position that the relationship between attorneys McDougall and Prince handicapped their ability to clearly analyze the State's case and to properly advise the respective defendants of their potential defenses. Significant exposure to an unjust conviction occurred with the joint representation.

As the COMMENTS to RPC 1.7 indicate, the potential for conflicts of interest is of utmost importance.

COMMENT 2 states:

> Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose

> representation might be materially limited under paragraph (a)(2).

There is no record of the defendants being advised of the conflict of interest.

There is no record that consent from the clients was requested or obtained.

COMMENT 14 to RP 1.7 states:

> Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are noncontestable, meaning that the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client's consent. **When the lawyer is representing more than one client, the question of consentability must be resolved as to each client**.

(Emphasis supplied.)

It is apparent that the attorneys did not fully consider the conflict of interest between their respective clients; although attorney Johnson did discuss it briefly with the trial court. (Steinmetz RP 321, ll. 6-20; RP 322, ll.12-24).

As recognized in *In re Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983)

> Taken together, *Holloway* [*Holloway v. Arkansas*, 435 U.S. 475, 55 L. Ed.2d 426, 98 S. Ct. 1173 (1978)], *Sullivan* [*Cuyler v. Sul-*

> *livan,* 446 U.S. 335, 64 L. Ed.2d 333, 100 S. Ct. 1708 (1980)], and *Wood* [*Wood v. Georgia,* 450 U.S. 261, 67 L. Ed.2d 220, 101 S. Ct. 1097 (1981)] create two rules. First, a trial court commits reversible error if it knows or it reasonably should know of a particular conflict into which it fails to inquire. Second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance. In neither situation need prejudice be shown.
>
> The application of these rules is not limited to joint representation of co-defendants.

Attorney Prince became involved in Mr. Jennings' case sometime late in the process. His first appearance was on behalf of attorney Johnson on September 13, 2015. (Steinmetz RP 179, ll. 5-8)

On September 22, 2015 Mr. Prince joined in a continuance motion. He also admitted prior minor involvement with attorney McDougall on the case. (Steinmetz RP 183, ll. 6-8; RP 192, ll. 16-25; RP 193, ll. 1-17)

The trial court made no in depth inquiry of attorney Prince concerning what his involvement had been with attorney McDougall. Obviously, the trial court had to know that McDougall and Prince was the law firm that had the public defender contract for Okanogan County.

Moreover, the trial court had to know that when there are cases pending in a single law firm involving criminal defendants the potential for a conflict of interest increases exponentially.

Attorney Prince continued to appear both with attorney Johnson and independently up to the time of trial. He was present during the trial. (Steinmetz RP 210, ll. 11-12; RP 227, l. 24 to RP 228, l. 12; RP 236, ll. 15-16; RP 384, ll. 12-14; RP 414, ll. 15-17; Beck RP 46, ll. 1-4)

Attorney Prince conducted the cross-examination of the State's expert and the direct examination of the defense expert. Attorney McDougall stated that she had no involvement in that portion of the case. Thus, attorney Prince was acting on behalf of both defendants during the examination of the expert witnesses. (Beck RP 757 *et seq*; RP 804, ll. 3-7; RP 957 *et seq*)

Mr. Jennings' position is that Mr. Prince's involvement in the case amounted to joint representation in contravention of the conflict of interest rules. Attorney Prince was not acting independently on John Jennings' behalf.

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

On the conflict of interest issue alone Mr. Jennings' conviction should be reversed and the case remanded for a new trial. Moreover, Mr. Jennings' defense was handicapped not only by the joint representation; but also by the fact that attorney Johnson could not approach any defense independently as a result of the relationship between attorneys McDougall and Prince.

IV. PROSECUTORIAL MISCONDUCT

Mr. Jennings contends that the following statements made by the prosecuting attorney in his rebuttal argument, along with the references to "they" and "the defendants", *infra.*, violated his right to a fair and impartial trial under the Fourteenth Amendment to the United States Constitution and Const. art. I, §§ 3 and 22:

> The argument that, "well, why do these other guns matter?" Well, they matter for other counts directly. But they matter for this count, the murder count, because in fact they show the defendants not only had multiple weapons, and all the ammunition and everything else that went along with that, but **they** also -- manipulated and -- **got rid of some**

> **weapons -- very clearly**. That's why it matters.

(Beck RP 1121, ll. 4-11) (Emphasis supplied.)

This particular reference was a direct violation of the trial court's pretrial ruling concerning other firearms. (Steinmetz RP 403, l. 11 to RP 408, l. 23)

> The defendants -- had the opportunity to have witnesses presented, have you all consider the evidence, to weigh -- you have reasonable doubt whether they committed the murder. None of which was offered (inaudible).

(Beck RP 1131, ll. 18-21)

> "… [F]ederal courts have held that comments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice. *E.g., United States v. Sanchez,* 659 F.3d 1252, 1259 (9th Cir. 2011) …; *United States v. Carter,* 236 F.2d 777, 778 (6th Cir. 2001) …."

State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014).

The prosecuting attorney's comments in his rebuttal argument were misleading and constituted a comment on Mr. Jennings' constitu-

tional rights. They deprived him of the fair trial guaranteed by both the United States Constitution and the Washington State Constitution.

In particular, the comment concerning failure to call witnesses, more probably than not, influenced the jury by implying that the prosecuting attorney knew something that defense counsel had not presented to them. Furthermore, it is indicative of the prosecutor's own belief that witnesses were not called because they would have been adverse to the defendants.

> When the missing witness doctrine is applied against a criminal defendant, certain limitations apply:
>
> > First, the doctrine applies only if the potential testimony is material and not cumulative. Second, the doctrine applies only if the missing witness is particularly under the control of the defendant rather than being equally available to both parties. Third, the doctrine applies only if the witness's absence is not satisfactorily explained …. Finally, the doctrine may not be implied if it would infringe on a criminal defendant's right to silence or shift the burden of proof.
>
> *Montgomery*, [*State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008)], at 598-99 …. **A prosecutor may "comment on the defendant's failure to call a witness" only where "it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the**

> **uncalled witness's ability to corroborate his theory of the case**." *State v. Contreras,* 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

State v. Dixon, 150 Wn. App. 46, 55, 207 P.3d 459 (2009). (Emphasis supplied.)

The prosecuting attorney never identified a missing witness. The only reasonable inference to draw from the argument is that the defendants were the witnesses referred to by the prosecutor.

The prosecuting attorney's comment on a missing witness was a red herring having potential prejudicial impact on the jury and making them wonder what the defense left out at trial and/or was trying to hide.

The prosecuting attorney's comment constitutes a shifting of the burden of proof and impacts the constitutional right to remain silent under the Fifth Amendment to the United States Constitution and Const. art. I, § 9.

Neither defendant testified at trial. Defense counsel challenged the State's expert witness with a defense expert. No other witnesses were called.

Mr. Jennings asserts that the prosecuting attorney's rebuttal argument was unconscionable and constitutes reversible err

V. CUMULATIVE ERROR

> The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

State v. Moses, 193 Wn. App. 341, 327 (2016).

Mr. Jennings has established prejudice based upon prosecutorial misconduct and a conflict of interest involving co-representation of co-defendants in a first degree murder case.

CONCLUSION

The State failed to present any evidence that John Jennings knew that his son was ineligible to possess firearms. The stipulation as to Adam Jennings' prior serious felony offense adversely impacted John Jennings' defense on Count II. Defense counsel's failure to address this matter with the trial court or in closing argument constitutes ineffective assistance of counsel.

Ineffective assistance of counsel is also established based upon the actual conflict of interest created by joint representation of the Jennings' by attorneys Prince and McDougall.

The evidence of John Jennings' involvement in the death of Michael Carrigan is so sketchy as to be almost non-existent. No overt act was established to indicate that Mr. Jennings was anything other than present at the time.

The State failed to prove, beyond a reasonable doubt, the offense of premeditated first degree murder as to John Jennings.

Mr. Jennings' convictions should be reversed and dismissed due to insufficiency of the evidence.

Alternatively, Mr. Jennings is entitled to a new trial due to the conflict of interest, ineffective assistance of counsel, prosecutorial misconduct and cumulative error.

DATED this 16th day of September, 2016.

Respectfully submitted,

s/ Dennis W. Morgan_____
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APPENDIX “A”

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Practice Information

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Firm or Employer:	None Specified
Firm Size:	Not Specified
Practice Areas:	None Specified
Other Languages Spoken:	Spanish

Liability Insurance

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Private Practice:	Yes
Has Insurance?	Yes - Click for more info
Last Updated:	01/29/2016

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Practice Information

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Firm or Employer:	None Specified
Firm Size:	2-5 Lawyers in Firm
Practice Areas:	Civil Litigation, Criminal, Family, Litigation, Personal Injury, Torts
Other Languages Spoken:	None Specified

Liability Insurance

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Private Practice:	Yes
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NO. 33910-6-III (Consolidated w/33932-7-III)

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. JOHN W. JENNINGS, Defendant, Appellant.	))))))))))))	OKANOGAN COUNTY NO. 13 1 00395 1 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 16th day of September, 2016, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

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