No. 42890-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY M. GARCIA,

Appellant.

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

The Honorable Frederick Fleming, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying appellant Johnny Garcia's motion for a mistrial after the jury was repeatedly informed of the specific nature of Garcia's prior conviction despite a stipulation under Old Chief v. United States, 519 U.S. 172, 136 L. Ed. 2d 474, 117 S. Ct. 644 (1997).

2. Garcia assigns error to the trial court's original instruction 20, the "to-convict" for first-degree unlawful possession of a firearm, which provided, in relevant part, that "the defendant had previously been convicted of Robbery in the First Degree, a serious offense." CP 202.[1]

3. Garcia further assigns error to the trial court's instruction to the jury which provided as follows:

> During closing argument, the Court realized that Instruction 20, concerning Count II, the charge of Unlawful Possession of a Firearm in the First Degree, was the wrong instruction for this case. You have now been given the correct Instruction 20 concerning Count II. You should disregard the previous Instruction 20.

CP 217[2]; 8RP 29.[3]

4. Garcia was deprived of his Article I, § 22 and Sixth Amendment rights to effective assistance of counsel.

5. Improper, highly prejudicial and completely irrelevant

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[1]A copy of the instruction is submitted as Appendix A in the separate Appendices document, filed herewith.

[2]A copy of the instruction is submitted as Appendix B in the separate Appendices document, filed herewith.

[3]The verbatim report of proceedings consists of 8 volumes, separately paginated, which will be referred to as follows:
The volume containing October 18 and 19, 2011, as "1RP;"
October 20, 2011, as "2RP;"
October 24, 2011, as "3RP;"
October 25, 2011, as "4RP;"
October 26, 2011, as "5RP;"
October 27, 2011, as "6RP;"
October 31, 2011, as "7RP;"
November 1-2 and December 2, 2011, as "8RP."

"gang" and "gun" evidence was admitted.

6. The cumulative effect of the improperly admitted evidence and improper instruction deprived Garcia of his Fourth Amendment and Article I, §§ 3 and 22 due process rights to a fair trial before an unbiased jury.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. On the first day of trial the prosecutor amended the charge of unlawful possession of a firearm, increasing it to first-degree based upon the realization that Garcia had a prior conviction for first-degree robbery.

During trial, when the prosecutor started to elicit evidence about the prior conviction, counsel agreed to stipulate to the existence of a generic prior conviction in order to avoid the jury hearing the inherently prejudicial evidence of the specific nature of the prior crime.

During closing argument, the prosecutor projected an image of the "to-convict" instruction for the firearm possession offense which specifically listed the prior conviction as a first-degree robbery. Later discussion established that the court had also read the jury a "to-convict" with the specific prior crime listed and that the jury instruction "packets" jurors had already been given contained an instruction which contained the error.

Although the parties initially agreed to correct the instructions in the packets and tell the jury a corrected instruction had been given, the next day it came to light that several of the jurors had marked crucial parts of the erroneous instruction in their individual packets, prior to the new instruction being inserted.

Did the trial court abuse its discretion in denying Garcia's motion for a mistrial where the error was extremely serious under Old Chief and its progeny, the improperly admitted evidence was not "cumulative" and the error was not properly cured?

Further, in the unlikely event the Court finds that the prejudice could have been "cured," was counsel ineffective in failing to do so?

2. Repeatedly, testifying officers referred to "gang' aspects of the case, saying things like the place where the crime had occurred was a "gang hangout" and describing the officers'

assignments with the "gang unit" and then establishing that the officers were working their assignments when they apprehended Garcia. At the same time, the jury was told that Garcia "always" brought a gun to a fight.

Is reversal required where the cumulative weight of the prejudice caused by the "gang" and gun evidence, coupled with the improper admission of the specifics of Garcia's prior conviction, deprived Garcia of his state and federal due process rights to a fair trial before an unbiased jury?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Johnny M. Garcia was charged by amended information with first-degree assault with a firearm enhancement, first-degree unlawful possession of a firearm and unlawful possession of methamphetamine. CP 7-8; RCW 9.41.010(16), RCW 9.41.040(1)(a), RCW 9.94A.530, RCW 9.94A.533, RCW 9A.36.011(1)(a), RCW 69.50.4013(1). After trial before the Honorable Judge Frederick Fleming on October 18, 20, 24-27 and 31, 2011, the jury found Garcia guilty as charged. CP 251-54. On December 2, 2011, Judge Fleming imposed standard-range sentences totaling 378 months, with 60 months as "flat time" for the special verdict. 8RP 83; CP 260-70.

Garcia appealed and this pleading follows. See CP 273-83.

2. Testimony at trial

On April 23, 2011, at about 6:30 in the evening, Tacoma Police Department (TPD) officers received a dispatch of a possible shooting. 1RP 24, 27, 29. Officers went to the area trying to find the location. Eventually, they were directed to a "garage shed" which appeared to have been converted into an apartment. 1RP 24, 27, 29.

The man who gave some of the officers that direction was named Phillip Noel. 1RP 29-30. A Puyallup Tribal Officer who responded to the dispatch described Noel as standing in a grassy area "kind of wandering back and forth" and acting "odd." 1RP 70-72. Noel also had blood on his hands. 1RP 72.

At the garage apartment, an officer kicked open the partially-closed front door and officers then entered, guns drawn and announcing "police!" 1RP 33-35. Inside, they saw a man slumped over on the couch holding his stomach. 1RP 36. The man had blood on his chest, stomach and arms and one of the officers thought it appeared that he had "at least one gunshot wound." 1RP 41. The man would later be identified by a Tribal Officer based on "prior contacts" and by self-admission as Mark McCloud. 1RP 41.

The fire department was called in to provide medical treatment and officers began to process the scene. 1RP 43. Several officers who asked McCloud what had happened and who had shot him said McCloud was not willing to say. 1RP 43, 52, 92.

A Tribal Officer testified that, when he had entered, he had seen a "native female peeking out" from the upstairs loft. 1RP 42-45. He notified the others and officers detained the woman while they tried to determine what had occurred. 1RP 42-45, 79. The woman had injuries to her face and watery, puffy, swollen and bruised eyes. 1RP 80-82, 2RP 100. TPD officer Robin Blackburn described the woman as "uncooperative" because she would not answer any questions and gave the name, "Wauleia McCloud-Simmons." 2RP 101. It was later established that the woman

was actually Tara McCloud-Shanta, a cousin of McCloud. 2RP 102, 4RP 30.

Despite labeling McCloud-Shanta "uncooperative," Blackburn admitted that the woman actually gave officers information, describing two men she said she saw. 2RP 102-106. McCloud-Shanta described seeing a "native" male, about 23 years old, approximately 5'3" in height and weighing about 200 pounds, as well as a second person who could have either been a female or a male, with light brown hair and a ponytail, light skin, about 20-30 years old. 2RP 105-106. McCloud-Shanta also told officers she was sleeping upstairs when "Marcus" and an unknown male had walked up the stairs. 2RP 106.

At trial, McCloud-Shanta recalled a female officer patting her down that evening. 4RP 51. McCloud-Shanta did not recall being asked questions by the officers and explained that she was drunk at the time. 4RP 51. She did not recall giving officers a different name but confirmed that "Wauleia McCloud-Simmons" was her sister. 4RP 52. Not only did McCloud-Shanta not remember telling the officer anything, she could not recall the officer asking her anything. 4RP 54.

McCloud suffered a gunshot wound to the abdomen which injured his intestines. 5RP 7-10. An officer who went to the hospital testified that McCloud's family told him who they thought might have been involved in the incident. 1RP 47.

Another officer stated his opinion that, based on the statements he had heard about, it appeared to him that "the victim and the witness there knew who the person was that shot them." 3RP 50. He also said that he

had some information from the Puyallup Tribe about who they thought the "shooter was," then named that suspect - Johnny Garcia. 3RP 50-51.

At trial, McCloud testified that he really did not remember the day he got shot but only remembered waking up later in the hospital. 5RP 25-27. He also was not aware of any injuries McCloud-Shanta had suffered in April of 2011 and, when shown pictures of her with black eyes, did not remember having seen it before. 5RP 31-32.

McCloud did not really recall speaking to police or paramedics but thought he had told them he did not know what had happened and did not know who had done it. 5RP 34. He did not know Garcia and did not recognize him in the courtroom. 5RP 37.

An officer testified that, after the incident, McCloud was willing to give police access to his medical records but did not want to otherwise talk about the incident. 6RP 93. The same officer told McCloud he had "heard that the reason the fight happened and subsequent shooting was because Tara had been assaulted" and McCloud confirmed it was "something like that." 6RP 93-94.

The officers kept trying to talk McCloud into saying more and one asked directly, "did Gizmo shoot you?" 6RP 94, 7RP 51. McCloud answered, "yes." 6RP 94, 7RP 51. An officer testified that McCloud also said, "Gizmo always brings a gun to a fight." 6RP 94. According to the officer, McCloud said they knew each other well and had been roommates for awhile. 6RP 94. Garcia was also known as Gizmo. 6RP 41.

Garcia's ex-girlfriend and the mother of his child, Sophia Ocasio-McDonald, testified that she received a phone call from a friend who had

claimed that Garcia had shot McCloud, so Ocasio-McDonald talked to Garcia about it. 4RP 15-20. She claimed that Garcia said he and McCloud-Shanta had gotten into a fight when he brought some stuff over at McCloud-Shanta's request. 4RP 21. Garcia described being confronted by McCloud, who threatened him and said, "you can beat up a bitch but you can't beat up a man." 4RP 22. According to Ocasio-McDonald, Garcia thought McCloud was going to fight him, so he shot McCloud and then, when McCloud tried to grab the gun, fired two more shots. 4RP 22. Ocasio-McDonald described Garcia as "concerned" and "remorseful," saying he asked if McCloud was okay. 4RP 21.

Ocasio-McDonald conceded that she still loved Garcia, however he was with McCloud-Shanta, who Ocasio-McDonald said she also cared about very much. 4RP 23-26. Ocasio-McDonald also admitted that she had believed that *she* and Garcia were "together" when Garcia had started dating McCloud-Shanta. 4RP 25. Ocasio-McDonald also thought that Garcia and McCloud-Shanta had broken up at the time that she claimed she had this conversation with Garcia. 4RP 27-28.

Ocasio-McDonald told police about what she said Garcia had told her when she herself was arrested. 4RP 27-28.

Noel testified in detail about that evening and what he said occurred. He said he and McCloud had run into each other at a gambling place that afternoon and ended up going to the garage apartment which belonged to a friend, Darryl Oya. 2RP 22. When they arrived, McCloud-Shanta was on the couch and there were possibly a "couple more people there leaving or. . .already walking away." 2RP 24. At some point,

McCloud-Shanta, who was talking on a cellular phone, got up off the couch, seeming to Noel a little "pissed off." 2RP 27. McCloud-Shanta said something like, "what the hell," then threw her phone at him, telling him to find her a cellular telephone charger or get the phone "charged up or something." 2RP 26-27.

At that point, Noel said, McCloud and McCloud-Shanta started talking to each other and McCloud was kind of "growling." 2RP 29. McCloud also said something like "that nigger," and McCloud-Shanta also used the same racial slur, saying "nigga' hung up on me." 2RP 29-30. When Noel asked what was wrong, McCloud said, "ah, nothing man, just this guy is tripping," while McCloud-Shanta said it was not a "big deal." 2RP 29. McCloud then started getting ready to "take a shower and stuff" and McCloud-Shanta continued looking for a charger and yelling about it. 2RP 29-33.

Noel testified that he was now unhappy because suddenly the night was not really relaxing for him any more, having "turned more busy and shit." 2RP 33. He also was thinking he might have to walk home, a fair distance, because of what might be going on. 2RP 30.

But Noel also said that everything seemed "normal" until McCloud "popped" Noel in the head and said, "got some guys rolling up." 2RP 34. McCloud then went outside and came back in with some men, introducing Noel to them. 2RP 34. For a few minutes there was just sort of getting "caught up," but one of the guys was also talking directly to McCloud-Shanta. 2RP 37. Noel described the man as a "nate," dark complected and shorter, with cornrows in his hair. 2RP 37.

Noel said that the shorter guy started getting "a little agitated" and "a little louder." 2RP 38. Noel started looking over at him, then made eye contact with McCloud. 2RP 38. Noel was hoping not to have to get involved but felt he might have to if the shorter guy did something like hit McCloud-Shanta. 2RP 39. Noel admitted that the "agitation towards the female" did not last long and was not "a real bang out loud fight," but Noel nevertheless looked at McCloud as if to say he should be "the man of the house" and "handle whatever." 2RP 30.

It was at this point that "everyone just kind of stood up all at once" and McCloud and the shorter man sort of "focused on each other," with things getting "louder." 2RP 30, 38-39. McCloud and the shorter man took two steps or so towards each other and Noel figured it was going to come to blows. 2RP 40. McCloud said something like "nigga right here" or something. 2RP 41. Noel did not have any question in his mind at that point that "something is going to go down." 2RP 41.

Noel could not see the other, taller man at the time. 2RP 41. The shorter man, however, was sort of next to Noel, so Noel thought he should hit that guy. 2RP 42. He started to turn and pulled back his arm to hit the guy when he saw a little chrome gun go by his face and heard it go off three times. 2RP 42-45.

Noel made it clear that the man who shot was not aiming the gun at all. 2RP 44. Instead, Noel said, the man was doing the "whole sideways thing." 2RP 44.

In fact, Noel was pretty sure the guy had shot at the ground. 2RP 42. The gun had not "come up" and had instead appeared to be shot

downwards. 2RP 42. Noel started laughing "like, these crazy bastards." 2RP 42. He looked at McCloud, who was not flinching, doubled over or anything. 2RP 44.

Noel was still laughing a moment later when McCloud said, "the nigga' shot me." 2RP 45, 48. Noel then grabbed McCloud, who was now "bent over" and had an obvious injury to his right arm. 2RP 48-49. Noel told McCloud-Shanta to call police and tried to administer some first aid to McCloud, who was talking and lucid. 2RP 49-51. Frustrated with how long it was taking help to arrive, Noel ran out of the apartment and down the alley onto a nearby avenue, where he ran into the first officer. 2RP 52.

Noel was frustrated by the officer, who was focused on asking who had shot McCloud instead of getting McCloud help. 2RP 53. Noel ended up running back out into the avenue and getting the ambulance pointed in the right direction. 2RP 53-54.

Noel was then arrested and, he said, "treated as a suspect on the scene." 2RP 58. Part of the reason he was probably suspected was that he had blood on his hands - not only from McCloud but also from "prior engagements." 2RP 58. He did not elaborate further. 2RP 58. Noel also had blood on his shirt and shoes. 2RP 58.

Noel said that he answered direct questions from police but did not write a statement until later. 2RP 59, 78, 81. He was shown two "sheets" of photographs by police, each with a picture of six men. 2RP 84-91. From one, he picked a picture of Johnny Garcia, identifying him as the shooter. 2RP 61-62, 3RP 57, 59. From another, he identified a man nicknamed "KB" whose real name was Mason Filitaula, who Noel said was

with Garcia that night. 3RP 60-61. In the courtroom, however, Noel did not recognize Garcia as the shooter of McCloud. 2RP 63.

Noel admitted to a defense investigator that he had taken his "best guess" in picking pictures and that, indeed, police officers *told* him to make such a guess. 2RP 86. His memory was very foggy. 2RP 86. Also, he was affected by the methamphetamine he had ingested that night. 2RP 88-92.

At some point, after that night, Officer Blackburn realized the name given by the woman she had seen in the garage apartment may also have been mentioned in relation to an incident the day before, which Blackburn called "[a]n aggravated assault," possibly a "domestic violence aggravated assault." 2RP 101. A neighbor of the garage apartment, Cathy Elliot, testified that, on that day, she had been in her living room, heard a woman crying for help, gone outside, heard a scream of "please, don't hurt me" and run back home to call police. 6RP 11, 96-97. After that, Elliot saw someone leave who she described as not "very tall," wearing a baseball hat, with olive skin, brown eyes and dark curly hair. 6RP 11. A woman Elliot had never seen before came outside, saying something like "I need help." 6RP 12. The woman had blood on her hands, lacerations on her face and was bleeding. 6RP 12.

According to Elliot, when Elliot told the woman that Elliot had called police for help the woman had said, "I don't want you to call the police." 6RP 12. The woman then said she wanted to call her sister and asked to use the neighbor's phone but the neighbor declined, saying, "no, you have got blood all over you." 2RP 13. At that point, the woman went back inside and, when the police came, initially refused to open the door.

6RP 13. When the woman eventually came out, Elliot opined, the woman did not want to give information to the police or talk to them but just said she wanted to call her friend or her sister. 6RP 14.

Elliot looked at a montage to try to identify the man she thought she saw but was only able to narrow it down to two of six pictures. 3RP 66, 6RP 16. In court, however, she was able to identify the defendant as the man she thought she saw leaving the house that day. 6RP 17.

Elliot admitted, however, that she was aware of where a defendant sat in the courtroom at the time that she pointed out Garcia. 6RP 20.

An officer who responded to Elliot's call saw a broken window and furniture, as well as blood on the floor. 6RP 49. The office looked all around and could hear someone "stirring" inside but initially got no response. 6RP 49-50. After awhile, a female voice said she did not need help and wanted police to leave. 6RP 50. The officers now present called their supervisor, who ordered them to kick down the door. 6RP 51, 7RP 11. Once inside, officers saw a woman whose facRP 51, e appeared to one officer to be "badly, badly injured." 6RP 50. The officer said he assumed that was "from the domestic situation that transpired earlier." 6RP 51.

The woman was angry, shouting and arguing with officers. 67RP 11. Although she initially gave the name "Wauleia Simmons," she was identified as McCloud-Shanta. 6RP 52, 7RP 13.

An officer described McCloud-Shanta as "somewhat uncooperative and somewhat hostile." 6RP 51. Ultimately, however, McCloud-Shanta identified the perpetrator, saying that Jonathon Redding had wanted to get money from her. 6RP 53, 7RP 16. Police never tried to find Redding other

than looking for his "true name and date of birth." 7RP 16. An officer said he thought McCloud-Shanta said something about Redding having taken a car from her but that police did not verify that. 7RP 17.

At trial, McCloud-Shanta did not remember much of the incident involving McCloud and testified that there was no "domestic violence" incident between her and Garcia the day before McCloud was shot. 4RP 30-33. Explaining her lack of memory, McCloud-Shanta said she had not been really sleeping or living anywhere at the time in question because she was using methamphetamines, drinking a lot and smoking formaldehyde. 4RP 33-34. She also suffered from Post-Traumatic Stress Disorder because of her drug use and other things "like with the law-wise," and was an alcoholic who went to the liquor store daily and drank every day. 4RP 34.

On the day of the shooting, McCloud-Shanta said, she had black eyes because she had been drunk and gotten into a fight with several people. 4RP 40. She said some girls had assaulted her near the mall, but she did not call police because anything to do with the police stresses her out and causes problems with her PTSD. 4RP 42-43. But she also said she spoke to officers that day, although she could not recall if they had taken her to the hospital or not. 4RP 45. McCloud-Shanta denied being in a "domestic violence" incident involving Garcia on the 22nd and said he had not given her the black eyes. 4RP 45-48, 5RP 59.

But the officer remembered hearing Tara say something about having been jumped by three females to someone at some point. 7RP 39. McCloud-Shanta's mother said she had been told by her daughter that "she was jumped." 6RP 41.

Regarding the shooting, McCloud-Shanta remembered being upstairs and that she went to sleep when no one was at the garage apartment but woke up and officers were there. 4RP 48. She also remembered officers bringing her down and putting her in the back of the police car. 4RP 47.

Nancy Games, McCloud-Shanta's aunt, was there when police went to speak to McCloud-Shanta. 6RP 29-43. Garcia said McCloud-Shanta was screaming and "cussing" while her mother and aunt were telling her she should just "be cooperative." 6RP 29-43, 7RP 32.

Games denied, however, telling police that McCloud-Shanta had said Garcia was the shooter. 6RP 32. She also denied handing a statement to police from McCloud-Shanta, although two officers testified to the contrary. 6RP 41-45, 87, 7RP 29. An officer also said that McCloud-Shanta "eventually" admitted to the officer that she had written and signed a statement, and that she said "yes" when asked if Garcia had been the one to assault her. 7RP 32-39.

Ocasio-McDonald's mother testified that McCloud told her a different version of events. He said he had been walking, Garcia had pulled up in a vehicle, they started fighting and Garcia pulled out a gun and shot McCloud. 6RP 70. McCloud also admitted to her that he had been out looking for Garcia so he could beat Garcia up. 6RP 70-71. Ocasio-McDonald's mother thought Garcia and someone named "Mason" or KB were "driving around" looking for McCloud at some point. 6RP 73.

Ocasio-McDonald's mother also admitted that Garcia had dated her daughter and was "going back and forth" between her daughter and

McCloud at the time. 6RP 76. She conceded that this situation had not worked out "so well" for Ocasio-McDonald, or her mother. 6RP 76.

Mason Filitaula, also known as "KB," testified that he did not really know Garcia or "Gizmo" well or "hang with him." 6RP 83, 102. KB said he had not been in the garage apartment, although he had dropped people off there (not Garcia). 6RP 104-106. KB did not know a shooting had taken place at that apartment and said he was not there at the time of or involved in the incident. 6RP 106.

During a search incident to Garcia's arrest, a small baggie of what later tested positive for methamphetamine was found in his left front jeans pocket. 3RP 88, 4RP 71.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT A MISTRIAL AFTER JURORS WERE IMPROPERLY INFORMED OF THE DETAILS OF THE PRIOR SERIOUS OFFENSE DESPITE THE STIPULATION OF THE PARTIES TO EXCLUDE THAT HIGHLY PREJUDICIAL EVIDENCE

When there has been a trial irregularity, this Court determines whether the trial court's refusal to grant a motion for mistrial was an abuse of discretion by looking at:

> (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.

State v. Young, 129 Wn. App. 468, 472-73, 119 P.3d 870 (2005), review denied, 157 Wn. App. 1011 (2006). Reversal is required if there is "a 'substantial likelihood' the prejudice" from a trial irregularity could have "affected the jury's verdict." See State v. Grieff, 141 Wn.2d 910, 921, 10

P.3d 390 (2000) (citation omitted).

In this case, this Court should reverse, because the trial court abused its discretion in denying Garcia's motion for a mistrial after the jury repeatedly heard the improper information that Garcia had a previous conviction for first-degree robbery when the parties had entered into a stipulation under Old Chief, supra. Further, the errors cannot be deemed "harmless."

a. Relevant facts

Initially, Garcia was charged with, *inter alia*, second-degree unlawful possession of a firearm. CP 1-2. On the first day of trial, however, the prosecutor amended that charge to first-degree, stating that Garcia had a prior conviction for first-degree robbery which would elevate the unlawful possession to a first-degree crime. 1RP 5. Counsel told the court he did not think the amendment "prejudices us in any way," admitting that he was "aware of what the charges would be[.]" 1RP 5.

After several days of trial, when TPD officer Vicki Chittick was testifying, the prosecutor started to show her "a series of exhibits," asking if the officer was "aware of what Mr. Garcia's criminal history was." 7RP 51. Counsel objected and the prosecutor responded by referring to "Count II." 7RP 51. Counsel said, "Count II would involve one event, proof of one event." 7RP 51. The prosecutor responded, "[o]r the one element," and counsel then said, "[w]ell, I'm at [a] loss, I'm not sure where they're going." 7RP 51.

After the court overruled the objection, the prosecutor again turned to documents, including one which was the "Information" and another

which was the "Probable Cause statement" for the prior conviction. 7RP 51-52. Counsel objected:

> Your Honor, I'll object again. As I understand it, one of the elements the State has to prove is that Mr. Garcia was convicted of a serious offense. So I don't know what all these documents are necessary for.

7RP 52. The prosecutor said he was just trying to "lay the groundwork" but the court sustained the objection as to "relevance." 7RP 53.

A moment later, with the jury out, counsel expressed surprise, saying that he had thought the prosecution would "just use a certified copy of the J&S for the serious offense." 7RP 53. The prosecutor said he did not want the jury to think he was hiding evidence from them about the prior conviction so he wanted to give them everything. 7RP 53.

The court pointed out that, in order to prove the first-degree unlawful possession crime, all the prosecution had to prove was that Garcia was convicted of "a serious offense," not the specifics of that prior offense. 7RP 53. Counsel then said, "we are not contesting that," telling the court he had seen some courts "do a stipulation" to avoid telling the jurors the specifics of the prior conviction. 7RP 54. Counsel thought it was "entirely up to the Court if you do it that way," but the court disagreed, thinking it was up to the parties. 7RP 54. The prosecutor then conceded that the law required him to accept any stipulation on this point and thus that the decision whether to stipulate is "entirely up to the defense." 7RP 54.

The court then asked if Garcia was willing to stipulate that he had been convicted of a serious offense and counsel said, "of course." 7RP 54. The court later read a statement that, as of April 23, 2011, Garcia had been

previously convicted of a serious offense which made him ineligible to possess a firearm as required to prove the first-degree unlawful possession of a firearm charge. 7RP 62-63. In discussing the jury instructions, neither party nor the court noticed any error in the instructions relating to the unlawful possession count. See 8RP 3, 76-80.

Later, during initial closing argument, when talking about Instruction 20, the "to convict" instruction for that count, the prosecutor "put that instruction up," apparently projecting it for jurors to see on a screen. 8RP 16. The prosecutor then went on with his argument, noting that there was a stipulation which showed that Garcia had been convicted of a prior serious offense as required. 8RP 16.

After the prosecutor was through with initial closing, counsel for Garcia began his closing but was interrupted by the prosecutor asking, "[y]our Honor, can we have a brief hearing outside the presence." 8RP 21. The jury was excused and the following exchange then occurred:

> [PROSECUTOR]: From now on when we review instructions I don't think I want to look at them on the overhead. Did the Court notice the problem with the to convict on the Unlawful Possession of a Firearm with a Deadly Weapon?
>
> THE COURT: Says Robbery.
>
> [PROSECUTOR]: I would ask the Court amend the instruction to include the prior serious offense. Obviously, the instruction was drafted at the point in time when we didn't have a stipulation. Subsequently, during trial, there was a stipulation, which means that they know the necessary predicate offense which is a serious offense was committed, but the instruction literally requires them to conclude that he was convicted of Robbery in the First Degree and there's been no evidence of that because of the stipulation.

8RP 21-22. The prosecutor said he had "tried to sanitize it in the midst of the argument" by using other language and "pulling it off the overhead as

quickly as I could without looking too obvious about it." 8RP 22.

At that point, counsel admitted that he "didn't catch this either." 8RP 22. The court said it had noticed the issue but "it was during the time I was reading it, and I had already given a copy to the jury." 8RP 22. Counsel said, "obviously, the record shows that we read it wrong to them." 8RP 22. The court confirmed that the improper instruction, containing the specific information about the nature of the prior conviction, had been read to the jury, as well. 8RP 24.

After some discussion, the parties agreed to have the court tell jurors there was a corrected instruction but not specify the correction. 8RP 25. Counsel agreed, saying, "I think the chance of them remembering what changed is slim" and "[i]t's the best we can do." 8RP 25.

When the parties returned after a short recess, however, new information had come to light. 8RP 26. When the improper instruction was being pulled from jury packets, counsel had found at least two sets where the respective jurors had already marked the improper language with emphasis. 8RP 26. In one, the juror had underlined the word "robbery," while in the other, a juror had "starred" the sentence. 8RP 26; see CP 203-16 (copies of all of the improper instructions taken from jury packets are contained in Appendix C of the Appendices document, filed under separate cover).

As a result, counsel said, he could no longer agree to just changing the instruction. 8RP 27. Instead, he said, only a mistrial would be sufficient to cure the prejudice caused to Garcia by the disclosure of the specific nature of the prior serious offense. 8RP 27.

The prosecutor conceded that the two marked juror packets had included specific emphasis on the improper instruction. 8RP 27. Despite this fact, which he called "unfortunate," the prosecutor argued that there was not "substantial prejudice" to Garcia. 8RP 27. The prosecutor said he would agree to a limiting instruction, although he admitted that giving such an instruction "adds additional emphasis" to the improper evidence. 8RP 27. The prosecutor also appeared to try to relieve himself of any responsibility for having projected the wrong instruction, saying that the instruction had been drafted before the parties' stipulation and if he had known there was going to be a stipulation, he would not have drafted the instruction that way. 8RP 27. He also suggested that the parties could later "poll" the jury later about the potential effect of the improper evidence. 8RP 28.

The prosecutor conceded, however, that the improper instruction was "on the overhead long enough to look up and see the robbery words on the instruction." 8RP 30.

The court said it would "take responsibility" for the error and that someone "looking at this, obviously, will make a decision whether or not a mistrial should have been granted." 8RP 29. The judge also said that he did not think the issue "rises to" that level, denying the motion for a mistrial and instead giving an oral instruction to which counsel now objected, which told the jury:

> During closing argument, the Court realized that Instruction 20, concerning Count II, the charge of Unlawful Possession of a Firearm in the First Degree, was the wrong instruction for this case. You have now been given the correct Instruction 20 concerning Count II. You should disregard the previous Instruction 20.

CP 217; see 8RP 29.

b. The trial court erred in denying the motion for a mistrial

The trial court abused its discretion in refusing to grant Garcia's motion for a mistrial and in its rulings on this issue. Further, there is more than a substantial likelihood that the resulting prejudice affected the jury's verdict.

At the outset, it is important to note what this case is not. This is not a case in which the prosecution is claiming that the specific nature or details of the prior conviction are somehow relevant and admissible to prove a fact at issue in the case. See, e.g., State v. Herzog, 73 Wn. App. 34, 44, 47, 867 P.2d 648 (1994) (prior conviction for a "signature" crime relevant to identity).

Instead, here, the prior conviction was being admitted solely to prove Garcia's legal status, i.e., that he was someone who had a prior conviction which rendered him, by law, unable to legally have a gun. See Old Chief, 519 U.S. at 180-81. In such situations, the U.S. Supreme Court has held, there are certain rules. Id. The broad discretion prosecutors enjoy to present their case as they see fit is not usually affected by the defendant's willingness to stipulate to certain facts, because it is the "Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense." Old Chief, 519 U.S. at 183.

This principle, however, does not apply where the prior conviction is being admitted solely to prove legal status:

[t]his recognition that the prosecution with its burden of persuasion

> needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him.

Old Chief, 519 U.S. at 183.

Put another way, when a prior conviction is being used solely to prove legal status, the details of the prior conviction themselves are irrelevant - at least as to any permissible purpose. Old Chief, 519 U.S. at 190-91. Because "the fact of the qualifying conviction is alone what matters under the statute" defining the possession crime, all the jury needs to know in that situation is that the prior conviction "falls within the class of crimes that [the Legislature] thought should bar a convict from possessing a gun," not any details or even the name of the prior crime. Id. Thus, so long as the jury is told that there is a qualifying prior conviction, all of the relevance for that prior conviction under the statute has been proved. Id.

In stark contrast, the Supreme Court noted, there is "no question" "that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant." Old Chief, 519 U.S. at 185. Such prejudice, the Court held, "will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning." Id. Prejudice was especially obvious, said the Court, if the prior conviction was for a crime involving a gun or one similar to the pending charges. Id. But it was also present in cases, for example, where a prior conviction was for assault and current

convictions involved use of a gun. Id.[4]

Balancing that prejudice against the evidentiary value of the nature of the prior crime when the prior crime is used to prove "legal status," the Supreme Court found the scale tipped entirely to one side. Old Chief, 519 U.S. at 190-91. There is little or no evidentiary difference, the Court held, between allowing the prosecution to introduce a document saying that the defendant was convicted of a specific crime and thus has a certain legal status as opposed to a document saying he was convicted of a generic crime and thus has the same status. Id. Indeed, the Court noted, the only really difference between those two documents is "the risk inherent in one and wholly absent from the other." Old Chief, 519 U.S. at 191.

Because there was no legitimate evidentiary purpose for introducing the nature of a prior of offense if that offense was being used only to prove legal status, and because of the extreme prejudice introduction of such evidence incites, the U.S. Supreme Court concluded, neither a court nor a prosecutor can deny the defendant the opportunity to stipulate to a prior generic conviction in order to keep the prejudicial evidence of the nature of a prior conviction from the jury in such cases. 519 U.S. at 174.

The decision in Old Chief reflects the same conclusion that courts in this state have also expressed about the extreme prejudice prior crime evidence has in a criminal case. Here, it has long been "recognized that

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[4]While the Old Chief Court noted that it was theoretically possible that the nature of a prior offense could carry less prejudice, the examples it found were limited to prior convictions for an offense "so far removed" from the current charges as to be unlikely to engender any prejudice or an extremely old conviction for a "relatively minor felony." Old Chief, 519 U.S. at 185-87.

evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995). Further, it is well-known that "[t]he danger of prior conviction evidence is its tendency to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality." State v. Jones, 101 Wn.2d 113, 120, 677 P.3d 131 (1984), overruled in part and on other grounds by, State v. Brown, 111 Wn.2d 124, 157, 761 P.2d 588 (1988).

Thus, in State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998), this Court noted that "[e]vidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial." 90 Wn. App. at 62. The Court then found that the evidence of the specific nature of the defendant's prior conviction was just so prejudicial. The defendant in Johnson was charged with assault and being a felon in possession of a firearm, and the prior conviction was for rape. 90 Wn. App. at 59. The defendant had stated a willingness to stipulate to a generic prior but the trial court had declined the invitation. 90 Wn. App. at 60.

Applying Old Chief, this Court pointed out that the evidence of "the defendant's legal status as a felon" was equally well established by either the proposed stipulation or the evidence which had been admitted, naming the prior crime. Johnson, 90 Wn. App. at 63. Further, this Court noted, the proffered stipulation "would have proved conclusively that Johnson was a felon," so that "the probative value of the conviction, as compared to the stipulation, was negligible." Id.

Further, this Court noted, under Old Chief,

> [t]he unfair prejudice was significant, i.e., there was a significant risk that the jury would declare guilt on the two assault charges based upon an emotional response to the rape conviction rather than make a rational decision based upon the evidence.

Johnson, 90 Wn. App. at 64. As a result, the Johnson Court found that the trial court had abused its discretion in refusing to accept the stipulation.[5]

Here, the error is not that the judge refused to accept the stipulation. Instead, the error is that, even though the parties agreed to a stipulation in order to avoid the prejudicial admission of the details of the prior conviction, the jury was nevertheless repeatedly given that information. First in the reading of the instructions by the judge, then projected on an overhead for a time, and also in the packets of instructions jurors had been given, jurors were told the nature of the prior conviction was "Robbery in the First Degree."

These extremely serious trial irregularities compel reversal. Young, supra, is instructive. In Young, the defendant was convicted of murder, assault and unlawful possession of a firearm. 129 Wn. App. at 470. The parties had all agreed that the nature of the prior conviction (an assault) should not be disclosed to the jury, which would instead hear a stipulation that the defendant had the required prior generic conviction. 129 Wn. App. at 473-75.

At the initial introduction of counsel and the parties to the jury venire, however, the trial court had read the charging document to the jury, indicating that Young's prior conviction was "of a serious offense. . .to wit:

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[5]The court reversed based on cumulative error. See discussion, *infra*.

Second Degree Assault." 129 Wn. App. at 471. When the jury was later excused, Young moved for a mistrial, which the court denied. Id.

On appeal, the Court first rejected the prosecution's attempts to claim "invited error" based upon the fact that defense counsel had asked the court to read the charging document to the venire. 129 Wn. App. at 471-72. Because there had been an agreement not to disclose the nature of the prior offense, the Court said, the trial court's reading of the information was "a trial irregularity no one intended," rather than "invited error." Id.

Further, the Court held, it was an abuse of discretion for the trial court to deny the motion for mistrial. Id. Put simply, the Court held, the disclosure of the nature of the prior conviction "created prejudice so substantial that it could be cured by nothing short of a new trial." 129 Wn. App. at 473. Citing Old Chief and Johnson, the Court noted that evidence of the specifics of a prior conviction used to simply prove legal status caused "unfair prejudice" which "was significant," because it raised a serious risk that the jury would declare guilt on the current charges "based upon an emotional response" to the prior conviction, rather than making "a rational decision based on the evidence." Young, 129 Wn. App. at 474, quoting, Johnson, 90 Wn. App. at 63.

Put another way, "revealing a defendant's prior offense is prejudicial in that it raises the risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged." Young, 129 Wn. App. at 475. Indeed, the prejudice caused by such evidence was so obvious and strong that the Young Court said it could not really be questioned, especially when violent felonies were involved:

> No one can seriously dispute that disclosure that an accused has been previously been convicted of second degree assault is not a serious irregularity that is inherently prejudicial. Here, like the prior conviction,. . .two of the current charges, are also violent felonies - murder and first degree assault. . . Disclosure of this prejudicial information to the jury was inherently prejudicial.

129 Wn. App. at 475.

Finally, the Court rejected the idea that the introduction of the nature of the prior conviction into the trial was "cured." Id. Even though the jury was given a general instruction that the charging document was not "proof of the crimes charged," that was not sufficient. Young, 129 Wn. App. at 476-77. While juries are presumed to follow instructions, the Court held, the instruction given had failed to "expressly direct the jury to disregard" the offending evidence. Id. Further, the Court noted, the jury was not given a limiting instruction telling them it could only consider the prior crime for the purpose of determining guilt on the possession offense but for no other purpose. Id.

As a result, the Court concluded, "even if one assumes that any instruction could have cured this trial irregularity," because the jury was never told to disregard the specific evidence, the general instruction could not "cure" or "ameliorate the inherent prejudice of disclosure." 129 Wn. App. at 477-78. The jury was instead "left with the knowledge that Young was previously convicted of. . . a violent crime" before it even heard the state's case on the current charges of violent crime. Id. However inadvertent, the prejudice remained and reversal was required. Id.

Just as in Young, in this case, Garcia had a prior conviction which was relevant only to prove his legal status as prohibited from possessing a

firearm. Also just as in Young, that prior conviction was for a violent crime and the defendant was accused of a current, violent crime. And just as in Young, the fact that the error was "inadvertent" does not erase the prejudice it engendered.

Notably, in Young, there was only a single mention of the prohibited information before the jury was selected. Here, there were multiple mentions - first from the court reading the instruction as part of the law the jury was supposed to apply, then with the improper information projected for the jurors to see for a time and also, most significant, in the instruction packets jurors were not only given but clearly read and considered - right before deliberations began. Thus, instead of the single reference in Young, there was far more evidence of the improper information given to the jury, and it was done just prior to deliberations, so it was fresh in jurors' minds.

Further, it is significant that the instruction was not just read but projected as an image and viewed by jurors in writing. Studies have shown that visual images such as that used here have much greater impact on a jury, and that "juries remember 85 percent of what they see as opposed to only 15 percent of what they hear." Chaterjee, *Admitting Computer Animations: More Caution and a New Approach Are Needed*, 62 Def. Counsl. J. 36, 44 (1995). And such images are "more memorable for jurors and will be more readily recalled" during deliberations than information transmitted orally. Caldwell, et. al., *The Art and Architecture of Closing Argument*, 76 Tul. L. Rev. 961, 1042-44 (2002).

In addition, as in Young, the error here was not "cured." The

"curative" instruction here only told the jury they had received the wrong instruction and should disregard it. App. B. But telling the jury to disregard the "previous instruction" is not the same thing as telling them to disregard the fact that they heard that the defendant had a prior conviction for first-degree robbery, a serious and violent crime. In addition, here, as in Young, the jury was not instructed that it was not to use the evidence of the prior conviction for any purpose other than proving legal status. See CP 218-50. And while it was given a limiting instruction on the alleged assault which occurred the day before the shooting and regarding "uncharged allegations," those instructions only exacerbated the prejudice here because they were *not* focused on the prior robbery. While jurors are presumed to follow instructions given, they cannot be expected to limit their use of improper information if they are not told to do so - especially when they are told to do so with some evidence but not the improper evidence in question.

Indeed, it is questionable whether instruction *could* in any way "cure" the prejudice already caused. As the prosecutor himself admitted, specific instruction to disregard that Garcia had a prior conviction for first-degree robbery would have had the effect of emphasizing the improper information in the jury's minds. 8RP 27.

The court should have granted a mistrial, and this Court should so hold and should reverse.

Finally, on remand, new counsel should be appointed based on counsel's ineffectiveness. Both the state and federal constitution guarantee Garcia the right to effective assistance of appointed counsel. See Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984);

State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Counsel is ineffective despite a strong presumption of effectiveness if counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Here, counsel first failed to propose an Old Chief stipulation prior to trial, which nearly resulted in the improper, prejudicial nature of the prior being presented to the jury until such a stipulation was reached. Then, counsel failed to notice that the proposed jury instruction *specifically included* that prejudicial information - not only when it was proposed but when it was then read by the court, given to the jury and projected by the prosecutor. Those failures led to the jury being given the very information that counsel recognized was so prejudicial it should have been excluded. On remand, new counsel should be appointed in order to ensure that this time Garcia is given the effective assistance of counsel to which he was entitled.

2. THE PREJUDICE CAUSED BY INTRODUCTION OF THE NATURE OF THE PRIOR CONVICTION WAS EXACERBATED BY INTRODUCTION OF IMPROPER, IRRELEVANT "GANG" AND "BAD CHARACTER" EVIDENCE WHICH THE PROSECUTION EXPLOITED IN CLOSING; THE CUMULATIVE EFFECT DEPRIVED GARCIA OF HIS RIGHTS TO A FAIR TRIAL

Both the state and federal due process clauses guarantee the defendant in a criminal case the right to a fair trial. See In re Personal Restraint of Woods, 154 Wn.2d 400, 417, 114 P.3d 607 (2005); Sixth Amend.; Fourteenth Amend.; Art. I, § 3.

Even if the admission of the highly prejudicial, completely

irrelevant evidence that Garcia had previously been convicted of a violent felony in a case where he was accused of a violent felony did not compel reversal on its own, coupled with other improperly admitted, highly prejudicial "gun" and "gang" evidence, the effect deprived Garcia of his fair trial rights.

a. Relevant facts

At trial, a tribal officer Loren Otterson testified that, when he heard the location where the shots were reported, he "knew that there was a garage" apartment there "that's a known gang hangout." 1RP 77. Later, when counsel tried to ask about whether the officer had previously been to that location, the jury was excused and the parties discussed the concern of the spontaneous "known gang hangout comment," with the prosecutor saying he had not moved to strike the comment because he "thought that would draw more attention to it." 1RP 90. The court agreed, "[t]hat's what I didn't want to draw attention to." 1RP 91. Counsel said he thought it was "probably dangerous" to ask why the officer was at the apartment but that he just wanted to ask how many times it had been, eliciting the testimony that it was "inside twice and outside . . .multiple times." 1RP 91-92.

Later in trial, TPD officer Joshua Boyd testified that he was "currently with the gang unit," that he was working in that capacity and with that unit on the day when he and his unit went to take Garcia into custody. 4RP 6-7.

A little later, another officer testified about working with his K-9 dog that day and having been "requested to meet with our gang unit officers regarding the operation they were involved with," which was trying to

arrest Garcia. 6RP 63-64.

In closing argument, in discussing the events, the prosecutor described the events as

> then low [sp] and behold the guy who had come over, who was getting in this altercation with the female and with Marcus, the defendant, pulls out a gun **and does the gangster shoot, boom, boom, boom**. That's what happened.

8RP 9-10 (emphasis added).

_____b. The evidence was highly prejudicial and, coupled with the other error, compels reversal

There can be no question that this evidence was highly prejudicial, as it was all improper "bad character" or "propensity" evidence. First, evidence of any relationship or association with a gang is recognized to be highly prejudicial. See State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136, review denied, 167 Wn.2d 1001 (2009). Further, "[l]ike membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association." State v. Scott, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009), review denied, 168 Wn.2d 1004 (2010). For this reason, before evidence of gang affiliation can be admitted in a criminal, there must be proof of a specific reason for the evidence, i.e., "a nexus between" that affiliation and the charged crime. Id.

Here, there was no such "nexus" - no claim that the incident involved gangs in any way. There was no relevance whatsoever to whether the "gang" unit was the one to look for, find and arrest Garcia, or that the incident occurred in a known "gang" hangout, except to imply to the jury that Garcia was a dangerous man who associated with gangs and was thus more likely to have committed the crime. And that improper "propensity"

was even further cemented in the jury's minds when an officer testified that McCloud had told him that Garcia always brought a gun to a fight - again painting a picture of a "bad character."

As our Supreme Court has declared, "[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 63, 70, 436 P.2d 198 (1968). Even if the effect of the jury hearing that Garcia had a prior conviction for first-degree robbery - a violent felony - was not incurably prejudicial in this case where Garcia was accused of committing an assault with a gun - also a violent felony - the effect of that evidence, coupled with the improper gang and gun evidence, had such a corrosive effect that Garcia was deprived of his right to a fair trial. Garcia was on trial for a violent assault with a gun. Evidence raising the specter of gangs in such a situation could have no other effect than to incite extreme prejudice in the jury against Garcia. And a claim that he "always" went to "fights" with a "gun" was clearly evidence that jurors would see as proof that Garcia was a violent person who got into fights and used guns - and thus more likely to have committed the charged crimes.

The cumulative effect of all of the errors in this case compels reversal. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 6th day of July, 2012.

Respectfully submitted,

/s/ Kathryn Russell Selk
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Counsel for Appellant
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1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY EFILING AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office via first class mail, postage prepaid, at 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402, and to Mr. Johnny Garcia, DOC 772467, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 6th day of July, 2012.

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
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No. 42890-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY M. GARCIA,

Appellant.

APPENDICES TO APPELLANT'S OPENING BRIEF

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WSBA No. 23879
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APPENDIX A

INSTRUCTION NO. 20

To convict the defendant of the crime of unlawful possession of a firearm in the first degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of April, 2011, the defendant knowingly had a firearm in his possession or control;

(2) That the defendant had previously been convicted of Robbery in the First Degree, a serious offense; and

(3) That the possession or control of the firearm 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 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.

APPENDIX B

State's proposed Oral Instruction concerning the erroneous Instruction 20.

During closing argument, the ~~attorneys~~ court realized that Instruction 20, concerning Count II, the charge of Unlawful Possession of a Firearm in the First Degree, was the wrong instruction for this case. You have now been given the correct Instruction 20 concerning Count II. You should disregard the previous Instruction 20.

APPENDIX C

11-1-01800-0 37422996 INS 11-02-11

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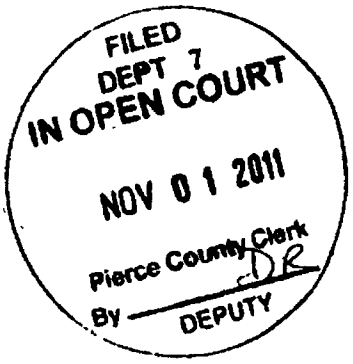

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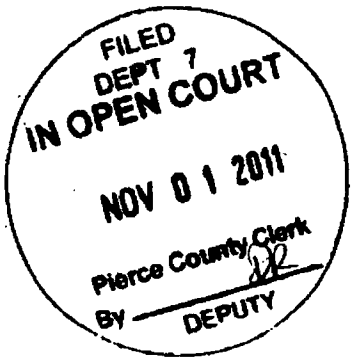

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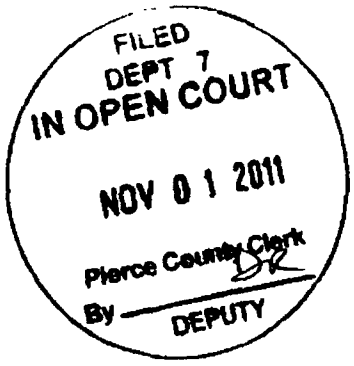

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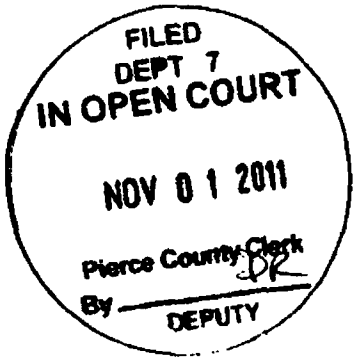

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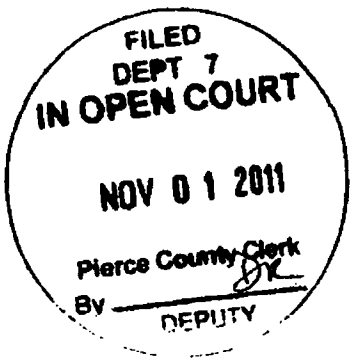
(1) That on or about the 23rd day of April, 2011, the defendant knowingly had a firearm in his possession or control;

(2) That the defendant had previously been convicted of Robbery in the First Degree, a serious offense; and

(3) That the possession or control of the firearm 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 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.



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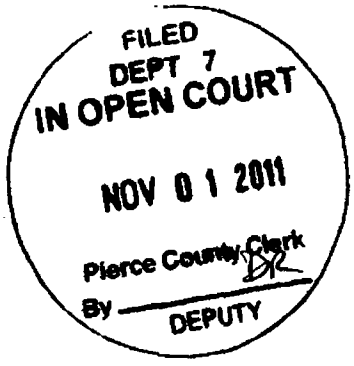

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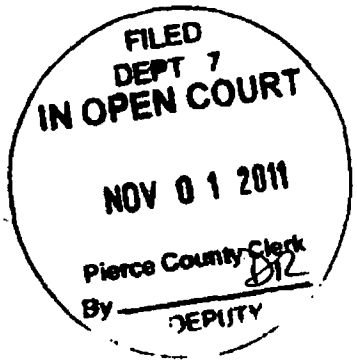

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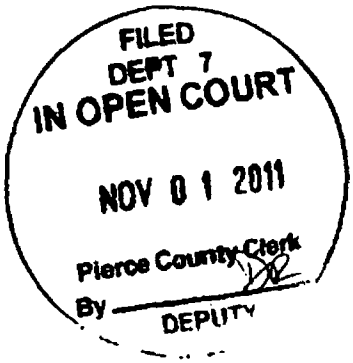

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July 06, 2012 - 2:13 PM

Transmittal Letter

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Case Name: State v. Garcia
Court of Appeals Case Number: 42890-3

Is this a Personal Restraint Petition? ◯ Yes ◉ No

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
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Case Name: State v. Garcia
Court of Appeals Case Number: 42890-3

Is this a Personal Restraint Petition? ◯ Yes ◉ No

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- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
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- ◯ Answer/Reply to Motion: ____
- ◉ Brief: Appellant's
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- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
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