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Court of Appeals
Division I
State of Washington

NO. 72734-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

YUSUF SHIRE,

Appellant.

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

The Honorable Jeffrey M. Ramsdell, Judge
The Honorable William L. Downing, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's rights to the compulsory process and to present a defense when it denied appellant's request for a material witness warrant. RP 2715-16.

2. Appellant was denied effective assistance of counsel when his attorney failed to timely request a material witness warrant.

3. The trial court violated the Fifth Amendment of the United States Constitution in failing to suppress appellant's statements to police. RP 173-74; CP 59-62.

4. The court erred in entering the following CrR 3.5 findings of fact and conclusions of law:¹

i. "Officer San Miguel, however, did make an innocuous statement about the reason for the arrest." CP 61.

ii. "This statement was not a question, nor was it intended to elicit a response from [appellant]." CP 61.

iii. "As a result, [appellant's] statement made in response does not implicate the protections afforded by Miranda."² CP 61.

¹ The trial court's written findings and conclusions are attached as appendix A.

² Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

iv. [Appellant's] response was spontaneously and voluntarily made and is admissible for CrR 3.5 purposes." CP 61.

5. The Judgment and Sentence contains a scrivener's error that must be corrected.³ CP 97.

Issues Pertaining to Assignments of Error

1. Appellant was charged with three counts of assault for an alleged shooting incident. Identity was a main issue at appellant's trial. A witness to the alleged shooting was prepared to testify that appellant was not involved. Despite being subpoenaed by both parties, the witness failed to appear to testify as scheduled. Defense counsel's request for a material witness warrant to secure the witnesses presence was denied. Is reversal required where the denial of the material witness warrant denied appellant a witness necessary to his defense and violated appellant's rights to the compulsory process and to present a defense?

2. Counsel requested a material witness warrant on the last day of trial. The trial court denied counsel's request as untimely, but noted it likely would have granted a material witness warrant had counsel requested one a week earlier. Was appellant denied effective assistance of counsel where counsel failed to timely request a material witness warrant thereby denying appellant a witness necessary to his defense?

³ The judgment and sentence is attached as appendix B.

3. The State sought to introduce statements appellant made to police after his arrest. After being read his Miranda rights, appellant invoked his right to silence. Appellant made no further comments and asked police no questions. Police told appellant he was being arrested because the car in which he was a passenger was suspected of being involved in a shooting. In response, appellant denied his involvement. Is reversal required where the officer's interrogation was reasonably likely to elicit an incriminating response from appellant and admission of the statements was not harmless beyond a reasonable doubt?

4. Appellant was convicted of three counts of second degree assault. Section 2.1 of the judgment and sentence, indicates appellant was found guilty of second degree assault but incorrectly cites the first degree assault statute, RCW 9A.36.011(1)(a). CP 97. Must this Court remand for correction of this scrivener's error?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Yusuf Shire and co-defendant, Mohamed Ibrahim, with two counts each of first degree assault and one count each of first degree unlawful possession of a firearm for their alleged involvement in a shooting incident on May 18, 2013. CP

1-8, 10-15. After a pretrial CrR 3.5 hearing, some of Shire's custodial statements were held admissible. RP 173-74; CP 59-62.

During trial a previously unidentified witness, Berket Kebede, appeared. RP 14484-9, 1453, 1478-81. Based on the Kebede's exculpatory disclosure, the trial court sua sponte granted a mistrial so additional investigation could occur. RP 1471, 1491-1501; CP 40.

Shire and Ibrahim's second trial began nine months later. RP 1504-05. By amended information, the State charged Shire and Ibrahim with a third count each of first degree assault with Kebede named as the complaining witness. RP 1544-45; CP 56-66.

A jury found Shire not guilty of each count of first degree assault. CP 89. The jury found Shire guilty of three counts each of lesser included second degree assault. CP 90. A jury also found Shire guilty of first degree unlawful possession of a firearm. CP 90. The jury also returned special verdicts finding each of the assaults was committed with a firearm. CP 91-92.

The trial court sentenced Shire to concurrent prison sentences of 72 months for each assault conviction and 75 months for the unlawful possession of a firearm conviction. The trial court also imposed three consecutive 36-month firearm enhancements. RP 2832-33; CP 97-103.

Shire was sentenced to a total prison term of 183 months. Shire timely appeals. CP 104-26.

2. Trial Testimony

Early in the morning of May 18, 2013, David Bentler was in his apartment in Greenwood listening to music when he heard several gunshots. After a short pause, Bentler heard several more gunshots. RP 1632, 1640-41, 1659-60. Bentler estimated hearing a total of six or seven gunshots. RP 1639-40, 1659.

Bentler looked out his window and saw one or two people get inside a late 1990's model Toyota Camry. RP 1632, 1635, 1637, 1639-43, 1659-60. Neither entered the driver's seat. RP 1642. Bentler saw a "tall guy" enter the car directly behind the driver seat. RP 1642, 1656, 1659, 1647-48. He "barely glimpsed" the other person. RP 1657. The car drove away westbound on 85th Street. RP 1632, 1635, 1637, 1639-46.

Bentler called 911 and reported the gunshots. RP 1632, 1643-44. Bentler described the tall person as a black man, wearing dark colored clothing. RP 1647, 1660-61.

Thomas English was also awake that morning and saw two black men run by his townhouse. RP 1684-85, 1722. One of the men was taller than the other. RP 1687, 1724. English saw a handgun in the shorter man's hand. RP 1701-02, 1726, 1741. About one minute later, English heard nine

or ten gunshots. RP 1685, 1690, 1725. English could not tell whether more than one gun was fired. RP 1690-91. English did not see the shooting. RP 1691-92.

English saw two men run back by his townhouse after the shooting. RP 1685, 1690, 1700-03, 1723-25. English did not see a gun in either man's hands. RP 1701, 1741. The taller of the two men looked he was either trying to stuff something down his pants or hold his pants up. RP 1688, 1701, 1713-14. English could not say whether they were the same men he saw before the gunshots. RP 1685, 1703. He never saw the men's faces and could not tell how old they were. RP 1723, 1736.

English did not call 911. RP 1727, 1732-33. He went to the scene of the shooting to see if anyone needed help. English saw Mardillo Barnes who was holding his injured left hand. He appeared to be in shock and did not respond when English asked if he needed help. RP 1704-05, 1727, 1733.

Police arrived at the scene of the shooting shortly thereafter. RP 1780-84. English told police he saw two black men. RP 1791-92. He described one man as wearing black clothing, a beanie, and appeared to be carrying a gun. RP 1791-92, 1807, 2081-82. The second man was wearing a blue and white shirt. RP 1791-92, 1825, 2082, 2123.

Ten minutes later, police stopped a white 1996 model Toyota Camry about ten blocks away from the shooting scene. RP 1831, 1850, 2078, 2533,

2615-17, 2631-32. Five men were in the car. RP 1834, 2537, 2540. Ibrahim was seated in the rear passenger seat behind the driver. RP 2252-54, 2547, 2552-53, 2558. Shire was seated in the right rear passenger seat. RP 1766, 1768, 1770, 1772, 2557-58, 2591, 2613. Shire told police he had just been picked up by some friend and was not involved in anything. RP 1770-71, 1775-76.

English was brought to the scene and identified Shire and Ibrahim as the men he saw run past his townhouse. RP 1681, 1706-09, 1720, 1730, 1798-1801, 1804-05, 2079-81, 2541-43, 2600, 2682. The driver of the car was also positively identified as being involved in the shooting. RP 2418-22, 2638-39. English was not able to identify Shire and Ibrahim in court at trial. RP 1719.

Bentler also went to where the car was stopped about 30 minutes after he called 911. RP 1653, 1666. Bentler identified the white Toyota Camry as the car he saw the two men enter. RP 1653-56. Bentler did not see how many people were inside the car or what they were wearing. RP 1655, 1663.

Police searched the car and found a left handed glove and 9mm semi-automatic handgun underneath the driver's seat of the car. RP 1907, 1913-14, 2078-79, 2089-91, 2105, 2136, 2255, 2547, 2558, 2591, 2613. Police also found a .38 caliber revolver under the front passenger seat. RP 2092-95,

2101, 2116, 2255, 2558, 2591, 2613. Both guns were operable. RP 2229-31. The revolver contained three live rounds and one spent round. RP 2096-99, 2118, 2614. No additional revolver rounds were found in the car. RP 2116, 2614.

Testing revealed no fingerprints on the revolver or 9mm bullets. RP 2270-71, 2284. No fingerprints were found on the 9mm pistol. RP 2271, 2591-92, 2594-95. Shire's thumbprint and left middle fingerprint were found on the cylinder of the revolver. RP 2273-74, 2276-79, 2280-81, 2547-48. Three unidentified fingerprints were also found on the revolver. RP 2276, 2281-82.

Police returned to the scene of the shooting later that same day. Barnes' father, Mardillo Arnold, gave police a spent bullet that was flattened on one side. RP 1751-52, 1754-55, 1758, 2140-42, 2146-47, 2154-55, 2166, 2169, 2179, 2186-87, 2190-91, 2444, 2446, 2448-49. Arnold told police he found the bullet at the shooting scene. RP 1756, 1758, 2442-43. Arnold did not put the bullet on the ground to show police its original location. RP 2168. Police could not identify what type of gun the bullet came from. RP 2177, 2563-67, 2645, 2648.

Police also found several 9mm bullet casings at the scene. 2140, 2146-47, 2154-55, 2166, 2169, 2179. Police found no .38 revolver bullet casings. RP 2150, 2166, 2614. Three bullet strike marks in the ground

suggested the shooter was moving from south to north during the incident. RP 2146-50, 2157, 2174-76.

Police spoke with Arnold. RP 2568. Arnold explained that he was asleep when he heard a loud explosion followed by several more gunshots. RP 2427, 2454. There was a pause between the first shot and the remaining six shots. RP 2428. Arnold went to his bedroom window and saw a black man in dark clothing run past his window. RP 2427-32, 2456-58. Arnold did not see a second person. RP 2455-56.

Arnold ran outside and encountered Vincent Williams. RP 2433-35. Williams told Arnold that Barnes had been shot and was probably dead. RP 2435, 2439. After Arnold yelled Barnes name several times, Barnes emerged from behind a car. RP 2435-36. Barnes did not say anything to Arnold about the shooting. RP 2438-39.

Barnes' mother, Carolyn Barnes-Arnold, was also asleep at the time of the shooting. Barnes-Arnold was awoken by a loud pop. She heard a brief pause followed by more shots as she woke up. RP 2011, 2030-31. Barnes-Arnold heard five or six shots in total. RP 2011. Barnes-Arnold went outside and encountered Williams and Kebede on the front porch. RP 2017-19. Williams told her that Shire had shot Barnes. RP 2020-21, 2033.

Detective Thomas Janes interviewed Williams a short time later. RP 2516, 2546, 2611-12. Williams identified Ibrahim and Shire in a photo

montage as the shooters. RP 2313, 2349-51, 2569-74. Williams explained that he, Barnes, and Kebede hung out earlier during the day of the shooting. RP 2296-97. The three of them drank and smoked marijuana before going back to Williams' house. RP 2298-99, 2387. Williams was intoxicated. RP 2298.

At a park near Williams' house, the three men got out of a car to eat food. RP 2298-03, 2374. While standing around the men were approached by someone named "New York." Kebede was friends with "New York" and talked with him. RP 2304-05, 2321, 2376-78. A short time later, Shire and Ibrahim walked towards the group from the north. RP 2304-14, 2320-2323, 2378.

Williams had previously seen Shire once or twice. RP 2318, 2369, 2379. He did not know Ibrahim. RP 2313-15. Shire spoke with Kebede for about five minutes. RP 2315-16, 2319. Shire also asked Barnes where he was from. Barnes "brushed off" Shire's questions. RP 2316-17. Williams did not feel threatened or intimidated by Shire or Ibrahim. RP 2318, 2383, 2386.

Shire backpedaled several steps while still talking with Barnes and Kebede. RP 2324-25, 2328, 2383-84, 2388. Shire then said something which sounded to Williams like "I do this." RP 2325, 2339-40. Shire put a gun in the air and fired it. Two or three seconds later Shire lowered the gun

and pointed it at Williams, Kebede, and Barnes who were all standing together. RP 2326-27, 2384, 2391. Shire fired five shots and then turned and ran. Williams did not see the gun. RP 2328-29, 2391. After a brief pause, Ibrahim pulled a gun from his waistband and also fired several shots. RP 2329, 2331-32, 2410. Williams saw Shire and Ibrahim run into an apartment complex after the shooting. RP 2334-35, 2392.

Williams went to Barnes' parents house after the shooting. RP 2344-45. Williams told Barnes-Arnold that Shire had shot at them. RP 2346, 2370. Williams spoke with several other people before telling police that Shire and Ibrahim were the shooters. RP 2410-11. Williams also looked online to get more information about Shire and Ibrahim's identities. RP 2314, 2347-48, 2351, 2371-72. Williams acknowledged there was "no way" he could have identified Ibrahim without first seeing his pictures online. RP 2394-95.

Barnes description of the events before the shooting was consistent with Williams'. RP 1950-59, 1965, 1971-73. Barnes heard about eight gunshots. RP 1971, 1996. A bullet entered Barnes' left hand and exited his wrist. RP 1973-74, 2064, 2067. Bones in Barnes' thumb, index finger, and middle finger were broken. RP 1983, 2058. Surgeons removed bullet and bone fragments and inserted pins and screws into Barnes' hand. RP 2059-

60, 2067-68. Barnes underwent hand therapy but still had impairment because of the injury. RP 1983-84, 2061-62.

Barnes explained that he did not see anyone or hear anything before the shooting. RP 1969-72. Barnes denied that anyone threatened them before the shooting. RP 1965, 1969. Barnes did not know Ibrahim. RP 1988. Barnes did not see or talk with Shire before the shooting. RP 1987, 1992-93. Barnes did not know who shot him. RP 1972, 1993.

After Shire's arrest, police received a letter that was allegedly written by Shire while he was in jail. RP 2596-98. The letter noted that his fingerprints had been found on a gun. The letter also noted that his case was dependent on the complaining witnesses testifying at trial. RP 2598.

3. Material Witness Warrant

Shortly before the State intended to rest its case at the first trial, defense counsel informed the trial court they had located Kebede. RP 1286, 1448, 1453. Neither party knew Kebede's true identity until he identified himself to defense counsel during trial. RP 1474-75, 1509-13, 1516, 1524; CP 43-50.

Shortly thereafter, Kebede gave a sworn interview to police. RP 1467, 1844-46. Kebede explained that he was acquainted with Barnes, Williams, and Shire. Supp. CP ____ (sub no. 116, State's Response to Defendants' Motions to Dismiss Based on Double Jeopardy with

Attachments, dated 6/19/14, at 43-45). Kebede said he was present at the shooting. Supp. CP ____ (sub no. 116, State's Response to Defendants' Motions to Dismiss Based on Double Jeopardy with Attachments, dated 6/19/14, at 44, 46, 48); RP 1449, 1479-81. Kebede denied that Shire was involved in the shooting. Supp. CP ____ (sub no. 116, State's Response to Defendants' Motions to Dismiss Based on Double Jeopardy with Attachments, dated 6/19/14, at 50, 54-55, 70, 90, 104-110, 112, 122); RP 1449, 1479-81. Kebede did not know who did the shooting. RP 1478-80, 1551-52.

Defense counsel explained that he wanted Kebede to testify but did not have him under subpoena. RP 1448. The State moved to exclude Kebede's anticipated testimony because of defense counsel's late disclosure of him as a witness. RP 1454-56, 1460-61, 1469. The prosecutor noted Kebede had contacted Shire while Shire was in jail and had also appeared in court and sat through Williams' testimony. RP 1467-69.

The trial court explained it would not exclude Kebede because his anticipated testimony was potentially exculpatory and not duplicative of any other witnesses. RP 1471-72, 1485, 1490-91. The trial court sua sponte granted a mistrial to allow the parties more time to investigate Kebede's anticipated testimony and potential impeachment evidence. RP 1493-94, 1500; CP 40.

Shire's trial began anew on September 3, 2014. RP 1504. The trial court concluded the first trial court properly exercised its discretion in granting a mistrial. RP 1536-39.

The State personally served Kebede with a subpoena on September 4, 2014. Supp. CP ____ (sub no. 129, Subpoena Return of Service, dated 9/4/14, at 2); RP 2497-98. On September 11, 2014, the State explained that it did not intend to call Kebede as a witness because it had not been able to locate him. RP 2477. The State did not request a material witness warrant for Kebede. RP 2497-98, 2716. The court noted that the State may not want to call Kebede as a witness given his anticipated testimony. RP 2496-97.

That same day, defense counsel noted he had not been able to reach Kebede by telephone. RP 2495. Defense counsel explained he was preparing a subpoena and would have his investigator serve it on Kebede. RP 2495-98. Defense counsel's investigator had a Seattle address and telephone number for Kebede. RP 2714.

On September 16, 2014, defense counsel noted he and his investigator had still not been able to reach Kebede by telephone. RP 2628-29, 2690, 2713. Defense counsel explained he had not had any contact with Kebede since December 2013. RP 2690, 2713-15. Defense counsel believed Kebede was unlikely to appear and testify. RP 2690. Later that afternoon, Ibrahim's attorney notified the court Kebede had contacted her

over the lunch hour and confirmed he would appear the following morning to testify. RP 2690-91, 2700.

The next day, defense counsel informed the court he had spoken with Kebede by telephone that morning. RP 2708-09, 2713. Kebede confirmed he received the defense subpoena left for him at his mother's residence. RP 2709, 2713-15. Kebede told counsel he would appear and testify that morning. RP 2708.

Defense counsel requested a material witness warrant when Kebede failed to appear on September 17, 2014 as scheduled. RP 2715-16. The trial court denied the material witness warrant as untimely. RP 2715-16. The trial court explained, "you know, I might have [granted a material witness warrant] a week ago[.]" RP 2715. Both parties rested later that same afternoon. RP 2719, 2722. The jury returned its verdicts the next day. CP 89-92.

4. Suppression Hearing

Officer Shelley San Miguel arrived after the car in which Shire was passenger had been stopped. RP 105-06; CP 60. San Miguel helped take Shire out of the car. RP 106; CP 60. San Miguel handcuffed Shire and read him his Miranda rights. RP 107, 113; CP 60. Shire confirmed he understood his rights and told San Miguel he "did not want to speak further

with [San Miguel] regarding the incident.” RP 108; CP 60. San Miguel asked Shire no further questions. RP 108, 110; CP 60-61.

Officer San Miguel told Shire that “the vehicle was a possible suspect vehicle in an incident a few blocks away. And that we had stopped the vehicle and were detaining all the occupants inside while we conduct an investigation.” RP 108-09, 111, 113-15, 117; CP 61. San Miguel did not believe he told Shire the incident was a shooting. RP 114-15. San Miguel did not remember whether he told Shire he was being arrested as a potential suspect. RP 114-15.

After San Miguel’s statement, Shire said “that he was not involved in anything and had just been picked up by his friends.” RP 109, 111; CP 61. Shire made no further statements to San Miguel. RP 111.

San Miguel explained he made the statement to let Shire know why he was being arrested. San Miguel denied his statement to Shire was intended to elicit a response. RP 109, 117. San Miguel did not believe Shire would respond to his statements. RP 117.

The State sought to admit Shire’s statements to San Miguel in its case-in-chief. RP 161; CP 59-62. The prosecutor argued Shire’s statements to San Miguel were spontaneous and voluntary. RP 161. The prosecutor maintained San Miguel’s statements to Shire about the reason for his arrest were not coercive and not intended to elicit a response. RP 161.

Defense counsel objected to admission of Shire's statements. RP 1552-53, 1592. Counsel argued that San Miguel's statements to Shire were designed to elicit further statements after he had invoked his Miranda rights. Counsel noted that Miranda and Rhode Island v. Innis,⁴ defined interrogation not only as express questioning, but also words or tactics that police should know are reasonably likely to elicit an incriminating response. Counsel explained the focus was on the perceptions of the accused rather than police intent. Counsel argued San Miguel's statements were more than just administrative or procedural comments. RP 166-70.

The trial court declined to suppress Shire's statements to San Miguel. RP 173. The court found Shire's statements were voluntary and not made as a result of coercion or threats. RP 173-74. The court concluded that San Miguel's statements to Shire "were innocuous, they were informative only, they weren't intended or designed, or objectively require a response on behalf of Mr. Shire." RP 173; CP 59-62.

⁴ 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING SHIRE'S REQUEST FOR A MATERIAL WITNESS WARRANT FOR KEBEDE.

The Sixth⁵ and Fourteenth⁶ Amendments, as well as article 1, § 21⁷ of the Washington Constitution, guarantee the right to trial by jury and to defend against the state's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

The Sixth Amendment and Article I, § 22 of the Washington Constitution also guarantee the accused the right to compulsory process to

⁵ The Sixth Amendment provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

⁶ The Fourteenth Amendment provides, in pertinent part, “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”

⁷ Article 1, § 21 provides, “The right of trial by jury shall remain inviolate[.]”

compel the attendance of witnesses. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The right to the compulsory attendance of material witnesses is also a fundamental element of due process, and goes directly to the right to present a defense. Texas, 388 U.S. at 19; Burri, 87 Wn.2d at 180-81. Because the right to compulsory process is a fundamental right, trial courts should safeguard it with meticulous care. Burri, 87 Wn.2d at 181.

The right to compulsory process is violated when the defendant is deprived of a material witness. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). The burden of showing materiality is met where the defendant “establish[es] a colorable need for the person to be summoned.” Smith, 101 Wn.2d at 41-42 (quoting Ashley v. Wainwright, 639 F.2d 258 (5th Cir. 1981)).

A witness who has been placed under subpoena “may be compelled to attend and testify in open court.” RCW 10.52.040. CrR 4.10 governs the issuance of a material witness warrant. The rule provides in relevant part as follows:

(a) Warrant. On motion of the prosecuting attorney or the defendant, the court may issue a warrant, subject to reasonable bail, for the arrest of a material witness. The warrant shall issue only on a showing, by affidavit or on the record in open court, that the testimony of the witness is material and that

(1) The witness has refused to submit to a deposition ordered by the court pursuant to rule 4.6; or

(2) The witness has refused to obey a lawfully issued subpoena; or

(3) It may become impracticable to secure the presence of the witness by subpoena.

CrR 4.10(a).

Generally, a trial court's ruling on a motion for a material witness warrant is reviewed for an abuse of discretion. City of Bellevue v. Virgil, 66 Wn. App. 891, 895-96, 833 P.2d 445 (1992). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996)). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Where no other remedy is sufficient, denial of the request for a material witness warrant may constitute an abuse of discretion. Virgil, 66 Wn. App. at 895.

Although the decision to issue a material witness warrant lies within the trial court's discretion, that discretion is constrained by a defendant's Sixth Amendment right to compulsory process. United States v. Goodwin, 625 F.2d 693, 703-04 (5th Cir. 1980); See also State v. Downing, 151 Wn.2d 265, 274-75, 87 P.3d 1169 (2004) (recognizing denial of a continuance motion infringes on a defendant's right to compulsory process and right to present defense if the denial prevents the defendant from presenting a witness material to his defense). This Court reviews de novo denial of Sixth Amendment rights, including the right to present a defense. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

Shire satisfied the requirements of a material witness warrant in this case. The trial court's denial of Shire's request for a material witness warrant violated his rights to the compulsory process and to present a defense.

a. Kebede Was Subject to a Material Witness Warrant.

The State personally served Kebede with a subpoena on September 4, 2014. Supp. CP ____ (sub no. 129, Subpoena Return of Service, dated 9/4/14, at 2). Defense counsel also represented to the court that Kebede had received a defense subpoena left for him at his mother's residence. RP 2709, 2713; See RPC 3.3(a)(1) (counsel's duty of candor prevents him

from making a knowingly false statement of fact to the court). Despite personal assurances that he would comply with the subpoenas, Kebede nonetheless failed to appear to testify as scheduled. RP 2708-09, 2713. Therefore, other available means of securing Kebede's presence at trial proved futile. Cf. Virgil, 66 Wn. App. at 896 (material witness warrant inappropriate absent showing that other available means of securing witness' presence at trial had proved futile). A material witness warrant to secure Kebede's presence at trial was appropriate and necessary. CrR 4.10(a)(2), (3); RCW 10.52.040.

b. There Was a Reasonable Likelihood of Locating Kebede.

Both parties detailed difficulty in contacting Kebede. Detective Janes explained he had tried to find Kebede via Internet searches and by calling his telephone number and leaving messages, by speaking with his mother, and by going to Kebede's last known address. RP 2595-96, 2655-56, 2660. On September 11, 2014, the state represented that it did not intend to call Kebede as a witness because it had not been able to locate him. RP 2477. Just one week earlier however, the State was able to find Kebede and personally serve him with a subpoena. Supp. CP ____ (sub no. 129, Subpoena Return of Service, dated 9/4/14, at 2).

Similarly, defense counsel explained his initial difficulty in reaching Kebede by telephone. RP 2495-98, 2628-29, 2690, 2713. On September 16, 2014 however, Ibrahim's trial attorney spoke to Kebede by telephone. RP 2690-91, 2700. The following day, defense counsel noted he had spoken with Kebede by telephone and confirmed that Kebede had received a subpoena left for him at his mother's residence. RP 2709, 2713.

Despite the parties initial difficulty in contacting Kebe, the record shows Kebede likely could have been found, and his presence ensured, if defense counsel's request for a material witness warrant had been granted.

State v. Lane⁸ is instructive by way of contrast. Lane was charged with possession of a controlled substance with intent to distribute for allegedly selling cocaine to a confidential informant. Lane, 56 Wn. App. at 288-89. At trial, Lane moved for disclosure of the confidential informant and a continuance to locate the informant. An investigator was unable to find the informant during a five day continuance. Lane, 56 Wn. App. at 291. The court refused to postpone the trial to allow additional time to search. It reasoned the search for the informant had no certainty of success, regardless of the amount of time allowed. During trial, defense counsel advised the court that an investigator had located the informant

⁸State v. Lane 56 Wn. App. 286, 786 P.2d 277 (1989).

but he had again disappeared before the police arrived to detain him. Lane, 56 Wn. App. at 291. There was no evidence the defense had any contact with the informant's acquaintances or family.

On appeal, Lane argued the trial court erred in denying his request for a further continuance to allow the defense more time to find the informant. Lane, 56 Wn. App. at 296. The Court of Appeals concluded the trial court had not abused its discretion in denying the request for an additional continuance because the defense could not guarantee they would successfully contact the informant if given more time. Lane, 56 Wn. App. at 297.

Unlike Lane, there was no evidence to believe Kebede would not be located except for his absence from court. Defense counsel, the State, and Ibrahim's trial attorney all had contact with Kebede during the course of trial. Kebede represented to defense counsel that he was willing to testify. RP 2690-91, 2700, 2708. Moreover, unlike Lane, defense counsel was aware that Kebede could be contacted at his mother's residence as evidenced by successfully serving a subpoena on him at that address. Defense counsel's request for a material witness warrant should have been granted.

c. Kebede's Testimony was Material.

Kebede's testimony was also material. A material witness warrant is properly issued when the accused can show the testimony of a witness is in fact material and could affect the outcome of the trial. CrR 4.10(a); State v. Hartley, 51 Wn. App. 442, 446, 754 P.2d 131 (1988); Virgil, 66 Wn. App. at 895-96.

The identity of the shooters was a main issue at trial. RP 2794. Mardillo Barnes did not know who shot him. RP 1965, 1969-72, 1993. Although Barnes was previously acquainted with Shire, he denied seeing or speaking with Shire before the shooting. RP 1987, 1992-93.

Only Williams and English positively identified Shire and Ibrahim as being involved in the shooting. English did not actually witness the shooting however, and only allegedly saw Shire and Ibrahim at the scene. RP 1691-92, 1736. Although English identified Shire and Ibrahim in a police lineup he was unable to make a subsequent in court identification of Shire. RP 1707-09, 1719-20, 1730. Williams was the only witness who testified Shire shot him. RP 1550. Indeed, as Janes acknowledged, "the case essentially was Mr. Williams telling [Janes] what happened." RP 2643, 2664.

The anticipated testimony of Kebede was exculpatory in nature and would have directly contradicted the testimony of English and

Williams. In his sworn interview with police, Kebede explained he was present at the shooting. Supp. CP ____ (sub no. 116, State's Response to Defendants' Motions to Dismiss Based on Double Jeopardy with Attachments, dated 6/19/14, at 44, 46, 48); RP 1449, 1479-81. Kebede repeatedly denied that Shire was involved in the shooting incident. Supp. CP ____ (sub no. 116, State's Response to Defendants' Motions to Dismiss Based on Double Jeopardy with Attachments, dated 6/19/14, at 50, 54-55, 70, 90, 104-110, 112, 122); RP 1449, 1479-81. In short, Kebede's anticipated testimony would have provided evidence that Shire was not the shooter. Cf. State v. Lewis, 156 Wn. App. 230, 244-45, 233 P.3d 891 (2010) (material witness warrant not appropriate where no evidence in the record as to what witnesses would have said if subpoenaed); State v. Tatum, 74 Wn. App. 81, 86-87, 871 P.2d 1123 (court erroneously denied continuance to obtain presence of material witness, but reversal not required because witness would have merely corroborated factual accounts of two other witnesses), rev. denied, 125 Wn.2d 1002 (1994).

Both the State and the trial court recognized the importance of Kebede's anticipated testimony. Supp. CP ____ (sub no. 116, State's Response to Defendants' Motions to Dismiss Based on Double Jeopardy with Attachments, dated 6/19/14, at 8); RP 1470, 1551-52, 2496-97. Indeed, recognizing the potentially exculpatory testimony of Kebede, the

first trial court granted a mistrial to allow further investigation. RP 1493-94, 1500; CP 40.

Kebede's anticipated testimony was not cumulative of other witnesses. It directly contradicted the State's only two witnesses who identified Shire as the alleged shooter. The jury should have been permitted to hear Kebede's testimony and allowed to draw its own conclusions. Given the importance of Kebede's anticipated testimony the trial court's denial of a material witness warrant was error.

d. Denial of a Material Witness Warrant Prejudiced Shire.

As discussed above, Kebede's anticipated testimony was material to the defense theory that Shire was not involved in the shooting incident. Because denial of a material witness warrant for Kebede prevented Shire from presenting a witness material to his defense and therefore violated his right to the compulsory process, reversal is required. See generally, Downing, 151 Wn.2d at 275 (denial of a request for a continuance may violate a defendant's right to compulsory process if the denial prevents the defendant from present a witness material to his defense).

Here, the trial court did not dispute that Kebede's testimony was material. Rather, the trial denied Shire's motion for a material witness warrant as untimely because Shire did not request a warrant until the final

day of trial. RP 2715-16. Given the importance of Kebede's anticipated testimony however, the trial court's denial was error. United States v. Moudy⁹ and State v. Edwards¹⁰ are instructive in this regard.

Moudy was charged with escaping from a federal correctional institution. Moudy, 462 F.2d at 695. Moudy's sanity at the time of the alleged offense was the primary issue at trial. Moudy, 462 F.2d at 696, 698. A government expert witness opined Moudy was sane at the time of the alleged escape. In contrast, a defense witness, although unsure of the legal definition of insanity, gave his opinion that Moudy was possibly insane at the time of the offense. Moudy, 462 F.2d at 696.

The day before trial, Moudy requested a subpoena for an out of state clinical psychologist. As an offer of proof, counsel explained the psychologist would testify that Moudy suffered from chronic mental health issues including schizoid personality disorder. Moudy, 462 F.2d at 696. The trial court denied the subpoena, reasoning it would cause the government extra expense and unnecessarily delay trial. Moudy, 462 F.2d at 696, 698.

On appeal, the Court recognized the psychologist was a material witness. Moudy, 462 F.2d at 698. The court reasoned that without the

⁹ 462 F.2d 694 (5th Cir. 1972).

¹⁰ 68 Wn.2d 246, 412 P.2d 747 (1966).

psychologist's testimony Moudy was forced to rely on the testimony of an unsure expert witness which had considerably less probative force than the firm opinion of the government's witness. Moudy, 462 F.2d at 698. The court concluded that denial of the subpoena was reversible error despite the filing of the motion on the day before trial. Moudy, 462 F.2d at 697-98. The Moudy court noted that, although delaying tactics should not be rewarded, the subpoena for a witness should have been issued where the testimony sought was material and the record did not demonstrate that the trial would have been delayed. Moudy, 462 F.2d at 698-99.

Edwards was charged with second degree assault for a shooting incident at a night club. Edwards, 68 Wn.2d at 247-48. Shortly before the jury was to begin deliberations, Edwards asked for a short recess so three witnesses could be compelled to appear in court and testify. Edwards explained he had served the three witnesses with subpoenas the night before. Edwards expected the witnesses to testify that they remained with Edwards at the night club until after the shooting occurred. The trial court denied Edwards' motion. Edwards, 68 Wn.2d at 251-52.

On appeal, the Washington Supreme Court found the trial court abused its discretion in denying the request for a continuance because there was no evidence trial would have been delayed, or the State's case prejudiced. Edwards, 68 Wn.2d at 257. The Court noted Edwards took

specific steps to assure the attendance of the witnesses and then made a timely application to enforce their attendance. Despite counsel's late request for subpoenas, the Court explained, "no rule of criminal procedure ought to be construed or applied so as to abridge a fundamental constitutional right." Edwards, 68 Wn.2d at 258. The Court concluded the trial court's refusal to compel the attendance of the witnesses constituted a denial of Edwards' constitutional right to the compulsory process. Edwards, 68 Wn.2d at 258-59.

Like Moudy and Edwards, here defense counsel took steps to ensure Kebede's presence once it became apparent he would not honor the State's earlier subpoena. Significantly, Shire did not ask for a continuance when he requested the material witness warrant. Thus, the record does not demonstrate the trial would have been unnecessarily delayed by issuance of a material witness warrant.

Moreover, as in Moudy and Edwards, denial of a material witness warrant denied Shire's constitutional right to the compulsory process. Reversal is required when denial of a motion violates due process rights, and the accused demonstrates prejudice or that the trial result would have been different had the motion been granted. Tatum, 74 Wn. App. at 86. Here, the trial would likely have been different had Shire's motion for a material witness warrant not been denied. As discussed above, Kebede's

presence could likely have been ensured if a material witness warrant had been granted. Absent Kebede's testimony, Shire was limited to cross-examining the State's witnesses in an effort to diminish the credibility of their recollections of the incident. In contrast, Kebede's anticipated testimony was exculpatory and went directly to a main issue at trial. Kebede's anticipated testimony would have directly contradicted the State's witnesses who identified Shire as the alleged shooter. Had the jury heard Kebede's testimony, they may have doubted English and Williams' identification of Shire as the shooter. Kebede's testimony could easily have been the difference between a verdict of guilt or an acquittal. This Court should therefore reverse the convictions and remand for a new trial.

2. DEFENSE COUNSEL'S FAILURE TO TIMELY REQUEST A MATERIAL WITNESS WARRANT TO SECURE KEBEDE'S PRESENCE AT TRIAL CONSTITUTED INEFFECTIVE ASSISTANCE.

Assuming arguendo, that defense counsel's request for a material witness warrant was not sufficiently timely, then Shire was denied effective assistance of counsel.

a. General Legal Principles.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State

Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

b. Counsel Was Deficient for Failing to Timely Seek a Material Witness Warrant for Kebede.

The decision not to call a witness does not necessarily render counsel's performance deficient, provided the decision is tactical. State v. Neidigh, 78 Wn. App. 71, 81, 895 P.2d 423 (1995). But the presumption of competence may be overcome by a showing such a witness is necessary to the presentation of the defense. State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995) (citing State v. Jury, 19 Wn. App. 256, 263-64, 576

P.2d 1302, rev. denied, 90 Wn.2d 1006 (1978)); see also State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (a tactic that would be considered incompetent by lawyers of ordinary training and skill in criminal law may constitute deficient performance); State v. Visitacion, 55 Wn. App. 166, 172-74, 776 P.2d 986 (1989) (“tactical” decision not to contact or interview witnesses objectively unreasonable and therefore deficient); United States v. Span, 75 F.3d 1383, 1389 (9th Cir. 1996) (“The label of ‘trial strategy’ does not automatically immunize an attorney’s performance from sixth amendment challenges.”) (quoting Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984)).

Here, despite difficulty securing Kebede’s presence at trial via subpoena, defense counsel did not request a material witness warrant for Kebede until the final day of trial. RP 2715. The trial court denied counsel’s request as untimely, but noted it likely would have granted a material witness warrant for Kebede had counsel requested one a week earlier. RP 2715-16.

Counsel’s failure to timely request a material witness warrant for Kebede fell below the standard expected for effective representation. There was no reasonable strategy for counsel’s failure to attempt to secure Kebede’s presence until the final day of trial. Defense counsel recognized the importance of Kebede’s anticipated testimony. Counsel also recognized

the previous difficulty in trying to contact Kebede. Counsel simply failed to exercise diligence in securing Kebede's presence.

Such neglect constitutes deficient performance. Washington v. Smith¹¹ and Young v. Washington¹² are particularly instructive in this regard.

In Washington v. Smith, defense counsel committed reversible error by failing to subpoena witnesses, including a "hard to reach" alibi witness until two days before her scheduled testimony. 219 F.3d at 629, 631-32. Washington was charged with two counts of being an accomplice to an armed robbery and one count of unlawful possession of a firearm. Smith, 219 F.3d at 622. Gola Richardson was listed as a defense alibi witness based on her anticipated testimony that Washington was at her house during the time of the robbery. Smith, 219 F.3d at 624-25.

Defense counsel attempted to reach Richardson by visiting her home three times, and left a business card with someone at the house. Richardson did not respond. Counsel did not interview Richardson, did not seek the assistance of an investigator to contact her, and did not serve her with a subpoena until two days before her scheduled testimony. By

¹¹ 219 F.3d 620 (7th Cir. 2000).

¹² 747 F. Supp.2d 1213 (W.D. Wa. 2010).

the time defense counsel served the subpoena, Richardson had left town for a week and therefore did not testify. Smith, 219 F.3d at 625, 629.

Several reviewing courts found counsel's attempts to secure Richardson's presence were reasonable. Smith, 219 F.3d at 626-30. The Seventh Circuit "emphatically" disagreed. Smith, 219 F.3d at 629. The Court noted there was no tactical reason for the delayed subpoena for Richardson given that counsel was aware that Richardson was hard to find. Smith, 219 F.3d at 629-30. The Court concluded defense counsel's performance fell "wide of the mark," of the "range of professionally competent assistance under Strickland[".]” Smith, 219 F.3d at 630.

In Young v. Washington, the United States District Court concluded defense counsel's failure to subpoena Young's son, and acquitted co-defendant, Matthew, was reversible error. Young, 747 F. Supp.2d at 1214-15, 1223. Young was charged with first degree murder for an incident involving his son and several other people. Although undisputed that Matthew fired the shot that killed the complaining witness, he was nonetheless acquitted of first degree-murder under a felon-murder theory with a predicate felony of robbery. Young, 747 F. Supp.2d at 1215-16. Matthew testified at his own trial that he and Young did not participate in the alleged robbery that lead to the shooting. Young, 747 F. Supp.2d at 1217.

Young's defense counsel informed the trial court he intended to call Matthew as a witness. Before trial, counsel understood that Matthew would be available as a witness. As trial approached counsel learned that Matthew did not intend to testify. Young's defense counsel did not serve Matthew with a subpoena. Young, 747 F. Supp.2d at 1216-17.

The Court found that defense counsel's failure to subpoena Matthew was not strategic and was therefore deficient performance. The Court noted that while counsel may have had a reasonable belief that Matthew would voluntarily appear, that mistaken belief nonetheless undermined the fundamental fairness of Young's trial. Young, 747 F. Supp.2d at 1220, 1222. The Court concluded that if counsel had subpoenaed Matthew, the jury would have been presented with a more balanced evidentiary picture. As a result, there was a reasonable probability that the jury would have reasonable doubt that Young was involved in the robbery. Young, 747 F. Supp.2d at 1222-23.

Like Smith and Young, counsel failed to secure the presence of a witness necessary to Shire's defense. Counsel was aware that Kebede was difficult to reach given Kebede's repeated failure to appear, and the numerous unsuccessful attempts all parties had experienced in trying to contact him by telephone. But, counsel was also aware of the exculpatory nature of Kebede's anticipated testimony. Shire has therefore shown these

actions were not “tactical.” See Jury, 19 Wn. App. at 264 (counsel’s failure “to adequately acquaint himself with the facts of the case . . . , failure to subpoena [witnesses], and failure to inform the court of the substance of their testimony . . . were omissions which no reasonably competent counsel would have committed”).¹³ Like Smith and Young, counsel’s failure to ensure Kebede’s presence through a timely material witness warrant constituted deficient performance. Shire has therefore satisfied Strickland’s first prong.

c. Counsel’s Deficient Performance Prejudiced Shire.

Shire has also shown prejudice. The record here demonstrates that the trial court would likely have granted Shire’s motion for a material witness warrant had it been brought sooner. RP 2715-16. As discussed in argument one, infra, there is a reasonable probability that Kebede’s presence could have been ensured if a material witness warrant had been granted and that the outcome of trial on the assault charges would have been different had Kebede testified. Shire’s constitutional right to effective assistance of counsel was violated. Therefore, this court should reverse the assault convictions and remand for a new trial.

¹³ The Court declined to reverse Jury’s conviction because it was necessary to speculate whether the witnesses’ testimony would have been helpful to the defense. 19 Wn. App. at 265. On the other hand, the content of Kebede’s proposed testimony here was clear and undisputed. RP 1449, 1479-81.

3. THE TRIAL COURT ERRED BY ADMITTING STATEMENTS MADE BY SHIRE IN RESPONSE TO CUSTODIAL INTERROGATION

A trial court's findings of fact on a CrR 3.5 motion to suppress statements must be supported by substantial evidence. State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008), aff'd, 168 Wn.2d 1039 (2010). Unchallenged findings of fact are verities on appeal. State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004). Whether the trial court's factual findings support its conclusions of law is a question of law reviewed de novo. Grogan, 147 Wn. App. at 516.

Here, Shire's custodial statements made after the invocation of his right to silence, were the product of interrogation and were therefore inadmissible. Reversal is required because this constitutional error was not harmless beyond a reasonable doubt.

a. Shire's Statements Were the Product of Interrogation and Therefore Inadmissible.

The Fifth Amendment to the United States Constitution commands "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." To preserve an individual's Fifth Amendment right against compelled self-incrimination, police must inform a suspect of his or her rights before custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

“[S]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege. The requirement that the waiver be knowing necessitates the Miranda warnings.” State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). “Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

“[T]he term ‘interrogation’ under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” Innis, 446 U.S. at 301. “The standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts.” Sargent, 111 Wn.2d at 651. All of the circumstances of a given case are considered. State v. Bradley, 105 Wn.2d 898, 903-04, 719 P.2d 546 (1986).

Shire first challenges the trial court’s conclusion that Shire’s statement that he “was not involved in anything and had just been picked up by his friends,” was admissible because no interrogation took place

when San Miguel told Shire that his car was suspected as being involved in the shooting. CP 61. Whether an officer engages in “interrogation” for Miranda purposes is a question of law reviewed de novo. In re Pers. Restraint of Cross, 180 Wn.2d 664, 681, 327 P.3d 660 (2014).

Under the totality of circumstances, it was reasonably likely that San Miguel’s statement to Shire would elicit an incriminating response from Shire. “Incriminating response” encompasses “any response — whether inculpatory or exculpatory — that the prosecution may seek to introduce at trial.” Innis, 446 U.S. at 301 n. 5.

San Miguel’s statement and Shire’s response cannot be looked at in a factual vacuum. What led up to that exchange must be taken into account. San Miguel arrived at the scene just as Shire was being removed from the car in which he was a passenger. CP 60; RP 105-06, 113. San Miguel handcuffed Shire and advised him of his Miranda rights. CP 60; RP 106-07. Shire confirmed he understood his rights and told San Miguel he did not want to speak further. CP 60; RP 108. Nonetheless, San Miguel decided to tell Shire he was being arrested because the car in which he was a passenger was suspected of being involved in the shooting. CP 61; RP 109-111, 114-17. Under these circumstances, it was reasonably likely that Shire would respond that he “was not involved in anything and had just been picked up by his friends.” CP 61; RP 109-111.

Shire cannot fairly be said to have initiated the conversation. San Miguel acted in a manner that provoked Shire into responding despite his earlier invocation of the right to silence.

And it was reasonably likely that San Miguel's comments about Shire's suspected criminal involvement would prompt Shire to respond. The psychological ploy of "posit[ing] the guilt" of the subject is a technique for eliciting statements from the suspect and amounts to interrogation in a custodial setting. Innis, 446 U.S. at 299; see United States v. Alexander, 428 A.2d 42, 51 (D.C. 1981) (informing suspect "we know what happened" or "we know you are responsible for the stabbing" was a form of interrogation). Shire, in responding to San Miguel's positing of guilt, attempted to fill in the picture by denying guilt and explaining why he was in the car. San Miguel's open-ended statement invited Shire to deny guilt and explain why he was in the car, which only served to implicate Shire in the crime.

The trial court determined San Miguel's statement to Shire that he was being detained because his car was suspected as being involved in the shooting was "innocuous" and not "intended to elicit a response." RP 173-74; CP 61. In so doing the court applied an incorrect legal standard to whether San Miguel's statement constituted interrogation. The standard is not whether an officer intended to elicit an incriminating response. State

v. Wilson, 144 Wn. App. 166, 184, 181 P.3d 887 (2008). The standard is foreseeability.¹⁴ The police cannot be held accountable for the unforeseeable results of their words or actions, so the definition of interrogation extends “only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.” Innis, 446 U.S. at 301-02. This is an objective standard. Sargent, 111 Wn.2d at 651. What was actually going through the officer’s mind — whether he subjectively intended to elicit an incriminating response — is not the test for whether interrogation took place.

That San Miguel’s statement was not in the form of a question is of little moment. Interrogation includes not only express questioning but its functional equivalent, which can include any words or actions. Innis, 446 U.S. at 301. Innis gave a broad and practical definition to the term “interrogation,” recognizing “[t]o limit the ambit of Miranda to express questioning would ‘place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the

¹⁴ Wilson was in jail for stabbing her husband. Wilson, 144 Wn. App. at 184. An officer reentered the interrogation room after Wilson invoked her right to counsel and gave her a “death notification” that her husband had died. Id. at 182-83. Wilson said “I didn’t mean to kill him. I didn’t mean to stab him.” Id. at 183. This was interrogation because “the officer should have known that the death notification was reasonably likely to elicit an incriminating response.” Id. at 184-85.

plain mandate of Miranda.”” Id. at 299 n.3 (quoting Commonwealth v. Hamilton, 445 Pa. 292, 297, 285 A.2d 172 (Pa. 1971)).

The trial court concluded Shire’s “response was spontaneously and voluntarily made[.]” CP 61. Shire challenges this determination. “Volunteered statements of any kind are not barred by the Fifth Amendment.” Miranda, 384 U.S. at 478. A defendant’s incriminating statement “that is not a response to an officer’s question” is therefore admissible. Bradley, 105 Wn.2d at 904. But that is not what happened here and comparison with precedent shows it. Shire’s response is categorically different from those cases where an incriminating statement was truly non-responsive and therefore admissible.

A defendant’s statement is properly categorized as volunteered and spontaneous where the context showed the defendant gave a statement unrelated to the crime being investigated. See Bradley, 105 Wn.2d at 904 (the statement “You sure are making a big deal about a little bit of coke” while being questioned about personal history was admissible because it not made in response to interrogation); State v. McWatters, 63 Wn. App. 911, 915-16, 822 P.2d 787, rev. denied, 119 Wn.2d 1012, 833 P.2d 386 (1992) (suspect’s statement that “not all of the money was drug money” was admissible because it was spontaneous and unrelated to the reason why the officer was there: to issue a citation for a traffic offense); United

States v. Gonzalez-Mares, 752 F.2d 1485, 1489 (9th Cir. 1985) (incriminating statement admissible because “the questions asked by the probation officer-whether appellant ever used any other names and whether she had a prior criminal record-were not directly related to the facts of the crime with which appellant was then charged.”), cert. denied, 473 U.S. 913 (1985).

In contrast, Shire’s response was directly related to San Miguel’s statement that Shire was being detained because his car was believed to be involved in the shooting. Shire did not respond out of the blue. Rather, Shire’s response was prompted by San Miguel’s statements about Shire’s suspected criminal involvement.

Shire’s custodial statements were the product of interrogation and were therefore inadmissible. Shire’s statements should have been suppressed.

b. The Error Was Not Harmless Beyond a Reasonable Doubt.

When statements obtained in violation of the Fifth Amendment are erroneously admitted, reversal is required unless the error was harmless beyond a reasonable doubt. Cross, 180 Wn.2d at 681. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78,

90, 929 P.2d 372 (1997). Constitutional error is therefore harmless only if this Court is convinced beyond a reasonable doubt any reasonable 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).

As discussed above, positing the guilt of the subject is a recognized technique for eliciting a response from a suspect. Innis, 446 U.S. at 299. As argued, San Miguel’s open-ended statement invited Shire to deny guilt and explain why he was in the car, which only served to implicate Shire in the crime.

An officer’s testimony about a confession has significant impact on a jury. Wilson, 144 Wn. App. at 185. “A confession is like no other evidence. Indeed, ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.’” Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting Bruton v. United States, 391

U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (White, J., dissenting)).

Shire anticipates the State may assert Shire's statements to San Miguel were not a confession because Shire did not explicitly admit involvement in the shooting. This argument should be rejected. The Miranda Court recognized:

No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution.

384 U.S. at 476-77. As Miranda recognized, if Shire's statements to San Miguel were truly exculpatory, the State would not have sought to admit them in its case-in-chief.

Prejudice is presumed. Reversal and remand for a new trial is required because the State cannot show beyond a reasonable doubt that error in admitting Shire's statements could not have possibly influenced the jury and contributed to the guilty verdicts.

4. REMAND IS REQUIRED TO CORRECT SCRIVENER'S ERRORS IN THE JUDGMENT AND SENTENCE

Section 2.1 of Shire's judgment and sentence correctly indicates that he was found guilty of three counts of second degree assault. The judgment and sentence however, incorrectly cites the first degree assault statute, RCW 9A.36.011(1)(a),¹⁵ for each of the convictions rather than the second degree assault statute, RCW 9A.36.021.¹⁶ CP 97. These scrivener's errors require remand for correction.

Under CrR 7.8(a), clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time of its own initiative or on the motion of any party. See State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal). This Court should therefore

¹⁵ RCW 9A.36.011(1)(a) provides:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death[.]

¹⁶ RCW 9A.36.021 provides in relevant part:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

....

(c) Assaults another with a deadly weapon[.]

remand to correct the judgment and sentence. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form). Remand for correction of these errors is necessary.

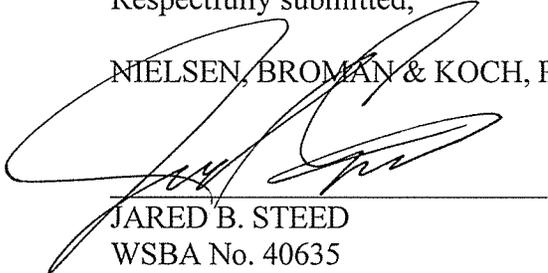
D. CONCLUSION

For the reasons set forth, this court should reverse Shire's convictions and remand for a new trial.

DATED this 31st day of August, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorney for Appellant

APPENDIX A

FILED

KING COUNTY WASHINGTON

SEP 03 2014

SUPERIOR COURT CLERK
BY DAWN TUBBS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

YUSUF HAISE SHIRE, and
MOHAMED IBRAHIM
And each of them,

Defendants.

No. 13-C-09789-0 SEA ✓
13-C-09790-3 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5
MOTION TO SUPPRESS THE
DEFENDANT'S STATEMENT(S)

A hearing on the admissibility of the defendant's statement(s) was held on December 2, 2013 before the Honorable Judge Ramsdell.

The court informed the each of the defendants that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant did not testify at the hearing.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 After considering the evidence submitted by the parties and hearing argument, to wit: the
2 testimony of Seattle Police Department Officers Shelley San Miguel and Enoch Lee.

3 the court enters the following findings of fact and conclusions of law as required by CrR 3.5.
4

5 1. THE UNDISPUTED FACTS: The defendants were stopped in a white 1996
6 Toyota Camry at approximately 1:40 AM on May 18, 2013 after a Seattle Police Department
7 officers learned that the Toyota Camry that was suspected to be involved in a shooting that had
8 just occurred. After a felony stop was conducted by several Seattle Police Department officers,
9 all of the occupants were ordered out of the Camry.

10 Officer Enoch Lee assisted in removing defendant Mohammed Ibrahim from the vehicle,
11 placed him into handcuffs, and took him into custody. The officer then apprised defendant
12 Ibrahim of his Miranda warnings, but failed to read the waiver provisions outlined on the Seattle
13 Police Department Miranda warnings card. When defendant Ibrahim responded that he did not
14 understand the warnings, Officer Lee provided them a second time and, again, failed to read the
15 waiver provision. Defendant Ibrahim indicated that he understood, and at no point indicated that
16 he desired to exercise any of his Constitutional rights. Officer Lee then asked defendant Ibrahim
17 what he was doing in the area. Defendant Ibrahim responded that they were heading to a party in
18 Greenwood and that he had just come from the Hollywood Casino in Shoreline.

19 Officer Shelley San Miguel arrived at the location of the stop just as defendant Shire was
20 being removed from the vehicle. The officer contacted defendant Shire, placed him into
21 handcuffs, and walked him back to Officer Elias's patrol vehicle. There, the detective apprised
22 defendant Shire of his Miranda warnings. Defendant Shire indicated that he understood, and
23 advised the officers that he did not want to speak about the shooting. He was not asked any
24

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 2

Daniel T. Satterberg, Prosecuting Attorney
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Seattle, Washington 98104
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1 further questions about the incident. Officer San Miguel did, however, inform defendant Shire
 2 of the reason for his arrest. Defendant Shire then stated that he was not involved in anything and
 3 had just been picked up by his friends.

4
 5 2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S
 6 STATEMENT(S):

7 a. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

8 The following statement(s) of the defendants are admissible in the State's case-in-
 9 chief:

10 Statements by Defendant Yusuf Shire: When defendant Shire was taken into custody, he
 11 was appropriately apprised of his Miranda warnings and exercised his right to remain silent.
 12 Defendant Shire was not questioned thereafter. Officer San Miguel, however, did make an
 13 innocuous statement about the reason for the arrest. This statement was not a question, nor was
 14 it intended to elicit a response from defendant Shire. As a result, defendant Shire's statement
 15 made in response does not implicate the protections afforded by Miranda. Defendant Shire's
 16 response was spontaneously and voluntarily made and is admissible for CrR 3.5 purposes.

17 b. ADMISSIBLE FOR IMPEACHMENT

18 The following statement(s) of the defendants is/are admissible only for
 19 impeachment because the custodial statements were not knowingly and
 20 intelligently made after waiver of Miranda rights, but the statement(s) was/were
 21 voluntary.

22 Statements by Defendant Mohamed Ibrahim: Any pre-Miranda statements made by
 23 defendant Ibrahim are inadmissible as they were elicited by Officer Lee's questions.

24 WRITTEN FINDINGS OF FACT AND
 CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
 SUPPRESS THE DEFENDANT'S STATEMENT(S) - 3

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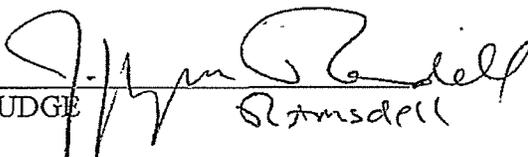
1 Additionally, the Court finds that defendant Ibrahim's post-Miranda statements inadmissible as
2 well because Officer Lee failed to adequately advise defendant Ibrahim of the waiver provision
3 of the Seattle Police Department Miranda card.

4 While defendant Ibrahim's statements are inadmissible for CrR 3.5 purposes, the Court
5 finds that the defendant was not coerced into making them. As a result, all of defendant
6 Ibrahim's statements are admissible for impeachment purposes under CrR 3.5.

7 ~~As a matter of strategy, however, the defense stipulated to the admissibility to all of~~
8 ~~defendant Ibrahim's statements for CrR 3.5 purposes.~~ gma

9
10 In addition to the above written findings and conclusions, the court incorporates by
11 reference its oral findings and conclusions.

12 Signed this 3rd day of Sept. 2014.

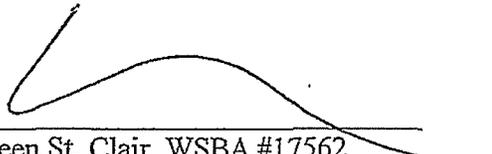
13
14 
15 JUDGE Stansdell

16 Presented by:

17 
18 Julie E. Kline, WSBA #35461
19 Senior Deputy Prosecuting Attorney

20 
21 Ned P. Jursek, WSBA #28621
22 Attorney for Defendant Yusuf Shire

23 
24 Paul G. Sewell, WSBA #43090
Senior Deputy Prosecuting Attorney


Coleen St. Clair, WSBA #17562
Attorney for Defendant Mohammed Ibrahim

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 4

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APPENDIX B

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a firearm in count(s) I-III RCW 9.94A.533(3).
- (b) While armed with a deadly weapon other than a firearm in count(s) _____ RCW 9.94A.533(4).
- (c) With a sexual motivation in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a protected zone in count(s) _____ RCW 69.50.435.
- (e) Vehicular homicide Violent traffic offense DUI Reckless Disregard.
- (f) Vehicular homicide by DUI with _____ prior conviction(s) for offense(s) defined in RCW 46.61.5055, RCW 9.94A.533(7).
- (g) Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.128, .130.
- (h) Domestic violence as defined in RCW 10.99.020 was pled and proved for count(s) _____.
- (i) Current offenses encompassing the same criminal conduct in this cause are count(s) _____ RCW 9.94A.589(1)(a).
- (j) Aggravating circumstances as to count(s) _____: _____

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

- Criminal history is attached in Appendix B.
- One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
I-III	10	IV	63-84 months	36 months each	99-120 months	10 YRS and/or \$20,000
IV	6	VII	57-75 months		57-75 months	10 YRS and/or \$20,000

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE

- Findings of Fact and Conclusions of Law as to sentence above the standard range:
Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) _____.
Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) _____. The court would impose the same sentence on the basis of any one of the aggravating circumstances.

An exceptional sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.

An exceptional sentence below the standard range is imposed. Findings of Fact and Conclusions of Law are attached in Appendix D.

The State did did not recommend a similar sentence (RCW 9.94A.480(4)).

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

- This offense is a felony firearm offense (defined in RCW 9.41.010). Having considered relevant factors, including criminal history, propensity for violence endangering persons, and any prior NGI findings, the Court requires that the defendant register as a firearm offender, in compliance with 2013 Laws, Chapter 183, section 4. The details of the registration requirements are included in the attached **Appendix L**.

4.1 RESTITUTION, VICTIM ASSESSMENT, AND DNA FEE:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached **Appendix E**.
 Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(5), sets forth those circumstances in attached **Appendix E**.
 Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
 Date to be set.
 Defendant waives right to be present at future restitution hearing(s).
 Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment in the amount of \$500 (RCW 7.68.035 - mandatory).

Defendant shall pay DNA collection fee in the amount of \$100 (RCW 43.43.7541 - mandatory).

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs (RCW 9.94A.030, RCW 10.01.160); Court costs are waived;
 (b) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030); Recoupment is waived;
 (c) \$ _____, Fine; \$1,000, Fine for VUCSA \$2,000, Fine for subsequent VUCSA (RCW 69.50.430); VUCSA fine waived;
 (d) \$ _____, King County Interlocal Drug Fund (RCW 9.94A.030);
 Drug Fund payment is waived;
 (e) \$ _____, \$100 State Crime Laboratory Fee (RCW 43.43.690); Laboratory fee waived;
 (f) \$ _____, Incarceration costs (RCW 9.94A.760(2)); Incarceration costs waived;
 (g) \$ _____, Other costs for: _____

- 4.3 PAYMENT SCHEDULE: The TOTAL FINANCIAL OBLIGATION set in this order is \$ 600⁰⁰⁰. Restitution may be added in the future. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month;
 On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.
 Court Clerk's trust fees are waived. Interest is waived except with respect to restitution.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately; (Date): _____ by _____m.

72 months/days on count I; 72 months/days on count II; 72 months/days on count III;
75 ~~72~~ months/days on count IV; _____ months/days on count _____; _____ months/days on count _____;

The above terms for counts _____ are consecutive concurrent.

The above terms shall run consecutive concurrent to cause No.(s) 13-1-10240-1 SEA

The above terms shall run consecutive concurrent to any previously imposed sentence not referred to in this order.

In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: 36 months on count I, II & III
(total of 108 months for enhancements)
which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98.)

The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles.)

[] On the conviction for aggravated murder in the first degree, the defendant was under 18 at the time of that offense. Having considered the factors listed in RCW 10.95.030, a minimum term of _____ years of total confinement and a maximum term of life imprisonment is imposed. (If under 16 at the time of the offense, minimum term must be 25 years; if 16 or 17, minimum term must be 25 years to life without parole.)

The TOTAL of all terms imposed in this cause is 180 months.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): _____ day(s) or days determined by the King County Jail.

4.5 NO CONTACT: For the maximum term of 10 years, defendant shall have no contact with Barber Kohode, Marillo Barnes, Vincent Williams

4.6 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

HIV TESTING: The defendant shall submit to HIV testing as ordered in APPENDIX G. RCW 70.24.340.

4.7 (a) COMMUNITY CUSTODY for qualifying crimes committed before 7-1-2000, is ordered for one year (for a drug offense, assault 2, assault of a child 2, or any crime against a person where there is a finding that defendant or an accomplice was armed with a deadly weapon); 18 months (for any vehicular homicide or for a vehicular assault by being under the influence or by operation of a vehicle in a reckless manner); two years (for a serious violent offense).

(b) COMMUNITY CUSTODY for any SEX OFFENSE committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months.

(c) **COMMUNITY CUSTODY** - for qualifying crimes committed after 6-30-2000 is ordered for the following established range or term:

- Sex Offense, RCW 9.94A.030 - 36 months—when not sentenced under RCW 9.94A.507
 - Serious Violent Offense, RCW 9.94A.030 - 36 months
 - If crime committed prior to 8-1-09, a range of 24 to 36 months.
 - Violent Offense, RCW 9.94A.030 - 18 months
 - Crime Against Person, RCW 9.94A.411 or Felony Violation of RCW 69.50/52 - 12 months
 - If crime committed prior to 8-1-09, a range of 9 to 12 months.
- _____ months (applicable mandatory term reduced so that the total amount of incarceration and community custody does not exceed the maximum term of sentence).

Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or the court.

APPENDIX H for Community Custody conditions is attached and incorporated herein.

APPENDIX J for sex offender registration is attached and incorporated herein.

4.8 **ARMED CRIME COMPLIANCE, RCW 9.94A.475, .480.** The State's plea/sentencing agreement is attached as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 09/24/14

[Signature]
JUDGE
Print Name: Dennis C

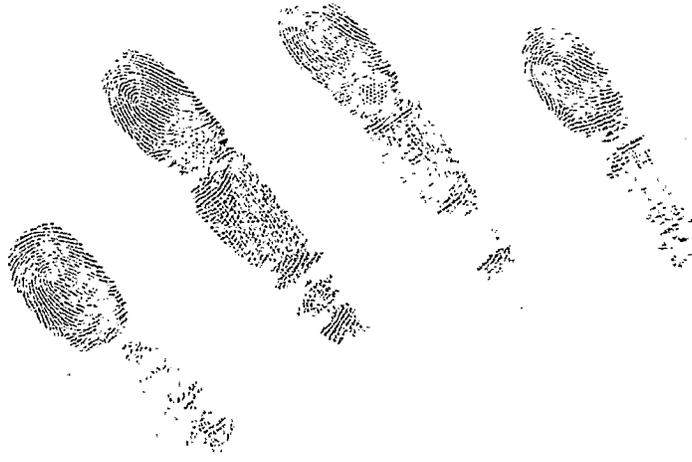
Presented by:

Deputy Prosecuting Attorney, WSBA# 43020
Print Name: Paul Sewell

Approved as to form:

[Signature]
Attorney for Defendant, WSBA # 28021
Print Name: Edward J. [unclear]

FINGER PRINTS



RIGHT HAND
FINGERPRINTS OF:
YUSUF HAISE SHIRE

DEFENDANT'S SIGNATURE:
DEFENDANT'S ADDRESS:

[Handwritten Signature]

Dated: 09/24/14

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK

[Handwritten Signature]

JUDGE

By: _____
DEPUTY CLERK

CERTIFICATE

OFFENDER IDENTIFICATION

I, _____
CLERK OF THIS COURT, CERTIFY THAT THE
ABOVE IS A TRUE COPY OF THE JUDGMENT AND
SENTENCE IN THIS ACTION ON RECORD IN MY
OFFICE.
DATED: _____

S.I.D. NO. WA25099347
DOB: 01/31/1993
SEX: Male
RACE: Black/African American

CLERK
By: _____
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

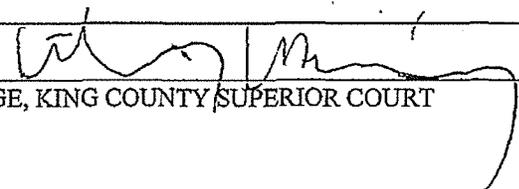
STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No. 13-C-09789-0 SEA
vs.)	JUDGMENT AND SENTENCE,
)	(FELONY) - APPENDIX B,
YUSUF HAISE SHIRE,)	CRIMINAL HISTORY
)	
)	Defendant.

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv.	Cause Number	Location
Robbery 2nd	08-28-2009	JF	09-8-01721-4	King Superior Court WA
Residential Burglary	02-08-2010	JF	09-8-04392-4	King Superior Court WA
Attempt Robbery 2nd	08-12-2011	AF	11-1-01891-8	King Superior Court WA
Unlawful Possession of a Firearm in the First Degree	10-02-2014	AF	13-1-10240-1	King Superior Court WA

[] The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date: 10/24/14



 JUDGE, KING COUNTY SUPERIOR COURT

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 72734-6-I
)	
YUSUF SHIRE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 31ST DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] YUSUF SHIRE
DOC NO. 378274
WASHINGTON PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2015.

X *Patrick Mayovsky*