No. 42425-8-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.

Jeffrey Strickland,
Appellant.

Grays Harbor County Superior Court Cause No. 11-1-00084-5

The Honorable Judge Gordon Godfrey

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant
BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ASSIGNMENTS OF ERROR

1. Mr. Strickland was denied his right to a speedy trial under CrR 3.3.

2. The trial judge erred by continuing the trial beyond Mr. Strickland's speedy trial expiration date.

3. The prosecution's mismanagement of its case resulted in delay that violated Mr. Strickland's right to a speedy trial.

4. The trial court erred by refusing to dismiss the case under CrR 3.3(h).

5. Mr. Strickland's convictions infringed his Fourteenth Amendment right to due process.

6. The trial judge violated Mr. Strickland's Sixth and Fourteenth Amendment right to present a defense by excluding evidence that was relevant and admissible.

7. The trial court erred by excluding the testimony of Dr. Loftus.

8. The trial court applied the wrong legal standard in ruling Dr. Loftus's testimony inadmissible.

9. The trial court erred by denying Mr. Strickland's continuance motion.

10. The evidence was insufficient to prove that Mr. Strickland was an accomplice to first-degree assault.

11. The trial court erred by instructing the jury on accomplice liability.

12. The state did not prove that Mr. Strickland acted with knowledge that his actions would promote or facilitate the commission of each assault.

13. The prosecution did not prove that Mr. Strickland aided or agreed to aid Kerby in commission of each assault.

14. Mr. Strickland's conviction violated his Sixth and Fourteenth Amendment right to confront witnesses.

15. The trial court erred by admitting testimonial hearsay.

16. The trial court erred by denying Mr. Strickland's severance motion.

17. The trial court erred by failing to instruct jurors that they could not consider Kerby's testimonial statements against Mr. Strickland.

18. Mr. Strickland was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

19. Defense counsel unreasonably failed to timely consult with Dr. Loftus.

20. Defense counsel unreasonably failed to object to testimonial hearsay.

21. Defense counsel unreasonably failed to request an instruction prohibiting the jury from considering Kerby's out-of-court statements against Mr. Strickland.

22. Defense counsel unreasonably failed to object to instructions suggesting Mr. Strickland could be convicted as an accomplice.

23. Judge Godfrey violated the appearance of fairness doctrine.

24. Judge Godfrey provided "some evidence" of his own potential bias.

25. Judge Godfrey should not have characterized proffered defense testimony as "nonsense."

26. Judge Godfrey should not have implied that defense counsel was fabricating a "litany" of issues in order to manipulate the court into severing Mr. Strickland's case from Kerby's.

27. Judge Godfrey should not have characterized defense counsel's polite request for permission to move an easel as "foolish" in the presence of the jury.

28. The trial court violated Mr. Strickland's First, Sixth, and Fourteenth Amendment right to an open and public trial.

29. The trial court violated Mr. Strickland's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22.

30. The trial court violated the constitutional requirement of an open and public trial by responding to a jury question in chambers.

31. The trial court violated Mr. Strickland's Sixth and Fourteenth Amendment right to counsel by responding to a jury question without consulting counsel in advance.

32. The accomplice liability statute is unconstitutionally overbroad.

33. Mr. Strickland was convicted through operation of a statute that is unconstitutionally overbroad.

34. The trial judge erred by giving Instruction No. 14, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.

35. The trial court failed to properly determine Mr. Strickland's criminal history and offender score.

36. The trial court erred by sentencing Mr. Strickland with an offender score of 8.

37. The trial court erred by entering Finding of Fact No. 2.3 (Judgment and Sentence).

38. The evidence was insufficient to establish that Mr. Strickland had the criminal history listed in Finding No. 2.3.

39. The trial court erred by failing to determine whether or not any of Mr. Strickland's prior convictions comprised the same criminal conduct.

40. The evidence was insufficient to prove that Mr. Strickland's 1995 Pierce County juvenile convictions were separate and distinct criminal conduct.

41. The evidence was insufficient to prove that Mr. Strickland's 2000 King County adult convictions were separate and distinct criminal conduct.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

42. CrR 3.3 requires the court to bring an in-custody defendant to trial within 60 days, unless the time for trial is reset pursuant to the rule. Here, the court erroneously continued the case beyond Mr. Strickland's speedy trial expiration date. Did the unwarranted delay violate Mr. Strickland's right to a speedy trial under CrR 3.3?

43. An accused person has a constitutional right to present relevant admissible evidence. Here, the trial judge excluded relevant expert testimony that would have helped the jury understand how a witness's fragmented perceptions while intoxicated can become solid but erroneous memories, leading to overstated confidence during testimony. Did the trial judge violate Mr. Strickland's Sixth and Fourteenth Amendment right to present a defense by excluding relevant, admissible evidence?

44. The constitution guarantees an accused person a meaningful opportunity to present his or her defense. Here, the trial judge refused Mr. Strickland's request for a continuance to allow him to secure expert testimony relevant to his defense. Did the trial judge violate Mr. Strickland's Fourteenth Amendment right to due process and to present a defense by unreasonably denying his request for a continuance?

45. To convict Mr. Strickland of assault as an accomplice, the prosecution was required to prove that he aided or agreed to aid Kerby in the shooting. Here, nothing in the record suggested that Mr. Strickland aided or agreed to aid Kerby, or that he acted with knowledge that his actions would promote or facilitate the commission of each assault. Did the convictions infringe Mr. Strickland's Fourteenth Amendment right to due process because they were based on insufficient evidence?

46. In a criminal case, the Sixth Amendment's confrontation clause prohibits the admission of testimonial hearsay unless the declarant is unavailable and the accused person had a prior opportunity for cross-examination. Here, the trial court admitted Michael Kerby's out-of-court statements to police, without instructing jurors to consider the evidence only against Mr. Kerby. Did the admission of this testimonial hearsay violate Mr. Strickland's Sixth Amendment right to confront the witnesses against him?

47. Under CrR 4.4(c), a motion to sever defendants must be granted unless sanitizing a codefendant's out-of-court statements eliminates "any prejudice." Here, the trial judge refused to sever Mr. Strickland's case from Kerby's, but Kerby's sanitized statements remained prejudicial to Mr. Strickland. Did the trial court abuse its discretion by failing to sever Mr. Strickland's trial from Kerby's?

48. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, Mr. Strickland's defense attorney failed to clearly object to the admission of testimonial hearsay and failed to request an instruction prohibiting the jury from considering it as proof of Mr. Strickland's guilt. Was Mr. Strickland denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

49. The guarantee of effective assistance requires defense counsel conduct adequate investigation. Here, counsel failed to investigate a potential defense prior to Mr. Strickland's trial. Was Mr. Strickland denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

50. To be effective, an attorney must be familiar with the law, and should raise appropriate objections to the court's instructions. Here, defense counsel failed to object to the trial court's instructions on accomplice liability, despite the absence of evidence suggesting that Mr. Strickland was an accomplice to the shootings. Was Mr. Strickland denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

51. A judge violates the appearance of fairness doctrine when there is some evidence of the judge's actual or potential bias. In this case, the judge described defense counsel's theories and conduct as "nonsense," "dishonest," and "foolish." Did the trial judge violate the appearance of fairness doctrine, in violation of Mr. Strickland's Fourteenth Amendment right to due process?

52. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge answered a jury question behind closed doors. Did the trial judge violate the constitutional requirement that criminal trials be open and public by answering the jury question in chambers without first conducting any portion of a Bone-Club analysis?

53. An accused person has the constitutional right to counsel at all critical stages of trial. In this case, the court answered a jury question without conferring with counsel. Did the trial judge violate Mr. McCarthy's right to counsel under the Sixth and Fourteenth Amendments and under Wash. Const. Article I, Section 22?

54. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite imminent lawless action. The accomplice liability statute criminalizes words that facilitate or promote commission of a crime, even if not directed at and likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

55. At sentencing, the prosecution must prove criminal history by a preponderance of the evidence. Here, the prosecutor failed to present sufficient evidence establishing Mr. Strickland's criminal history. Did the trial court violate Mr. Strickland's Fourteenth Amendment right to due process by finding that he had numerous prior felony convictions and sentencing him with an offender score of eight?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. EVENTS OF FEBRUARY 3, 2011

On the evening of February 3, 2011, Jeffrey Strickland went to Mac's Tavern in Aberdeen, along with his friend Michael Kerby, and Kerby's girlfriend Jerri Crissman. RP (6/29/11) 277. Earlier in the evening, while Kerby and Crissman were getting ready to go out, Crissman saw Kerby wrap a gun in a towel. RP (6/30/11) 426, 453-455.

The bar was crowded that evening. RP (6/28/11) 47, 110; RP (6/29/11) 182, 225. Among those present was a group of men working a construction job in Cosmopolis. The group, which included Eugene Savage and Daniel Ivy, sat at the bar and listened to the band. RP (6/28/11) 32, 82-84; RP (6/29/11) 249; RP (6/30/11) 523.

At some point, Savage went outside to smoke a cigarette in front of the tavern. RP (6/28/11) 36. He was intoxicated, having consumed a fair amount of alcohol throughout the evening. RP (6/28/11) 35, 37; RP (6/29/11) 198. Kerby, Crissman and Strickland were already outside, and Savage said something to them in Spanish. RP (6/29/11) 360-362. Kerby and Strickland were offended. RP (6/28/11) 37.

Words were exchanged, and the men had a face-to-face confrontation visible through the window in the tavern's door. RP (6/28/11) 88; RP (6/29/11) 229. At some point, Savage told the other men they should "shake

the sand out of their pussies." RP (6/28/11) 58. Ivy came out and tried to stop the argument. RP (6/28/11) 89. When told that Savage had been disrespectful, Ivy responded that the issue was "ridiculous." RP (6/28/11) 89-90. Someone suggested that the issue could be resolved in the parking lot. RP (6/28/11) 60, 91. Ivy tried to get Savage to walk to the parking lot with him, following Strickland and Kerby. RP (6/28/11) 91-93.

When Ivy realized Savage was not following him, he walked back toward the bar. On his way there, he was shot in the chest. RP (6/28/11) 96-99; RP (6/29/11) 154-155. After Ivy was shot, Savage went toward the men to "have it out" with them. RP (6/28/11) 67-69. He was shot in the leg. RP (6/28/11) 40; RP (6/30/11) 377.

Police and medical assistance came shortly after the shooting. RP (6/29/11) 266. Mr. Strickland was arrested five blocks from the bar. He was unarmed. RP (6/29/11) 210, 213, 221.

On the ground outside the bar, police found two spent .380 caliber shells and one unused round. RP (6/29/11) 186. The gun that fired the shots was never located.

Before the police arrived, Kerby fled the scene. He put his vehicle in an ex-girlfriend's garage and stayed in a rented hotel room in another town. RP (6/29/11) 293, 299, 302. He was arrested on February 4th, and he gave a statement to police. RP (6/30/11) 484-486, 578-583. Before any questions

were asked, he said that he'd neither seen nor touched a gun. After denying any knowledge or involvement in the shooting, he told police that he "didn't pull the trigger," and that "the gun never went off in his hand." RP (6/30/11) 582. He also said that he got rid of the gun. Attachment to Memorandum of Authorities (filed 3/30/11), Supp. CP; RP (6/30/11) 578-583.

II. SPEEDY TRIAL

The state charged Mr. Strickland (and Kerby) with two counts of Assault in the First Degree, and alleged that "the defendant, or an accomplice, was armed with a firearm." CP 1-2. The court arraigned Mr. Strickland on March 7, 2011. Clerk's Minutes (filed 3/7/11), Supp. CP.

At the end of March, the prosecution asked to continue the trial beyond Mr. Strickland's speedy trial expiration date. Mr. Strickland objected. RP (4/4/11) 3-15; Motion to Continue (filed 3/30/11), Supp. CP; Order Setting Trial Date (filed 4/4/11), Supp. CP. The reason for the continuance was the state's desire to have the shell casings recovered from the scene tested for DNA evidence. RP (4/4/11) 3, 5. The materials hadn't been sent to the lab until February 28, 2011, and the prosecution hadn't yet received any results. RP (5/9/11) 17; RP (4/4/11) 3.

The court granted the prosecutor's motion, and continued the trial beyond Mr. Strickland's speedy trial expiration date:

> Regarding your request for a continuance. I believe it is appropriate on this evidentiary matter. And that is that the state crime

> lab being required to produce the evidence that could exculpate or work to the benefit of either party and/or obviously work to the detriment of either party but the evidence is obviously crucial, so therefore based upon the State's motion I believe a continuance is appropriate.
>
> I am going to require that Mr. Fuller [the prosecutor] find out from the crime lab when the reports are anticipated to be received by him and I will expect that once he receives them that they will immediately or within 48 hours make certain copies of the evidence and/or crime lab reports are given to counsel. And I will grant the continuance at this point in time, but if there is an issue brought by the parties regarding the time involved I will allow them to make subsequent motion accordingly.
>
> RP (4/4/11) 13.

Mr. Strickland moved to dismiss the charges for violation of speedy trial. Motion to Dismiss, Supp. CP; Supplemental Motion to Dismiss, Supp. CP; RP (5/9/11) 16-17, 19. The motion was denied. Order Denying Motion to Dismiss (filed 5/9/11), Supp. CP.

In mid-June, the parties learned that the DNA sample was too small to permit testing. RP (6/17/11) 4.

III. MOTION TO SEVER AND ADMISSIBILITY OF CO-DEFENDANT'S OUT-OF-COURT STATEMENTS.

The prosecution moved to join the two defendants for trial. Motion to Join Defendants for Trial, Memorandum of Authorities (filed 3/30/11), Supp. CP. Mr. Strickland objected to the joinder, as did Kerby. RP (4/4/11) 6-12. The prosecutor indicated that he did not intend to offer any of Kerby's

statements that implicated Mr. Strickland.[1] Memorandum of Authorities (filed 3/30/11), Supp. CP. The court granted the prosecution's motion, joining the two cases for trial. Order Granting Motion (filed 4/4/11), Supp. CP; RP (4/4/11) 12-13.

Prior to the start of trial, the prosecutor announced his intention to introduce into evidence Kerby's statements to police, including Kerby's claims that he hadn't pulled the trigger and that he had disposed of the gun. RP (6/27/11) 43-44; Attachment to Memorandum of Authorities (filed 3/30/11), Supp. CP. Mr. Strickland again urged the court to sever the two defendants cases.[2] RP (6/27/11) 46-47. The judge denied Mr. Strickland's severance request. RP (6/27/11) 48.

At trial, Kerby's statements were introduced through the testimony of Detectives Green and Laur. RP (6/30/11) 565-567; 578-580. Kerby had initially denied seeing or touching a gun. RP (6/30/11) 565-567; 579-580. Kerby later said that he had not pulled the trigger. RP (6/30/11) 582. He told police that he'd had the gun in his hand but had disposed of it, and that he'd done nothing wrong. Kerby also said that "if [the police] asked the little

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[1] In its Memorandum on the issue, the state acknowledged that Kerby's statement could only be admitted if properly redacted and if "the court gives a cautionary instruction". Memorandum of Authorities (filed 3/30/11), Supp. CP.

[2] Defense counsel also argued that the entire statement should be admitted, without redaction, as evidence of Kerby's guilt. RP (6/27/11) 46.

Mexican guy, he can't state who actually pulled the trigger." RP (6/30/11) 582. The court did not instruct the jury that these statements could only be considered against Kerby. Court's Instructions, Supp. CP.

After the state rested its case, Mr. Strickland renewed his motion to sever his trial from Kerby's. The court again denied the request. RP (7/1/11) 20-22. In closing, the prosecutor used Kerby's statements as substantive evidence of Mr. Strickland's guilt, paraphrasing the questions posed by police and the answers provided by Kerby:

> Did you have a firearm? I never pulled the trigger. At one time did you have it at the scene? At one time I had it at the scene; I got rid of it. He asked again later on. Well, if I had it, I got rid of it. The evidence, circumstantial, is, he gave it to Jeffery Strickland. Very simple. RP (7/1/11) 134 (emphasis added).

Following his conviction, Mr. Strickland moved for a new trial. Motion for a New Trial, Supp. CP. He argued that his confrontation rights had been violated by the admission of Kerby's out-of-court statements. Motion for New Trial, Supp. CP; RP (7/25/11) 71-75. The court denied the motion. RP (7/25/11) 76.

IV. MOTION FOR EXPERT TESTIMONY ON PERCEPTION, MEMORY, AND INFLATED CONFIDENCE IN EYEWITNESS TESTIMONY

The primary issue at trial was whether Kerby or Mr. Strickland was the shooter. Of all the people at the bar that night, only two—Savage and Ivy—planned to testify that Mr. Strickland was the shooter. Both had been

drinking; neither had identified Mr. Strickland as the shooter in their initial statements. RP (6/27/11) 34; RP (6/28/11) 47, 120-121, 150.

Mr. Strickland wanted to use expert testimony to challenge their in-court identifications. Defense counsel – who had consulted with an expert, but had not yet retained him—requested a continuance, and renewed Mr. Strickland's motion to sever the codefendants. RP (6/17/11) 1; RP (6/27/11) 34, 36, 46; Motion to Continue (filed 6/15/11), Supp. CP; Motion to Continue (filed 6/24/11), Supp. CP. The court denied the motion. RP (6/27/11) 40-42. In his rulings, the trial judge repeatedly referred to defense arguments as "nonsense," accusing counsel of raising a "litany" of problems to get the cases severed.[3] RP (6/27/11) 40-42.

Defense counsel later filed an offer of proof regarding the proposed expert testimony. Ex. 1, Supp. CP; RP (7/1/11) 18-20. He renewed the motions for a continuance and severance. The court denied the motions. RP (7/1/11) 20, 21-22.

At trial, Savage testified that he was intoxicated at the time of the incident and did not have a clear memory of all that had happened.[4] RP

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[3] The court made another comment about defense counsel later in the trial, with the jury present, when counsel asked the court for permission to move an easel the state had used during their direct. RP (6/30/11) 419. The trial judge responded, in front of the jury, that the question was "foolish." RP (6/30/11) 419. After the jury left the room, Mr. Strickland moved for a mistrial; the motion was denied. RP (6/30/11) 419-421.

[4] Despite the number of people present, there was much confusion as to what actually happened that night. Some witnesses believed Crissman said "shoot his ass;" others said she left the area

(continued)

(6/28/11) 35, 45, 54. He testified that he did not see who had shot Ivy, but claimed that right before his leg was hit, he saw a muzzle flash near Mr. Strickland. RP (6/28/11) 38-40. In his initial statement to police, shortly after the incident, he had said that he didn't know who had shot him; however, he refused to affirm that statement at trial. RP (6/28/11) 46-47. He did acknowledge that he hadn't seen a gun in Mr. Strickland's hands. RP (6/28/11) 66, 70.

Ivy also testified that he had been drinking that night, but asserted that he had not been intoxicated. RP (6/28/11) 102-105, 109. In his initial statement to police (given at the hospital after the shooting), he had not identified Strickland as the person with the gun. Despite this, he testified that Mr. Strickland had shot him. RP (6/28/11) 98; RP (6/29/11) 150, 178.

Crissman said that she believed she saw Kerby pulling out his gun right before she ran away from the area. RP (6/29/11) 356, 365-366; RP (6/30/11) 409-410, 425. No witnesses (besides Ivy and Savage) suggested that Mr. Strickland had been the shooter. RP (6/29/11) 230, 235, 245.

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before the men walked toward the parking lot. (RP (6/29/11) 168, 365). There were also questions as to whether or not Kerby brandished or used a taser during the argument. RP (6/28/11) 59, 107; RP (6/29/11) 230; RP (6/30/11) 460. Witness memories conflicted on what Kerby wore, and which of the two defendants wore a black puffy coat that was found outside the bar. RP (6/29/11) 158, 173, 256. On this last point, Detective Cox testified that Mr. Strickland was arrested within hours of the assault wearing a jacket that was not the black puffy jacket later found and admitted into evidence. RP (7/1/11) 35-37.

Physical evidence showed that the bullet entered Ivy's chest just below the nipple before passing through his lungs, diaphragm, liver, and near his adrenal gland, suggesting that the shot was fired downward by someone tall (like Kerby) rather than someone short (like Mr. Strickland).[5] RP (6/29/11) 261, 385-389; RP (6/30/11) 527-528, 530, 540.

Mr. Strickland testified. He acknowledged that he'd been present during the verbal altercation, but told the jury he left the scene before the shooting occurred. RP (7/1/11) 56-62.

V. COURT'S INSTRUCTIONS AND JURY QUESTION

Following the presentation of evidence, the court instructed the jury. The court's "to convict" instructions allowed the jury to convict if it found that Mr. Strickland "or a person to whom he acted as an accomplice" assaulted Ivy and Savage. Court's Instructions Nos. 7, 9, Supp. CP. The court also defined accomplice liability (using the standard pattern jury instruction). Court's Instructions, No. 14, Supp. CP.

At some point during deliberations, jurors submitted a written question to the court regarding accomplice liability and the firearm enhancement. Jury Note, Response, Supp. CP. The matter was not addressed on the record in open court. Nor is there any indication in the record that the court consulted

[5] This is especially true given Ivy's great height.

with counsel prior to responding to the question. Jury Note and Response, Supp. CP; see Clerk's Minutes (7/1/11), Supp. CP; Clerk's Minutes (7/5/11), Supp. CP.

Mr. Strickland was convicted of both charges. At sentencing, Mr. Strickland objected to the state's assertions about his criminal history. RP (7/25/11) 63-66; Supplemental Memorandum of Authorities, Sentence Recommendation, Supp. CP. The state presented the court with a Defendant's Case History (DCH) printout and some (but not all) of the Judgment and Sentence documents listed in the prosecution's sentencing materials. RP (7/25/11) 67-687; Statement of Prosecuting Attorney, Presentencing Investigation Report, Response, Supp. CP.

Defense counsel notified the court that at least some of the convictions did not belong to Mr. Strickland, and that his brother had falsely used his name and date of birth when in trouble. RP (7/25/11) 69. The judge overruled Mr. Strickland's objections and included all of the contested priors in the criminal history and offender score. The court reasoned that all of the contested priors could be included because they were listed in a Judgment and Sentence from October of 2007. RP (7/25/11) 70. The court sentenced Mr. Strickland with 8 points. CP 5.

Mr. Strickland timely appealed. CP 13.

ARGUMENT

I. MR. STRICKLAND WAS DENIED HIS RIGHT TO A SPEEDY TRIAL UNDER CRR 3.3.

A. Standard of Review

Alleged violations of the speedy trial rule are reviewed de novo. State v. Rafay, ___ Wash.App. ___, ___, ___ P.3d ___ (2012).

B. The trial court should not have continued Mr. Strickland's trial beyond his speedy trial expiration date.

CrR 3.3 is captioned "Time for trial," and sets out the speedy trial rule for criminal cases in Washington. Under CrR 3.3(h), "[a] charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice." It is the responsibility of the court to ensure compliance with the rule. CrR 3.3(a)(1). A person who is in custody must be brought to trial within 60 days of the case's commencement date.[6] If the time for trial expires "without a stated lawful basis for further continuances, the rule requires dismissal and the trial court loses authority to try the case." State v. Saunders, 153 Wash. App. 209, 220, 220 P.3d 1238 (2009) (Saunders I).

The rule requires strict compliance, which not only ensures an accused person's right to a speedy trial, but also preserves the integrity of the judicial process. State v. Kenyon, 167 Wash. 2d 130, 136, 216 P.3d 1024 (2009). A

[6] The initial commencement date is the date of arraignment. CrR 3.3(c)(1).

case may be continued on motion of a party, but only if "such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). When a continuance is granted, the court "must state on the record or in writing the reasons for the continuance." CrR 3.3(f)(2).

In Saunders, the Court of Appeals dismissed a prosecution, in part because the trial court failed to adequately inquire into the circumstances and to provide adequate reasons for continuances granted over the defendant's personal objection. Saunders I, at 220-221. Similarly, in Kenyon, the Supreme Court dismissed a case because the trial court continued a case without documenting the unavailability of judges pro tempore and unoccupied courtrooms. Kenyon, at 139.

In this case, Mr. Strickland's arraignment took place on March 7, 2011; therefore, his speedy trial period expired on May 6, 2012. Clerk's Minutes (filed 3/7/11), Supp. CP; CrR 3.3(b)(1), (c)(1). Over objection, the trial date was reset to June 28, more than a month and a half after the expiration date. RP (4/4/11) 3-13; Order Granting Motion (filed 4/4/11), Supp. CP. The trial court's written order recited that the case was continued "for good cause, to allow completion of laboratory testing." Order Granting Motion (filed 4/4/11), Supp. CP.

The record does not support the trial court's decision.

First, the court did not find that a continuance was "required in the administration of justice," as required by CrR 3.3(f)(2).[7] Nor did the court find that Mr. Strickland would not be prejudiced in the presentation of his defense. RP (4/4/11) 3-13; Order Granting Motion (filed 4/4/11), Supp. CP. By continuing the case without making the required findings, the court failed to strictly comply with the dictates of CrR 3.3, and thus violated Mr. Strickland's right to a speedy trial. Kenyon, at 139.

Second, the court failed to make an adequate inquiry into the circumstances prior to extending the case beyond speedy trial. The court did not determine when the shell casings were obtained by the police and sent to be tested. From the record, it appears that the shell casings were obtained on the night of the shooting (February 3), but that they weren't sent for fingerprint or DNA analysis until February 28. RP (4/4/11) 3-13; Order Granting Motion (filed 4/4/11), Supp. CP. The initial delay suggests a lack of diligence on the part of the government.[8] The court made no findings on the issue.

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[7] The court indicated that it had found "good cause" for the continuance. RP (4/4/11) 12-13. However, the court did not elucidate what it meant by this phrase.

[8] Government mismanagement cannot justify delaying a trial beyond the expiration of speedy trial. See, e.g., State v. Michielli, 132 Wash. 2d 229, 937 P.2d 587 (1997); see also State v. Brooks, 149 Wash. App. 373, 384, 203 P.3d 397 (2009). Where mismanagement forces a continuance beyond speedy trial expiration, dismissal is appropriate. Id.

Third, the court didn't inquire into the procedures used by the two government laboratories testing the shell casings. As a result, the court failed to determine whether the labs do everything possible to ensure that tests are performed in a timely way—for example by prioritizing older cases, by using resources and staff efficiently, by performing preliminary tests to see if further testing is warranted, and so forth. RP (4/4/11) 3-13; Order Granting Motion (filed 4/4/11), Supp. CP.

Fourth, the court didn't determine the likelihood that the tests would provide useable information that would be material to the prosecution or the defense. Nothing in the record shows that the test results were essential to the prosecution, and, as the record shows, the testing ultimately provided no information of value. RP (4/4/11) 3-13; Order Granting Motion (filed 4/4/11), Supp. CP.

Neither the written order nor the court's oral ruling acknowledged the court's duty to ensure Mr. Strickland a speedy trial. Furthermore, the court failed to balance Mr. Strickland's right to a speedy trial against the prosecution's desire for the evidence it sought. RP (4/4/11) 3-13; Order Granting Motion (filed 4/4/11), Supp. CP. Given the inadequate inquiry and insufficient findings, the record does not support the court's decision to postpone the trial beyond Mr. Strickland's speedy trial expiration date.

Accordingly, the convictions must be reversed and the charges dismissed with prejudice. CrR 3.3(h); Saunders I, at 216-217.

II. MR. STRICKLAND WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT DENIED HIS REQUEST FOR A CONTINUANCE AND EXCLUDED THE TESTIMONY OF DR. LOFTUS.

A. Standard of Review

Constitutional errors are reviewed de novo. Bellevue School Dist. v. E.S., 171 Wash.2d 695, 702, 257 P.3d 570 (2011).

Although evidentiary rulings and denials of continuances are ordinarily reviewed for an abuse of discretion,[9] this discretion is subject to the requirements of the constitution: a court necessarily abuses its discretion by denying an accused person her or his constitutional rights. See, e.g., State v. Iniguez, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009); see also United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992). Where the appellant makes a constitutional argument regarding the exclusion of evidence or the denial of a continuance, review is de novo. Id.

Constitutional errors are presumed prejudicial, and the prosecution bears of the burden of establishing harmlessness beyond a reasonable doubt.

[9] A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. State v. Depaz, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes (continued)

State v. Watt, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. City of Bellevue v. Lorang, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Burke, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. Due process guaranteed Mr. Strickland a meaningful opportunity to present his defense.

A state may not "deprive any person of life, liberty, or property, without due process of law..." U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). The accused must be able to present his version of the facts, so the fact-finder may decide where the truth lies. State v. Maupin, 128 Wash.2d 918, 924, 913 P.2d 808 (1996); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v.

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reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. State v. Hudson, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has called this right "a fundamental element of due process of law." Washington v. Texas, at 19.

The right to present a defense includes the right to introduce relevant and admissible evidence. State v. Lord, 161 Wash.2d 276, 301, 165 P.3d 1251 (2007). Denial of this right requires reversal unless it can be shown beyond a reasonable doubt that the error did not affect the verdict. State v. Elliott, 121 Wash.App. 404, 410, 88 P.3d 435 (2004). An appellate court will not "tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt." State v. Fisher, 165 Wash.2d 727, 755, 202 P.3d 937 (2009).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Unless otherwise limited, all relevant evidence is admissible. ER 402. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. Salas v. Hi-Tech Erectors, 168 Wash.2d 664, 669, 230 P.3d 583 (2010).

C. The exclusion of Dr. Loftus's testimony denied Mr. Strickland his constitutional right to present a defense.

ER 702 governs testimony by experts, providing:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. Under the rule, expert testimony is admissible if it will be helpful to the trier of fact. "Helpfulness" is to be construed broadly. Philippides v. Bernard, 151 Wash.2d 376, 393, 88 P.3d 939 (2004) (citing Miller v. Likins, 109 Wash.App. 140, 148, 34 P.3d 835 (2001)). This means the rule favors admissibility in doubtful cases. Likins, at 148.

Where the accused person seeks to use an expert to challenge the reliability of eyewitness testimony,

> [T]he trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. In making this determination the court should consider the proposed testimony and the specific subjects involved in the identification to which the testimony relates, such as whether the victim and the defendant are of the same race, whether the defendant displayed a weapon, the effect of stress, etc.

State v. Cheatam, 150 Wash. 2d 626, 649, 81 P.3d 830 (2003).

Here, the defense sought to introduce the expert testimony of Dr. Loftus. RP (6/27/11) 34-36, 39-40; RP (7/1/11) 18-20. The purpose of the evidence was primarily to undermine the testimony of Savage and Ivy, since their confidence did not relate to the accuracy of their testimony.

Studies show that a witness's level of confidence is the primary determinant of whether or not jurors accept eyewitness testimony. This is so

because "in most of normal, everyday life, high confidence is predictive of high accuracy." Ex. 1, p. 2, Supp. CP (emphasis in original). However, certain factors, present in this case, can lead a witness to express a high level of confidence regarding testimony that is factually erroneous. Ex. 1, p. 3, Supp. CP. This is extremely counterintuitive; the average juror is not aware of the studies supporting this conclusion. Because of this, expert testimony on the subject is "helpful" within the broad definition of helpfulness adopted by the Supreme Court. Philippides, at 393.

Two circumstances that have a significant impact on eyewitness testimony are (1) the conditions under which the event was witnessed, and (2) exposure to suggestive information after the event. The original conditions under which an event is witnessed can interfere with the witness's ability to form an accurate impression (i.e. due to intoxication, stress, poor lighting, and the short duration of the event). Subsequent exposure to suggestive information can alter the memory and increase the witness's confidence, creating the possibility that erroneous testimony will be delivered with a high degree of confidence. Ex. 1, pp. 3-5, Supp. CP.

Similar expert testimony has been held admissible in other cases. See, e.g., State v. Taylor, 50 Wash. App. 481, 489, 749 P.2d 181, 184 (1988) ("[E]xpert testimony on the unreliability of eyewitness identification can provide significant assistance to the jury beyond that obtained through cross

examination and common sense"); see also United States v. Sebetich, 776 F.2d 412, 419 (3d Cir. 1985) (interpreting federal Rules of Evidence); United States v. Downing, 753 F.2d 1224 (3d Cir.1985) (same). Furthermore, the New Jersey Supreme Court has recently adopted court rules and jury instructions aimed at mitigating the problems inherent in eyewitness testimony. See "Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases," New Jersey Supreme Court Press Release (July 19, 2012).[10],[11]

Here, Savage and Ivy witnessed the shooting after consuming alcohol, and under poor lighting conditions. RP (6/28/11) 35, 37, 45, 51, 68, 84. Both were likely under some stress from the ongoing confrontation; Savage was under additional stress at the time he was shot because Ivy had just been shot in the chest seconds earlier. RP (6/28/11) 38, 67-68, 74, 100. Furthermore, the shootings happened very quickly and without warning. Neither Savage nor Ivy identified Mr. Strickland as the shooter when they initially spoke to police. RP (6/28/11) 47, 62, 150, 178. Two weeks after the shooting, Savage and Ivy had the opportunity to discuss the events. RP (6/28/11) 65, 97-98. At

[10] Available at http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm.

[11]See also Weiser, B. "New Jersey Court Issues Guidance for Juries About Reliability of Eyewitnesses," New York Times (July 19, 2012).Available at http://www.nytimes.com /2012/07/20/ nyregion/judges-must-warn-new-jersey-jurors-about-eyewitnesses-reliability.html#h[].

trial, both expressed confidence that Mr. Strickland had the gun and shot each of them. RP (6/28/11) 40, 159-160.

Under these circumstances, it is highly likely that each witness's original statement to police—in which neither had been able to say who had fired—was more accurate than the highly confident trial testimony—that each witness knew that Mr. Strickland had fired the shots. However, jurors had no reason to believe defense counsel's suggestion that this was the case. RP (7/1/11) 155-161. Instead, without testimony outlining the problems with perception, memory, and confidence under circumstances such as these, jurors were far more likely guided by their erroneous belief that confidence correlates with accuracy. As Dr. Loftus indicates, in the mind of most jurors, an eyewitness's confidence is the chief determinant of whether or not the witness is believed. Ex. 1, p. 3, Supp. CP.

Without Dr. Loftus's testimony, the jury likely gave greater deference to each witness's confidence level than was warranted under the circumstances. As a result, jurors were more likely to believe that Mr. Strickland was the shooter. Furthermore, the identity of the shooter was not merely "any fact that [was] of consequence to the determination of the action;"[12] instead, it was the contested fact at Mr. Strickland's trial. Dr. Loftus's testimony would have made it less probable (in the jury's eyes) that

Mr. Strickland was the shooter, thus his testimony was relevant under ER 401 and admissible under ER 402.

Because the average juror is unfamiliar with the scientific basis for questioning Savage's confidence, the testimony would have been "helpful" to the jury under ER 702. It would have helped the jury to "understand the evidence" (each witness's confidence) and to "determine a fact at issue" (the identity of the shooter). ER 702.

For these reasons, Dr. Loftus should have been allowed to testify. Instead of "carefully consider[ing] the proposed testimony, the trial court dismissed it as "nonsense." RP (6/27/11) 40-42; Cheatam, at 649. The exclusion of this evidence prejudiced Mr. Strickland: without expert testimony, jurors were left with their common-sense understanding that confidence necessarily correlates with accuracy in eyewitness testimony—an idea that has been discredited by scientific studies. Ex. 1, Supp. CP.

Given the Supreme Court's broad definition of "helpfulness," the evidence should have been admitted. Philippides, at 393. By excluding relevant and admissible evidence, the trial court violated Mr. Strickland's right to present a defense. U.S. Const. Amend. XIV; Holmes, supra. His convictions must be reversed and the case remanded for a new trial, with

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[12] ER 401.

instructions to permit Dr. Loftus to testify on Mr. Strickland's behalf. ER 401, ER 402, ER 702; Philippides, supra; Cheatam, at 649.

D. The court's decision denying Mr. Strickland's request for a continuance infringed his constitutional right to present a defense.

As noted above, trial continuances are governed by CrR 3.3: the court "may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). Failure to grant a continuance may deprive a defendant of a fair trial. State v. Purdom, 106 Wash.2d 745, 725 P.2d 622 (1986); see also United States v. Flynt, 756 F.2d 1352 (9th Cir. 1985). Furthermore,

> While efficient and expeditious administration is, of course, a most worth-while objective, the defendant's rights must not be overlooked in the process through overemphasis upon efficiency and conservation of the time of the court.

State v. Watson, 69 Wash.2d 645, 651, 419 P.2d 789 (1966).

Factors relevant to the trial court's decision on a continuance motion include the moving party's diligence, due process considerations, the need for orderly procedure, the possible impact on the trial, whether prior continuances have been granted, and whether the purpose was to delay the proceedings. State v. Bonisisio, 92 Wash.App. 783, 964 P.2d 1222 (1998); State v. Early, 70 Wash.App. 452, 458, 853 P.2d 964 (1993).

For example, in Flynt, the defendant sought a continuance to enable him to consult with a psychiatrist in anticipation of presenting a diminished capacity defense to a contempt charge. Flynt, at 1356. The trial court refused the request, and the case proceeded to hearing without expert testimony. Flynt, at 1356-1357. The 9th Circuit Court of Appeals reversed the convictions, finding that

> Flynt's only defense... was that he lacked the requisite mental capacity. The district court's denial of a continuance... effectively foreclosed Flynt from presenting that defense.

Flynt, at 1358.

Similarly, in this case, the trial court's refusal to grant a continuance prevented Mr. Strickland from presenting his only possible defense: that witnesses who testified he was the shooter were likely mistaken.

Furthermore, the factors outlined above weighed in favor of granting the continuance.

Diligence. Defense counsel had consulted with Dr. Loftus in advance, and was still awaiting a report at the time the continuance request was made. The trial judge did not reject the continuance request because it was untimely; instead, the trial judge believed that the proposed testimony would be "nonsense." RP (6/27/11) 40-42. Although it would have been preferable for counsel to have retained Dr. Loftus earlier, this should not be held against Mr. Strickland.

Due process. Mr. Strickland's only defense hinged on whether or not the jury believed the testimony of those witnesses who claimed he, not Kerby, was the shooter. Given the confidence those witnesses expressed, Dr. Loftus's testimony would have provided important ammunition for the defense to argue that those witnesses were mistaken. Accordingly, due process considerations supported the requested postponement.

Orderly procedure. The motion was made before the start of trial, and Mr. Strickland was willing to waive his right to a speedy trial.[13] RP (6/27/11) 36. The state raised no objection to a continuance; instead, the prosecutor argued only that the evidence sought was unnecessary. RP (6/27/11) 38-39. Accordingly, the continuance would have interfered only minimally with the need for orderly procedure.

Prior continuances. The trial date had previously been reset only once, at the state's request. RP (4/4/11) 14.

Impact on trial. The evidence sought would have had a significant impact on the trial. If Mr. Strickland had been permitted the time necessary to secure the attendance of Dr. Loftus at trial, he would have been able to cast

[13] Furthermore, Kerby had apparently sought to waive his right to a jury; thus, the two cases could have been tried separately, with Kerby submitting his case to the bench. See Motion to Continue (filed 6/24/11), p. 2, Supp. CP; RP (6/27/11) 36; RP (6/29/11) 141. Even if a joint trial were considered necessary, a continuance could have been granted over Kerby's objection without violating his right to a speedy trial. See State v. Dent, 123 Wash. 2d 467, 484-85, 869 P.2d 392 (1994).

significant doubt on the testimony of those witnesses who claimed that he personally had fired the shots. Because there was no additional evidence suggesting Mr. Strickland acted in concert with Kerby, he could not have been convicted as an accomplice. Thus, Dr. Loftus's testimony would have provided a complete defense to the charge.

Effort to delay. There was no indication that the continuance was sought in order to delay the proceedings. As counsel indicated, he had consulted with Dr. Loftus, but had not yet received his written report, and would not have been able to secure his attendance at trial without a short continuance. Given the gravity of the offenses—both were felonies carrying the possibility of significant confinement in prison—the continuance request was not unreasonable.

The denial of the continuance prevented Mr. Strickland from presenting his only possible defense to the charge. As in Flynt, the trial court's decision prejudiced Mr. Strickland. Flynt, at 1358; see also State v. Poulsen, 45 Wash. App. 706, 711, 726 P.2d 1036 (1986). The conviction must be reversed and remanded for a new trial. Flynt, at 1358.

III. MR. STRICKLAND'S CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE HE WAS AN ACCOMPLICE TO EACH CRIME.

A. Standard of Review

Constitutional questions are reviewed de novo. E.S., at 702. The interpretation of a statute is reviewed de novo, as is the application of law to a particular set of facts. State v. Engel, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009); In re Detention of Anderson, 166 Wash.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Engel, at 576.

B. Due process requires the prosecution to prove each element of an offense beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986). It is improper to instruct the jury on "a theory for which there is insufficient evidence." State v. Berube, 150 Wash. 2d 498, 510-11, 79 P.3d 1144, 1151 (2003); see also State

v. Clausing, 147 Wash. 2d 620, 626-27, 56 P.3d 550 (2002) ("It is prejudicial error to submit an issue to the jury that is not warranted by the evidence.")

To convict Mr. Strickland as an accomplice, the prosecution was required to establish that he aided or agreed to aid Kerby in planning or committing each assault, and that he acted with knowledge that his participation would promote or facilitate the assaults. RCW 9A.08.020.

C. The prosecution did not prove that Mr. Strickland acted with knowledge that his actions would promote or facilitate each assault, or that he aided or agreed to aid Kerby in committing the assaults.

Two different versions of the shooting emerged at trial. In one, Mr. Strickland obtained the gun from Kerby and shot the two men himself. In the other, Kerby brought the gun to the bar and shot Ivy and Savage in Mr. Strickland's presence, but without his involvement. RP (6/28/11) 40, 98; RP (6/29/11) 365-367; RP (6/30/11) 409-410, 425.

When taken in a light most favorable to the prosecution, this evidence was insufficient to prove accomplice liability (even though it might have been sufficient to prove Mr. Strickland's guilt as a principal). This is so because "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." WPIC 10.51. If Mr. Strickland was not the shooter, then he was guilty of no more than being present when Kerby shot Ivy and Savage.

It was error to instruct the jury on accomplice liability as to Mr. Strickland. His convictions must be reversed. Smalis, at 144. Upon retrial, the prosecution may not pursue a theory of accomplice liability. Id.

IV. THE ADMISSION OF TESTIMONIAL HEARSAY VIOLATED MR. STRICKLAND'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.

A. Standard of Review

Constitutional questions are reviewed de novo. E.S., at 702.

A manifest error affecting a constitutional right may be raised for the first time on review.[14] RAP 2.5(a)(3); State v. Kirwin, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).[15] An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. State v. Nguyen, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

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[14] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see State v. Russell, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. Id.

[15] The policy is designed to prevent appellate courts from wasting "judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits." State v. WWJ Corp., 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. Watt, at 635. To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. Lorang, at 32. Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Burke, at 222.

B. Testimonial hearsay is inadmissible at trial unless the declarant is unavailable and the accused person had a prior opportunity for confrontation.

The Sixth Amendment to the U.S. Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI.[16] A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

[16] This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV.

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The core definition of testimonial hearsay includes statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, at 52. A Crawford issue is "unquestionably constitutional in nature," and thus qualifies for review under RAP 2.5(a) if it is manifest. State v. Kronich, 160 Wash.2d 893, 901, 161 P.3d 982 (2007), overruled on other grounds by State v. Jasper, 174 Wash. 2d 96, 100, 271 P.3d 876 (2012).

C. The admission of Kerby's testimonial statements to police violated Mr. Strickland's confrontation rights.

The admission of a non-testifying codefendant's statement violates the confrontation clause unless the statement is (1) redacted so that it is facially neutral, (2) modified so it is free of obvious deletions, and (3) accompanied by an instruction prohibiting jurors from using it against the defendant.[17] State v. Larry, 108 Wash. App. 894, 905, 34 P.3d 241 (2001) (citing Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), and

[17] This third step—providing a proper instruction—is especially important to ensure the defendant is not prejudiced. Larry, at 905 n. 6 (quoting United States v. Mayfield, 189 F.3d 895, 902 (9th Cir. 1999)).

Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)). Even when all three steps are followed, a redacted statement violates the confrontation right if "the only reasonable inference" drawn from the statement implicates the defendant. State v. Vincent, 131 Wash. App. 147, 154, 120 P.3d 120 (2005).[18]

In Vincent, a non-testifying codefendant's statement was sanitized by replacing references to the defendant's name with "the other guy." Id, at 151. The trial court instructed jurors it could not consider the codefendant's statement against the defendant. Id. Despite these measures, the Court of Appeals found a confrontation violation and distinguished cases in which similar substitutions had been made, noting that in Vincent,

> [T]here were only two participants in the crimes and only two defendants... [T]he only reasonable inference the jury could have drawn from... references to the "other guy" was that the other guy was [the defendant]. The redaction thus failed in its purpose, and admission of [the] testimony in the joint trial violated [the defendant's] rights under Bruton.
> Id, at 154.

In this case, the prosecution introduced excerpts of Kerby's statements to police following his arrest. RP (6/30/11) 562-567, 578-583. The statements fall within Crawford's core definition of testimonial hearsay, and Mr. Strickland had no prior opportunity for cross-examination. Their admission violated Mr. Strickland's confrontation rights for two reasons.

[18]But see Larry, at 906-907. The Vincent court made no reference to Larry.

First, the trial court failed to provide an instruction prohibiting jurors from using the statements against Mr. Strickland.[19] Court's Instructions, Supp. CP. Without it, the jury was free to use Kerby's statements as substantive evidence of Mr. Strickland's guilt, violating Crawford's prohibition against testimonial hearsay. Crawford, at 58-59.

Second, even after Kerby's statements were redacted, they inescapably suggested that Mr. Strickland was the shooter. In particular, Kerby told police that he himself "didn't pull the trigger," and that "the gun never went off in his hand." RP (6/30/11) 582. As in Vincent, "the only reasonable inference" from these statements was that Mr. Strickland shot both Ivy and Savage: "there were only two participants in the crimes and only two defendants." Vincent, at 154. By claiming he was not the shooter, Kerby implicated Mr. Strickland. Id. Indeed, the prosecution made this very point when arguing in favor of joinder: "Given the facts in this case the only logical inference that could be drawn from these statements is that Kerby is implicating Strickland as the shooter." Memorandum of Authorities (filed 3/30/11), p. 5, Supp. CP.

Furthermore, rather than asking the jury to consider Kerby's statements only against Kerby, the prosecutor explicitly invited jurors to use

[19] Ordinarily, failure to request a limiting instruction waives any objection to the absence of such an instruction. See, e.g., State v. Dow, 162 Wash. App. 324, 332, 253 P.3d 476 (2011).This rule should not be applied to Bruton-type confrontation errors: in the Bruton context, failure to give the appropriate instruction actually creates a confrontation error.

the statements as evidence against Mr. Strickland. Specifically, the prosecutor reviewed Laur's conversation with Kerby, concluding that Kerby's statements established that Mr. Strickland was the shooter:

> Did you have a firearm? I never pulled the trigger.
> At one time did you have it at the scene? At one time I had it at the scene; I got rid of it. He asked again later on. Well, if I had it, I got rid of it. The evidence, circumstantial, is, he gave it to Jeffery Strickland. Very simple.
> RP (7/1/11) 134.

The admission of testimonial hearsay violated Mr. Strickland's Sixth and Fourteenth Amendment right to confront adverse witnesses. Crawford, at 58-59. His conviction must be reversed and the case remanded for a new trial. Id.

V. THE TRIAL COURT ERRED BY DENYING MR. STRICKLAND'S SEVERANCE MOTION.

A. Standard of Review

Denial of a motion to sever is reviewed for abuse of discretion. State v. Emery, ___, Wash.2d ___, ___, 278 P.3d 653 (2012). The interpretation of a court rule is an issue of law, reviewed de novo. State v. Sims, 171 Wash. 2d 436, 441, 256 P.3d 285 (2011).

B. Severance should have been granted under CrR 4.4(c) because sanitizing Kerby's statement did not "eliminate any prejudice."

Court rules are interpreted with reference to principles of statutory construction. City of Seattle v. Holifield, 170 Wash. 2d 230, 237, 240 P.3d

1162 (2010). Interpretation starts with the plain language of the rule. Id. If the plain language is subject to only one interpretation, the inquiry ends, "because plain language does not require construction." Id.

Under CrR 4.4(c),

> A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless... deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.
> CrR 4.4 (emphasis added).

Under the plain language of CrR 4.4(c), the admission of a nontestifying codefendant's statement requires severance unless "any prejudice" can be eliminated by deleting references to the defendant. This rule thus provides greater protection than the Sixth Amendment's confrontation clause. Cf. Bruton, supra.

Here, Mr. Strickland sought severance from his codefendant, and the prosecution agreed to delete from Kerby's statements all references to Mr. Strickland. These deletions may have mitigated the prejudice against Mr. Strickland; however, they did not eliminate it. Instead, jurors were free to consider Kerby's statement that he did not pull the trigger as proof that Mr. Strickland did.

Severance should have been granted under CrR 4.4(c). Accordingly, Mr. Strickland's convictions must be reversed and the case remanded for a new trial. CrR 4.4(c).

C. Severance should have been granted under CrR 4.4(c) because Kerby and Mr. Strickland presented mutually antagonistic defenses.

Defense are mutually antagonistic if they "depend on propositions that cannot both be true." Emery, at ___. If codefendants with mutually antagonistic defenses are tried together, reversal is required upon a showing of prejudice. Id.

Kerby's defense was that he did not pull the trigger, while Mr. Strickland's was that Kerby did pull the trigger. These propositions cannot both be true; accordingly, the two defenses were antagonistic and mutually exclusive. Id.

Reversal is required because Mr. Strickland was prejudiced by the court's failure to grant his motion for severance. Id. Unlike the defendant in Emery, the prosecutor's case against Mr. Strickland was not strong: of the numerous witnesses present, none claimed in their initial statements that Mr. Strickland was the shooter. And only two witnesses, Savage and Ivy, later concluded that Mr. Strickland fired the gun, while Crissman testified it was Kerby. RP (6/28/11) 40, 47, 62, 98, 150; RP (6/29/11) 366; RP (6/30/11) 425-426. Further, the trial court failed to instruct jurors that Kerby's statement could not be used against Mr. Strickland.[20] Court's Instructions, Supp. CP; cf.

[20] The court did instruct jurors to decide each defendant`s case separately; however, jurors could not accept both Kerby`s position (that he did not pull the trigger) and Mr. Strickland`s position (that Kerby did pull the trigger). Court`s Instructions, No. 2, Supp. CP.

Emery, at ___. Finally, Kerby's statement that he did not pull the trigger would not have been admissible against Mr. Strickland if the trials had been severed, as it would have violated Crawford. Cf. Emery, at ___.

The trial judge should have recognized that Kerby's and Mr. Strickland's defenses were mutually antagonistic. Id. The court's failure to grant Mr. Strickland's severance motion requires reversal. Id.

VI. MR. STRICKLAND WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. In re Fleming, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); State v. Horton, 136 Wash. App. 29, 146 P.3d 1227 (2006).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in

person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) defense counsel's conduct was deficient, in that it fell below an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. Reichenbach, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy.[21]

These are guidelines only, not "mechanical rules." Strickland, at 696. Instead, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. In every case, the court

[21] See, e.g., State v. Hendrickson, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

must consider whether the result is unreliable because of a breakdown in the adversarial process. Id.

C. Defense counsel was ineffective for failing to consult with Dr. Loftus in a timely fashion.

To be effective, counsel must conduct an adequate investigation. State v. A.N.J., 168 Wash. 2d 91, 110-112, 225 P.3d 956 (2010). This requires counsel to consult with experts, where appropriate. Id, at 112.

Here, the primary issue at trial was the identity of the shooter. The prosecution had little (if any) evidence that Mr. Strickland was involved as an accomplice; absent proof that he personally shot Ivy and Savage, he would have been acquitted. Mr. Strickland's strategy at trial involved pointing to Kerby as the shooter. Only the testimony of Ivy and Savage implicated Mr. Strickland rather than Kerby. RP (6/28/11) 40, 160. Ultimately, defense counsel sought the assistance of Dr. Loftus, who would have helped to cast doubt on Savage's confident identification of Mr. Strickland as the shooter.

However, instead of contacting Dr. Loftus during the first few weeks of the case, defense counsel apparently delayed, and did not even obtain an order authorizing consultation at public expense until after trial had been completed. In this belated motion, counsel indicates that "this was an emergency situation," but does not explain the delay. It appears that counsel hoped to get a continuance to enable him to consult with Dr. Loftus; when the continuance request was denied, Mr. Strickland was left without the option of

presenting the expert testimony. Motion and Declaration for Authorization to Hire Expert (7/25/11), Motion and Declaration for Payment of Expert Witness (7/27/11), Supp. CP.

Had defense counsel consulted with Dr. Loftus in a timely fashion, he would have been able to present the court with a copy of the doctor's expert report. Information in the report suggests that the proffered testimony should have been admitted at trial: it was based on theories generally accepted in the scientific community, and it would have explained the relationship between eyewitness confidence and accuracy. Ex 1, Supp. CP; see ER 702.

At trial, Crissman testified that Kerby was the shooter, Ivy and Savage testified that Mr. Strickland was the shooter, and several more saw the confrontation but did not know who had been the shooter. RP (6/28/11) 40, 160, 229-231, 272; RP (6/29/11) 365-366; RP (6/30/11) 530. This balance would have been altered if counsel had timely consulted with Dr. Loftus and secured his attendance at trial. Dr. Loftus's testimony would have explained to the jury how Ivy and Savage could be confident and yet wrong about which person pulled the trigger. Ex. 1, Supp. CP.

Counsel's error prejudiced Mr. Strickland. Accordingly, his convictions must be reversed and the case remanded for a new trial. Reichenbach, at 130.

D. Defense counsel unreasonably failed to raise a clear objection to Kerby's testimonial statements and to request instructions prohibiting jurors from using those statements against Mr. Strickland.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. State v. Saunders, 91 Wash.App. 575, 578, 958 P.2d 364 (1998) (Saunders II).

Here, defense counsel should have made a clear objection[22] to the admission of Kerby's statements to Detectives Green and Laur, and sought an instruction prohibiting jurors from considering those statements against Mr. Strickland. Even if defense counsel wished to have the statements in evidence (to suggest that Kerby fired the gun), there was no reason to allow the testimony to be used as substantive evidence against Mr. Strickland.

The statements were testimonial hearsay; thus an objection would likely have been sustained and the required instruction given. See Crawford, at 52; Vincent, supra. Had the evidence been excluded (or the jury instructed not to consider the statements against Mr. Strickland), there is a reasonable probability that the outcome of trial would have been different. Kerby

[22] Prior to trial, counsel`s objections and argument relating to Kerby`s statements were unclear at best.

admitted that he had a gun, and told police that he was not the shooter. RP (6/30/11) 582. The obvious inference to be drawn from his statement was that Mr. Strickland fired the gun. Absent Kerby's statements, the jury would have been left with the conflicting accounts of the eyewitnesses (one of whom testified that Kerby fired the gun) and the physical evidence of the bullet's trajectory (which suggested that a tall person—Kerby—shot Ivy). Under these circumstances, it is likely that at least some jurors would have voted to acquit.

Counsel's failure to object and seek a proper instruction fellow below an objective standard of reasonableness. Reichenbach, at 130. The error prejudiced Mr. Strickland, and deprived him of the effective assistance of counsel. Saunders II, at 578. His convictions must be reversed, and the case remanded for a new trial. Id.

E. Defense counsel was ineffective for failing to object to instructions allowing conviction under a theory of accomplice liability.

It is error to instruct on a theory for which there is insufficient evidence. Berube, at 510-11; Clausing, at 626-27. Here, the evidence suggested either that Mr. Strickland was the shooter or that he was merely present (as a bystander) when Kerby fired the gun. Under these circumstances, defense counsel should have objected to the instructions on accomplice liability as they pertained to Mr. Strickland.

Had defense counsel objected, the instruction would not have been given, and there is a reasonable probability that the outcome of trial would

have differed.[23] Because the jury was given the option of convicting Mr. Strickland as an accomplice (even in the absence of sufficient evidence), it is likely that at least some jurors voted to convict on the theory that he was present and approved of Kerby's decision to shoot.

Mr. Strickland was denied his right to the effective assistance of counsel. Reichenbach, at 130. Accordingly, his convictions must be reversed and the case remanded for a new trial. Id.

VII. THE TRIAL JUDGE VIOLATED THE "APPEARANCE OF FAIRNESS" DOCTRINE AND THEREBY INFRINGED MR. STRICKLAND'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

Constitutional issues are reviewed de novo. E.S., at 702.

B. Judge Godfrey provided "some" evidence of a potential for bias.

Due process secures the right to a fair tribunal. Bracy v. Gramley, 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L. Ed. 2d 97 (1997). Indeed, "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 36, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)). "The law goes farther than requiring an impartial judge; it also

[23] Accomplice instructions were, however, appropriate for Kerby, on the state's theory that he provided the gun to Mr. Strickland, who fired.

requires that the judge appear to be impartial." State v. Madry, 8 Wash. App. 61, 70, 504 P.2d 1156 (1972). "The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." Id., at 70; Brister v. Tacoma City Council, 27 Wash. App. 474, 486, 619 P.2d 982 (1980), review denied, 95 Wash.2d 1006 (1981).

A decision may be challenged under the appearance of fairness doctrine for "partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party..." Buell v. City of Bremerton, 80 Wash.2d 518, 524, 495 P.2d 1358 (1972), quoted with approval in OPAL v. Adams County, 128 Wash.2d 869, 890, 913 P2d. 793 (1996). To prevail, a claimant must only provide "some evidence of the judge's... actual or potential bias." State v. Dugan, 96 Wash.App. 346, 354, 979 P.2d 85 (1999). The appearance of fairness doctrine can be violated without any question as to the judge's integrity. See, e.g., Dimmel v. Campbell, 68 Wash.2d 697, 414 P.2d 1022 (1966).

In this case, the trial judge made comments providing "some evidence" of a potential for bias. First, he described the expert testimony proffered by counsel as "nonsense," and asserted that he didn't "need to listen to this nonsense..." RP (6/27/11) 40-42. He questioned defense counsel's competence and implied that counsel was dishonestly raising a "litany" of

issues in an effort to manufacture a reason to sever the cases. RP (6/27/11) 42. Finally, he criticized counsel in front of the jury for his "foolish" request (for permission to move an easel). RP (6/30/11) 419.

The judge's conduct showed at least "some evidence" of potential bias. Dugan, at 354. Accordingly, Mr. Strickland's convictions must be reversed and the case remanded for a new trial. Id.

VIII. THE TRIAL COURT VIOLATED MR. STRICKLAND'S RIGHT TO AN OPEN AND PUBLIC TRIAL AND HIS RIGHT TO COUNSEL.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. E.S., at 702. Whether a trial court procedure violates the right to a public trial is a question of law reviewed de novo. State v. Njonge, 161 Wash.App. 568, ___, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. Id, at ___.

B. The trial court violated both Mr. Strickland's and the public's right to an open and public trial by responding to a jury question in chambers.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; State v. Bone-Club, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); Presley v. Georgia, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam). Proceedings may be closed only if the trial court

enters appropriate findings following a five-step balancing process. Bone-Club, at 258-259. Failure to conduct the proper analysis requires reversal, even if the accused person did not make a contemporaneous objection. Bone-Club, at 261-262, 257.[24] In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. Presley, 130 S.Ct., at 724-725.

The public trial right ensures that a defendant "is fairly dealt with and not unjustly condemned." State v. Momah, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, "the presence of interested spectators may keep [the accused person's] triers keenly alive to a sense of the responsibility and to the importance of their functions." Id. The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. Strode, at 226; State v. Duckett, 141 Wash.App. 797, 803, 173 P.3d 948 (2007). The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly de minimis, for hearings that address only legal matters, or for proceedings are merely "ministerial." See, e.g., Strode, at 230.[25,26]

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[24] See also State v. Strode, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); State v. Brightman, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

[25] "This court, however, 'has never found a public trial right violation to be [trivial or] de minimis'" (quoting State v. Easterling, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

In this case, the trial judge responded to a jury question in camera without the required analysis and findings. This closed proceeding violated Mr. Strickland's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; Bone-Club, supra. It also violated the public's right to an open trial. Id. Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

C. The trial court violated Mr. Strickland's right to counsel by answering a jury question without consulting counsel.

An accused person has a constitutional right to counsel at all critical steps of the process. State v. Ulestad, 127 Wash. App. 209, 214, 111 P.3d 276 (2005). Limitations on this right must be closely monitored. Id. A stage is critical if it presents a possibility of prejudice to the defendant. State v. Harell, 80 Wash. App. 802, 804, 911 P.2d 1034 (1996).

Nothing in the record here shows that the trial judge consulted with counsel prior to responding to the jury's questions regarding accomplice liability for the firearm enhancements. Jury Note and Response, Supp. CP. Here, the trial court responded to a jury question without consulting counsel.

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[26] The Court of Appeals has held that the public trial right only extends to evidentiary hearings. See, e.g., State v. Sublett, 156 Wash.App. 160, 181, 231 P.3d 231, review granted, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered. Momah, at 148; Strode, at 230.

This violated Mr. Strickland's right to the assistance of counsel. Ulestad, at 214. Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

IX. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. Standard of Review.

Constitutional violations are reviewed de novo. E.S., at 702. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); Kirwin, at 823. A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." Walsh, at 8.[27] An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. Nguyen, at 433.

Free speech challenges are different from most constitutional challenges to statutes; under the First Amendment, the state bears the burden of justifying a restriction on speech. State v. Immelt, 173 Wash. 2d 1, 6, 267 P.3d 305 (2011).

[27] The policy is designed to prevent appellate courts from wasting "judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits." State v. WWJ Corp., at 603.

B. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds; facts are not essential.

The First Amendment to the U.S. Constitution provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I. This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; Adams v. Hinkle, 51 Wash.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).[28] A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. Immelt, at ___.

Anyone accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. Immelt, at ___. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. Immelt, at ___. In other words, "[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds." City of Seattle v. Webster, 115

[28] Washington's constitution gives similar protection: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Wash. Const. Article I, Section 5.

Wash.2d 635, 640, 802 P.2d 1333 (1990), cert. denied, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; Virginia v. Hicks, 539 U.S. 113, 118, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003). Instead of applying the general rule for facial challenges, "[t]he Supreme Court has 'provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.'" United States v. Platte, 401 F.3d 1176, 1188 (10th Cir. 2005) (quoting Hicks, at 119); see also Conchatta Inc. v. Miller, 458 F.3d 258, 263 (3rd Cir. 2006).

Mr. Strickland's jury was instructed on accomplice liability. Instruction No. 14, Supp. CP. Accordingly, Mr. Strickland is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. Hicks, at 118-119; Webster, at 640.

C. The accomplice liability statute is overbroad because it criminalizes pure speech that is not directed at inciting imminent lawless action.

The First Amendment protects speech advocating criminal activity: "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." Ashcroft v. Free Speech Coal., 535 U.S. 234, 253, 122 S. Ct. 1389, 1403, 152 L. Ed. 2d 403 (2002). Because of this, speech

advocating criminal activity may only be punished if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech protected by the First Amendment. Under RCW 9A.08.020, one may be convicted as an accomplice if he, acting "[w]ith knowledge that it will promote or facilitate the commission of the crime... aids or agrees to aid [another] person in planning or committing it." The statute does not define "aid." No Washington court has limited the definition of aid to bring it into compliance with the U.S. Supreme Court's admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) "imminent lawless action." Brandenburg, at 447-449.

Washington courts, including the trial judge here, have adopted a broad definition of aid: "The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence." See WPIC 10.51; Instruction No. 14, Supp. CP. By defining "aid" to include "assistance... given by words... [or] encouragement...", the instruction criminalizes a vast

amount of pure speech protected by the First Amendment, and runs afoul of the U.S. Supreme Court's decision in Brandenburg.[29]

It is possible to construe the accomplice statute in such a way that it does not reach constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. Brandenburg, supra. However, such a construction has yet to be imposed. The prevailing construction—as expressed in WPIC 10.51 and adopted by the trial court in Instruction No. 14—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. Brandenburg, supra.

Mr. Strickland's convictions must be reversed and the case remanded for a new trial. Brandenburg, supra. Upon retrial, the state may not proceed on any theory of accomplice liability. Id.

D. The Coleman and Ferguson courts applied the wrong legal standard in upholding RCW 9A.08.020, and should be reconsidered in light of established U.S. Supreme Court precedent.

The U.S. Supreme Court has drawn "vital distinctions between words and deeds, between ideas and conduct." Ashcroft, at 253. Because the

[29] For example, anyone who praises ongoing acts of criminal trespass by Occupy Wall Street protestors is guilty as an accomplice if she or he utters praise knowing that it provides support and encouragement for the protesters. A journalist sent to cover the protest, who knows that media presence encourages the illegal activity, would be guilty as an accomplice simply for reporting on the protest. Anyone who supports the protest from a legal vantage point (for example by carrying a sign on the sidewalk across the street) is guilty as an accomplice. An attorney who agrees to represent the protesters pro bono provides support and encouragement, and is thus guilty of trespass as an accomplice.

accomplice liability statute reaches pure speech—"words" and "encouragement"—it cannot be analyzed under First Amendment tests for statutes regulating conduct. See WPIC 10.51; Instruction No. 14 Supp. CP.

Despite this, the Court of Appeals has upheld Washington's accomplice liability statute by applying the standards for conduct rather than pure speech. State v. Coleman, 155 Wash.App. 951, 960-961, 231 P.3d 212 (2010), review denied, 170 Wash.2d 1016, 245 P.3d 772 (2011); State v. Ferguson, 164 Wash.App. 370, 264 P.3d 575 (2011). In Coleman, the court concluded that the statute's mens rea requirement resulted in a statute that "avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime." Coleman, at 960-961 (citations omitted). The Ferguson court adopted the reasoning set forth in Coleman.

The court's conclusion in Coleman and Ferguson is incorrect; the statute's mens rea element cannot save the statute from First Amendment problems. Speech that "encourage[s] unlawful acts" is protected, unless it falls within the narrow category outlined by Brandenburg. Ashcroft, at 253. The state cannot ban speech made with knowledge that it will promote or facilitate the commission of crime. Such speech can only be criminalized if it also meets the Brandenburg test. A conviction can only be sustained if the jury is instructed that it must find that the speech was (1) "directed to inciting or

producing imminent lawless action..." and (2) "likely to incite or produce such action." Brandenburg at 447. The jury was not so instructed in this case.

The Coleman and Ferguson courts applied the wrong legal standard in upholding the accomplice liability statute. These decisions should be revisited.

X. MR. STRICKLAND'S SENTENCE MUST BE VACATED BECAUSE THE SENTENCING COURT FAILED TO PROPERLY DETERMINE HIS OFFENDER SCORE AND STANDARD RANGE.

A. The prosecution produced insufficient evidence to prove that Mr. Strickland had an offender score of eight.

At sentencing, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist." RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. Mitchell v. United States, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); Estelle v. Smith, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from a defendant's silence pending sentencing. Mitchell, at 328-329.

The prosecution bears the burden of proving any prior convictions. In re Detention of Post, 145 Wash.App. 728, 758, 187 P.3d 803 (2008); State v. Mendoza, 165 Wash.2d 913, 920, 205 P.3d 113 (2009); State v. Knippling, 166 Wash.2d 93, 206 P.3d 332 (2009). If the offender objects to the sufficiency of the evidence, the prosecution is held to the existing record on remand. In re Cadwallader, 155 Wash.2d 867, 878, 123 P.3d 456 (2005).

At sentencing, Mr. Strickland disputed nine of the ten felony charges alleged by the prosecution. See Statement of Prosecuting Attorney, Declaration in Opposition to Sentencing Information, Supp. CP. He noted numerous problems with the materials provided by the prosecution, including the absence of the defendant's signature on one Judgment and Sentence, discrepancies in the recitation of criminal history, and lack of proof that he was the same person named in each document. Declaration in Opposition, Supp. CP. Defense counsel argued that some of the prior convictions were not Mr. Strickland's, noting Mr. Strickland's brother had previously used his name. RP (7/25/11) 63-64, 69.

Despite the problems with the documentary evidence and the defense objections, the prosecutor did not present additional proof of the validity of each prior conviction. See RP (7/25/11) generally. Nor did the prosecutor present evidence proving that the person named in each document was the same person before the court. See RP (7/25/11).

In light of this failure of proof, Mr. Strickland's sentence must be vacated. The case must be remanded for resentencing with an offender score of zero.[30] Cadwallader, at 878.

B. The sentencing court failed to determine whether or not any of Mr. Strickland's prior convictions comprised the same criminal conduct.

A sentencing court is required to analyze multiple prior convictions to determine whether or not they are based on the "same criminal conduct:"

> (5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except: (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations.
>
> RCW 9.94A.525.

The burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. See State v. Dolen, 83 Wash.App. 361, 365, 921 P.2d 590 (1996), review denied, 131 Wash.2d 1006, 932 P.2d 644

[30] The only prior conviction Mr. Strickland did not dispute was a 1996 juvenile conviction from Skagit County, which scored only half a point, yielding an offender score of zero.

(1997); State v. Jones, 110 Wash.2d 74, 750 P.2d 620 (1988); State v. Gurrola, 69 Wash.App. 152, 848 P.2d 199, review denied, 121 Wash.2d 1032, 856 P.2d 383 (1993). "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

The analysis requires examination of the extent to which the offender's criminal intent, objectively viewed, changed from one crime to the next. State v. Haddock, 141 Wash.2d 103, 113, 3 P.3d 733 (2000); see also State v. Anderson, 72 Wash.App. 453, 464, 864 P.2d 1001 (1994). Sometimes this necessitates determination of whether one crime furthered another. Haddock, at 114. A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. State v. Williams, 135 Wash.2d 365, 368, 957 P.2d 216 (1998); State v. Porter, 133 Wash.2d 177, 183, 942 P.2d 974 (1997).

The sentencing court is bound by prior determinations that multiple offenses comprise the same criminal conduct. RCW 9.94A.525(a)(i). However, in the case of multiple offenses not previously found to be the same criminal conduct, the sentencing court must exercise its discretion and decide whether multiple prior offenses should count separately or together. State v. Mehaffey, 125 Wash. App. 595, 600-01, 105 P.3d 447 (2005).

The court here failed to make the required determination with respect to two pairs of Mr. Strickland's prior convictions. First, Mr. Strickland was convicted as a juvenile of Taking a Motor Vehicle Without the Owner's Permission (TMVOP) and Attempting to Elude. Statement of Prosecuting Attorney, p. 4, Corrected Disposition Order (95-8-01803-1, attached to Declaration of Gerald R. Fuller), Supp. CP. The two offenses were sentenced on the same date under the same cause number. This suggests that they involved a single criminal episode, consisting of a car theft followed by a police chase. The prosecution did nothing to prove the two offenses were not the same criminal conduct.

Second, Mr. Strickland was later convicted as an adult of the same two crimes. Statement of Prosecuting Attorney, p. 4. The offenses were both committed on the same day, and (as with the 1995 juvenile offenses) were sentenced under a single cause number on the same date. Judgment and Sentence (00-1-06197-4) (attachment to Declaration of Gerald R. Fuller, Supp. CP). Defense counsel specifically noted a "question of sa[m]e criminal activity." Declaration in Opposition, Supp. CP. The prosecution did not prove the two offenses comprised separate criminal conduct. RP (7/25/11).

Because the prosecution failed to prove each of these offense pairs scored separately, they should have scored as the same criminal conduct. This would reduce Mr. Strickland's offender score by 1.5 points. Accordingly, the

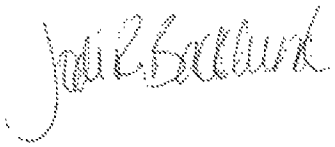
sentence must be vacated and the case remanded for resentencing with a corrected offender score. Cadwallader, at 878. The state must be held to the existing record on remand. Id.

CONCLUSION

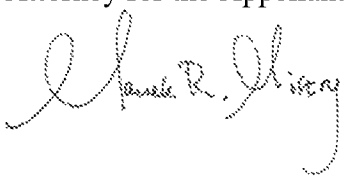
For the foregoing reasons, Mr. Strickland's convictions must be reversed and the case remanded for a new trial. In the alternative, his sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on August 23, 2012,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jeffrey Strickland, DOC #788803
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

and to:

Grays Harbor Co Pros Ofc
102 W Broadway Ave Rm 102
Montesano WA 98563-3621

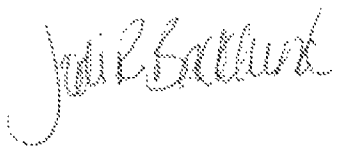
With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

Eric Nielsen (for Mr. Kerby)
neilsene@nwattorney.net
Casey Grannis (for Mr. Kerby)
grannisc@nwattorney.net

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 23, 2012.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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