SUPREME COURT NO. 90240-2
COA NO. 42425-8-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL KERBY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Michael Kerby asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Kerby requests review of the decision in State v. Michael Kerby, Court of Appeals No. 42425-8-II (slip op. filed April 8, 2014), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the court violated Kerby's constitutional right to a public trial where the peremptory challenge stage of jury selection was conducted in private?

2. Whether the court violated Kerby's constitutional right to self-representation in denying his request to proceed pro se?

3. Whether the court violated Kerby's constitutional right to due process in failing to give his proposed instruction cautioning the jury about accomplice testimony?

D. STATEMENT OF THE CASE

The State charged Michael Kerby and Jeffrey Strickland with two counts of first degree assault while armed with a firearm. CP 1-2. Ted Debray and Thomas Keehan were Kerby's assigned attorneys. Before the scheduled start of trial, Kerby sent a letter to the court, stating he wanted

to be placed on the docket for one of three things to happen: (1) a "dismissal;" (2) "let me represent myself;" and (3) "replace Debray and Keehan for obvious reasons with David Mistackin and Christine Newbry." CP 86. After alleging various ways in which his assigned counsel was deficient, the letter continues: "that leaves you and I to come up with [sic] solution. (1) I would like to have and want Mr. David Mistachkin and Christine Newbry (2) If not - I wish to represent my self with no problem doing so your honor. I welcome that decision. (3) You dismiss this case." CP 91. The letter goes on to ask the judge to grant one of these three requests. CP 92.

In a letter dated June 16, 2011, the judge responded as follows:

> I have reviewed your correspondence presented to the court on June 13, 2011. It appears you have three issues you believe you need to be heard by the court. Specifically:
>
> A. You are concerned regarding representation by your present attorneys.
> B. You are requesting appointment of different counsel or in the alternative to represent yourself;
> C. You indicate that you will not be appearing in further court proceedings.
>
> I am placing your correspondence in the court file. Copies are being sent to your attorneys and to the prosecuting attorney as I am required to do.
>
> *The issues you raise in your correspondence will be addressed at hearing on Friday, June 17*, 2011, at 8:30 A.M. Your attendance is required.

CP 95 (emphasis added).

At the June 17 hearing, the judge told Kerby "I am going to let you put in your two bits, and then I'm going to have my own discussion." 3RP[1] 7. Kerby said he was ready for trial. 3RP 8. He voiced his displeasure with the performance of one of his attorneys, stating "I would like to dismiss DeBray, keep Hatch and Keehan, for all the reasons I mentioned in there." 3RP 9.

The judge responded by saying he did not care if Kerby liked his lawyers and they knew what they were doing. 3RP 10-11. The judge next addressed a motion for continuance made by Strickland's attorney. 3RP 11-12. The judge then addressed Kerby's comment in his letter indicating he did not want to be in court if he did not get a new lawyer. 3RP 12-13. The judge said he had the authority to force defendants into court. 3RP 13. In summing up his ruling, the judge said "replacement of counsel and anything of that nature, no, denied." 3RP 13-14.

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[1] The verbatim report of proceedings is referenced as follows: 1RP - one volume consisting of 4/4/11, 5/16/11, 6/13/11, 6/27/11 and 7/25/11; 2RP - 4/8/11; 3RP - three consecutively paginated volumes consisting of 6/17/11, 6/28/11, 6/29/11, 6/30/11; 4RP - 6/28/11; 5RP - 7/1/11; 6RP - 7/5/11. Supplemental transcripts include 3/1/11; 3/7/11 & 3/21/11 (one volume); 6/28/11(additional portion addressing trial procedures), and 6/28/11 (tail end of jury selection).

Strickland's attorney indicated his understanding that Kerby had also asked to proceed pro se. 3RP 14. The judge responded, "Well, if you are not Mr. Kerby's attorney, Mr. Farra, why don't you take care of your client. I gave Mr. Kerby an opportunity to address the court. Issues have been addressed. Thank you." 3RP 14.

The case proceeded to trial. After prospective jurors were questioned as part of the voir dire process, the judge announced, "Ladies and gentlemen, the attorneys and I are going to be step [sic] over to the table with Mr. Strickland and Mr. Kerby. I will allow you to stand and stretch while we have a discussion. It should not take us a long time. Then we will be seating the panel. Please remain in the courtroom. You do not have anything to talk with each other at this point in time, outside the stretching, and rest-assured, we are talking about you." 4RP 106.

A jury panel was subsequently impaneled and sworn. 3RP 24. The jurors exited the courtroom. 3RP 24. The judge then stated, "Let's make a record. The record will reflect, that approximately, 12:05, the lawyers and Mr. Strickland and Mr. Kerby and I stepped to the table and a side bar to select the jury. We spent approximately 20 to 25 minutes doing that. Every one was given the opportunity to exercise their challenges, and for all intents and purposes as making a record of the side bar, that's what took place." 3RP 24. The judge then confirmed this was

an accurate representation of the record by obtaining agreement from the prosecutor, Strickland, Kerby, and their respective counsel. 3RP 24-27. A piece of paper listing the names of jurors excused through peremptory challenges was filed three days later, after the trial began. CP 98-99.

Evidence at trial showed Strickland, Kerby, and Kerby's then-girlfriend, Jerri Chrisman, went to Mac's Tavern in Aberdeen on the night of February 3, 2011. 3RP 350, 352, 357-58. Eugene Savage and co-worker Daniel Ivy were also there. 3RP 32-35. Savage and Ivy had been drinking. 3RP 35, 37, 45-46, 77, 102-03, 105, 109, 198, 542. At some point that night, a confrontation between Kerby, Strickland, and Savage ensued outside the bar over a perceived insult. 3RP 35-37, 58, 87-88. Ivy noticed the confrontation and went outside. 3RP 87-89, 94. The situation at first appeared to resolve itself, but then the conflict began to escalate again. 3RP 92-95, 143-47, 164-66.

Strickland said the matter could be dealt with away from the bar. 3RP 91, 94, 147. The four men walked toward the parking lot, with Kerby and Strickland in front. 3RP 60-61. When Ivy reached Savage's car in the parking area, he realized Savage was no longer with him and walked back to see where he was. 3RP 95-96, 155-56.

As Ivy walked back, he heard Chrisman yell, "shoot his ass." 3RP 97, 134, 136, 156-57, 168-69. Ivy did not hear Kerby say anything. 3RP

156-57. Ivy looked up and saw Strickland lift a gun and shoot him in the chest. 3RP 97-99, 129, 131-32, 134, 150, 159-61. At no point did Ivy see Kerby with a gun. 3RP 159. Ivy was certain that Strickland, not Kerby, was the man who shot him. 3RP 159.

Savage, for his part, remembered Ivy turning around and saying he was shot in the chest. 3RP 38, 39. Savage had not seen a gun when Ivy was shot. 3RP 38, 66. He heard the gun shot. 3RP 38. As Savage advanced, Strickland shot him in the leg. 3RP 39-41, 67, 74. Savage did not see Kerby with a firearm. 3RP 70. Strickland and Kerby took off down an alley. 3RP 40. 41.

Michael Murphy accompanied Savage and Ivy to Mac's Tavern that night. 3RP 522-24. Murphy never heard Kerby threaten to shoot anyone and never saw him with a firearm. 3RP 549-50.

Chrisman described meeting up with Kerby at a bowling alley earlier that night. 3RP 353-55. Chrisman and Kerby then went to Chrisman's residence, where she thought she saw Kerby fold a black gun into a towel, place it into his backpack, and put the backpack in his vehicle. 3RP 356-57, 409-10, 453-54, 457. She was not sure if what she saw was actually a gun. 3RP 457.

At Mac's Tavern, Chrisman followed Strickland and Kerby outside and observed the confrontation. 3RP 360-65, 418-19, 442-43, 460.

According to Chrisman, Kerby pulled out a gun and said he was going to "shoot the motherfucker." 3RP 366. Chrisman described the gun as black, the same as what she thought she saw earlier at the house. 3RP 367. She walked away and heard a "pop pop sound." 3RP 367. She denied saying, "shoot the motherfucker." 3RP 426.

In an initial statement to police, Chrisman said nothing about seeing Kerby with a gun in front of Mac's or that Kerby yelled anything about shooting anybody. 3RP 434-35. As detectives continue to press her for an account of what happened, Chrisman told a detective that she heard Kerby say, "I will shoot you motherfucker." 3RP 432-33, 436-37. She also stated she saw Kerby grab for something in his pocket and pull out what she thought was a gun. 3RP 437.

Strickland, testifying on his own behalf, acknowledged an altercation occurred but maintained he and Kerby walked away after the situation calmed down. 5RP 59-61, 69-75. Strickland claimed he heard gunfire and ran off. 5RP 61, 63, 75. He denied having a gun that night or shooting anyone. 5RP 57, 62. He never saw Kerby with a gun that night and did not know Kerby to carry firearms. 5RP 57, 63.

Kerby was arrested on February 4 at a hotel in Ocean Shores. 3RP 484-86. During subsequent interrogation at the police station, Kerby initially said he never saw or touched a gun. 3RP 578-79. He denied

doing anything. 3RP 580. When later asked during the course of interrogation if he had a gun during the incident, Kerby at one point said he did but got rid of it. 3RP 582, 583. He maintained the gun never went off in his hand, he did not do anything wrong, and that an eyewitness "can't state who actually pulled the trigger." 3RP 582. When the detective tried to "clarify" when Kerby had the gun in his hands, Kerby replied there was no gun and the only thing he had was a Taser. 3RP 583. Police later recovered a toy plastic handgun in an area behind the hotel where Kerby had stayed. 3RP 576-77.

The jury convicted Kerby and Strickland on two counts of first degree assault while armed with a firearm. CP 63-66. The court sentenced Kerby to life without the possibility of parole. CP 76.

Kerby raised several arguments on appeal, including violation of his right to a public trial during jury selection, violation of his right to self-representation when the trial court denied his request to proceed pro se, and violation of his right to due process because the trial court refused to give a cautionary instruction on accomplice liability. Brief of Appellant at 1, 12-38. The Court of Appeals rejected Kerby's arguments and affirmed. Slip op. at 1. Kerby seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE COURT VIOLATED KERBY'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The federal and state constitutions guarantee the right to a public trial to every criminal defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

The Court of Appeals held the right to a public trial does not attach to the peremptory challenge stage of the jury selection process. Slip op. at 23-24. That is a significant question of constitutional law calling for review under RAP 13.4(b)(3).

To which aspects of the trial process the public trial right attaches has roiled appellate courts during the past few years. The jury selection process has received special scrutiny in this regard.

It is established that the right to a public trial encompasses jury selection when it comes to questioning prospective jurors to determine fitness to serve on a particular case. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012).

But whether other aspects of the jury selection process are subject to the public trial mandate has resulted in considerable litigation that has yet to be resolved. See State v. Njonge, 161 Wn. App. 568, 570-72, 255 P.3d 753 (2011) (public trial right violated where hardship phase of voir dire closed to public), review granted, 176 Wn.2d 1031, 299 P.3d 19 (2013); State v. Wilson, 174 Wn. App. 328, 342-43, 346, 298 P.3d 148 (2013) (public trial right not implicated when bailiff excused two jurors solely for illness-related reasons before voir dire began); review pending (No. 88818-3); State v. Jones, 175 Wn. App. 87, 97-101, 303 P.3d 1084 (2013) (public trial right violated where trial court clerk drew four names to determine which jurors would serve as alternates during a court recess off the record), review pending (No. 89321-7); State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) (public trial right violated where discussion on whether some prospective jurors should be dismissed took place in chambers), review granted, 176 Wn.2d 1031, 299 P.3d 20 (2013).

Division Three recently held the public trial right does not attach to the peremptory challenge stage of jury selection. State v. Love, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013), review pending (No. 89619-4). A panel in Division Two adhered to Love without independent analysis. State v. Dunn, __Wn. App.__, 321 P.3d 1283, 1285 (2014).

But in other cases, Division Two treated the peremptory challenge

stage as part of the voir dire process that should be conducted in open court. See Wilson, 174 Wn. App. at 342-43 (in holding public trial right not implicated when bailiff excused jurors solely for illness-related reasons before voir dire began, contrasting voir dire process involving for cause and peremptory challenges); Jones, 175 Wn. App. at 97-101 (in holding private drawing of alternates violated right to public trial, comparing it to voir dire process involving for cause and peremptory challenges); see also People v. Harris, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) ("The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends."), review denied, (Feb 02, 1993).

Application of the "experience and logic" test set forth in State v. Sublett, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012) shows the peremptory challenge process implicates the core values of the public trial right and therefore must be subject to contemporaneous public scrutiny. Historical evidence reveals "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts

have historically treated the peremptory challenge process as part of voir dire on par with for cause challenges. Wilson, 174 Wn. App. at 342-44.

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." State v. Saintcalle, 178 Wn.2d 34, 74, 309 P.3d 326 (2013) (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Saintcalle, 178 Wn.2d at 62 (Madsen, C.J., concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, a prosecutor is forbidden from using peremptory challenges to remove a juror based on race, ethnicity, or gender. McCollum, 505 U.S. at 48-50; Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992). Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The public trial right encompasses circumstances in which the public's supervision contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. Wise, 176 Wn.2d at 5-6. An open peremptory process of jury selection acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory removal from taking place in the first instance and, if such a peremptory challenge is exercised, increases the likelihood that the challenge will be denied by the trial judge. This Court should grant review to determine whether this integral aspect of the jury selection process is subject to the public trial right.

2. WHETHER THE COURT VIOLATED KERBY'S RIGHT TO SELF-REPRESENTATION IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

Criminal defendants have the right to self-representation under the federal and state constitutions. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); U.S. Const. amend. VI; Wash. Const. art. I, § 22. "The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is

equivocal, untimely, involuntary, or made without a general understanding of the consequences." Madsen, 168 Wn.2d at 504-05.

The Court of Appeals held Kerby's request to proceed pro se was equivocal and therefore the trial judge did not abuse his discretion in denying it. Slip op. at 19-21. Review is warranted under RAP 13.4(b)(3) to address this significant question of constitutional law.

Kerby plainly requested to proceed pro se as an alternative to getting new counsel in a letter to the court. CP 91-92. The court responded directly to Kerby, informing him that the issue would be addressed at the upcoming hearing. CP 95. The court invited Kerby to speak at that hearing, at which point Kerby talked about why he wanted new counsel. 3RP 7-9. At no time did the court direct Kerby to address the alternative request to proceed pro se. Instead, the court denied the request for "replacement of counsel and anything of that nature," without addressing the pro se issue at all. 3RP 13-14. The court simply denied Kerby's request for new counsel and ignored Kerby's alternative request that he be allowed to proceed pro se, despite the fact that the hearing was scheduled to specifically address both issues. 3RP 13-14; CP 95. Having been told by the judge that his request to proceed pro se would be addressed at that hearing, it was not incumbent upon Kerby to make yet another request in order to have it be deemed unequivocal.

Kerby's case is materially different from State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998), the case relied on by the Court of Appeals. Slip op. at 20-21. Stenson filed a written request for new counsel before trial without any mention of wanting to proceed pro se if the request was denied. Stenson, 132 Wn.2d at 733. After the trial court denied the Stenson's motion for new counsel at a hearing on the matter, Stenson raised his desire to proceed pro se for the first time. Id. at 739-40. The trial judge engaged in a colloquy on the matter with Stenson, telling him to his face that it was finding "*based upon your indications that you really do not want to proceed without counsel.*" Id. at 740. Stenson did not deny the court's direct finding on that matter. Id. at 740, 742. Under these circumstances, the request to proceed pro se was deemed equivocal. Id. at 741-42.

In contrast to Stenson, Kerby filed a written request to proceed pro se as an alternative to new counsel before a hearing scheduled on both matters was to take place. CP 91-92. The fact that Kerby couched his request to proceed pro se as the alternative in the event he was denied new counsel does not render the request equivocal. Madsen, 168 Wn.2d at 507. In Stenson, the trial judge actually discussed the pro se request at the hearing. Stenson, 132 Wn.2d at 740. The judge in Kerby's case did not do that. In Stenson, the defendant did not refute the trial judge's point blank

finding that there was no real desire to proceed pro se. Id. at 740, 742. In Kerby's case, the judge failed to address Kerby's pro se request altogether, even though the hearing was scheduled to not only address Kerby's motion for new counsel but also his alternative motion to proceed pro se. CP 95 Kerby made an unequivocal request to proceed pro se and the trial judge erred in denying that request. The unjustified denial of the fundamental right to proceed pro se right requires reversal. Madsen, 168 Wn.2d at 503.

3. WHETHER THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO CAUTION THE JURY ABOUT UNRELIABLE ACCOMPLICE TESTIMONY IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND IS OF SUBSTANTIAL PUBLIC IMPORTANCE.

This Court has long singled out accomplice testimony as being of "questionable reliability." State v. Harris, 102 Wn.2d 148, 153, 685 P.2d 584 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124, 157, 761 P.2d 588 (1988). For that reason, the jury must be cautioned about such testimony to avoid reversible error unless the accomplice's testimony is substantially corroborated. Harris, 102 Wn.2d at 155. But since Harris was decided 30 years ago, this Court has not had occasion to clarify what substantial corroboration means in this context.

In holding no reversible error occurred, the Court of Appeals disregarded key aspects of the accomplice's testimony that went

uncorroborated in favor of a loose approach that focused on whether the evidence more generally "connected" Kerby to the crime. Slip op. at 22-23. Kerby's case gives this Court the opportunity to clarify the substantial corroboration standard. The issue regularly arises given the frequency with which accomplices testify in criminal trials. Review is warranted under RAP 13.4(b)(3) and (b)(4) for these reasons.

Kerby's counsel proposed an instruction based on WPIC 6.05, which reads "Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth." CP 27. WPIC 6.05 "instructs the jury about the provisions of a rule of law applicable to the class to which the witness belongs. It is a rule which has long found favor in the law, evolved for the protection of the defendant." State v. Carothers, 84 Wn.2d 256, 269, 525 P.2d 731 (1974), disapproved on other grounds, Harris, 102 Wn.2d at 153-54.

Defense counsel argued this instruction embodied "a consistent and coherent theory of this case, regardless of whether Ms. Chrisman was a charged accomplice or not." 5RP 99. The court declined to give the

instruction cryptically responding it was not "appropriate under the circumstances." 5RP 99.

A defendant is entitled to have the jury fully instructed on the defense theory of the case. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). A party is entitled to instructions supporting his case theory if evidence exists to support the theory. State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). These are due process requirements. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022, 245 P.3d 773 (2011); U.S. Const. amend XIV; Wash. Const. art I, § 3. The failure to instruct on a theory of defense may constitute a violation of due process by depriving the defendant of the right to present his case where the defendant has presented substantial evidence to support that defense. Bradley v. Duncan, 315 F.3d 1091, 1098-1100 (9th Cir. 2002).

A central part of Kerby's defense was that Chrisman lied about Kerby's involvement in the shooting. Because evidence showed Chrisman was an accomplice to Strickland, Kerby was entitled to have the jury given the special instruction by which to judge Chrisman's credibility. Trial evidence showed Chrisman yelled, "shoot his ass" right before Strickland shot Ivy and Savage. 3RP 97, 134, 136, 168-69. That makes her an accomplice because she could have been charged with the same crime.

State v. Boast, 87 Wn.2d 447, 455, 553 P.2d 1322 (1976); RCW 9A.08.020(3)(a)(i) (person is liable as an accomplice for the criminal conduct of another if, with knowledge that it will facilitate commission of a crime, she "[s]olicits, commands, encourages, or requests such other person to commit it.").

The Court of Appeals concluded the failure to give the cautionary instruction did not amount to reversible error on the ground that Chrisman's testimony was substantially corroborated, pointing to other evidence showing Kerby and Strickland were at the bar and had a confrontation with Ivy and Savage, and Kerby had a gun "at one point." Slip op. at 22-23. But when that "one point" occurred, and what happened at that point, is of crucial importance. No one but Chrisman maintained Kerby pulled a gun in the midst of the confrontation with Ivy and Savage. 3RP 366-67, 437. Chrisman was the only witness who testified that Kerby said "I'm going to shoot the motherfucker" right before Ivy and Savage were shot. 3RP 366, 436-37.

"[W]hether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration." Harris, 102 Wn.2d at at 155. An accomplice's testimony need not be corroborated in each and every detail. Id. But here, important parts of a Chrisman's accomplice

testimony are uncorroborated. They were not mere details. They were central to the State's case. The failure to give the cautionary instruction prejudiced the outcome of the trial because it forced the jury to consider a version of events supported only by the testimony of an accomplice without being directed to judge that testimony with special scrutiny.

The trial court told counsel that he was free to argue the issue to the jury. 5RP 99. But "[a] jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). Kerby's convictions should be reversed based on the failure to give the cautionary instruction to which he was entitled.

F. CONCLUSION

For the reasons stated above, Kerby requests that this Court grant review.

DATED this 9th day of May 2014.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL AUSTIN KERBY, Appellant.	No. 42425-8-II Consolidated with
STATE OF WASHINGTON, Respondent, v. JEFFREY ALLEN STRICKLAND Appellant.	No. 42428-2-II UNPUBLISHED OPINION

LEE, J. — A jury found Michael Austin Kerby and Jeffrey Allen Strickland guilty of two counts of first degree assault while armed with a firearm. Both Kerby and Strickland raise numerous issues in their appeals. In Strickland's case, the trial court erred by admitting Kerby's statement to the police without a limiting instruction. Therefore, we reverse Strickland's conviction and remand for proceedings consistent with this opinion. The trial court did not commit reversible error in Kerby's case, and we affirm Kerby's conviction.

FACTS

Daniel Ivy and Eugene Savage were having drinks at Mac's Cigar and Tavern. At some point in the evening, Savage went outside to smoke. Kerby and Strickland were already outside

smoking. Savage made a passing comment to Kerby and Strickland in Spanish. Kerby and Strickland took offense to being spoken to in Spanish and confronted Savage about the perceived disrespect. The confrontation between Kerby, Strickland, and Savage began to escalate. Ivy noticed the confrontation from inside and went outside to try to intervene and calm the situation. At first, it appeared that the situation was resolved, but then the conflict began to escalate again. During the conflict, Ivy was shot in the chest and Savage was shot in the leg. Kerby and Strickland fled from the scene, but were later apprehended by law enforcement.

The State charged both Kerby and Strickland with two counts of first degree assault while armed with a firearm. On April 4, 2011, the trial court heard several pretrial motions, including the State's motion to continue the trials and to join Kerby's and Strickland's cases for trial. The State moved to continue the trials in order to finish forensic testing on bullets and shell casings found at the scene of the shooting. The State told the court that the evidence was currently with the fingerprint lab, and that the fingerprint testing should be completed in a few days. However, the evidence would then need to be sent to another lab for deoxyribonucleic acid (DNA) testing which would take approximately 60 days from the time the DNA lab received the evidence. Both Kerby and Strickland objected to continuing their trials. The trial court stated that the evidence found from forensic testing had the potential to benefit either party, and therefore, there was good cause to continue the trial until the forensic testing could be completed. The trial court entered an order continuing the trial date "for good cause to allow completion of laboratory testing." Suppl. Clerk's Papers (CP) (Dec. 6, 2011) at 35.

The trial court also heard the State's motion for joinder. Strickland objected to the joinder because the State was going to introduce statements that Kerby made to the police after his arrest.[1] The State conceded that if the trials were joined he could not introduce any of Kerby's statements that implicated Strickland. However, the State presented a redacted copy of Kerby's statement which it argued eliminated any mention of Strickland and, therefore, did not prevent joint trials. The trial court agreed and granted the State's motion for joinder.

On June 13, 2011, Kerby wrote a letter to the trial court, stating he wanted the trial court to do one of three things: (1) dismiss the case, (2) allow Kerby to proceed pro se, or (3) replace his current counsel with specific counsel. Kerby listed four grounds supporting his request:

> 1. (no objections) except to my right to speedy trial in 3 strikes case.
> 2. Since I've been graciously given 2 lawyers, they have only been to court 2 times together and 4 or 5 times just one.
> 3. My trial date was suppose [sic] to be June 2nd but my attorney had 5 days vacation. WOW.
>
> Well my life is worth more than a 5 day vacation.
>
> 4. I find it mysteriously odd that the PA knows our or my every move when we get to court. OH. Because Ted DeBray is hoping to work 4 [sic] PA. Makes sense now.

Suppl. CP (Dec. 7, 2012) at 89. Kerby also stated that until the trial court granted one of his three requests he would no longer attend court.

The trial court responded with a letter stating:

> I have reviewed your correspondence presented to the court on June 13, 2011. It appears you have three issues you believe need to be heard by the court. Specifically:
>
> A. You are concerned regarding representation by your present attorneys;

[1] The trial court held a CrR 3.5 hearing and found that Kerby's statements were made after a knowing and voluntary waiver of his Miranda rights.

> B. You are requesting appointment of different counsel or in the alternative to represent yourself;
>
> C. You indicate that you will not be appearing in further court hearings.
>
> I am placing your correspondence in the court file. Copies are being sent to your attorneys and to the prosecuting attorney as I am required to do.
>
> The issues you raise in your correspondence will be addressed at hearing on Friday, June 17, 2011, at 8:30 A.M. Your attendance will be required.

Suppl. CP (Dec. 7, 2011) at 95. At the June 17 hearing, the trial court allowed Kerby to speak on the record regarding his attorneys. Kerby stated:

> I am ready for trial, and I would like to dismiss DeBray, keep Hatch and Keehan, for all the reasons I mentioned in there. For me, it was, I haven't seen anybody since I have had two lawyers. They have been to court twice in three months together. That's crazy. He comes back, he leaves for ten days. I don't know what's going on. You know, and out of respect for him and Keehan, for him telling me that he is still on vacation, still doing work, that's good enough for me. But, you know, for me not to hear anything. And, you know, everything that is done in this case, I did. If I didn't have any law books, I would be sitting doing life right now. That's a fact. You know, but I have to fight for myself and fight for my co-defendant, because it's crazy. That's all. I just wish that you would let—keep him, I just don't see any reason for me to put my life in someone—I don't trust looking at life in prison.

1 Report of Proceedings at 9.

The trial court responded that Kerby had been appointed good lawyers and it did not matter whether Kerby liked them because they were doing a good job. The trial court concluded by stating, "Rule number two, replacement of counsel and anything of that nature, no, denied." 1 RP at 13-14.

The jury trial began on June 28, 2011. After the jury voir dire was conducted, the attorneys, the defendants, and the trial court conducted a side bar to select a jury. After the side bar the trial court made the following record:

> The record will reflect, that approximately, 12:05, the lawyers and Mr. Strickland and Mr. Kerby and I stepped to the table and a side bar to select the jury. We spent approximately 20 to 25 minutes doing that. Every one [sic] was given the opportunity to exercise their challenges, and for all intents and purposes as making a record of the side bar, that's what took place.

1 RP at 24.

At trial, Ivy testified about the events leading up to the shooting. Ivy saw Savage talking to Strickland and Kerby and believed they were in some type of confrontation. Ivy left the bar to check on the situation. When he got outside he learned that Strickland and Kerby felt disrespected because Savage had spoken to them in Spanish. Ivy attempted to calm the situation down, but Strickland and Kerby began saying that it needed to be dealt with away from the bar. Ivy attempted to leave with Savage, and he believed that he had gotten the situation calmed down. However, the situation began escalating again when Kerby encouraged Strickland to deal with being disrespected. Ivy walked to the car, realized that Savage was not with him, and went back to get him. At that point, Ivy saw Strickland raise his arm up and saw the muzzle of the weapon. Ivy heard a "click" followed by a "bang" and realized he had been shot in the chest. 1 RP at 99. Ivy went back into the bar and asked for help.

Ivy admitted that before the altercation he had consumed approximately seven to eight beers. He did not know either Strickland or Kerby before the incident so he identified the shooter as the shorter of the two people and wearing a black "pouffy" jacket. 1 RP at 98. Ivy also testified that the woman who was with Strickland and Kerby (later identified as Jerri Chrisman) said "just shoot his ass." 2 RP at 134. In addition, Ivy was adamant that nobody had

a stun gun or got stunned. Finally, Ivy admitted that he could not identify Strickland as the shooter when he originally spoke to the police.

Savage also testified. He remembered going to Mac's, but he admitted that he had "a fair amount to drink." 1 RP at 35. Savage also admitted that he had a limited memory about what happened on the night he was shot because he was highly intoxicated. He testified that he remembered going outside to smoke and saying something innocuous in Spanish. The next thing he remembered was Ivy getting shot and he saw a muzzle flash coming from Strickland. After Ivy was shot, Savage was shot in the leg. Savage also testified that Strickland did not have a coat on when they were outside. Savage was also adamant that there was no stun gun involved in the altercation. Savage did not identify Strickland as the shooter in his original statement, and he never saw Kerby with a gun.

Chrisman, Kerby's girlfriend at the time, testified about her recollection of the day of the shooting. On the night of the shooting, Chrisman picked Kerby up at the bowling alley. Kerby had a stun gun with him at the bowling alley. Before going to Mac's, Chrisman and Kerby stopped at Chrisman's house. Chrisman thought she saw Kerby wrap a gun in a towel and bring it with him. Chrisman and Kerby picked up Strickland and the three of them went to Mac's. Kerby and Strickland went outside and Chrisman followed them. Chrisman saw Savage and another man wearing a cowboy hat outside the bar. Chrisman heard one of the men speak to Strickland in Spanish and then Kerby got angry about Strickland being disrespected. The confrontation began to escalate, and Chrisman testified that Kerby stunned Savage. Chrisman believed that she heard Kerby say "he was going to shoot the mother f******" and pull out a

gun. 2 RP at 366. Chrisman ran from the parking lot of Mac's, and law enforcement later contacted her at the nearby Jack in the Box.

Chrisman gave several statements to law enforcement over the course of the investigation. In her first statement, she did not say anything about Kerby having a firearm. In a later statement, Chrisman told the defense investigator that she could not say who did the shooting because she did not actually see it. On cross-examination, Chrisman's account of the events of the shooting was unclear and contradictory. For example, at one point she stated she thought Kerby had the stun gun in one hand and the pistol in the other, although she was not sure. She also admitted that she has "a tendency to black things out, black them out and make them try to go away." 3 RP at 446.

The State introduced several pieces of evidence obtained from the crime scene. One full bullet and two spent shell casings were recovered from the parking lot outside of Mac's. The bullet and shell casings were tested for DNA. The lab was able to obtain a partial DNA profile. Although the partial profile was insufficient to perform an identification, the lab technician testified that the partial profile excluded both Kerby and Strickland. Law enforcement never recovered the gun used in the shooting.

Aberdeen Police Detective Sergeant Arthur Laur interviewed Kerby after his arrest and testified about the statements Kerby made during the interview.[2] At first, Kerby stated that he never saw or touched a gun. Later, Kerby said that he had a gun, but he never pulled the trigger;

[2] The State introduced Kerby's statements through Laur's testimony. Laur's testimony was based on, and consistent with, the redactions that the State presented during the pretrial motions.

he got rid of the gun. Then, Kerby changed his story and stated that he never saw a gun but if there was a gun, he got rid of it and did not shoot anybody.

Strickland testified in his own defense. According to Strickland, Savage was the one who attempted to start the confrontation. Neither Kerby nor Strickland thought it was significant and attempted to ignore him. By the time Ivy came outside, Strickland believed that the situation was resolved. Then Strickland left and began walking toward a store about half a block away. As Strickland was walking away, he heard gunshots and began to run away. Strickland testified that he did not have a gun, and he never shot anyone. Strickland also testified that he was not wearing a black pouffy jacket.[3]

The trial court instructed the jury on both principal and accomplice liability for both Strickland and Kerby. The trial court did not give a limiting instruction regarding the use of Kerby's statements. Kerby also requested an instruction regarding accomplice testimony based on the theory that Chrisman acted as an accomplice and the jury should be cautioned on the use of her testimony.[4] The trial court refused to give Kerby's proposed instruction on accomplice testimony because it did not believe the facts of the case warranted a cautionary instruction.

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[3] The black pouffy jacket was a size triple XL. Strickland was 5'6" and weighed 160 pounds. Apparently, at trial, Strickland tried the jacket on to demonstrate that it did not fit him.

[4] Kerby's proposed instruction was WPIC 6.05 which reads,

> Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

Suppl. CP (Oct. 26, 2011) at 27 (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 6.05, at 184-85 (3rd ed., 2008)).

During deliberations the jury sent the trial court a question which read,

> On the form regarding who was armed – It seems as if, the way in which the statement is written, it doesn't matter who was armed with a firearm (i.e.) "was [Kerby], or an accomplice armed . . ."
>
> LIKEWISE
>
> "was [Strickland], or an accomplice, armed with a firearm . . ."
>
> Are we correct to interpret these statements as if it is not pertinent who has the gun?

Suppl. CP (Oct. 27, 2011) at 62. The trial court responded. "Pursuant to your note of inquiry regarding the special verdict form. You must be guided by the instructions given to you by the court." Suppl. CP (Oct. 27, 2011) at 61. The jury returned verdicts finding both Strickland and Kerby guilty of two counts of first degree assault while armed with a firearm. Kerby and Strickland timely appeal.

ANALYSIS

Strickland and Kerby each raise numerous issues. However, with the exception of the public trial issue, their issues are separate and distinct. Because it requires reversal, we first address Strickland's claim that the trial court erred by admitting Kerby's statement to the police without a limiting instruction. We also address the following issues raised by Strickland: (1) whether the trial court violated the time for trial rules, (2) whether the accomplice liability statute is unconstitutionally overbroad, and (3) whether sufficient evidence supports the jury's verdict because these issues raise double jeopardy concerns. Because we reverse on the trial court's failure to give a limiting instruction regarding Kerby's statements, it is unnecessary for us to address Strickland's issues that do not raise double jeopardy concerns or that may arise on retrial.

Kerby raises three issues: (1) whether the trial court violated his right to proceed pro se, (2) whether the trial court erred by denying Kerby's request for a cautionary instruction on accomplice testimony, and (3) whether the trial court violated Kerby's and Strickland's public trial right. Kerby also raises claims of ineffective assistance of counsel and prosecutorial misconduct in his Statement of Additional Grounds (SAG).[5] Kerby has not identified any reversible error.

A. STRICKLAND'S CLAIMS

1. Confrontation Clause Violation

Strickland claims that the trial court erred by admitting Kerby's statement to the police. Although the trial court's redaction of Kerby's statement complies with the requirements set out in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), the trial court violated Strickland's right to confrontation by failing to give the jury a proper limiting instruction.

We review a claim that the trial court violated the defendant's right to confrontation by admitting a codefendant's statement de novo. *State v. Larry*, 108 Wn. App. 894, 901-02, 34 P.3d 241 (2001) (citing *United States v. Mayfield*, 189 F.3d 895, 899 (9th Cir. 1999); *United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir. 1993)). In *Bruton*, the United States Supreme Court established that a defendant is "'deprived of his confrontation rights under the Sixth Amendment when he [is] incriminated by a pretrial statement of a codefendant who did not take the stand at

[5] RAP 10.10.

trial.'" *Larry*, 108 Wn. App. at 902 (quoting *State v. Hoffman*, 116 Wn.2d 51, 75, 804 P.2d 577 (1991)). However, the confrontation clause is not violated if the statement can be redacted so that it is no longer incriminating on its face. *Richardson*, 481 U.S. at 208.

In *Richardson*, Richardson and two other defendants were convicted of assault and murder. 481 U.S. at 205. The State introduced a codefendant's confession that omitted any indication that Richardson participated in the crime. *Richardson*, 481 U.S. at 203. However, the confession included a conversation that took place in a car between the codefendant and the third participant (who was a fugitive at the time of trial) in which they decided they would have to kill the victims after the robbery. *Richardson*, 481 U.S. at 204. Later, Richardson took the stand and testified that she was in the car with the two other participants, although she alleged she did not hear any conversation about killing the victims of the robbery. *Richardson*, 481 U.S. at 204. On appeal, Richardson argued that the codefendant's statement violated her right to confrontation because it incriminated her by establishing that she participated in the robbery knowing that the other participants premeditated killing the victims. *Richardson*, 481 U.S. at 205-06. The United States Supreme Court disagreed and held that because the statement did not incriminate Richardson unless other evidence placed her in the car, introducing the statement did not violate the confrontation clause. *Richardson*, 481 U.S. at 206.

In *Larry*, we reached the same conclusion as the Supreme Court in *Richardson*. 108 Wn. App. at 907-08. Larry and his codefendant Varnes, kidnapped the victim at gunpoint, drove with him in the car, and ultimately shot him several times. 108 Wn. App. at 899-902. Varnes's confession was redacted and introduced at trial. *Larry*, 108 Wn. App. at 905-06. Although the

confession was redacted to eliminate any direct reference to Larry, it contained references to another person including specific references to the car's driver. *Larry*, 108 Wn. App. 906. Based on the evidence presented at trial, the jury could infer that Larry was the driver or one of the other people referred to in the statement. *Larry*, 108 Wn. App. at 906. We held that although the jury could infer that the statement referred to Larry as one of the participants in the crime, it complied with the requirements of *Bruton*. *Larry*, 108 Wn. App. at 907.

Here, the redacted statements admitted at trial complied with the rules established in *Richardson* and *Larry*. Kerby's statements reference what he did not do, i.e., fire the gun, possess the gun, or shoot anyone. Strickland argues that Kerby's statement directly incriminates him because he was the other person at the scene, thus if Kerby did not shoot the gun, Strickland must have. This is the same argument that was rejected in *Richardson* and *Larry*. Kerby's statement incriminates Strickland because other evidence, including his own testimony, establishes that he was the other person with Kerby outside the bar, the statement is not incriminating on its face. Therefore, the statement was redacted consistent with the requirements of *Richardson* and *Larry*.

In *Richardson* and *Larry*, however, the redaction cured any confrontation clause violation because the trial court explicitly instructed the jury that the statements could not be considered evidence against the codefendants. 481 U.S. at 207; 108 Wn. App. at 905. Without an appropriate limiting instruction, the jury is free to consider testimonial hearsay as evidence against the defendant which is a violation of the confrontation clause, regardless of whether the

statement directly incriminates the defendant. *See Richardson*, 481 U.S. at 206-07. In *Richardson*, the Supreme Court explicitly stated,

> We hold that the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession *with a proper limiting instruction* when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

481 U.S. at 211 (emphasis added). Here, the trial court failed to instruct the jury that Kerby's statement could not be considered evidence against Strickland. Without an explicit instruction prohibiting the jury from considering Kerby's statement as evidence against Strickland, admission of the statement, even properly redacted, violated the confrontation clause.

Further, the error was not harmless. Violations of the confrontation clause are subject to harmless error analysis. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), *aff'd*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). When determining whether a constitutional error is harmless, we apply the overwhelming untainted evidence test. *Davis*, 154 Wn.2d at 305. "Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless." *Davis*, 154 Wn.2d at 305. Here, Ivy testified that Strickland was the person who shot him. However, Ivy never actually saw Strickland with the gun. There was no evidence at trial that Strickland ever possessed the gun, and Savage was not sure who shot him. Strickland denied possessing a gun or participating in the shooting, and he testified that he was already leaving the scene at the time the shooting took place. Accordingly, there was not overwhelming, untainted evidence proving that Strickland was the shooter or participated in the shooting, and we reverse his conviction.

2. Time for Trial

Strickland argues that the trial court violated the time for trial rules by granting the State's motion for a continuance over his objection. Although the trial court's error violating Strickland's right to confrontation is dispositive and requires reversal, we must address the alleged time for trial error because such an error would require dismissal with prejudice. The trial court did not abuse its discretion by granting the State's motion to continue and, thus, did not violate the time for trial rules.

Under CrR 3.3(b)(2), a defendant not detained in jail is required to be brought to trial within 90 days of his arraignment date. However, CrR 3.3(f)(2) allows the trial court to continue the trial 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." The decision whether to grant or deny a motion to continue lies within the sound discretion of the trial court and will not be disturbed absent a showing of manifest abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 579, 23 P.3d 1046 (2001). "A continuance granted by the trial court is an abuse of discretion only if it can be said that the decision was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Woods*, 143 Wn.2d at 579 (quoting *In re Det. of Schuoler*, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986)) (internal quotations omitted).

Strickland appears to rely in large part on the fact that the trial court's written order which granted the trial continuance "for good cause to allow completion of laboratory testing," does not contain explicit findings of fact on which the trial court relied when making its decision. However, we can supplement written findings and orders with the trial court's oral decision

provided that the trial court's oral decision does not conflict with the written order. *State v. Hinds*, 85 Wn. App. 474, 486, 936 P.2d 1135 (1997). Furthermore, CrR 3.3 does not require the trial court to enter written findings of fact or conclusions of law. *Compare* CrR 3.3 with CrR 3.5. Even when a court rule requires written findings of fact and conclusions of law, the trial court's failure to enter written findings of fact and conclusions is not a fatal error provided that the record is sufficient to allow us to review the alleged error. *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998), *review denied*, 137 Wn.2d 1023 (1999). Here, the record is sufficient to allow us to determine whether the trial court abused its discretion when it granted the State's motion to continue.

Strickland also argues that CrR 3.3 must be strictly construed and, therefore, the trial court erred by failing to make specific findings that (1) the continuance was required in the administration of justice and (2) that the defendant would not be prejudiced by the continuance. Strickland's argument is not persuasive. Strickland cites *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009), for the proposition that CrR 3.3 must be strictly construed. However, nothing in *Kenyon* stands for the proposition that it is reversible error for the trial court to fail to make specific findings regarding the exact language within the rule. Strickland has cited no authority that requires the trial court to make specific findings, and we have found none. Instead, the appropriate question is whether the trial court abused its discretion by granting the State's motion for a continuance. *See Woods*, 143 Wn.2d at 579.

Strickland further argues that the trial court abused its discretion because it failed to make an adequate inquiry into (1) why the casings were not sent for forensic testing until two weeks

after they were collected, (2) the procedures used by the laboratories "to determine whether the labs do everything possible to ensure that tests are performed in a timely way," and (3) the likelihood that the tests would produce material evidence. Br. of Appellant (Strickland) at 20. Although this information may have been helpful to the trial court, this level of inquiry is not necessary to determine whether the trial court's decision was manifestly unreasonable.

Here, the State moved for a continuance to determine whether fingerprint or DNA evidence could be recovered from the shell casings found at the scene of the shooting. Obviously, if Kerby's or Strickland's fingerprints or DNA had been found on the shell casings it would be material evidence and this was clearly the State's goal in obtaining forensic testing. In addition, the State had spoken to both lab technicians and was able to give the court specific time frames for the forensic testing to be completed. It was not manifestly unreasonable for the trial court to grant the State's motion for a continuance to obtain potentially material evidence, especially when the State was able to provide a specific time frame in which the forensic testing would be completed. Therefore, the trial court did not abuse its discretion, and it did not violate the time for trial rules by granting the State's motion for a continuance.

3. Constitutionality of Accomplice Liability

Strickland argues that the accomplice liability statute is unconstitutionally overbroad because it impermissibly penalizes free speech in violation of the First and Fourteenth Amendment. We address Strickland's challenge to the constitutionality of the accomplice liability instruction because a charge based on an unconstitutional statute requires dismissal. However, Strickland's argument has already been addressed and rejected by Washington courts.

In *State v. Coleman*, 155 Wn. App. 951, 960-61, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016 (2011), Division One of this court rejected the argument that the accomplice liability statute was impermissibly overbroad because the accomplice liability statute "requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime. . . [The statute's] sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime." In *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011), *review denied*, 173 Wn.2d 1035 (2012), we explicitly adopted Division One's reasoning and held that the accomplice liability statute is not unconstitutionally overbroad. *Coleman* and *Ferguson* are controlling. The accomplice liability statute is not unconstitutionally overbroad. Accordingly, Strickland's claim fails.

4. Accomplice Liability Jury Instruction

Strickland argues that there is insufficient evidence to support the jury's guilty verdict. Strickland concedes that there is sufficient evidence to support the jury's verdict finding him guilty as a principle, and therefore, there is sufficient evidence to support the jury's verdict. However, Strickland contends that there was insufficient evidence to support the jury's verdict finding him guilty under a theory of accomplice liability. Although Strickland alleges that this is an issue of sufficiency of the evidence, it is not. Rather, Strickland actually argues that the trial court erred by instructing the jury on accomplice liability. Accordingly, it will be addressed as such.

We review challenged jury instructions de novo. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Jury instructions are sufficient when, read as a whole, they accurately state

the law, do not mislead the jury, and permit each party to argue its theory of the case. *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). Under RCW 9A.08.020(3)(a), a person acts as an accomplice if, with knowledge that it will promote or facilitate the commission of a crime, he solicits, commands, encourages, or requests a person to commit a crime, or he aids or agrees to aid such other person in planning or committing a crime. Here, the jury instructions properly stated the law establishing accomplice liability. The jury instruction also allowed both sides to argue their theories of the crime. The State argued that Strickland created the confrontation between the parties and escalated the confrontation to the point that a shooting occurred. Strickland was able to argue that he had abandoned the confrontation and was leaving the scene; therefore, he was merely present at the scene of the crime. Here, the accomplice jury instruction was legally correct and the trial court did not err by instructing the jury on both principle and accomplice liability.

Although the trial court did not violate the time for trial rules, the accomplice liability statute is constitutional, and the trial court did not err in giving an accomplice liability jury instruction, the trial court did improperly admit Kerby's statement without a proper limiting instruction. Therefore, Strickland's convictions are reversed, and his case is remanded for further proceedings consistent with this opinion.

B. KERBY'S CLAIMS

1. Kerby's Request to Proceed Pro Se

Kerby argues that the trial court erred by summarily denying his motion to proceed pro se. The State responds that because Kerby's request was either equivocal or abandoned, the trial

court did not err by refusing to allow Kerby to proceed pro se. At the hearing addressing this issue, Kerby had the opportunity to articulate his request to proceed pro se, but he did not. There are identifiable facts in the record that convince us Kerby's request to proceed pro se was equivocal. Therefore, we affirm the trial court's decision denying Kerby's request to proceed pro se.

Criminal defendants have an explicit right to self-representation under both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution. "This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). "The unjustified denial of this [pro se] right requires reversal." *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (citing *State v. Breedlove*, 79 Wn. App. 101, 111, 900 P.2d 586 (1995)).

We review the trial court's decision denying a defendant's right to proceed pro se for an abuse of discretion. *Madsen*, 168 Wn.2d at 504. After a defendant has made a request to proceed pro se, the trial court must first determine whether the request is unequivocal and timely. *Madsen*, 168 Wn.2d at 504 (citing *Stenson*, 132 Wn.2d at 737). If the defendant's request is unequivocal and timely, "the court must then determine if the defendant's request is voluntary, knowing, and intelligent, usually by colloquy." *Madsen*, 168 Wn.2d at 504 (citing *Faretta*, 422 U.S. at 835). Courts are required to indulge in every reasonable presumption against a defendant's waiver of the right to counsel. *Madsen*, 168 Wn.2d at 504 (quoting *In re Det. of*

Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999)). However, in *Madsen*, Division One of this court stated,

> This presumption does not give a court carte blanche to deny a motion to proceed pro se. The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary or made without a general understanding of the consequences. Such a finding must be based on some identifiable fact; the presumption in *Turay* does not go so far as to eliminate the need for any basis for denying a motion for pro se status.

Madsen, 168 Wn.2d at 504-05.

Here, Kerby wrote a letter to the court stating that he wanted the court to replace his current counsel with specific counsel or allow him to represent himself. At the hearing on this issue, Kerby spoke to the court about his request. Kerby specifically requested to keep two attorneys, but asked that the third be dismissed. Kerby was silent as to his prior written request to the court except for his specific statements as to which counsel he wanted dismissed.

Given this record, Kerby's request to proceed pro se was equivocal. In *Stenson*, the defendant made a motion to substitute counsel because of his dissatisfaction with his current counsel's performance. 132 Wn.2d at 734-35. When the trial court denied his motion to substitute counsel, Stenson made a motion to proceed pro se. *Stenson*, 132 Wn.2d at 739. Stenson told the court that he wanted to proceed pro se because he did not want to go to trial with the counsel that he had appointed. *Stenson*, 132 Wn.2d at 739-40. Our Supreme Court noted that, "[w]hile a request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal . . . such a request may be an indication to the trial court, in light of the whole record, that the request is not unequivocal." *Stenson*, 132 Wn.2d at 740-41

(citing *Hamilton v. Groose*, 28 F.3d 859, 862 (8th Cir. 1994); *Adams v. Carroll*, 875 F.2d 1441, 1445 (9th Cir. 1989); *People v. Williams*, 220 Cal. App. 3d 1165, 269 Cal. Rptr. 705, 707-08 (1990)). Such is the case here.

Although Kerby made a request to proceed pro se, the request was an alternative to obtaining substitute counsel. Kerby affirmatively agreed to keep two of his attorneys, Hatch and Keehan. As in *Stenson*, almost all of the discussion between Kerby and the trial court, both in his letter and in his oral statement, concerned his request for different counsel rather than his request to represent himself. 132 Wn.2d at 742. Kerby's primary complaints were regarding the attorney's taking vacation and not communicating with him enough. Accordingly, based on the record as a whole, Kerby's request was equivocal, and he was not denied his Sixth Amendment right to counsel.

2. Accomplice Testimony Jury Instruction

Kerby argues that the trial court erred by refusing to give the jury an instruction cautioning them on the use of accomplice testimony. Kerby's argument rests on the assumption that Chrisman was an uncharged accomplice, and therefore, the trial court was required to instruct the jury to treat her testimony with extreme caution. Even assuming that Chrisman was an uncharged accomplice, the facts of this case are such that it was not reversible error for the trial court to fail to give a jury instruction on accomplice testimony because Chrisman's testimony was sufficiently corroborated.

Washington courts have repeatedly expressed concern over the reliability of accomplice testimony. *State v. Harris*, 102 Wn.2d 148, 153, 685 P.2d 584 (1984), *overruled on other*

grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989). "A conviction may rest solely upon the uncorroborated testimony of an accomplice *only* if the jury has been sufficiently cautioned by the court to subject the accomplice's testimony to careful examination and to regard it with great care and caution." *State v. Carothers*, 84 Wn.2d 256, 269, 525 P.2d 731 (1974). In *Harris*, our Supreme Court held,

> (1) [I]t is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies *solely* on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration.

102 Wn.2d at 155. Corroborating evidence is sufficient if it fairly connects the defendant with the crime, and independent evidence is not needed to corroborate every part of the accomplice's testimony. *State v. Calhoun*, 13 Wn. App. 644, 648, 536 P.2d 668 (1975).

Assuming, but not deciding, that Chrisman's testimony would be considered accomplice testimony, it would have been the better practice for the trial court to give the jury a cautionary instruction.[6] However, independent evidence sufficiently connects the defendants with the crime. Therefore, it was not reversible error for the trial court to refuse to instruct the jury to treat Chrisman's testimony with caution. Independent evidence established that Strickland and Kerby were at the bar and that they both engaged in a confrontation with Ivy and Savage. Furthermore, Kerby's own statements corroborate Chrisman's assertion that at one point Kerby

[6] Kerby argues that Chrisman was an uncharged accomplice because Ivy testified that he heard the woman who was with Kerby and Strickland yell, "[S]hoot his ass." 2 RP at 134. Taking Ivy's testimony as true, Chrisman encouraged the commission of the crime and could be charged as an accomplice. *See* RCW 9A.08.020.

had a gun. Based on all the other evidence presented at trial, the defendants were connected to the crime without Chrisman's testimony. Therefore, it was not reversible error for the trial court to refuse to give the jury a cautionary instruction on accomplice testimony.

C. PUBLIC TRIAL RIGHT

Kerby alleges that the trial court violated his right to a public trial by holding portions of jury selection in a side bar. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). We review alleged violations of the public trial right de novo. *Wise*, 176 Wn.2d at 9. The threshold determination when addressing an alleged violation of the public trial right is whether the proceeding at issue even implicates the right. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). In *Sublett*, our Supreme Court adopted a two-part "experience and logic" test to address this issue: (1) whether the place and process historically have been open to the press and general public (experience prong), and (2) whether the public access plays a significant positive role in the functioning of particular process in question (logic prong). 176 Wn.2d at 72-73. Both questions must be answered affirmatively to implicate the public trial right. *Sublett*, 176 Wn.2d at 73.

Kerby argues that the trial court violated his public trial right because the trial court conducted the for-cause and peremptory challenges portion of jury selection during a sidebar conference. Division Three of this court addressed this exact issue in *State v. Love*, 176 Wn. App. 911, 915-16, 309 P.3d 1209 (2013). In *Love*, the court held that neither "prong of the

experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public." 176 Wn. App. at 920. The public trial right does not attach to the exercise of challenges during jury selection. *Love*, 176 Wn. App. at 920. Accordingly, the trial court did not violate Kerby's public trial right and Kerby's challenge fails.

D. KERBY'S SAG

1. Denial of Right to Counsel – Irreconcilable Conflict

Kerby alleges that his right to counsel was violated because he had an irreconcilable conflict with one of his appointed attorneys. Here, the majority of facts Kerby uses to support his allegation are facts outside the record and, thus, we do not consider them. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). Based on the record before us on appeal, there was not an irreconcilable conflict between Kerby and his attorney.

A defendant's Sixth Amendment right to counsel is violated if the relationship between attorney and client completely collapses and the trial court refuses to substitute new counsel. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). But there is a difference between a complete collapse of the relationship or irreconcilable differences and a "mere lack of accord." *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (citing *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)), *cert. denied*, 549 U.S. 1022 (2006). A complete collapse of the attorney and client relationship can exist when the defendant refuses to cooperate or communicate with his attorney in any way. *In re Stenson*, 142 Wn.2d at 724 (citing *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)). But a complete collapse can also exist when

the communications are quarrelsome, derogatory, or threatening. *In re Stenson*, 142 Wn.2d at 724-25.

Based on the record before us on appeal, Kerby cannot establish an irreconcilable conflict. Although Kerby did express dissatisfaction with his attorney, he never alleged a complete inability to communicate with his attorneys. When the trial court gave him an opportunity to discuss the situation with his attorneys, Kerby responded with generalized dissatisfaction with the way his case was progressing, but he never alleged any severe impediments to continuing the attorney client-relationship. Therefore, nothing in the record before us establishes there was a complete breakdown in attorney client relationship or that there was an irreconcilable conflict. *See State v. Varga*, 151 Wn.2d 179, 200-01, 86 P.3d 139 (2004) (defendant's general dissatisfaction and distrust insufficient to warrant substitution of counsel).

2. Ineffective Assistance of Counsel

Kerby makes several allegations of ineffective assistance of counsel. Specifically, he states that counsel was ineffective for (1) failing to object to the admission of Kerby's statement to the police, (2) failing to obtain the cautionary instruction for Chrisman's testimony, (3) failing to sever the trials, and (4) failing present expert testimony. Kerby also alleges that, even if one alleged instance of ineffective assistance of counsel was not prejudicial, he received "cumulative error of ineffective assistance of counsel." SAG at 19. Kerby's ineffective assistance of counsel claims lack merit.

To prevail on an ineffective assistance of counsel claim, Kerby must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *McFarland*, 127 Wn.2d at 335. To establish prejudice, a defendant must show a reasonable probability that the outcome would have differed absent the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If an ineffective assistance of counsel claim fails to support a finding of either deficiency or prejudice, it fails. *Strickland*, 466 U.S. at 697.

First, Kerby alleges that counsel was ineffective for failing to object to the admission of his statement to the police. But Kerby's statement was admitted after the trial court held a CrR 3.5 hearing to determine its admissibility. Accordingly, counsel's performance cannot be deficient for failing object to the admission of Kerby's statement.

Second, Kerby alleges that counsel was ineffective for failing to obtain an instruction cautioning the jury about Chrisman's testimony. But defense counsel proposed this instruction. Further, as we explained above, it was not error for the trial court to refuse to give the instruction. Therefore, counsel's performance was not deficient for failing to obtain a cautionary instruction regarding Chrisman's testimony.

Third, Kerby alleges that defense counsel was ineffective for failing to object to the State's motion for joinder and for failing to file a motion to sever the trials. To show ineffective assistance of counsel based on failure to make a motion to sever, Kerby must show that the motion to sever would have been granted. *State v. Standifer*, 48 Wn. App. 121, 125-26, 737 P.2d 1308 (1987). Kerby argues that he and Strickland had mutually antagonistic defenses that

required separate trials. Specifically, Kerby argues that his defense implies the Strickland fired the gun, and Strickland's defense implies that Kerby fired the gun. The record shows that Kerby and Strickland did not have mutually antagonistic defenses sufficient to warrant separate trials. *See State v. Grisby*, 97 Wn.2d 493, 508, 647 P.2d 6 (1982) (in a trial where the sole disagreement was who killed which victim the prejudice by the antagonistic defenses was not sufficient to require separate trials). Therefore, defense counsel's performance was not deficient for failing to make a motion to sever the trials.

Fourth, Kerby alleges that defense counsel was ineffective for failing to obtain and present expert testimony.[7] Generally, whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). Failure to provide expert testimony has been held deficient only where the expert was necessary to explain something a lay witness could not. *See Maurice*, 79 Wn. App. at 552; *Thomas*, 109 Wn.2d at 231-32. Kerby's proposed expert, Dr. Loftus, would have testified about the effects of alcohol on eyewitness identification and recall. This expert testimony does not rise to the level of being necessary for Kerby's defense, and defense counsel was not deficient for failing to obtain or present this expert testimony.

Finally, because counsel's performance was not deficient there can be no cumulative prejudice from counsel's ineffectiveness. Kerby has failed to meet his burden to prevail on his ineffective assistance of counsel claims.

[7] We also note that Strickland attempted to introduce Dr. Loftus's testimony, but the trial court excluded it.

3. Prosecutorial Misconduct

Kerby alleges that the prosecutor engaged in misconduct by failing to disclose a deal made with Chrisman in exchange for her testimony. This allegation rests on facts outside the record on appeal, and cannot be reviewed on direct appeal. *McFarland*, 127 Wn.2d at 338. Therefore, we do not address Kerby's prosecutorial misconduct claim.

We reverse Strickland's conviction because the trial court erred by failing to give a proper limiting instruction regarding Kerby's statements and remand for further proceedings consistent with this opinion. Kerby has not identified a reversible error. Therefore, we affirm Kerby's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, P.J.

Penoyar, J.P.T.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DSHS, Respondent, v. MICHAEL KERBY, Petitioner.	)	SUPREME COURT NO. _____ COA NO. 42425-8-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF MAY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL KERBY
DOC NO. 725509
WASHINGTON STATE PENITENIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF MAY, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

May 08, 2014 - 2:42 PM

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