

63408-9

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COA No. 63408-9-I

IN THE COURT OF APPEALS FOR WASHINGTON STATE
IN AND FOR DIVISION ONE

STATE OF WASHINGTON,
Respondent,
vs.
DWAYNE PARKS,
APPELLANT.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE KING COUNTY SUPERIOR COURT
IN THE STATE OF WASHINGTON

THE HONORABLE CHRIS WASHINGTON

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS
PURSUANT TO RAP 10.10

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STATEMENT OF THE CASE

I. PROCEDURAL FACTS.

On December 9, 2008, the State, by way of information, charged Mr. Parks with one count of Unlawful Possession of a Firearm in the First Degree. CP 1-2.

On March 19, 2008, after a bench trial, Mr. Parks was found guilty by Honorable Chris Washington who presided over the trial.¹ (3-19-08) III RP at 98-100.

On April 24, 2009, the Court entered its written findings of fact and conclusions of law as to the finding of guilt. CP 28-31.

Also on April 24, 2009, Mr. Parks was sentenced to a term of 67 months for the crime of Unlawful Possession of a Firearm in the First Degree. CP 32-39. This appeal timely follows. CP 40-48.

II. EVIDENCE PRESENTED AT THE BENCH TRIAL.

A. OVERVIEW.

The State claimed that on the evening of October 24, 2008, Mr. Parks along with Mr. Christopher Wilson, his then girlfriend Ms. Tina Raines and her two children, were pulled over during a traffic stop which Mr. Parks, as well as Mr. Wislon were both immediately placed under arrest. After the arrests occurred, the officers searched the Yukon vehicle and located two firearms. One was a black 9mm and the second was a black and silver .380. These firearms were located directly under Ms. Raines seat on the front passenger side of the Yukon. The State asserted that one of the firearms belonged to Mr. Parks who was seated in the back of the Yukon directly behind Ms. Raines and that when the officer was pulling over the Yukon, Mr. Parks kicked the firearms underneath 1. There are three volumes of transcripts collectively titled "Transcript of Proceeding" where the first two are bound in one set and numbered, and the second one is bound in its own volume. Each are referred to in the volume it is given on the cover page.

Ms. Raines seat.

B. WITNESS TESTIMONY.

1. STATE WITNESS DETECTIVE BRIAN LUNDIN.

The State called its first witness, Mr. Brian Lundin, to the stand. Mr. Lundin testified that he was a Detective for the Seattle Police Department to which is how he was assigned to the case in the later part of October 2008.

Detective Lundin testified that he was assigned to the case to conduct a follow-up investigation. During the follow-up investigation of the case the Detective interviewed State's witness, and co-defendant, Mr. Christopher Wilson, but nothing was disclosed as to the substance of that interview. I-IIRP 71-74.

Detective Lundin then testified that he conducted tests on both of the firearms at the S.P.D. (Seattle Police Department) firing range to test whether or not the firearms were operational. Both firearms were fully operational. Id.

Detective Lundin further testified that he was not present, nor did he partake in the initial stop of the Yukon truck which ended up in the arrest of Mr. Parks. As well, the detective was not present when the firearms were located in the Yukon and removed. Id. at 74-78.

Very material testimony was elicited from the Detective where he, in fact, stated that another Seattle Police Detective, Mr. Sausman, conducted an interview of a material witness, Ms. Tina Raines, but that Detective Lundin did not get to review what that interview consisted of due to it being "lost." I-IIRP 84-85.

The Detectives testimony established that he never saw Mr. Parks with any firearms. Id.

2. STATE WITNESS KELLY BANKS.

The State next put S.P.D. Latent Print Examiner, Ms. Kelly Banks, on

the stand to testify. Ms. Banks testified that she was employed by the S.P.D. and her job description title was a latent print examiner. I-IIRP 86.

Ms. Banks testified that her job description called for processing of evidence which had been collected from crime scenes seeking to acquire some form of prints for identification purposes which would then be entered into the AFIS (Automated Fingerprint Identification Database) to see if a match appeared.

The following testimony was elicited from Ms. banks and is material to the issues at hand in relation to if any prints were found on either firearm:

Q. And what process did you use in looking for latent prints? A. Well first I did a visual examination of each piece of evidence just to see if there was any visual latent prints on the items. I did not see any so I then fumed them in a superglue tank with superglue fumes. What that does is the fumes adhere to any latent print residue that is on the items. Once that is completed I did another visual of all the items of evidence to see if there was any visual latent prints on there. I did not see any so I went to the next step. I used a chemical that is called basic yellow. It is a fluorescing dye stain that is placed on the items which will cause the latent print residue to fluoresce under a light source. I did not locate any latent prints at that time with that visual, so I went to the next step which I applied black fingerprint powder to all the items of evidence and did not locate any latent prints at that point. Q. Did you do that with all of the items that you received into evidence? A. Yes, Ma'am.

I-IIRP 92-93 (emphasis added).

This evidence established that Ms. Banks not only attempted to obtain prints from both of the firearms and ammunition once, but made four attempts to locate a person's prints on the firearms and state's evidence without success.

Therefore, Mr. Parks, according to the testimony, could not have had the actual or constructive possession of the firearm in order to have been guilty.

3. STATE WITNESS OFFICER JACOB BRISKEY.

The State's third witness to testify was S.P.D. Officer, Mr. Jacob Briskey. Officer Briskey testified that he was the officer who initiated the stop of Mr. Wilson for running a red light and that it was Mr. Wilson who did not want to stop once the officer turned on his flasher lights. Officer Briskey

testified that Mr. Parks was seated in the back seat of the Yukon on the right passenger side behind Ms. Raines who was seated in the front passenger side of the Yukon. IIIRP 3-4.

Officer Briskey testified that he did not have anything to do with the search of the vehicle after the traffic stop occurred and both Mr. Wilson and Mr. Parks were arrested and detained. IIIRP 7.

Officer Briskey testified that the Yukon vehicle's windows were tinted and therefore he was unable to clearly see through the windows and once the other officers arrived and secured the vehicle and Mr. Parks and Mr. Wilson were detained the officer noticed guns were located in the car under the front passenger seat where Ms. Raines was sitting. IIIRP 6-8. The officer had initially testified that the 380 firearm was located under the seat closer to Mr. Parks feet and the 9mm was under the seat closer to Ms. Raines feet, but on cross-examination the officer corrected his testimony stating that the 9mm was actually under the front of the passenger seat closer to Ms. Raines. IIIRP 11.

The crucial evidence to the State's position was when the officer in his testimony stated that he never spoke to Mr. Parks and never saw Mr. Parks with a handgun. III RP 11.

4. STATE WITNESS OFFICER MICHAEL BONET.

The State's fourth witness to testify was Officer Michael Bonet who testified that he was a patrol officer with the S.P.D. and was back-up in the traffic stop initiated by Officer Briskey. III RP 12-13. Officer Bonet further testified that Mr. Parks was sitting in the right rear passenger seat of the Yukon and that Ms. Raines was sitting in the right front passenger seat. III RP 13-14. Officer Bonet testified that Officer Briskey had him look under the car

seats for weapons and the like and that after he looked under the seat of the driver's side he did not locate any weapons. III RP 15.

Officer Bonet testified that Officer Kelly, another S.P.D. Officer, alerted him that there were firearms located inside the Yukon--specifically a black semi-automatic handgun. III RP 15. Officer Bonet testified that he was not sure if any of the officers during their search of the vehicle had moved the firearm from its original position under the seat. III RP 17. Officer Bonet had some vitally important evidence he testified to which consisted of the following:

Q. From what vantage point are we looking? A. This is almost from the floorboard looking under the seat. THE COURT: This is Exhibit 7? MS. PETERSON: This is Exhibit 7. THE WITNESS: This is the cross-bar that goes underneath the seat. This is the black handgun. **This is a red bag that was underneath**, more pushed towards the back of the seat, it's more towards the back of the seat underneath the seat from there. **And then you'll see right here there's a Couch purse that's sitting right here to the right.** Q...did you ever see another weapon, other than this black semi-automatic gun, in the car? A. Yes...the other one was black and silver.

III RP 18 (emphasis added).

The Court inquired as to whether or not the front seat where the firearms were located in its normal position or had any portion of the front of the seat appear to have been removed. III RP 21. The Officer testified that he was not the officer who took any of the photographs of the crime scene, and did not take any of the firearms into evidence. III RP 25. The Officer did, in fact, testify to moving evidence which should not have been moved until it was photographed first according to the procedures employed by S.P.D.:

Q. Did you move any of the items at any point during the--A. The red bag I moved. Q...What point did you move that? A. After I observed it under there I removed it, looked at it, and placed it back. Q. Did you place it back under the seat? A. yep.

III RP 25.

During cross-examination Officer Bonet testified that he never saw Mr. Parks handle or have in his possession a firearm. III RP 28.

5. STATE WITNESS OFFICER STEVEN STEWART.

The State's fifth witness to testify was S.P.D. Officer Mr. Steven Stewart who testified that he was a Seattle Police Officer and became involved in the case due to his assisting Officer Briskey during the initial traffic stop where Officer Stewart was the third or fourth officer to arrive on the scene. III RP 29-30.

Officer Stewart testified to the following material facts:

Q. Once the driver was taken into custody, what did you do? A. I was on the passenger side of the vehicle...I contacted...the rear back seat passenger...[d]id a frisk for weapons. That was my first concern, I wanted to make sure that he did not have a handgun or any weapons on him. **Q. Did you find any weapons or anything on Mr. Parks's person?** A. **I did not find any weapons on his person.**

III RP 31. (emphasis added).

This Officer, just like Officer Bonet testified he did, testified that he searched the car which turned up a .380 firearm located about midway underneath the front passenger seat which may have even been, in fact, partially concealed. III RP 32-33. The Officer then testified that he moved the State's evidence:

Q. Once you found that firearm what did you do with it? A. Initially, since it was tucked underneath the seats, I believe I removed it, observed it was a firearm and then placed it back underneath the seat so I could photograph it.

III RP 33.

The Officer testified that he took control of the firearm after taking photographs of it and turned it over to Officer Kelly. III RP 34. This Officer testified that he was not the officer to secure the firearm into evidence. Id.

Officer Stewart again testified that he "did initially take it [the firearm] out to see, okay, this is a weapon and then I placed it back." III RP 35.

On cross-examination the defense lawyer inquired as to the location of the front passenger seat and whether or not it had been moved either forward or backwards in order for the photograph to be taken. The Officer responded by stating that he did not **think** the seat was moved prior to the photograph being taken. III RP 36.

This officer's testimony reflects that he never witnessed Mr. Parks as having been in possession of the firearm in question.

6. STATE WITNESS OFFICER BENJAMIN KELLY.

The State's sixth witness to testify was S.P.D. Officer Mr. Benjamin Kelly who testified that he was a patrol officer for the S.P.D. and came into contact with Mr. Parks after officer Briskey already had the Yukon pulled over and stopped. III RP 40-41. Officer Kelly testified that he assisted officer Briskey in removing the occupants from the vehicle where Mr. Parks was seated in the back passenger seat behind Ms. Raines the front passenger seat occupant. III RP 41-42. Officer Kelly testified that after the stop and arrests of Mr. Parks and Mr. Wilson he was the officer who searched the vehicle and recovered the black sig sauer semi-automatic handgun from underneath the right front passenger seat and then packaged the evidence and secured it into the S.P.D. evidence. Nothing else was found under the seat. III RP 41-45.

Officer Kelly testified that he was not present when the other S.P.D. officers located the black and silver 380 handgun in the Yukon, but that he was the officer who packaged all of the evidence and submitted it to the S.P.D. evidence unit. III RP 48-50.

Officer Kelly's most vitally important testimony material to the case conviction came out when he testified to the following facts:

Q. Officer, **did you ever see Mr. Parks handle, or have in his possession, his actual physical possession, a firearm?** A. No.

III RP 54. (emphasis added).

7. STATE WITNESS CHRISTOPHER WILSON.

The State's seventh witness, and star witness which the conviction rests upon, was Mr. Christopher Wilson, the appellants co-defendant. The State before Mr. Wilson testified disclosed that Mr. Wilson had taken a plea and was found guilty and sentenced to electronic home monitoring prior to the State's putting Mr. Wilson on the stand to testify. III RP 55.

Mr. Wilson testified that he was the driver of the Yukon on the night of the arrest. (October 24, 2008). Mr. Wilson also testified that he was pulled over for running a red light and failing to stop once the officer attempted to pull him over. III RP 57. Mr. Wilson testified further that Mr. Parks was sitting in the back passenger side of the vehicle and that Ms. Tina Raines was seated in the front passenger seat. Two children were also seated in the back of the Yukon that evening. III RP 57-58. Mr. Wilson testified that the black semi-automatic (State's exhibit 2) belonged to Mr. Parks and that he saw Mr. Parks with the gun earlier in the day. Mr. Wilson testified that the black and silver semi-automatic (State's Exhibit 1) belonged to him. III RP 58-59.

The following testimony is important for this review court to decide the merits of the issues being raised as this is the State's star witness:

Q. Mr. Parks [sic]--tell me about how those guns ended up under that front seat? A. Kicked them under the seat. Q. Who? A. Mr. Parks. Q. When were they kicked under the seat? A. When they was pulling me over. Q. Prior to the police pulling you over; where were the guns? A. In the back. Q. In the back, where? Q. Back seat. Q. On the floor, on Mr. parks's person, in a bag? A. bag. Q. And at what point--was there a discussion in the car at any time about hiding the guns when the police started to pull you over? A. No. Q. **How do you know they were kicked under the back seat.**

A. Because Tina said don't kick those under my seat.
MR SJURSEN: Objection, Your Honor. That's hearsay. MS. PETERSON:
It's not being offered for the truth of the matter asserted. It's
being offered to show how Mr. Wilson knew that they were being
kicked under the seat. THE COURT: I will allow it for that reason.
Q. Did you--when the police started to pull you over, did you still
have the silver firearm? A. Yes. Q. And what did you do with it
when the police started to pull you over? A. Gave it to Tina. Q. You
gave it to Tina? A. Yeah. Q. And what did she do with it? A. I don't
know. Q. Did you ever have possession of the black firearm? A. No.
Q. Did anyone other than Mr. Parks have possession of that gun in
that car? A. No.

III RP 59-61(emphasis added).

During cross-examination, the defense lawyer elicited the following:

Q...your testimony today is the guns were in the back; is that right?
A. Right. Q....when you were pulled over...you knew there were guns
in the car, right? A. Yes. Q. And essentially you didn't want to get
implicated with a firearm, right? A. Right. Q. You knew you could go
to prison for that, right? A. Right. Q. You also knew it wouldn't
look good if your girlfriend was seen to have a firearm either, right?
A. Yeah. Q. Because she had two children with her, right? A. Yes....
Q. And the reason you had these guns or this gun was to protect
yourself? A. Yes. Q. And you were afraid for your life? A. Yes. Q So
you needed this gun for protection....A. Yes....Q. Yesterday when we
interviewed you, you said that you had gone with Parks and the
children and the children's mother, Ms. Raines, to football practice;
is that right? A. Yes. Q. And that's where you were returning from...
A. Yes. Q. Now at that particular time I asked you whether or not you
had the guns with you or in your possession and you said you had left
them in the car, correct? A. Yes. ...Q....is the gun--was it at the
front of Ms. Raines seat? A. Right...Q. And would it be fair to say
that you would not want to be charged with possession of each of
these guns; isn't that correct? A. Right.

III RP 62-65.(emphasis added).

On the State's redirect, Mr. Wilson testified to the following
substantive evidence:

Q. Mr. Wilson, did you see this black gun, the State's Exhibit No. 2,
with Mr. Parks that day? A. I don't remember. Q. You don't remeber?
A. No. Q. Previously you testified that you did see him with it; do
you remember? Wasn't that your testimony? A. Yes. Q. So are you saying
now you don't remember? A. Yes.

III RP 66. (emphasis added).

On re-cross examination, Mr. Wilson testified to the folloiwng:

Q. Mr. Wilson, it would be in your interests, obviously, to say that

this firearm is Mr. Parks's; isn't that correct? A. Yes....Q. Did you say earlier you were concerned about Ms. Raines getting into trouble? A. I didn't say anything like that. Q....Didn't you say it wouldn't look good or you were concerned it wouldn't look good that Ms. Raines had a firearm near her when she had two kids in the back seat? A. I didn't say that. Q. That wasn't your testimony just a few minutes ago? A. No, She said that. Q. She said that? A. Yes....Q. Is it true that you knew that Ms. Raines did not want the gun linked to her correct? A. Yes.

II RP 67-69.(emphasis added).

The substance of Mr. Wilson's testimony can be summed up by stating that it was more favorable to Mr. Parks in favoring Mr. Parks's factual and actual innocence, rather than pointing to Mr. Parks guilt. Mr. Wilson's own testimony was inconsistent where he first started out by testifying that the firearms were in a bag in the back seat of the Yukon and that once the police were behind him pulling him over Mr. Parks kicked the bag with the firearms under the front passenger seat where Ms. Raines was located. Mr. Wilson said that he knew the firearms were kicked under Ms. Raines seat because he heard Ms. Raines say, "don't kick those under my seat."

But, to the contrary, Mr. Wilson later testified that when the police were behind him pulling him over that he had actual possession of the silver firearm to which he then handed to Ms. Raines. Although Mr. Wilson claims to have not known what Ms. Raines did with this firearm, its very clear that Ms. Raines put it under her seat with her firearm (the black one).

Mr. Wilson then testified that he was aware that both him and Ms. Raines would get into trouble for having the firearms. One, because he was a convicted felon, and two, because Ms. Raines had her two sons in the vehicle.

During a defense interview prior to the trial, Mr. Wilson admits that he stated that he left the guns, plural, in the Yukon during football practice, not Mr. Parks.

Once Mr. Wilson's testimony was finished it came down to the fact that Mr. Wilson had the firearms for protection because he had recently (three-weeks) been shot and was hospitalized for it and was in fear for his life. Mr. Wilson also testified that he had an interest in saying that the black firearm was Mr. Parks because he did not want to be caught with two firearms and further that he did not want his then girlfriend, Ms. Tina Raines to be blamed for having the firearm due to the two children of Ms. Raines being in the car and who also did not want to be linked to possession of the black firearm upon which Mr. Parks's conviction is based needing reversed and dismissed due to the insufficiency of the evidence to which the state failed to satisfy its burden of proving all the elements of the crime beyond a reasonable doubt.

The State rested at this point, it was the defense's turn to offer its evidence. The defense lawyer placed Mr. Parks on the stand to testify. Mr. Parks testified that he was in the Yukon on October 24, 2008 with both Mr. Wilson and his girlfriend, Ms. Tina Raines, and her two children. III RP 72.

Mr. Parks testified that his contact with Mr. Wilson was initiated by Mr. Wilson through a phone call from Mr. Wilson inquiring into the reason why Mr. Parks had not been at the hospital a few weeks prior when Mr. Wilson was hospitalized after having been shot. Mr. Parks testified that he was dropped off at Mr. Wilson's house later in the day on October 24, 2008 where Mr. Parks, Mr. Wilson, Ms. Raines and her two children left to football practice. Mr. Parks testified that he was not in possession of any firearm, neither did he know that any firearms were presently in the vehicle. III RP 72-74.

Mr. Parks testified that he never kicked any firearms under the seat in Mr. Wilson's vehicle. In fact, Mr. Parks provided the following testimony as to when he first learned of the firearms being in the vehicle:

Q. When was the first time you realized there was a firearm in

the vehicle? A. As we were being pulled over I heard him look at her and say, we are going to jail for a long time for this. And I didn't know what it was but I figured that's probably when they were doing whatever they were doing...I never seen it though, So. Q. At any time on the 24th of October 2008, were you in possession of a firearm? A. No.

III RP 74. (emphasis added).

Mr. Parks further testified that he had never seen the firearms prior to the police arresting him that night. Id. at 78.

C. CLOSING ARGUMENTS.

During the State's argument to the Court, the State made the argument that possession can be established in two ways: (a) by actual possession on a persons possession, or (b) by constructive possession which means that the person actually possessed dominion and control over the firearm. The State also argued that it had a duty to establish that Mr. Parks knew he was in possession of the firearms. III RP 79.

In asking the Court to accept Mr. Wilson's testimony as the truth, the State conceded that the case was dependent upon Mr. Wilson's testimony which was the sole evidence establishing that Mr. Parks was in possession of the firearm. III RP 79-81. The State asserted that there was no evidence in the case which would support a finding that the firearm belonged to Ms. Raines as the defense was arguing and that because the guns were found within Mr. Parks reach, and since Mr. Wilson testified that he saw Mr. Parks with the firearm, that the State had met its burden of establishing beyond a reasonable doubt that Mr. Parks had both actual and constructive possession of the firearm. III RP 81-82.

The States argument lacks any supporting evidence due to the officers testimony that the firearms were located under the front passenger seat, first Mr. Wilson's firearm in the back and Ms. Raines in the front. This evidence

is corroborated by Mr. Wilson's testimony that he handed the firearm to Ms. Raines once they were being pulled over by the S.P.D. Officer which is when Ms. Raines put Mr. Wilson's firearm under the front passenger seat then hers and pushed them under the seat and put her bag on top of them to conceal them.

The State's argument fails in that it would have this Court dismiss the fact that not only were the firearms within Mr. Parks reach, but they both were equally within the reach of Ms. Raines who was never put on the stand to testify and was a very material witness to the case conviction which no competent lawyer would have failed to produce. The State's case further fails due to the fact that not one witness, except Mr. Wilson whose testimony was contradicted by his own testimony, testified that they saw Mr. Parks with a firearm on his possession. Not one witness testified that the vehicle was Mr. Parks in order to obtain the required element of dominion and control, in fact, the testimony was to the contrary establishing that the vehicle belonged to Mr. Wilson and that Mr. Parks had only been in the vehicle momentarily (30 minutes) before the traffic stop occurred.

Therefore the State's case, taken in light most favorable to the State failed to establish either actual or constructive possession and needs to be reversed and dismissed due to insufficient evidence.

The defense argued in its closing that the State's burden needing to be met was beyond a reasonable doubt, not by the preponderance of the evidence and that there were ample reasons not to trust Mr. Wilson's testimony such as Mr. Wilson's firearm being located in the back part of the seat closest to Mr. Parks, and that Mr. Wilson had a motive to lie as he testified that he did not want Ms. Raines to get into trouble for having the firearm due to her two sons being in the car as well, and that he himself did not want to get caught with two firearms which was why Mr. Wilson testified he handed his firearm to Ms. Raines

to hide the firearms which she hid under the seat where she was sitting and Mr. Parks ended up the blame for a crime he factually never did commit and is, in fact, 100% innocent of. III RP 86-89.

Further the defense lawyer argued that the defendant, Mr. Parks was to get the benefit of the doubt and the State was required to prove beyond a reasonable doubt that (a) Mr. Parks had knowledge of the firearms, and (b) Mr. Parks had constructive possession and the State failed to meet either one and a finding of not guilty needed to be reached. Mr. Wilson testified to multiple stories. III RP 90-91.

The trial Judge found for the State and found that the State had proved its case beyond a reasonable doubt. The Judge found Mr. Wilson's testimony to be credible and Mr. Parks's not to be credible and found Mr. Parks guilty as charged. III RP 98-99.

On April 24, 2009, the trial court entered its written findings of fact and conclusions of law. CP 28-31. In these findings of fact, the Judge in Finding of fact #14 concluded that the area under Ms. Raines seat was accessible from the rear passenger seat where Mr. Parks was sitting. In #18 of the Findings of fact the Judge stated that Mr. Parks had knowingly possessed and had in his control a firearm. In #19-20 of the Findings of fact the Judge found that Mr. Wilson saw Mr. Parks with the Interim Star semi-automatic gun on October 24, 2008 which was the same gun found by S.P.D. during its search of the vehicle. In #21 Finding of fact the Judge found that Mr. Wilson's testimony was credible and in #22 of the Findings of fact the Judge found that Mr. Parks testimony was not credible. CP 30.

In its conclusions of law, the Judge ruled in number II that the State proved the following elements beyond a reasonable doubt: On October 24, 2008, while in King County, Dwayne Parks knowingly had in his possession and control

a firearm after having been previously convicted of an Assault in the Second Degree, a serious offense. CP 31. In the Court's Conclusion of Law number III, the Judge ruled that Mr. Parks was guilty of Unlawful Possession of a Firearm in the First Degree as charged. In the Judge's Conclusion of Law number IV, the Judge rules that judgment should be pronounced. CP 31.

On April 24, 2009, the Judge entered Judgment and sentenced Mr. Parks to a term of 67 months total confinement. CP 32-39. This appeal timely follows.

III. LEGAL ARGUMENT AND AUTHORITY.

1. THE STATE DEPRIVED PARKS OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE STATE "LOST" A MATERIAL WITNESS'S RECORDED INTERVIEW WHICH WAS FAVORABLE TO THE DEFENSE THEORY AND SERVED AS BOTH IMPEACHMENT AND EXCULPATORY EVIDENCE AND THEREFORE THE CONVICTION MUST BE REVERSED.

A. STANDARD OF REVIEW.

The standard of review in addressing issues of constitutionality are de novo. State v. Sieyes, 168 Wn.2d 276, 255 P.3d 995 (2010)(citing State v. Chavez, 163 Wn.2d 262, 267, 180 P.3d 1250 (2008)(citing State v. Eckbald, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004)). Courts further review claims of a manifest constitutional error de novo. State v. Walters, 146 Wn.App. 138, 144, 188 P.3d 540 (2008)(citing State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004)(citing City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875(2004)).

Article I, section 21 of the Washington State Constitution and Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a fair trial. State v. Johnson, 152 Wn.App. 924, 934-35, 219 P.3d 958 (2009).

One of the most important procedural functions in a criminal case, which is utilized to test the strength of the State's case, is the discovery process. CrR 4.7 et. seq., provides the primary basis for pretrial discovery in all criminal cases. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

In the criminal case, a prosecutor has an affirmative duty to disclose to the defendant, not later than the omnibus hearing, any material or information within the prosecutor's knowledge which tends to negate the defendant's guilt as to the offense charged. CrR 4.7(a)(1)(3)(4); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)(failure to grant meaningful discovery).

Based upon the reasons set forth below, Parks alleges that a Brady violation occurred when the government, acting on behalf of the State, "lost" a very material interview of a key central witness and therefore Parks's conviction must be reversed and dismissed.

The State has an affirmative "duty to learn of any favorable evidence known to others acting on the government's behalf in the case." Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

"Brady suppression occurs when the government fails to turn over evidence that is 'known only to police investigators and not the prosecutor.'" Youngblood v. West Virginia, 547 U.S. 867, 869-70, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006)(quoting Kyles, 514 U.S. at 438).

Our Ninth Circuit Court of Appeals holds to this same principle:

...actual awareness (or lack thereof) of exculpatory evidence in the government's hands,...is not determinative of the prosecutor's disclosure obligations. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf. Because the prosecution is in a unique position to obtain information known to other agents of government, **it may not be excused from disclosing what it does not know but could have learned.**"

Carriger v. Stewart, 132 F.3d 463, 479-80 (9th Cir. 1997)(en banc)(emphasis added).

In addition to the applicable rules of discovery, a separate and distinct constitutional obligation requires the prosecution to disclose evidence at trial or to the defense lawyer that is necessary to assure the

accused a fair trial consistent with the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington States Constitution safeguards of due process.

The Fourteenth Amendment to the United States Constitution and art. I, section 3 of the Washington States Constitution prohibit any State to "deprive any person of life, liberty, or property, without due process of law." Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962).

Due process is denied an accused if the prosecution withholds material exculpatory evidence or destroys any evidence prior to trial. State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984), appeal after remand, 109 Wn.2d 832, 750 P.2d 208 (1988); Brady v. Maryland, supra.

Parks argues that there can be no disputing in this case that State witness, Detective Lundin, was working on behalf of the State conducting a post-arrest investigation seeking out evidence to support the State's case. I-II RP 71-74. It is also without dispute that the Detective, during this investigation phase, came across evidence that another S.P.D. Detective, Mr. Sausman, conducted and recorded an interview of a key material witness, Tina Raines. I-II RP 84-85. It is equally without dispute that the Detective Lundin was unable to learn of the interview's contents and statements made by Ms. Raines because that interview recording became "lost." Id.

Therefore, it is also without dispute that the government failed to turn over the recorded interview of Tina Raines, a very material key witness, and therefore in so doing, violated Brady.

In performing a Brady violation analysis, three components must be met which the Strickler court defines as being:

The evidence at issue must be favorable to the accused, either because its exculpatory, or because its impeaching; that the evidence must have been suppressed by the State; either wilfully

or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

In turning to the first component, whether the evidence at issue (Ms. Raines "lost" pre-trial interview) was favorable to Parks's defense either because it was impeaching or due to it being exculpatory the Court must look at the case de novo. In support of the State's case, the State put six (6) S.P.D. Officers on the stand to testify which were directly involved in the case. Not one of these officers testified that they either (a) saw Parks with a firearm, (b) were told by either Ms. Raines or Mr. Wilson that the firearm belonged to Mr. Parks, (c) witnessed Mr. Parks driving the vehicle, (d) had evidence establishing that Parks owned the vehicle where the firearms were located in, (e) were disclosed to by Mr. Parks himself that the firearm was his, (f) that after a thorough test of the firearms Mr. Parks prints were found on the Black firearm, (g) and that the officers suspected the firearm belonged to Mr. Parks. I-II RP 71-85; I-II RP 86-93; III RP 3-11; III RP 12-28; III RP 29-36; III RP 40-54.

What testimony was elicited from the officers Briskey, Bonet, Stewart, and Kelly who were all on the scene was that (a) Mr. Wilson was the driver of the Yukon which was stopped, (b) Mr. Parks was seated in the right passenger rear seat, (c) Tina Raines (Mr. Wilson's girlfriend) was seated in the right front passenger seat, (d) Ms. Raines had two sons in the vehicle which were seated in the rear left and middle seat next to Mr. Parks, (e) that the Black and Silver-Black firearms were located and found underneath Ms. Raines seat, (f) That Mr. Wilson ran a red light and was attempted to be pulled over and that Mr. Wilson refused to stop immediately, and (g) that both officers Bonet and Stewart, prior to photographing the firearms where they were located, did

in fact first move the firearms and then put them back underneath the seat. III RP 3-11; III RP 12-28; III 29-36; and III RP 40-54.

The only direct evidence (which was severely impeached by the witness himself) linking Parks to the Black firearm was testimony from Mr. Wilson. It is Mr. Wilson's testimony which establishes that the recorded interview of Ms. Raines is not only material as impeachment evidence, but is also exculpatory evidence clearing Parks of the charge. Mr. Wilson first testified that the Black firearm, as well as the silver-black firearm, belonged to Parks who, once the police were pulling Mr. Wilson over, kicked them underneath Ms. Raines seat.

Mr. Wilson testified, over defense objection which was overruled by the Court, that he knew that the firearms were kicked underneath the seat by Parks because Tina Raines said, "don't kick those under my seat." III RP 60.

But, directly after testifying that Parks put both the firearms underneath Ms. Raines seat, Wilson testified that when the police were behind him pulling him over that he still had possession of the firearm which he handed to Ms. Raines and did not know what she did with the firearm. III RP 59-61.

During the defense lawyers cross-examination, Wilson testified that he had the **guns** for protection because he was recently (three weeks prior to having been pulled over on October 24, 2008) shot and hospitalized for the wound. Wilson also testified that he knew the **guns** were in the Yukon when he was being pulled over and he did not want to get implicated with both the firearms because it would mean a prison sentence for him and he did not want his girlfriend, Ms. Raines, to get into trouble for the other firearm (the one Parks is convicted of having possessed) because her two sons were in the car. III RP 62-65.

On Re-Direct, Wilson testified that he actually did not remember seeing

Parks with the Black firearm. III RP 66.

On Re-Cross, Wilson testified that it would be in his interest to say that the [black] firearm belonged to Parks because Wilson was concerned that Ms. Raines, who did not want the firearm linked to her, would get into trouble. [For having and being the owner of the Black firearm with which Mr. Parks is convicted of owning] III RP 67-69.

At this point the State rested its case-in-chief and it was the defense's turn to present testimony. Parks took the stand and testified that prior to the date of October 24, 2008 and stop by the S.P.D. he had never seen the Black firearm before and that he was only in the vehicle to go to football practice. That the firearm was not his. III RP 72-78.

Based upon Mr. Wilson's testimony (which the conviction solely rests upon) and Mr. Parks's testimony, Ms Tina Raines recorded interview was very material in that it was both (a) impeachment material for Wilson's own testimony that the firearm belonged to Parks, and (b) exculpatory in that it established, as Wilson later testified to, that the firearm within which Mr. Parks is convicted of allegedly owning and possessing belonged to Ms. Raines.

But, as the evidence shows, the "lost" interview of Ms. Raines would have answered some very important unanswered questions such as: (a) where did Ms. Raines put Mr. Wilson's firearm, (b) whose bag was on top of the firearms, (c) who put the bag on top of the firearms, (d) was the bag completely on top of the firearms, (e) who owned the Black firearm which Parks is convicted of possessing, (f) where did the firearms come from and what was the purpose of purchasing them, and (g) did Parks know the firearms were in the vehicle that day.

Without that recoded interview of Ms. Raines whose seat the firearm located underneath these questions cannot be answered which were material to

Parks's defense and the interview served as both impeachment and exculpatory evidence therefore the first component of the Brady claim has been met.

As stated, supra, the second Brady component states that the very evidence "must have been suppressed by the State." Strickler, 527 U.S. at 281. See also, Edwards v. Ayers, 542 F.3d 759, 768 (9th Cir. 2008)("Suppression by the prosecution, whether wilfull or inadvertent of evidence favorable to the accused and material either to guilt or the punishment violates the constitution).

The term "suppression" does not describe merely overt acts, sin of omission are equally within Brady's scope. United States v. Price, 566 F.3d 900 (9th Cir. 2009)("[T]he terms 'suppression,' 'withholding,' and 'failure to disclose' have the same meaning for Brady purposes.>").

This second step must be performed of the inquiry "irrespective of the good faith or bad faith of the prosecution" in failing to dislcose favorable evidence. Brady, 373 U.S. at 87.

In Parks's case, the evidence undisputibly shows that: (a) State's witness, Detective Lundin conducted a post-arrest pre-trial investigation in which he sought to gather evidence for the State's case, (b) during Detective Lundin's investigation he found evidence establishing that another S.P.D. Detective by the name of Mr. Sausman conducted a recorded interview of a very key witness, Tina Raines, (c) that Detective Lundin was unable to review the contents of the Tina Raines interview because it became "lost", and (d) the State, although inadvertently conducted, failed to disclose the material case interview of Ms. Raines because of it being "lost." I-II RP 71-85.

Based upon these facts which are undisputable, the proponent, Parks, has met the second component to the Brady claim.

As stated, supra, the final component to a Brady violation claim is that "prejudice must have ensued." Strickler, 527 U.S. at 282.

The prejudicial analysis is often phrased in terms of "materiality." See e.g., United States v. Jernigan, 492 F.3d 1050, 1053-54 (9th Cir. 2007)(en banc). However, "[t]he terms 'material' and 'prejudicial' are used interchangeably in Brady cases. Evidence is not 'material' unless it is 'prejudicial' and not 'prejudicial' unless it is 'material.' Thus, for Brady purposes, the two terms have the same meaning." Benn v. Lambert, 283 F.3d 1040, 1053 n.9 (9th Cir. 2002).

"The touchstone of [the prejudicial analysis] is whether admission of the suppressed evidence would have created a 'reasonable probability of a different result.'" United States v. Jernigan, 492 F.3d at 1053(quoting Kyles, 514 U.S. at 434).

The United States Supreme Court in addressing this has "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal." United States v. Bagely, 473 U.S. 667, 682, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985)(citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

In a Brady claim the proponent bears the initial burden of producing some evidence to support the inference that the government possessed or knew about material favorable to the defense yet failed to disclose it. Cf. United States v. Lopez, 534 F.3d 1027, 1034 (9th Cir. 2008).

However, once the proponent produces such evidence (which in this case Parks has done), the burden then automatically shifts to the government to demonstrate that it has satisfied its duty to disclose all favorable evidence known to the government. Kyles, 514 U.S. at 437.

The suppression of facts capable of establishing the innocence of the accused may not stand. 12 Wash. Prac., Criminal Practice & Procedure § 1317 (2004 ed)(citing Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed 214

(1942); Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967)).

Parks will argue that the State's evidence establishes that it has "lost" a key piece of evidence material to Parks's guilt or innocence and that the state cannot meet its burden establishing that it produced all evidence known to the State and therefore a Brady violation occurred requiring reversal and dismissal of Parks's conviction.

2. THE STATE'S EVIDENCE WAS INSUFFICIENT TO OBTAIN A CONVICTION OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE REQUIRING REVERSAL AND DISMISSAL OF THE CHARGE.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992)(citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). Both the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution prohibits any State to "deprive any person of life, liberty, or property, without due process of law." Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). "[D]ue process requires the State to prove every element of the charged crime beyond a reasonable doubt." State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

A reviewing court will only reverse a conviction for insufficient evidence only if no rational trier of fact could find that all the elements were proved beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954

P.2d 900 (1998); See RCW 9A.04.100.

The State charged Parks with Unlawful Possession of a Firearm in the First Degree. CP 1-2.

The State failed to establish and prove beyond a reasonable doubt with competent evidence that Parks had either actual or constructive possession of the firearm.

A. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT WITH COMPETENT EVIDENCE THAT PARKS HAD EITHER ACTUAL OR CONSTRUCTIVE POSSESSION OF A FIREARM BECAUSE IT DID NOT ESTABLISH THE ELEMENT OF POSSESSION.

To convict Parks as a principle to the Unlawful Possession of a Firearm in the First Degree, the State was required to prove with competent evidence that Parks either (a) owned, (b) had in his possession, or (c) had in his control after having been previously convicted of a serious offense a firearm. RCW 9.41.040(1)(a).

This case presents a very unique question as to the applicable case standard of review on this issue since Parks was not committing any crime at the time he was arrested. It was Wilson who ran the red light and then made a decision not to stop once being pulled over by the S.P.D. This is circumstantial evidence that Wilson had something to hide from the police officer, not Parks.

The facts of the case, as set forth supra, hold also that the vehicle belonged to Wilson, the firearm was found under Wilson's then girlfriend, Tina Raines, seat. The firearm accused of being Parks was also the firearm that was found under the passenger front seat closer to Tina Raines and Wilson's firearm was found under the front passenger seat near the back towards Parks seated location. Parks would have had to reach around in front of Tina Raines legs and then placed the firearm under the seat, or he would have had to exit the vehicle, while it was moving, then placed it in the front underneath the seat.

Possession of a firearm may be actual or constructive. In this case

Parks will address the actual possession element first as applied to the case facts. The State did not produce any competent evidence, as required under RCW 9A.04.100, which would establish that Parks had actual possession of the black firearm. The State solicited testimony from several sources, the first being a latent print examiner who worked for the S.P.D. This examiner stated that four distinctly separate and different tests were conducted on the firearm to determine if there was any fingerprints which would establish the actual owner of the firearm, or at least who possessed the firearm, and that all of the tests conducted have resulted in no prints being located on the firearms. I-II RP 92-93.

Next, the State placed officers Briskey, Bonet, Stewart, and Kelly on the stand each to testify as to the events surrounding the traffic stop leading to Parks's arrest in which each of these officers were present. Every one of these witnesses testified that they never saw Parks have in his actual possession any firearm. III RP 11, 28, 29-36, 54.

Next, the State's star witness, Wilson, took the stand and during the first part of his testimony Wilson testified that Parks owned the black firearm and that Wilson saw Parks with the firearm earlier in the day. III RP 58-59. Wilson then testified that he knew that Parks had kicked the firearms under the seat when the police were pulling him over because Tina Raines said, "don't kick those under my seat." III RP 59-61. (This testimony was objected to based upon it being hearsay but was overruled by the court).

Wilson testified that he possessed the silver firearm (State's Exhibit 1), when the police were pulling him over he handed the firearm to Tina Raines but did not know what she had done with the firearm. Id.

However, Wilson broke down and disclosed the truth stating that he did

know that both of the firearms were in the vehicle and that neither him, nor his then girlfriend, Tina Raines, wanted to take the blame for the firearms and be implicated because it would mean a prison sentence for him and because Ms. Raines had two children in the vehicle which were her sons and she did not want to be caught with a firearm. Wilson testified that he had a vested interest in stating that the black firearm belonged to Parks. III RP 62-69.

Wilson ended up finally testifying that he did not remember seeing Parks with a firearm that day. III RP 66.

Wilson's testimony, at best, established that Parks was not possessing any firearms and instead it was Wilson and Raines who had possession of both the firearms and just did not want to get caught with them. Id.

Because Parks did not have physical custody of the firearm, the question turns to whether the State produced sufficient and competent evidence to prove Parks had constructive possession of the firearm.

Constructive possession may be established by presenting proof that the defendant had dominion and control over the firearm or over the premises where the firearm was found. However, a showing of constructive possession depends on the totality of the circumstances. Relevant factors include the ability to reduce the firearm to actual possession, the defendant's knowledge of the firearm being on the premises, and any evidence of the defendant's dominion and control over the premises.

But, evidence proving that a defendant was in close proximity to the firearm by itself is insufficient to obtain a conviction for possession of a firearm. State v. Echeverria, 85 Wn.App. 777, 783-84, 934 P.2d 1214, 1217 (1997); State v. Jeffrey, 77 Wn.App. 222, 227, 889 P.2d 956, 958 (1995).

An automobile may be considered a "premises." State v. Potts, 1 Wn.App.

614, 617, 464 P.2d 742 (1969).

In Echeverria, the defendant was the driver of a vehicle registered to another person. 85 Wn.App. at 780. He was charged with unlawful possession of a firearm and unlawful possession of a dangerous weapon (a martial arts throwing star). 85 Wn.App. at 779. On appeal, the Court found sufficient evidence that Echeverria constructively possessed the firearm because it was plainly visible, but insufficient evidence to support possession of the martial arts throwing star weapon because it was not. 85 Wn.App at 783-84.

Unlike Echeverria, Parks's case evidence established that both of the firearms were out of sight underneath the front passenger seat covered up by a bag where both officers Bonet and Stewart testified that before taking the pictures of the firearms underneath the seat, they moved the bag and located the firearms and then removed the firearms and then put them back and took the photographs after the fact. This evidence clearly shows that the firearms were not plainly visible and were only discovered after the arrest and subsequent search of the vehicle. III RP 25, 33.

Further, the firearms were found underneath Ms. Raines seat, not under Parks's seat. All the evidence established that the "premises" which was the vehicle within which the firearms were found belonged to Wilson, not Parks.

And to top that off, Wilson testified at the close of his testimony that he did not remember seeing Parks with the firearm that day.

There were no fingerprints taken from the firearm which would prove, beyond a reasonable doubt, that Parks constructively possessed and handled the firearm.

And the State produced no evidence, except for Wilson's testimony which he recanted on the stand on his own volition, that Parks ever knew that the firearms (either one of them) were in Wilson's vehicle underneath the seat.

In State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005), the defendant was arrested for driving on a suspended license. In a search incident to the arrest, police found a back pack behind the driver's seat where Gurske had been sitting. 155 Wn.2d at 136. Inside the zipped back pack police found a Coleman torch, a holstered handgun under the torch, and three grams of meth-amphetamines. Id.

The Supreme Court held that there was insufficient evidence to show that the firearm was easily accessible and readily available for use because in order to reach it, Gurske would have had to exit the vehicle or move over into the passenger seat. 155 Wn.2d at 143.

The Court further noted that the facts did not give rise to the inference that Gurske could access the weapon from the driver's seat. Id.

Accordingly, the State in Parks case failed to prove any nexus between Parks and the firearm, beyond mere proximity, and further failed to produce sufficient evidence establishing that Parks had dominion and control over the vehicle and firearm in order to gain the conviction.

Therefore, reversal and a dismissal of the charge is necessary to assure that a grave miscarriage of justice does not occur to an actually innocent man.

3. DEFENSE COUNSEL'S FAILURE TO CALL TINA RAINES TO THE STAND AS A WITNESS DEPRIVED PARKS OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL REQUIRING REVERSAL.

A. DEFENSE COUNSEL'S FAILURE TO CALL TINA RAINES TO THE STAND TO TESTIFY VIOLATED PARKS'S RIGHT TO CONFRONT HIS ACCUSER.

STANDARD OF REVIEW. The standard of review of a confrontation clause challenge is de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

The Sixth Amendment to the United States Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

Likewise, Article I, section 22 of Washington's State Constitution states that, "In criminal prosecutions, the accused shall have the right to... meet witnesses against him face to face."

The Washington Courts have not differentiated between the two provisions. State v. Florczak, 76 Wn.App. 55, 882 P.2d 199 (1994)("the protection afforded by both clauses is identical").

The right to confrontation and the hearsay rule serve similar objectives - to allow a criminal defendant to test the perception, memory, credibility, and narrative powers of the witness against him. State v. Parris, 98 Wn.2d 140, 654 P.2d 77 (1982).

They are, however, two different rules. Each is an independent ground for objection that may be invoked without regard to whether the evidence is objectionable under the other. California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

During the State's star witness's testimony, Mr. Wilson, testimony was elicited from Wilson, which was objected to on the basis of hearsay, where Wilson stated that he knew the firearms were kicked under Ms. Raines seat due to Ms. Raines stating, "don't kick those under my seat." III RP 60.

The objection was made on the basis of that particular testimony being hearsay which was inadmissible. See ER 802. The State came back stating that the testimony was not being offered to prove the truth of the matter asserted, but instead, was being offered to establish and show how Wilson knew the firearms were being kicked under the seat. Id. The Court allowed that statement to come in on that basis.

But, as the evidence shows, the State's only evidence linking Parks with the firearm was that line of testimony which means that even though the state asserted that the testimony was not being offered to prove the truth of

the matter asserted (which was that Parks had the firearm), that is exactly what the testimony ended up being - evidence offered to prove the State's case. Such testimony is hearsay and inadmissible. See ER 802. The testimony also did not fit within one of the hearsay exceptions to the rule and it was an abuse of the Court's discretion to allow it to come in.

Since the State had manifested and adopted a belief in that line of testimony by Wilson (who later recanted that testimony) then it was fair game for the defense lawyer to move for a continuance of the trial so as to secure the material witness warrant of Tina Raines in order to test the perception, memory, credibility, and narrative powers of her alleged statement which the conviction rests upon. The rule (801) does not allow a party to introduce his or her own out-of-court statements through the testimony of other witnesses.

If the rule were otherwise, a party could simply tell his or her side of the story out of court, and then present it through the testimony of another witness without taking an oath subjecting that witness to perjury charges if the testimony was false and without facing cross-examination.

That is exactly what the State did in this case where the State's investigative detective also had evidence establishing that a recorded interview of Tina Raines was made but mysteriously "lost." The State's case hinges upon this line of testimony and therefore no tactical decision by counsel not to call Tina Raines who was to have made a statement against interest could be maintained. Such failure was deficiency and prejudiced Parks's defense in violation of Parks state and federal confrontation rights requiring reversal.

B. DEFENSE COUNSEL'S FAILURE TO CALL TINA RAINES AS A WITNESS DEPRIVED PARKS OF HIS RIGHT TO A FAIR TRIAL.

Defense attorneys have a duty to make a reasonable investigation. In re Personal Restriant of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). A lawyer who "fails adequately to investigate, and to introduce into evidence,

evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." Riley v. Payne, 352 F.3d 1313, 1318 (9th Cir. 2003), cert. denied, 543 U.S. 917, 125 S.Ct. 39, 160 L.Ed.2d 200 (2004).

Defense counsel must, " at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." Davis, 152 Wn.2d at 721(quoting In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001)). "An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices and ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case." Davis, 152 Wn.2d at 722(citations omitted).

Although failure to interview a witness to a crime may be considered deficient performance, counsel "need not interview every possible witness to have performed proficiently." Riley, 352 F.3d at 1318.

However, defense counsel's failure to call a witness with exculpatory evidence may constitute deficient performance. See e.g., Riley, 352 F.3d at 1321(defense counsel performed deficiently where he failed to call a witness who would have said the victim was the first aggressor); Lord v. Wood, 184 F.3d 1083, 1096 (9th Cir. 1999)(counsel's performance was deficient where counsel had failed to interview three witnesses who had material evidence as to thier client's innocence); Brown v. Meyers, 137 F.3d 1154(9th Cir. 1988)(failure to investigate and present available alibi witness prejudicial where, without corroborating witnesses, defendant's bare testimony left him without a defense).

There was no tactical reason in this case for the defense counsel not to call Tina Raines to the stand to testify. No reasonably competent attorney

would have made such a mistake.

Parks's testimony, standing alone and faced with Wilson's who used Tina Raines to implicate Parks as having kicked the guns underneath the seat, left Parks without a defense. This is especially true given the fact that Mr. Wilson's later testimony held that when the police were pulling him over he handed the firearm to Ms. Raines but did not know what she had done with it.

Clearly, Tina Raines was not interviewed by the defense lawyer, and it is without dispute that her testimony would have been alibi evidence that established that Parks was not the owner of the firearm and had, in fact, never seen the firearm prior to the arrest.

The State opened the door to this witness being called as a witness during Wilson's testimony and therefore any argument by the State suggesting that defense counsel's decision not to call Tina Raines was tactical should be rejected.

Counsel's mistake constituted deficient performance and prejudiced Parks's constitutional rights. Had counsel produced this testimony, there is a reasonable probability that the outcome of the case would have been different. Ms. Raines's testimony would have bolstered the defense that parks had never seen nor touched that firearm prior to the arrest and that the black firearm was Ms. Raines which she placed underneath the seat along with the silver-black one belonging to Wilson. Counsel's failure to call Raines to enable Parks to make this critical argument to the court establishing Parks's innocence constituted ineffective assistance of counsel.

Therefore the Court should reverse Parks's conviction

**C. COUNSEL'S FAILURE TO CALL TINA RAINES, A MATERIAL WITNESS,
WAS NOT A VALID TACTIC AND THE INVITED ERROR DOCTRINE DOES NOT
APPLY.**

Parks had the right to effective assistance of counsel at trial.

United States Constitutional Amend. VI; Wash. Const. art. I, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); State v. Gentry, 125 Wn.2d 570, 646-47, 888 P.2d 1105(1995); State v. Doogan, 82 Wn.App. 185, 188, 917 P.2d 155(1996).

To prevail on an ineffective assistance of counsel claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Doogan, 82 Wn.App. at 188(citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

This argument is linked and directly related to the preceding arguments raised establishing that the defense counsel was ineffective in failing to: (1) raise the constitutional due process claim under Brady where the State's lost favorable evidence to the defense; (2) challenge the sufficiency of the State's evidence pre-trial, at the close of the state's case-in-chief after the defense rested, after verdict in a post-trial motion; (3) failing to call Tina Raines as a witness who played a unique role in that her status was, in one spectrum and based upon Wilson's testimony, an accuser, and on the other spectrum, and in light of Wilson's latter testimony, Ms. Raines was a witness in favor of the defense's position that Parks was not guilty of the crime charged.

Without Ms. Raines testimony one is left to question which part of Wilson's testimony was true: (a) that the firearm was Parks's and Parks kicked the firearm underneath Ms. Raines seat; or (b) that Wilson gave the firearm to Ms. Raines who put it underneath her seat along with her firearm. These very questions go to the guilt or innocence of Parks and had no valid tactical reason for not being inquired into.

Parks's counsel rendered deficient performance prejudicing Parks.

right to a constitutionally fair trial.

4. THE TRIAL COURT ERRED IN ADMITTING INADMISSIBLE HEARSAY PREJUDICIAL TO PARKS'S DEFENSE WHICH DENIED PARKS HIS RIGHT TO A FAIR TRIAL UNDER CONSTITUTIONAL SAFEGUARDS.

Article I, section 21 of the Washington State Constitution and the Sixth Amendment to the United States Constitution guarantees a criminal the right to a fair trial and impartial jury. State v. Johnson, 152 Wn.App. 924, 934-35, 219 P.3d 958 (2009).

Reversal of Parks's conviction of Unlawful Possession of a Firearm in the First Degree is required because the trial court erred in admitting inadmissible hearsay which was prejudicial to Parks's defense thereby denying Parks his constitutional right to a fair trial.

"Hearsay" is a statement, other than one made by the declarant while testifying at trial, or offered into evidence to prove the truth of the matter asserted. ER 801(c). A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. ER 801(a). Absent an exception, hearsay is inadmissible. ER 802.

The record before this court substantiates that the trial court erroneously admitted inadmissible hearsay over defense counsel's objections during the State's star witness, Mr. Wilson's, testimony. Although the State claimed that the testimony that Mr. Wilson knew Parks had kicked the guns under Ms. Raines' seat because Ms. Raines allegedly stated, "don't kick those under my seat." III RP 60, was admitted to establish how Wilson knew the firearms were kicked underneath Ms. Raines' seat and not to prove the truth of the matter asserted, that argument is not well taken because the State after it was all said and done used that line of testimony just for that—to prove the truth of the matter asserted—that Parks was the person who kicked the firearms underneath

Ms. Raines seat which would established that the State satisfied its heavy burden of proving the elements of actual and constructive possession where the Parks had knowledge of the firearm being in the vehicle.

The trial court's erroneous admission of inadmissible hearsay was not harmless error because there is a real probability that the use of this hearsay evidence was necessary to reach a guilty finding by the Court given that Mr. Wilson's testimony was the sole piece of State evidence linking Parks to the firearm in question.

Further, as stated supra, not one of the State's officers who were on the scene of the traffic stop testified that they saw Parks have actual possession of the firearm and that once the firearms were located, which were moved and then repositioned, they were located underneath Ms. Raines seat with a bag on top of them.

The record before this court equally substantiates that the tainted evidence shored up the State's only evidence linking Parks to the firearm, Wilson's testimony. Therefore the trial court erred in admitting this line of inadmissible hearsay testimony and such error was not harmless in light of the fact that the untainted evidence in the case was not so overwhelming that it necessarily led to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985).

Reversal is required because the court's admission of inadmissible hearsay which was prejudicial to Parks's defense denied Parks his constitutional right to a fair trial.

5. PARKS IS FACTUALLY INNOCENT OF THE CHARGE UPON WHICH HE IS CONVICTED OF ALLEGEDLY COMMITTING AND THEREFORE HE SHOULD BE IMMEDIATELY RELEASED PENDING THE APPEAL DECISION.

The United States Supreme Court held that the actual innocence means factual innocence, not mere legal insufficiency. Bousley v. United States, 523

U.S. 614, 140 L.Ed.2d 828, 118 S.Ct. 1604 (1998). The Supreme Court articulated the following standard in evaluating a claim of innocence:

...the prisoner must show a fair probability that in light of all the evidence, including evidence tenably claimed to have been wrongfully excluded or to have come available only after trial, that the trier of facts would have not entertained a reasonable doubt of his guilt.

Kuhlmann v. Wilson, 477 U.S. 436, 455, 91 L.Ed.2d 364, 106 S.Ct. 2639 (1986).

It has long been established and acknowledged that one cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakingly. Kansas v. Marsh, 584 U.S. 163, 165 L.Ed.2d 429, 126 S.Ct. 2516 (2006).

The facts of this case are unique in that they establish that Parks's only participation in the case was that once Mr. Wilson called Parks and asked Parks if he wanted to attend a football practice Parks decided to go since he was unable to go see Wilson at the hospital a few weeks prior when Wilson was shot. After the football practice was over, which Parks was only in the vehicle a total of 30 minutes or so, Wilson ran a red light which led to S.P.D. officer Briskey's attempt to conduct a traffic stop, however, Wilson had his very own agenda and decided that he did not want to stop for the officer and instead wanted to attempt to take flight. Wilson eventually ended up pulling over and was arrested. Parks, who was an innocent bystander passenger in the vehicle who had no control over the actions of Wilson was also arrested which later led to the current firearm charge in question. Wilson first testified that Parks was the firearms owner but then recanted his statement in trial stating that the firearm was actually his and his girlfriends, Tina Raines but that they had a vested interest in accusing Parks of being the owner because Wilson did not want to go to prison for two firearms and Tina Raines did not want to take the blame due to her two sons being occupants in the vehicle that evening.

Thus, the evidence points towards Parks's actual innocence rather than innocence by legal insufficiency.

Therefore, this Court should accept the fact that Parks's case in light of all the State's evidence points towards his factual innocence and release Parks pending the appeal decision to prevent a gross miscarriage of justice.

6. THIS COURT, PURSUANT TO RAP 10.10(f), SHOULD ORDER THE APPELLANT LAWYER TO PREPARE ADDITIONAL BRIEFING BASED UPON THE ISSUES SET FORTH IN THIS STATEMENT OF ADDITIONAL GROUNDS.

RAP 10.10(f) holds that this Court, in the exercise of its discretion, may request additional briefing from an appellate counsel to address issues raised in a Statement of Additional Grounds by an appellant.

Due to the strength of the issues raised herein, Parks respectfully asks that this court use its discretion and request additional briefing on the matters set forth herein.

IV. CONCLUSION.

Based upon the above set forth arguments, and to prevent a gross miscarriage of justice from happening, this Court should reverse the conviction and dismiss it for insufficiency of the evidence and due to the constitutional issues contained herein.

Dated this 22nd day of June, 2010.

RESPECTFULLY SUBMITTED,

[Signature]
Dwayne Parks

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JUL -1 AM 10:13

CERTIFICATE OF SERVICE

I, Dwayne Parks certify under penalty of perjury that I caused a true and correct copy of this Statement of Additional grounds to be delivered to the below named individuals by depositing it into the AHCC Federal mail System on this 24th day of June, 2010.

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Dwayne Parks