NO. 44972-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

AGYEI J. MCDANIEL,

Appellant.

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

The Honorable Vicki L. Hogan, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENTS OF ERROR

1. Under the rules of statutory construction, the rule of lenity and In re the Personal Restraint of Andress,[1] RCW 9A.32.050(1)(b) must be interpreted to apply only to assault predicates which are separate from the act causing the death.

2. Appellant's conviction of second degree felony murder violates his State and Federal constitutional rights to equal protection and fundamental fairness.

3. The trial court's exclusion of relevant evidence violated appellant's constitutional right to present a complete defense.

4. Trial counsel's failure to object to damaging propensity evidence denied appellant effective representation.

Issues pertaining to assignments of error

1. The only way to avoid an absurd and nonsensical result and comply with the rule of lenity is to interpret the current second degree felony murder statute so as to permit conviction based upon the predicate crime of assault only if the assault is not the conduct which results in the death. Should this Court so interpret the statute, and should the conviction be reversed where the predicate assault in this case was the conduct which caused the death?

[1] 147 Wn.2d 602, 56 P.3d 981 (2002).

2. Does the current second degree felony murder statute violate equal protection where there is no limit to the prosecutor's discretion to charge a higher crime for the same acts and no basis for treating similarly situated defendants differently? Further, does it offend fundamental principles of fairness to allow such unfettered discretion to arbitrarily select which defendant faces far greater punishment for the exact same act?

3. In support of his claim of self-defense appellant offered expert testimony that the gang the deceased was affiliated with had a reputation for committing violent crimes. Appellant knew of the gang affiliation and of the gang's reputation and argued that the expert testimony was necessary for the jury to evaluate the circumstances known to appellant at the time of the shooting. Did exclusion of this relevant, admissible evidence violate appellant's constitutional right to present a complete defense?

4. The court admitted evidence of the circumstances surrounding a prior shooting for which appellant was convicted, in order to impeach a statement made by appellant's wife on the stand. Although the court ruled that the impeachment evidence could not connect appellant to the prior incident, the prosecutor's line of inquiry made it clear that

appellant was the shooter. Did defense counsel's failure to object to the damaging propensity evidence constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On December 6, 2012, the Pierce County Prosecuting Attorney charged Appellant Agyei McDaniel with one count of second degree murder, alleging that he was armed with a firearm, and one count of unlawful possession of a firearm in the second degree. CP 1-2; RCW 9A.32.050(1)(a); RCW 9.41.040(2)(a). The State amended the information to include felony murder as an alternative means to intentional murder. CP 154-55; RCW 9A.32.050(1)(b).

The case proceeded to jury trial before the Honorable Vicki L. Hogan. The jury returned guilty verdicts on both counts and found McDaniel was armed with a firearm. CP 280-82. The jury answered special interrogatories indicating the jurors did not unanimously agree that McDaniel committed intentional murder but unanimously agreed he caused the death in the course of or in furtherance of a felony assault. CP 283.

The court imposed a high end standard range sentence of 254 months, plus a 60-month firearm enhancement, for a total sentence of 314

months on the murder charge. It imposed a concurrent sentence of 12 months on the firearm charge. CP 314-15. McDaniel filed this timely appeal. CP 361.

2. Substantive Facts

On December 4, 2012, Agyei McDaniel shot Patrick Nicholas. He has never denied the shooting, asserting that he acted in self-defense. Nicholas died as a result of the gunshot wounds, and the State charged McDaniel with second degree murder. RP 248, 343; CP 154-55.

McDaniel and Nicholas had been close friends for more than ten years. RP 628. Their wives are cousins, and McDaniel and Nicholas thought of themselves as brothers. RP 203-04, 250, 631, 805. Like brothers they occasionally argued, but they had never come to physical blows, and they always reconciled. RP 206-07, 250, 631-32, 837.

Yet, McDaniel knew Nicholas to be violent with others. RP 633. He had seen Nicholas get into fights, and he had witnessed Nicholas pistol whip a man over a parking space dispute. RP 633. McDaniel saw Nicholas act that way more than once, but he assumed, because of their close relationship, that Nicholas never posed a threat to him. RP 634. That changed on December 4, 2012.

McDaniel rented a storage unit at a Public Storage facility in Tacoma. When Nicholas separated from his wife in July 2012, he moved

some belongings into McDaniel's unit and helped pay the rental fees. RP 212. In December, McDaniel decided to close out his unit because he could no longer afford the fees, and he tried contacting Nicholas to ask him to move his belongings. RP 635-36. Nicholas did not answer his phone or return any of McDaniel's calls, which upset McDaniel. RP 636-37, 829. He knew he needed to move everything out of the unit before December 5 or it would be forfeited. RP 637. Finally, on December 3, McDaniel's wife, Angela McDaniel, called Nicholas's wife, Korrin Tennyson, and explained the situation. RP 209. Tennyson told Angela[2] she would get Nicholas to the storage facility the next day. RP 210.

Nicholas had been sick the week before, and he still was not feeling well. He did not want to move his items from the storage unit, but McDaniel and Tennyson insisted, and that upset Nicholas. RP 208, 213, 256. Nonetheless, he called McDaniel on December 4, and they agreed to meet at the storage facility. RP 638.

When McDaniel and his 10-year-old son Antonio arrived at the storage facility, Nicholas's car was parked in the lot. Tennyson was in the car, and Nicholas was in the office. RP 590, 639-40. McDaniel went through the gate to his storage unit, then walked back to the office to meet Nicholas. RP 591, 639-40. McDaniel thought Nicholas might be

[2] McDaniel's wife and son are referred to by their first names to avoid confusion. No disrespect is intended.

arranging to have McDaniel's storage unit switched to his name, so that he would not have to move his belongings, and he thought Nicholas was waiting for him. RP 641. When McDaniel started talking to Nicholas, however, Nicholas made a gesture with his hand. McDaniel could tell Nicholas was upset, but he did not know why. RP 641-42. McDaniel followed Nicholas outside, asking what they were going to do, but Nicholas did not respond. He just got in his car and proceeded to the storage unit. RP 643.

Once in front of McDaniel's storage unit, Nicholas and McDaniel started arguing, yelling back and forth at each other. RP 216, 594, 643. Nicholas was angry that McDaniel had made him come down to move his things, and McDaniel responded that he had no choice. RP 644. The argument was pretty intense, and Tennyson texted Angela and told her she thought Nicholas and McDaniel might start fighting. RP 235, RP 257-58. Angela responded that she did not think that would happen, but she was not there at the time to see the argument. RP 235, 258.

McDaniel and Antonio proceeded to load McDaniel's El Camino, while McDaniel and Nicholas continued to argue. RP 649-50. Tennyson and her son went to the next building where she had a storage unit. RP 218. Once she had made room for Nicholas's belongings, she walked back to McDaniel's unit to ask Nicholas to help her. RP 231. Nicholas

and McDaniel were still arguing, and Nicholas was not helping McDaniel move. RP 232. Tennyson walked back to her unit. RP 233.

McDaniel and Antonio finished loading the El Camino and got in the car to leave. Nicholas walked behind the car, following them all the way through the gate. He was still making comments to McDaniel. RP 594-95. Antonio felt nervous, and he thought Nicholas might do something because he was so mad. RP 596. He was yelling, and he had his hands in his pockets. RP 597. McDaniel felt that the way Nicholas had his hands in his pockets looked like he was clutching something. He was motioning with his hands but not taking his hands out of his pockets. RP 650. Since he knew Nicholas to carry a gun, he had an overwhelming feeling that Nicholas was pointing a gun at him through the pocket. RP 650-51. Nicholas was acting really mad, and McDaniel was nervous and scared, especially with his son there. RP 651.

The only time McDaniel had seen Nicholas behave that aggressively in the past was when he was smoking PCP-dipped cigarettes. At those times, Nicholas would not perceive situations as they were really happening, becoming aggressive when he mistakenly thought people were saying things about him. RP 652. Nicholas's behavior reminded McDaniel of those previous situations, and McDaniel felt very vulnerable around him. RP 653. He believed that he would be shot. RP 653.

McDaniel told Nicholas not to do something he would regret, then he drove away. RP 655.

After McDaniel left, Nicholas moved his car to Tennyson's storage unit. He told Tennyson that McDaniel had left and locked his unit, so they had to wait until he returned to get their stuff, and he was angry about that. RP 233, 235.

McDaniel drove home and unloaded his car. When Angela got home, he told her what was going on and that he was nervous about returning to the storage unit because he did not know what Nicholas would do. RP 660, 672. Eventually McDaniel decided to return, and he asked Angela to go with him. RP 672. They went in separate cars, Angela driving the El Camino and McDaniel driving their Grand Am. RP 674.

After Nicholas and Tennyson had worked in their storage unit for 30 to 45 minutes, Nicholas said, "I'm going to go see if this bitch ass nigga is here." RP 264. He walked back to McDaniel's unit. RP 234.

When McDaniel arrived at the storage facility, he did not see Nicholas's car, and he was relieved, thinking Nicholas had left. But as he pulled up to his storage unit, McDaniel saw Nicholas pacing back and forth, talking on his cell phone. RP 674. Nicholas looked mad. RP 808. As soon as McDaniel got out of his car, Nicholas started calling him names. RP 677. McDaniel became frightened again, because he had to

walk past Nicholas to unlock the unit, and Nicholas was clearly mad. Nicholas did not back up or give McDaniel space to move, and he was still shouting. RP 677-78. Nicholas had his hands in his pockets at that point, and McDaniel again thought Nicholas was going to pistol whip or shoot him. RP 677. Once he had the door unlocked, McDaniel started responding to Nicholas's comments. Whatever name Nicholas called McDaniel, McDaniel called Nicholas. McDaniel told Nicholas he was there to move his things and he suggested Nicholas do the same. RP 679.

Like Tennyson, Angela noticed that the argument between Nicholas and McDaniel was more hostile than usual. RP 811, 828, 838. Although Nicholas did not say he had a gun, Angela heard him threaten McDaniel, daring him to make a move. RP 832-33. She perceived Nicholas's words as a threat to kill, and she was very scared. RP 833.

McDaniel walked inside his storage unit, turning sideways to squeeze through a narrow pathway. He was uncomfortable turning away from Nicholas, because Nicholas still had his hands in his pockets, and McDaniel was afraid he would be shot. RP 687.

McDaniel and Nicholas continued to exchange insults, and Nicholas referred to Angela as a "stupid bitch." RP 831. Then Nicholas started moving quickly toward McDaniel, asking McDaniel what he was going to do. RP 690-91, 814. Although Nicholas never fully pulled a gun

out of his pocket, McDaniel saw something brown and silver, which he assumed was a gun. Nicholas's hand was half in and half out of his pocket, and McDaniel could tell it was wrapped around something. RP 719-20. McDaniel, afraid he would be shot, pulled a gun out of the holster in front of his pants and fired at Nicholas. RP 691. McDaniel thought his first shot had missed, and he believed he needed to fire again to keep from getting shot, so he fired the gun a second time. RP 692-93. RP 693. After the second shot, Nicholas fell to the ground. RP 694.

When Angela first heard the shots, she panicked and thought about running, because she thought Nicholas had killed McDaniel. RP 815. Then she saw Nicholas stumbling out of the storage unit. RP 811, 815. Nicholas fell to the ground, and McDaniel came out of the unit, tripping on something as he moved. RP 817.

Tennyson heard the two gunshots from where she was waiting in her car, and she ran over to McDaniel's storage unit. RP 237-38. As she came around the corner she saw Nicholas on the ground. RP 241. Angela was standing in front of the storage unit, and McDaniel was walking away, putting a gun in his pocket. RP 242. Tennyson ran to Nicholas and saw that he had been shot in the shoulder and head. RP 243-44. She screamed and asked McDaniel what he had done. McDaniel responded that Nicholas had run up on him. RP 244, 698, 817.

McDaniel told Angela to get in the Grand Am. He felt he needed to leave quickly because he did not know who Nicholas had been talking to on the phone. He thought someone might be coming and that he was in danger. RP 697-98. He also felt that if he was standing there when police arrived, he would be shot. RP 699. Angela started getting in the El Camino, but McDaniel yelled at her to get in the Grand Am. They left together in the Grand Am, leaving the El Camino behind, as Tennyson called 911. RP 244-46, 699, 818.

The manager of the storage facility heard the shots and some screaming, and she stepped out of the office to see what was happening. She saw Nicholas on the ground with Tennyson leaning over him. RP 318-20, 343. She saw Angela reaching into the El Camino. RP 321. She then went back inside the office and called 911, and she hid in the hallway until police arrived. RP 322-23.

McDaniel drove directly home. He ran upstairs and packed a black duffle bag with some clothing and told Antonio and his younger son to get ready to leave. RP 699-700. The boys could tell that both their parents were upset. RP 600. McDaniel, Angela, and the two boys got in the Grand Am and drove away from the house. RP 601, 819.

After making a few stops in Tacoma, McDaniel drove to his cousin's house in Federal Way. RP 602, 703-04, 819. While there he

unloaded some boxes from his car so the children had room to sit in the back seat. RP 704, 820. McDaniel told his cousin something bad had happened with one of his friends and he needed to get out of town. They were back on the road within 20 minutes. RP 704, 820.

They continued heading north, with Angela driving. RP 604, 705. They made stops for gas and for food, they stopped in Seattle to withdraw money from an ATM, and they stopped at a drugstore where McDaniel bought some hair clippers so he could change his appearance. RP 603, 706-08, 821-23. While in Seattle, McDaniel sold his gun for $100. RP 709.

McDaniel had only packed socks and underwear in the duffle bag, so they stopped at a Walmart to buy a change of clothes for everyone. RP 710-11, 822. The boys were tired, so they stopped at a motel in Arlington. RP 711, 788, 823. While there, McDaniel thought about hanging himself, but he did not want his wife or children to find him like that. RP 711-12. Angela convinced him that he needed to turn himself in. RP 712-13, 823-24. She helped him cut his hair, because he did not want to go to jail with long hair. RP 604, 709, 824.

The next morning they headed back toward Tacoma. McDaniel spoke to a deacon at his church, asking advice about turning himself in, and he made arrangements to meet with his pastor. RP 714, 824.

McDaniel wanted more time with his family before going to jail, so they stopped in Southcenter to see a movie. RP 605, 715, 824-25. After the movie they drove to the church. RP 605, 716, 826. McDaniel met with his pastor and then called the police. RP 718-19, 826. The police came and arrested McDaniel at the church. RP 498, 606, 719, 826.

At trial, the medical examiner who performed the autopsy testified that Nicholas was shot twice. The fatal wound was a penetrating gunshot to the front right side of the head, toward the top. RP 393, 441. There was another gunshot wound to the left shoulder, but it was not fatal. RP 394. Both shots appeared to have been fired from more than 24 inches away. RP 398, 405. The shot to the head caused immediate loss of voluntary control and consciousness. RP 414. If Nicholas was moving at the time of the injury, he would have continued moving after the gunshot due to momentum, and it could have appeared as though he was stumbling, but he could not have moved his legs to take any steps. RP 415, 444. It was not possible to tell from the wounds which gunshot occurred first. RP 437.

Police found a gun in the outer right breast pocket of the jacket Nicholas was wearing. The gun was loaded with live .22 caliber ammunition. RP 120, 163. A holster was also found on Nicholas's belt

which appeared to match his gun. RP 126, 136, 176. The gun was tested at the crime lab and found to be operable. RP 571-72.

No blood was found inside the storage unit. RP 108. There was a pool of blood ten to 15 feet from the back of the El Camino. RP 111. Medics found Nicholas in the pool of blood and moved his body away from the blood to work on him. RP 111, 183. McDaniel testified that he remembered Nicholas falling to the ground where the blood was found. RP 696.

A spent bullet was found under a hat collected from the scene. RP 115, 483. The hat had a defect which could have been a bullet hole, although there was no gunshot residue on the hat. RP 121, 568-69. The medical examiner recovered bullet fragments from inside Nicholas's head, which were consistent with either .38 or .357 magnum ammunition. RP 403-04, 501. A box of .357 magnum ammunition was found in a drawer of female clothes in an armoire in the master bedroom of McDaniel's house. RP 373, 377.

Although there were surveillance cameras all around the storage facility, the cameras closest to McDaniel's unit were pointed downward instead of out, and they did not capture the incident. RP 300. McDaniel knew there were surveillance cameras at the facility and believed when he talked to police that everything that happened at his unit would be caught

on camera. He had no way of knowing the cameras outside his unit were not functioning properly. RP 791-92. Surveillance footage showed the cars entering and leaving through the gate and McDaniel and Nicholas in the office. RP 486-90. The video showed Nicholas, wearing the jacket with the gun in it, following McDaniel's car all the way to the gate as McDaniel described. RP 536, 539.

Police found the hair clippers McDaniel had bought in a duffle bag in the trunk of McDaniel's car after he was arrested. RP 133. They also found a cell phone in the car and tracked the location of the phone from the time of the shooting until McDaniel's arrest by the cell phone towers that were accessed when calls were made. RP 504-05. The locations were consistent with the locations described by McDaniel, his son, and his wife. RP 509-10, 514, 602-05, 704-16, 819-25.

The parties stipulated that prior to December 4, 2012, McDaniel had been convicted of a felony which was not a serious offense, and because of that conviction he was prohibited from possessing a firearm. RP 470.

The court instructed the jury on self-defense and on the alternative means of intentional murder and felony murder based on assault, in addition to unlawful possession of a firearm. CP 246-79. The jury returned guilty verdicts. Although the State's theory was that the shooting

was an intentional "execution," the jury did not unanimously agree that the killing was intentional. RP 979; CP 283.

C. ARGUMENT

1. MCDANIEL'S CONDUCT DID NOT VIOLATE THE SECOND DEGREE FELONY MURDER STATUTE, AND HIS CONVICTION MUST BE DISMISSED.

The felony murder statute is ambiguous and therefore must be interpreted in McDaniel's favor. Under the rule of lenity, where a statute is ambiguous and thus subject to several interpretations, the Court is required to adopt the interpretation most favorable to the defendant. State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Further, when interpreting a statute, a reviewing court must try to construe it in order to effect its purpose, but "'strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided.'" State v. Leech, 114 Wn.2d 700, 708-709, 790 P.2d 160 (1990) (quoting State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989)). In addition, because it is presumed that the Legislature does not intend absurd results, courts will not construe a statute to allow such a result. In re the Personal Restraint of Andress, 147 Wn.2d 602, 610, 56 P.3d 981 (2002); see State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1985).

After the decision in Andress, the Legislature amended the second degree felony murder statute to provide, in relevant part:

> A person is guilty of murder in the second degree when ... he or she commits or attempts to commit any felony, including assault ... and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants [.]

RCW 9A.32.050(1)(b); Laws of 2003, ch.3, § 1 (statute amended in response to Andress). Although the statute does not specify whether it applies to an assault which is the act resulting in death or only to separate assaults, the Washington State Supreme Court has examined the "in furtherance of" language in another context and held that it means that the death has to be "sufficiently close in time and place" to the underlying felony so as "to be part of the res gestae of that felony." Leech, 114 Wn.2d at 706.

In Andress, the Court applied Leech and held that the language of the felony murder statute requiring the death to be "in the course of and in furtherance of the predicate felony, or in immediate flight therefrom," meant that the Legislature could not have intended to include assault as a predicate felony, because:

> the statute would provide, essentially, that a person is guilty of second degree felony murder when he or she commits or attempts to commit assault on another, causing the death of the other, and the death was sufficiently close in time and place to that assault to be part of the res gestae of the assault. *It is nonsensical to speak of a criminal act - - an assault, that results in death as being part of the res gestae of that same criminal act since the conduct constituting the assault and the homicide are the same.* Consequently, in the case of assault there will never be a res gestae

> issue because the assault will always be directly linked to the homicide.

Andress, 147 Wn.2d at 610 (emphasis added). It was necessary to reject this "absurd" interpretation, the Court held, because otherwise "the 'in furtherance of' language would be meaningless as to that predicate felony" as "the assault is not independent of the homicide." 147 Wn.2d at 610. Indeed, as the Supreme Court later noted, the "felony murder statute is intended to apply when the underlying felony is distinct from, yet related to, the homicidal act." In re Bowman, 162 Wn.2d 325, 331, 172 P.3d 681 (2007).

Although the new statute specifically includes reference to assault as the predicate felony, it still suffers from the same infirmity as that which led the Andress Court to its inescapable conclusion. The statute still contains the same "in furtherance of" language which the Supreme Court found in Andress would be rendered superfluous by allowing conviction for felony murder based upon an assault which causes death. And the statutory language is still nonsensical if applied to such situations, because it still speaks of "a criminal act—an assault, that results in death as being part of the res gestae of that same criminal act," even though "the conduct constituting the assault and the homicide are the same." Andress, 147 Wn.2d at 610

Because the statute does not specify whether it applies to all assaults, or only to those which are separate from the act which causes the death, but it still contains the "in furtherance of" language, it is ambiguous. Applying the rule of lenity and the rules of statutory construction against absurd results, and assuming the Legislature did not intend such results, the Court is required to interpret the statute to apply only to assaults which are separate from the act causing death. This is the only way to avoid rendering superfluous the "in furtherance of" language or requiring an absurd result. It is also the only way to honor the Legislature's apparent desire to include at least some assaults as predicate felonies for second-degree felony murder while following these mandates of statutory construction.

In response, the State may cite to State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009), reversed on other grounds, 172 Wn.2d 671 (2011). In Gordon, Division One first declared, without explanation, that the second degree felony murder statute "is not ambiguous." Gordon, 153 Wn. App. at 529. The Court then stated that, if the statute was ambiguous, looking at the legislative history clarified that the Legislature "wants assault to be a predicate felony," which means it should be so. Id. This Court should decline to follow Gordon, because that case was not well-reasoned and does not withstand scrutiny.

First, Gordon ignored the very language of the statute in finding it was not ambiguous. The language used by the 2003 Legislature did not clarify which assaults it intended to qualify as predicate felonies, because it still included the "in furtherance of" language in the statute. See Laws of 2003, ch.3. Further, in amending the statute, the 2003 Legislature specifically stated that the purpose of the second degree felony murder statute was to punish those who "commit a homicide in the course and in furtherance of a felony," which the Legislature said meant the death was to be "sufficiently close in time and proximity to the predicate felony." Laws of 2003, ch. 3, § 1 (emphasis added). Thus, the mere fact that the Legislature included the word "assault" in the statute does not answer the question raised by the statute's ambiguity, contrary to Division One's declaration in Gordon.

Further, Division One's ruling failed to apply the rule of lenity, despite the mandate to do so under such cases as Roberts, supra. See Gordon, 153 Wn. App. at 524-27. And it ignored the Supreme Court's holding in Bowman, supra, that the felony murder scheme is intended to apply "when the underlying felony is distinct from, yet related to, the homicidal act"—a distinction which is lost if the underlying felony is the assault which results in death but not if the underlying felony is an assault and a different act causes the death. Bowman, 162 Wn.2d at 331.

Because Gordon is not well-reasoned and ignores fundamental law and principles, it should not be followed by this Court.

The only way to interpret the post-Andress RCW 9A.32.050(1)(b) to make sense of all of the language, avoid absurdity, and follow the rule of lenity as required is to hold that the statute applies only when the predicate assault is an assault separate from the act which caused the death. This Court should so hold and should reverse McDaniel's conviction.

2. ALLOWING PROSECUTION FOR SECOND DEGREE MURDER BASED UPON AN ASSAULT PREDICATE VIOLATES EQUAL PROTECTION PRINCIPLES AND DUE PROCESS MANDATES OF FUNDAMENTAL FAIRNESS.

Even if RCW 9A.32.050(1)(b) could be interpreted to apply to this case, application was still improper because allowing prosecution for second degree murder based upon an assault predicate violates the constitutional mandates of equal protection and the fundamental fairness requirements of the state and federal due process clauses.

Both Article I, §12, of the Washington constitution and the Fourteenth Amendment require that similarly situated individuals receive like treatment under the law. Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997); Dandridge v. Williams, 397 US. 471, 518, 90 S. Ct. 1153, 25

L. Ed. 2d 491 (1970).[3] When conducting an equal protection analysis, the first step is to determine the appropriate standard of review. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). This is done by looking at the nature of the interests or class affected. State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). Although physical liberty is an important liberty interest, the Supreme Court has held that it implicates only the "rational relationship" test. State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996), cert. denied sub nom Manussier v. Washington, 520 U.S. 1201 (1997). Under that test, the courts ask 1) whether the classification applies to all members of the class, 2) whether there was some rational basis for distinguishing between those within and those outside the class, and 3) whether the challenged classification bears a "rational relationship" to the legitimate state objective which must be the basis for the classification. In re Bratz, 101 Wn. App. 662, 669, 5 P.3d 755 (2000).

While identical treatment is not required in all circumstances, it is still required that any distinction "have some relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966). Further, even a seemingly valid

[3] Washington courts have thus far construed the Washington clause as "substantially identical" to the federal clause, and use the same analysis. See State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

law will violate equal protection if it is administered in a manner which unjustly discriminates between similarly situated people. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990).

Here, McDaniel is in a class of defendants who commit second degree assault which results in death. Under the statutes, the prosecution is given the astounding choice of charging such persons with either second degree felony murder or the much lesser crime of manslaughter, as the Supreme Court noted in Andress and Bowman. Yet there is absolutely no distinction between the people who would be subject to the far disparate punishments and higher crimes, save for the prosecutor's unfettered discretion. The complete lack of any standards for treating similarly situated defendants who commit exactly the same acts so differently cannot possibly serve any legitimate state objective, so that the "rational relationship" test was not met and concepts of fundamental fairness were violated.

In response, the prosecution may again attempt to rely on Gordon, in which Division One held that there was no equal protection violation. Any such reliance would be misplaced. In Gordon, Division One relied on its own decision in State v. Armstrong, 143 Wn. App. 333, 178 P.3d 1048 (2008), review denied, 164 Wn.2d 1035 (2008), holding that it was sufficient that the Legislature had declared that it intended to "[p]unish,

under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony." Gordon, 153 Wn. App. at 546.

But Armstrong itself specifically recognized that equal protection is violated when a statutory scheme proscribes crimes that do not require proof of different elements. Armstrong, 143 Wn. App. at 338. Put simply, the Armstrong Court noted, "[w]hen the crimes have different elements, the prosecutor's discretion is not arbitrary, but is constrained by which elements can be proved under the circumstances." Id.

Further, in Gordon, Division One completely ignored the Supreme Court's holdings in a related, instructive area of the law. Applying equal protection principles and the need to limit the prosecution's discretion, the Supreme Court has held that, "where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute." State v. Shriner, 101 Wn.2d 576, 579, 681 P.2d 237 (1984) (quoting State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)); see State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982). Both the Court of Appeals and the Supreme Court have indicated that equal protection principles underlie this rule, because those principles are offended when the prosecutor is allowed to make a choice of which comparable crime to charge when one is far more serious. State v. Pyles, 9 Wn. App. 246, 511 P.2d 1374,

review denied, 82 Wn.2d 1013 (1973); State v. Collins, 55 Wn.2d 469, 348 P.2d 214 (1960). This line of cases illustrates the equal protection problems with application of the second degree felony murder statute to McDaniel in this case.

Further, the Supreme Court has stated that, under equal protection principles, the prosecution should not be permitted the discretion to choose "different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations." Olsen v. Delmore, 48 Wn.2d 545, 550, 295 P.2d 324 (1956).

For example, if a defendant commits an intentional assault and unintentionally but recklessly inflicts substantial bodily harm which results in death, the prosecution can charge either second degree murder or manslaughter, with the resulting differences in punishment and consequence. Similarly, with assault as the predicate felony for second degree felony murder, "a negligent third degree assault resulting in death can be second degree murder," although RCW 9A.32.070 provides that a person who with criminal negligence causes the death of another is guilty only of second degree manslaughter." Andress, 147 Wn.2d at 615; RCW 9A.32.070(1).

The unfairness which can result from such discretion is evident, and the harshness of punishing an unintentional homicide this way has

been recognized by the Supreme Court itself. See Andress, 147 Wn.2d at 612. By giving the prosecution this expansive discretion to charge a higher or lesser crime for the same conduct, RCW 9A.32.050 as currently written violates the prohibitions against equal protection. This Court should reverse McDaniel's conviction for second degree felony murder.

3. THE TRIAL COURT VIOLATED MCDANIEL'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE WHEN IT EXCLUDED EVIDENCE RELEVANT TO THE SELF-DEFENSE THEORY.

Criminal defendants have the constitutional right to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22. The trial court violated McDaniel's right to present a complete defense by excluding expert evidence that the gang with which Nicholas was affiliated had a reputation for violence. That evidence was relevant to McDaniel's self-defense theory, and no compelling interest justified its exclusion.

Prior to trial defense counsel filed a notice that McDaniel was asserting a self-defense claim. CP 4. Counsel also filed a summary of anticipated expert testimony regarding gang evidence, being offered in support of the self-defense claim. CP 145-49. The summary indicated

that Tacoma Police Detective John Ringer would be called to testify as an expert witness about street gangs, particularly the Hilltop Crip gang. CP 145. Ringer's training, knowledge, and experience investigating gang related crimes was detailed. CP 145-46. Ringer would be able to provide the jury with specialized knowledge about street gangs not known to the average juror, including that gangs can be organized for the purpose of engaging in violent crime for the sake of violence and that ties among gang members are often stronger than family ties. CP 146.

McDaniel told police when he was arrested that he knew Nicholas to be a Hilltop Crip gang member, and he knew Nicholas to carry guns at all times. He knew that the shooting occurred within the Hilltop Crip territory, and he admitted to fleeing the scene because he was afraid. CP 147. Counsel asserted that in order for the jury to evaluate McDaniel's claim of self-defense, it had to consider the conditions as they appeared to McDaniel, taking into consideration all the facts and circumstances known to him. It could not do that without the specialized knowledge about the Hilltop Crips that Detective Ringer would provide. CP 147-49.

The State moved to exclude that evidence. The prosecutor argued that McDaniel's knowledge and Nicholas's reputation were admissible, but evidence regarding the Hilltop Crip gang was not. RP 61-62. The defense clarified that McDaniel would testify extensively regarding his

knowledge of Nicholas's association with the gang, but the jury could not accurately put themselves in his position unless they understood what it meant to be a Hilltop Crip. Detective Ringer would provide that information. RP 62-64. Ringer would also explain the meaning of the gang signs McDaniel would testify about, so the jury could understand what they meant to McDaniel and what his state of mind was on the day of the shooting. RP 65.

The court excluded the expert testimony. It ruled that McDaniel could testify to what he knew at the time of the shooting, but the expert's testimony was not relevant because he had no connection to Nicholas. RP 65.

The correct interpretation of an evidentiary rule is reviewed de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion only if the trial court correctly interprets the rule. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Moreover, a court necessarily abuses its discretion in denying a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A claimed denial of a constitutional right, such as the right to present a defense, is reviewed de novo. Iniguez, 167 Wn.2d at 280; State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence … more probable or less probable than it would be without the evidence." ER 401. If the defense evidence is relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Darden, 145 Wn.2d at 622. Relevant defense evidence may be excluded only if the State can show a compelling interest in limiting the prejudicial effects of that evidence. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983).

McDaniel's defense was that the homicide was justifiable because he was acting in self-defense. Evidence of self-defense "must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). There are both subjective and objective components to this assessment. The subjective component entitles the jury "to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act." Id., (quoting State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977)). Moreover, "the jury is to consider the defendant's actions in light of all the facts and circumstances known to the defendant." Id., at 238. The

assessment is objective in that "the jury is to use this information in determining 'what a reasonably prudent [person] similarly situated would have done.'" Id., (quoting Wanrow, 88 Wn.2d at 236).

In light of this standard, it has long been recognized that the reputation of the deceased for violence is an acceptable means of establishing self-defense, where the defendant is aware of that reputation. ER 404(a)(2); ER 405(a); State v. Hutchinson, 135 Wn.2d 863, 886, 959 P.2d 1061 (1998); State v. Adamo, 120 Wash. 268, 270, 207 P. 7 (1922). Moreover, where, as here, the deceased was a member of a particular group, the reputation of that group for lawlessness may be taken into account if the defendant knew of the deceased's affiliation. State v. Despenza, 38 Wn. App. 645, 649, 689 P.2d 87 (citing State v. Smith, 2 Wn. App. 769, 771, 470 P.2d 214 (1970)), review denied, 103 Wn.2d 1005 (1984).

Here, the jury was required to determine whether a reasonably prudent person knowing what McDaniel knew would have done what McDaniel did. One key piece of information McDaniel had was that Nicholas was a member of the Hilltop Crips. Unless the jury was informed about the reputation of that group for violent crime, a reputation known to McDaniel, it could not accurately determine the reasonableness of his fears and actions.

In assessing a self-defense claim, the jury must "stand in the shoes" of the defendant and determine whether he had a reasonable, subjective fear of imminent harm. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The trial court's ruling prevented the jury from fully standing in McDaniel's shoes as it evaluated his defense. Detective Ringer's testimony about the reputation of Nicholas's gang for violent crimes and the close ties between gang members would have helped the jury evaluate the situation from McDaniel's point of view. See Despenza, 38 Wn. App. at 649. The State cannot show that exclusion of this relevant evidence was necessary to further a compelling interest.

The denial of the right to present a complete defense is constitutional error. Crane, 476 U.S. at 690; Jones, 168 Wn.2d at 724. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt that any trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The State cannot overcome the presumption of prejudice here. The State has the burden of proving the absence of a valid self-defense claim

beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). McDaniel testified extensively about his fears that Nicholas would shoot him that day. His wife testified that she was alarmed by Nicholas's actions, and when she heard the shots she immediately thought that Nicholas had shot McDaniel. Even earlier in the day Nicholas's actions were enough to make McDaniel's son nervous. The prosecutor sought to overcome this evidence by arguing in closing that the only evidence in the case that McDaniel was afraid came from him, his wife and his son; there was no other evidence to corroborate his claim. RP 912.

The corroborating evidence which would have cast a reasonable doubt on the State's theory was wrongly excluded by the court. The offered expert testimony about the reputation of the Hilltop Crips for violence would have helped the jury understand McDaniel's fear of Nicholas under the circumstances. And testimony of the strong ties between gang members would have helped the jury understand why McDaniel's fear increased when he saw Nicholas on the phone just before the shooting and why he fled immediately afterwards, casting doubt on the State's theory that McDaniel's actions were not consistent with justifiable homicide. RP 929. The court's error was not harmless beyond a reasonable doubt, and McDaniel's murder conviction must be reversed.

4. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO DAMAGING PROPENSITY EVIDENCE.

The Sixth Amendment to the United States Constitution guarantees "[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. The Washington State constitution similarly provides "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. See Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.") (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)) .

The primary importance of the right to counsel cannot be overemphasized: "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." State v. McDonald, 96 Wn. App. 311, 316, 979 P.2d 857 (1999) (quoting Schaefer, Federalism and State Criminal Procedure, 70 Harv. L.Rev. 1, 8 (1956)). Left without the aid of counsel, the defendant "may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." McDonald, 96 Wn. App. at 316 (quoting Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

A defendant is denied his right to effective representation when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993). In this case, trial counsel's failure to object to highly prejudicial testimony regarding a prior shooting McDaniel was involved in constituted deficient performance which prejudiced the defense.

On cross examination of McDaniel's wife, the prosecutor asked her about the fact that she had remembered some details only after giving her statement to the police. RP 849-50. On redirect, Angela testified that she had never been through anything like this before, and she remembered some details vividly while others were a blur. RP 852-53. Outside the jury's presence, the prosecutor informed the court that he believed Angela's testimony opened the door to impeachment regarding an incident in 1996. McDaniel had been involved in a dispute at Angela's apartment complex, and he fired a gun into a group of people, striking one man in the head. He was charged with assault, and Angela was a crucial witness in the investigation. McDaniel eventually pled guilty to third degree assault. The prosecutor argued that it was a gross misstatement for Angela to say she had never been through anything like this before, and the details of the prior incident should be admitted to impeach her. RP 860-61.

The court ruled that the door had been opened to impeachment, but it needed to determine what the limitations on the evidence would be. RP 862. Defense counsel maintained that McDaniel's prior conviction should not be admitted and that evidence should be admitted only to impeach Angela without connection to McDaniel. RP 863-64, 873.

After considering the issue, the prosecutor stated that he did not intend to elicit testimony that would implicate McDaniel. RP 872. His

plan was to confront Angela with the fact that in 1996 she was a witness to a similar incident in which the man she was dating shot someone, and she later gave a statement to the police about what she witnessed. He recognized that it would be imprudent to identify McDaniel as the shooter. RP 872. The court agreed that the evidence needed to be limited to impeachment of Angela exclusively. RP 873. Defense counsel responded, "Well, I agree with the assessment that I have heard this morning. My concern was that she should be impeached in regard to her experiences, but not in regard to any connection with my client." RP 873.

While the prosecutor assured the court he would not elicit testimony that implicated McDaniel in the prior event, he failed to keep that information from the jury. When cross examining Angela, he asked,

> Isn't it true that in July of 1996 you also were a witness to a shooting? ... You gave a statement to the police involving a shooting in 1996? ... And that shooting involved a man that you were dating 16 years ago, correct? ... And he was the shooter? ... And the man that you were dating at the time shot another man in the head, correct?

7RP 893. The jury had already heard testimony that McDaniel and Angela had been together for 22 years, since they were in high school. The jury knew that Angela and McDaniel have four children, including a 20-year-old son and a 16-year-old daughter. RP 628. Thus, the jury knew that the prosecutor was referring to McDaniel when asking Angela about

the prior shooting by a man she was dating 16 years ago. And when the prosecutor went on to describe further details of the prior shooting, the jury knew he was talking about McDaniel. RP 893-95.

It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, and not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this principle of fundamental fairness, ER 404(b) forbids evidence of prior acts which establishes only a defendant's propensity to commit a crime. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). While specific acts of misconduct may sometimes be introduced for other purposes, they can never be used to establish bad character. ER 404(b)[4]; State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence of other misconduct may not be admitted merely to show a defendant is a "criminal type" who is likely to have committed the charged crime. State v. Brown, 132 Wn.2d 529, 570, 940 P.2d 546 (1997), cert. denied, 118 S. Ct. 1192 (1998).

Evidence of prior bad acts is presumptively inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The parties and the

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[4] ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

court recognized that McDaniel's prior conviction was inadmissible propensity evidence, and it would be unfairly prejudicial to connect McDaniel to the prior shooting. Moreover, they recognized that there was no need to do so in order to impeach Angela. Angela could have been impeached if the inquiry was limited to the fact that she had given a witness statement regarding a shooting in the past and therefore she was not truthful when she testified she had never been in this situation before. Yet, for some inexplicable reason, defense counsel did not object to, and in fact assented to, a line of questioning which could leave no doubt that McDaniel was the shooter in the prior incident.

There is a reasonable probability that counsel's error affected the outcome of the case. McDaniel presented strong evidence of self-defense, and the State's efforts to disprove it were not insurmountable. Although the State argued that McDaniel and his wife came up with a plan to claim self-defense in the 24 hours after the shooting before he turned himself in, McDaniel's statement to Tennyson immediately after the shooting that Nicholas had rushed him was consistent with what he told the police. While the State argued that McDaniel acted out of anger rather than fear, McDaniel testified in detail about the circumstances that led to his fear. But because of counsel's error, the jury was permitted to consider the fact that McDaniel had shot a man following an argument in the past. The

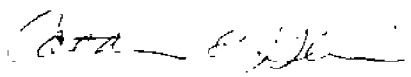
State's case was improperly bolstered by the inference that because of this prior act McDaniel must be guilty of the charged offense, and his claim of self-defense should be rejected. Counsel's error undermines confidence in the outcome of the case, and McDaniel's murder conviction must be reversed.

D. CONCLUSION

For the reasons stated above, this Court should reverse McDaniel's murder conviction and dismiss the charge.

DATED January 10, 2014.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

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