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

IN RE THE PERSONAL RESTRAINT PETITION OF:

ROBERT BONDS,

Petitioner.

NO. 33704-5-II

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

FILED
COURT OF APPEALS
DIVISION II
05 OCT 10 PM 2:00
STATE OF WASHINGTON
BY
DEPUTY

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Must the petition be dismissed where the petitioner cannot show actual prejudice to a constitutional right or a fundamental defect resulting in a complete miscarriage of justice?

B. STATUS OF PETITIONER:

Petitioner, ROBERT BONDS, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 01-1-05476-9 for the offenses of attempted first degree murder, two counts, and unlawful possession of a firearm in the first degree. (Appendix A).

For these convictions he is serving a sentence of 680 months, including firearm enhancements. (Appendix A).

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Defendant's convictions were affirmed by an unpublished decision issued on July 15, 1999. (Appendix B). A mandate was issued on May 9, 2005. (Appendix C).

On July 22, 2005, defendant filed his first personal restraint petition.

C. ARGUMENT:

1. THIS PETITION SHOULD BE DISMISSED WHERE PETITIONER CANNOT ESTABLISH A CONSTITUTIONAL ERROR THAT WAS PREJUDICIAL OR A NONCONSTITIONAL ERROR RESULTING IN A COMPLETE MISCARRIAGE OF JUSTICE.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. In re Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs, and they require that collateral relief be limited in state as well as federal courts. Hagler, Id.

In this collateral action, the petitioner has the duty of showing constitutional error and that such error was actually prejudicial. The rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. In re Mercer, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987); Hagler, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to

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demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. In re Hagler, 97 Wn.2d at 825-26. To obtain collateral relief from an alleged nonconstitutional error, a petitioner must show "a fundamental defect which inherently results in a complete miscarriage of justice." In re Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the constitutional standard of actual prejudice. Id. at 810.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L.Ed.2d 858, 116 S.Ct. 931 (1996). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336.

The Strickland test applies to appellate as well as trial counsel. See, e.g., Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 764, 145 L.Ed.2d 756 (2000). A petitioner alleging ineffective assistance of appellate counsel must prove both that (1) appellate counsel acted objectively unreasonable in failing to raise a particular issue on

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appeal, and (2) absent counsel's deficient performance, there was a reasonable probability that defendant's appeal would have been successful before the state's highest court. e.g., Smith v. Robbins, 528 U.S. at 285, 120 S. Ct. at 764. If a petitioner raises ineffective assistance of appellate counsel on collateral review, he or she must first show that the legal issue that appellate counsel failed to raise had merit. In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). Second, the petitioner must show that he or she was actually prejudiced by appellate counsel's failure to raise the issue. Id.

Here, petitioner asserts that appellate counsel was ineffective for failing to challenge the admission of hearsay below under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). However, counsel is not ineffective for failing to forecast a change in the law. *See, e.g.*, Fuller v. United States, 398 F.3d 644, 651 n.4 (7th Cir. 2005). Crawford was issued March 8, 2004, some approximately 2 weeks after oral argument in the direct appeal. Appendix C. Because Crawford announced a significant departure from previous hearsay jurisprudence, appellate counsel's performance on direct appeal did not fall below an objective standard of reasonableness.

Even if counsel should or could have raised Crawford on direct review, defendant has failed to meet the second prong of Strickland and make a showing of reversible error. More specifically, the court's ruling in Crawford does not apply to the record in this case

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where, contrary to petitioner's assertions, there was no use of co-defendant's statements against petitioner.

The Confrontation Clause generally precludes admission of a testimonial hearsay statement unless the defendant has had a prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). The Crawford Court declined to provide a comprehensive definition of "testimonial," but gave the following examples of testimonial statements: ex parte in court testimony, and its functional equivalents, such as affidavits, custodial examinations, prior testimony that the defendant has not had the opportunity to cross-examine, and pretrial statements that declarants would reasonably expect to be used prosecutorially. Crawford, 124 S. Ct. at 1364. The Court declined to settle on a single formulation but noted that whatever else the term "testimonial" covers, it applies to:

> prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 124 S. Ct. at 1374.

The Crawford Court also gave examples of nontestimonial statements: "off-hand, overheard" remarks and "business records or statements in furtherance of a conspiracy." Crawford, 124 S. Ct. at 1364, 1367. The Court also suggested that "statements made unwittingly" to a government officer may not be testimonial. Crawford, 124 S. Ct. at 1368.

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Here, there were no "testimonial" statements offered against petitioner. In his petition, defendant attaches portions of the trial transcripts, where codefendant statements were allegedly offered as proof of guilt against petitioner. (See PRP at 4, arguing that Miller and Wilson's statements were used). What petitioner fails to also make part of the record is the court's instructions where the jury was instructed not to consider these statements as proof of defendant's guilt. Instruction number seven provided:

> You may not consider an admission or incriminating statement made out of court by one defendant as evidence against a codefendant.

Appendix D.

Nor is there any merit to defendant's claim that the prosecutor inappropriately linked defendant to Miller and Wilson's redacted statements. Defendant argues that during closing the prosecutor linked petitioner to Spencer Miller's statements by arguing:

> The only additional thing is to consider who had the motive to shoot, who had the motive, a reason to pull that trigger, who cared whether Daron Edwards was saying "fuck the hilltops; Robert Bonds, and Spencer Miller care because they are Hilltops and that kind of disrespect toward the gang, against Andre Bonds cannot be tolerated and is taken care of that night."

(PRP – Appendix F, RP 3016).

Taken in its entire context, the prosecutor was not attributing any admission or statement from another codefendant to defendant Bonds. The prosecutor carefully argued that when Daron Edwards "mouths off about `Fuck, Hilltops'" (RP 2978)

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Spencer Miller admitted in his statement that it "set him off." RP 2978. The prosecutor never linked defendant Bonds to any kind of admission that it also "set him off" but argued that it was a reasonable inference that Roberts Bonds, as co-founder of the Hilltop Crips, would take offense to such a statement. PRP Appendix F, RP 2978, 2979, 3016.

Defendant also complains about the following argument:

> . . . the fact that he is summonsed to the scene by Robert Bonds by Tonya Wilson by that phone call indicates to you that something is going to happen. It also indicates to you that it's not Andre Bonds who's the driving force behind this. It's not Andrew Bonds who's out to avenge his honor after getting his – this is Daron Edward's words, an ass whipping at Browne's. It's not Andrew Bonds who's the driving force. It's Tonya Wilson and Robert Bonds.

(PRP Appendix G - RP 3148-49).

In this argument, it appears from the context, that the State inadvertently attributed the phone call to Robert Bonds, but then quickly corrected itself by saying, "the fact that he is summonsed to the scene by Robert Bonds by Tonya Wilson."

Even assuming the State attempted to improperly use codefendant's statements as proof of guilt against defendant Bonds, jurors are also presumed to follow instructions. State v. Russell, 125 Wn.2d 24 at 84, 882 P.2d 747 (1994). The jurors here were specifically instructed not to consider an admission by one defendant as proof of guilt against another.

Nor has defendant provided the entire transcript record to determine whether such testimony, even if used against defendant, created such error requiring reversal.

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D. CONCLUSION:

For the foregoing reasons the State respectfully requests that this court dismiss the petition.

DATED: October 4, 2005.

GERALD A. HORNE
Pierce County Prosecuting Attorney

MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.7.05
Date Signature

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STATE OF WASHINGTON
BY
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APPENDIX "A"

Judgment and Sentence

CERTIFIED COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

IN OPEN COURT DEPT 21 MAY 24 2002 BOB SANDUCIE, Clerk By DEPUTY MAY 28 2002

STATE OF WASHINGTON, Plaintiff, vs. ROBERT CHARLES BONDS, JR., Defendant. DOB: 11/11/1972 SID NO.: WA14078044	CAUSE NO.01-1-06020-3 JUDGMENT AND SENTENCE (JS) [✓] Prison [ ] Jail One year or less [ ] First Time Offender [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative [ ] Breaking The Cycle (BTC)

I. HEARING

1.1 A sentencing hearing in this case was held on 5-17-2002 and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on the 8th day of April, 2002 by

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02-9-06607-0

01-1-06020-3

[] plea [X] jury-verdict [ ] bench trial of:

Count No.: I
Crime: ATTEMPTED MURDER IN THE FIRST DEGREE (FASE), Charge Code: (D1F-A)
RCW: 9A.32.030(1)(a), 9.41.010, 9.94A.310, 9.94A.510, 9.94A.370, 9.94A.530
Date of Crime: 10/14/2002
Incident No.: 01-287-0136

Count No.: II
Crime: ATTEMPTED MURDER IN THE FIRST DEGREE (FASE), Charge Code: (D1F-A)
RCW: 9A.32.030(1)(a), 9.41.010, 9.94A.310, 9.94A.510, 9.94A.370, 9.94A.530
Date of Crime: 10/14/2002
Incident No.: 01-287-0136

Count No.: III
Crime: UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, Charge Code: (GGG66)
RCW: 9.41.040(1)(a)
Date of Crime: 10/14/2002
Incident No.: 01-287-0136

as convicted by the jury.

[X] **A special verdict/finding for use of a firearm was returned on Count(s) I and II. RCW 9.94A.125, .310.**

[ ] A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s)_____.RCW 9.94A.125, .310.

[ ] A special verdict/finding of **sexual motivation** was returned on Count(s)_____. RCW 9.94A.127.

[ ] A special verdict/finding for **violation of the Uniform Controlled Substances Act** was returned on Count(s)_____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, or within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local government authority as a drug-free zone.

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) _____. RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.

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[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.129.

[ ] The crime charged in Count(s)_____involve(s) **domestic violence.**

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	Adult or Juv	Crime Type
TMVOP	09/01/88	PIERCE CO WA	06/10/88	JUV	NV
ATT ELUDE	02/02/89	PIERCE CO WA	12/28/88	JUV	NV
WFTCWLOMWICC	06/16/93	PIERCE CO WA	UNKNOWN	ADULT	NV
ASSAULT 2	05/21/90	PIERCE CO WA	02/08/90	ADULT	V
ASSAULT 2	05/21/90	PIERCE CO WA	02/08/90	ADULT	V
ASSAULT 2	05/21/90	PIERCE CO WA	02/08/90	ADULT	V
ASSAULT 3	05/21/90	PIERCE CO WA	02/08/90	ADULT	NV
FELON POSS FA	08/12/94	USM SEATTLE	11/01/93	ADULT	NV

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360

[ ] the court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

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2.3 SENTENCING DATA:

Count	Offender Score	Serious Level	Standard Range (w/o enhancement)	Plus Enhancement*	Total Standard Range	Maximum Term
I	~~12~~ 10	XV	308.25-411 MOS	60 MOS	368.25-471 MOS	LIFE
II	0	XV	180-240 MOS	60 MOS	240-300 MOS	LIFE
III	9	VII	87-116 MOS	N/A	87-116 MOS	10YRS/$20,000

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile Present.

2.4 [ ] EXCEPTIONAL SENTENCE: Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [✓] as follows:

No plea agreement was entered into; this was a jury trial.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [ ]The Court DISMISSES Count(s)_____. [ ] The defendant is found NOT GUILTY of Count(s)_____.

IV. SENTENCE AND ORDER

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IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma, WA 98402):

$_____ Restitution to: _____

$_____ Restitution to: _____

$_____ Restitution to: _____
(Name and Address-address may be withheld and provided confidentially to Clerk's Office).

$ ~~500~~ 500 Victim assessment RCW 7.68.035

$ 110 Court costs, including RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190

Criminal filing fee $ 110
Witness costs $_____
Sheriff service fees $_____
Jury demand fee $_____
Other $_____

$ 500 Fees for court appointed attorney RCW 9.94A.030

$_____ Court appointed defense expert and other defense costs RCW 9.94A.030

$ 365 Fine RCW 9A.20.021 [ ] VUCSA additional fine waived due to indigency RCW 69.50.430

$_____ Drug enforcement fund of _____ RCW 9.94A.030

$_____ Crime Lab fee [ ] deferred due to indigency RCW 43.43.690

$_____ Extradition costs RCW 9.94A.120

$_____ Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum) RCW 38.52.430

$_____ Other costs for: _____

$ 1475 TOTAL RCW 9.94A.145

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the

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court. An agreed order may be entered. RCW 9.94A.142. A restitution hearing:
[ ] shall be set by the prosecutor
[ ] is scheduled for _____

[ ] RESTITUTION. See attached order.
[✓] Restitution ordered above shall be paid jointly and severally with:

NAME OF OTHER DEFENDANT	CAUSE NUMBER	VICTIM NAME	AMOUNT-$
Tonya Wilson	01-1-06021-1	Keith Harrell Daron Edwards	
Spencer Miller	01-1-05476-9	"	

[ ] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.
[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than $_____ per month commencing _____. RCW 9.94A.145.
[ ] In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145.
[ ] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.
[X] The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [ ] HIV TESTING. The health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.
[✓] DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

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4.3 The defendant shall not have contact with Victims Keith Harrell Or Dana Edwards * (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).
[ ] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.4 **OTHER:** _____

4.4(a) Bond is hereby exonerated.

4.5 **CONFINEMENT OVER ONE YEAR:** The defendant is sentenced as follows:

(a) CONFINEMENT: RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

350 months on Count No. One 210 months on Count No. Two
87 months on Count No. Three _____ months on Count No. _____

(a)(i)CONFINEMENT (Sentence Enhancement): A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 months on Count No. One 60 months on Count No. Two
_____ months on Count No. _____ _____ months on Count No. _____

Sentence enhancements in Counts 1 and 2 shall run
[ ] concurrent [✓] consecutive to each other.
Sentence enhancements in Counts 1 and 2 shall be served
[✓] flat time [ ] subject to earned good time credit.
Sentence enhancements in Counts 1 and 2 shall run consecutive to the base sentence.
Actual number of months of total confinement ordered is 680.
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3 above).

(b) **CONSECUTIVE/CONCURRENT SENTENCES.** RCW 9.94A.400. ~~All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:~~
Counts 1 and two shall be served consecutively, the firearm enhancements in Counts 1 and 2 shall be served consecutively, and Count 3 shall be served concurrently.
The sentence herein shall run consecutively to all felony sentences in

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* Or their families

other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here.[ ] The sentence herein shall run consecutively to the felony sentence in cause number(s) _____

_____

The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here: _____

_____

Confinement shall commence immediately unless otherwise set forth here:

_____

_____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 189 182 days

_____

_____

4.6 [✓] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:
Count NA for _____ months;
Count _____ for _____ months;
Count _____ for _____ months;

[✓] **COMMUNITY CUSTODY** (post 6/30/00 offenses) is ordered as follows:
Count One for a range from 24 to 48 months;
Count Two for a range from 24 to 48 months;
Count _____ for a range from _____ to _____ months;

or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.120 for community placement/custody offenses--serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense. Use paragraph 4.7 to impose community custody following work ethic camp.]

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While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.
[✓] Defendant shall have no contact with: the victims per § 4.3 above
[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to-wit: _____

_____

[ ] The defendant shall participate in the following crime-related treatment or counseling services: _____

_____

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: _____

_____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

_____

4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.137, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total

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confinement. The conditions of community custody are stated in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections:

V. NOTICES AND SIGNATURES

5.1. **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.

5.4. **RESTITUTION HEARING.**
[ ] Defendant waives any right to be present at any restitution hearing (defendant's initials): Robert C. Bonds

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200.

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5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

Cross off if not applicable:
5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the State of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of the Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the

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institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis if you have been classified as a risk level II or III, or on a monthly basis if you have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.

If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5.8 **OTHER:** _____

_____

DONE in Open Court and in the presence of the defendant this date: 23rd of May 2002.

Frank E. Cuthbertson
JUDGE Print Name:

_____
Deputy Prosecuting Attorney
Print Name:
WSB# 17298

_____
Attorney for Defendant
Print name:
WSB# 15794

REFUSED
Defendant
Print name:

FILED
IN OPEN COURT
DEPT 21
MAY 24 2002
BOB SANDQUCIE, Clerk
By _____ DEPUTY

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01-1-06020-3

CERTIFICATE OF INTERPRETER

Interpreter signature/Print name: _____
I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 01-1-06020-3

I, Bob San Soucie, Interim Clerk of this Court, certify that the foregoing is a full, true and correct copy of the judgment and sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed on this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No.: WA14078044 Date of Birth: 11/11/1972
(If no SID take fingerprint card for WSP)

FBI No. 555948LA0 Local ID No. _____

PCN No. _____ Other _____

Alias name, SSN, DOB: _____

Race:	Ethnicity:	Sex:
[ ] Asian/Pacific Islander	[ ] Hispanic	[X] Male
[X] Black/African-American	[X] Non-Hispanic	[ ] Female
[ ] Caucasian		
[ ] Native American		
[ ] Other: _____		

kyr

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APPENDIX F

Cause No. 01-1-06020-3

The defendant having been sentenced to the Department of Corrections for a:

_____ sex offense
_____ serious violent offense
_____ assault in the second degree
_____ any crime where the defendant or an accomplice was armed with a deadly weapon
_____ any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year term of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

_____ (I) The offender shall remain within, or outside of, a specified geographical boundary:
_____
_____

_____ (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals:_____
_____

_____ (III) The offender shall participate in crime-related treatment or counseling services;

_____ (IV) The offender shall not consume alcohol;

_____ (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

_____ (VI) The offender shall comply with any crime-related prohibitions.

_____ (VII) Other:_____

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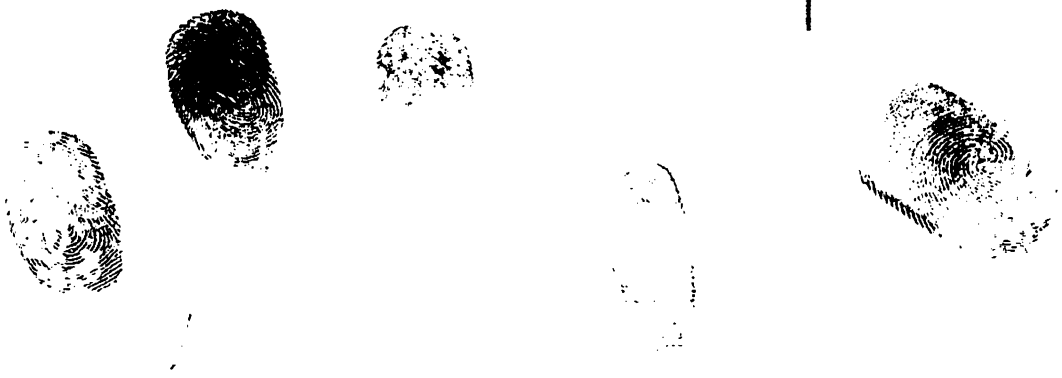
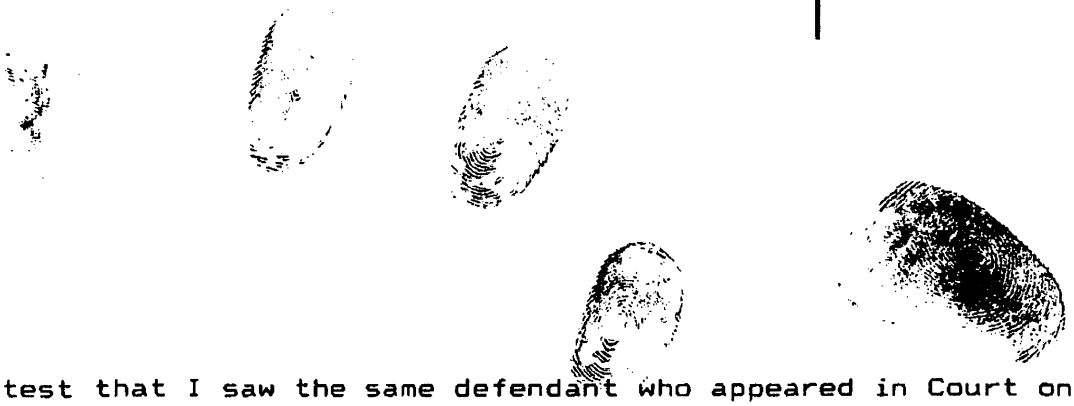
01-1-06020-3

FINGERPRINTS

Right four fingers taken simultaneously	Right thumb



Left four fingers taken simultaneously	Left thumb



I attest that I saw the same defendant who appeared in Court on this Document affix his or her fingerprints and signature thereto. Interim Clerk of the Court, BOB SAN SOUCIE:

Valerie Rhude, Deputy Clerk.

Dated: 5-17-2002

DEFENDANT'S SIGNATURE: REFUSED

DEFENDANT'S ADDRESS: _____

_____

DEFENDANT'S PHONE#: _____

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APPENDIX "B"

Unpublished Opinion

STATE OF WASHINGTON, Respondent, v. SPENCER LEROY MILLER, Appellant. STATE OF WASHINGTON, Respondent v. ROBERT CHARLES BONDS, JR., Appellant. STATE OF WASHINGTON, Respondent, v. TONYA ROCHELLE WILSON, Appellant.

No. 28847-8-II consolidated with 28935-1-II, 28964-4-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2004 Wash. App. LEXIS 1902

August 17, 2004, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

PRIOR HISTORY: Appeal from Superior Court of Pierce County. Docket No:01-1-05476-9. Judge signing: Hon. Frank E Cuthbertson. Date filed: 05/24/2002.

State v. Miller, 122 Wn. App. 1074, 2004 Wash. App. LEXIS 2572 (2004)

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: For Appellant(s): Pattie Mhoon, Attorney at Law, Tacoma, WA. Rebecca Wold Bouchey, Attorney at Law, Mercer Island, WA. Rita Joan Griffith, Attorney at Law, Seattle, WA.

For Respondent(s): Kathleen Proctor, Pierce County Prosecuting Atty Ofc, Tacoma, WA.

JUDGES: Authored by J Dean Morgan. Concurring: David H. Armstrong, J. Robin Hunt.

OPINIONBY: J Dean Morgan

OPINION:

MORGAN, A.C.J. -- Spencer Miller, Robert Bonds, and Tonya Wilson appeal their convictions for attempted first degree murder. They raise issues concerning speedy trial, amending the charges, jury instructions, polygraph evidence, evidence of a prior bad act, gang affiliation evidence, expert testimony, closing arguments, sufficiency of the evidence, inconsistent verdicts, and cumulative error. n1 We affirm.

n1 Except where indicated, the issues raised are common to all three defendants.

[*2]

Robert Bonds and his cousin, Andre Bonds, are two of the thirteen original members of a Tacoma street gang called the Hilltop Crips. Although Spencer Miller was not an original member, he had been a member since the early 1990's. Tonya Wilson was Robert's girlfriend and a Crips "associate." n2

n2 2 Report of Proceedings (RP) at 236.

In October 2001, Keith Harrell was living in Tacoma's Hilltop neighborhood. Daron Edwards had been living with him for about seven years. There was an AM/PM store in the same neighborhood. The Crips assert dominion over an area that includes the Harrells' residence and the AM/PM store.

A rival street gang, the Bloods, originated in Compton, California. Edwards grew up in Compton but never belonged to the Bloods.

During the afternoon of October 13, 2001, Andre Bonds and Edwards had a confrontation in front of Harrell's residence. While displaying a gun, Andre said that he was revoking Edwards's Hilltop privileges and that he would return with five of his "homeboys" to enforce [*3] the revocation.

Later that night, Edwards went to Browne's Star Grill, a nightclub that the Crips frequented. Andre and

Robert Bonds were there, as was Cory Thomas, a friend of Edwards. Andre hit Thomas in the face with Edwards watching. Edwards responded by knocking Andre to the floor and hitting him several times. Robert punched Edwards in the face, and security guards ejected them all.

Outside, Edwards challenged Andre to continue the fight. The two exchanged more blows, with Edwards getting the better of Andre. Robert, Wilson, and Miller were among those watching. Edwards shouted, "This is Compton," or "I'm Compton," n3 and Miller shouted back, "Fuck California, this is Hilltop." n4 Edwards replied, "[Fuck] the Hilltop." n5 As Edwards was preparing to leave, Robert took a gun from his waistband and said, "Fuck these niggers." n6 A witness named Neecie Brown considered warning Edwards that "they got a gun," n7 but Wilson told her to mind her own business.

n3 3 *RP at 261.*

n4 7 *RP at 925.*

n5 13 *RP at 2212, 2217.*

n6 9 *RP at 1172.*

[*4]

n7 14 *RP at 2453.*

Edwards, Thomas, Harrell, and several others returned to Harrell's residence. They had been back about ten minutes when the phone rang. Thomas answered and heard someone say that two of Harrell's friends were surrounded by Hilltop Crips at the AM/PM and feared for their safety.

Thomas, Edwards, and a man named Sinclair quickly drove to the AM/PM. Harrell and a person named Trent went also, but in a separate car. Thomas had a gun, and there was also a gun in Harrell's car. The time was about 2 A.M.

Andre, Robert, Wilson, Miller, and others were already at the AM/PM. Some of them were armed. Andre, Robert, and Miller conferred, then walked to different locations as the cars from Harrell's house arrived. Edwards got out and approached Andre, who was holding a gun. Edwards asked if Andre wanted "another ass whipping." n8 The two exchanged words, Andre got in his car and left. At about this same time, Wilson was slowly driving a station wagon out of the parking lot with Robert as her passenger.

n8 3 *RP at 275.*

[*5]

Gunfire then erupted from more than one place. According to several witnesses, it came from the station wagon, from an alley behind the AM/PM, and from across the street near a business called the Absolute Auto Shop. Edwards was shot in the back, hip and arm. Harrell was shot in the head. Both survived, but Harrell remains impaired.

When police arrived, they found two pools of blood and eight shell casings. The guns were never recovered, and Miller later said they had been discarded in Seattle.

On October 22, 2001, Miller was charged with two counts of attempted first degree murder. n9 On November 19, 2001, Robert Bonds and Wilson each was charged with two counts of attempted first degree murder, and Robert was charged with unlawful possession of a firearm in the first degree. All three were joined for a trial that lasted seven weeks. The jury convicted as charged and returned special verdicts finding that Robert, but not Miller or Wilson, had been armed with a firearm.

n9 A man named Henderson was also a defendant at that time, but the charges against him were later dismissed on a *Knapstad* motion.

[*6]

I. SPEEDY TRIAL

Robert Bonds and Wilson were arraigned on November 19, 2001. Their trial was initially set for December 13, 2001, because, about a month earlier, Miller's trial had been set for that same date. On December 7, 2001, they asked for a continuance, and the court reset trial for January 10, 2002. On January 10, 2002, they asked for another continuance, and the court reset trial for February 13, 2002. Trial began on February 20, 2002. Although Bonds and Wilson argue otherwise, the trial court's orders show that it granted the continuances under CrR 3.3(h)(2). n10

n10 We reject Bonds and Wilson's argument that the trial court was applying CrR 3.3(f)(2) to the exclusion of CrR 3.3(h)(2) and CrR 3.3(g)(3). CrR 3.3(f)(2) applies when a trial court must "reset for any reason, including but not limited to the applicability of . . . a period of exclusion pursuant to section (g)." Subsection (g)(3) excludes any "[d]elay granted . . . pursuant to section (h)." When a trial court resets under CrR 3.3(f)(2), it does so under all applicable rules, including CrR 3.3(g)(3) and (h)(2).

[*7]

Bonds and Wilson claim that the trial court erred by not commencing trial within the time prescribed by CrR 3.3. CrR 3.3(c)(1) provides that trial must begin within 60 days of arraignment. CrR 3.3(h)(2) provides that trial may be continued "when required in the administration of justice and the defendant will not be substantially prejudiced." CrR 3.3(g)(3) provides that delay granted under (h)(2) shall be excluded from the 60-day period for trial. *State v. Dent* n11 provides that a court may consider the need to maintain joinder with other defendants.

n11 *123 Wn.2d 467, 484, 869 P.2d 392 (1994).*

Applying these rules here, we hold that Bonds and Wilson were tried within 60 days, less time properly excluded under CrR 3.3(h)(2) and CrR 3.3 (g)(3). And, even if they were not so tried, any delay was required by the administration of justice because it maintained joinder and was not prejudicial. n12

n12 We also reject defendants' argument that trial counsel rendered ineffective assistance, as we perceive neither deficient performance nor resulting prejudice. *See State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), aff'd, 161 F.3d 13 (9th Cir. 1998).*

[*8]

II. AMENDMENT OF THE INFORMATIONS

During its case-in-chief, the State moved to amend the charges against each defendant to allege that he or she, with premeditated intent to cause the death of another person, had caused the death of the other person "or of a third person." n13 Bonds and Wilson objected, but the trial court overruled, finding no substantial prejudice.

n13 Clerk's Papers (CP) (Miller) at 35-36; *3 CP (Bonds) at 523-24*; CP (Wilson) at 77-78.

Bonds and Wilson claim that the trial court erred by granting the State's motion to amend. CrR 2.1(d) permits amendment at any time before verdict if the defendant is not substantially prejudiced. Prejudice exists if, because of the late amendment, the defendant did not receive adequate notice of the charges against him. n14 We review only for abuse of discretion. n15

n14 *State v. Schaffer, 120 Wn.2d 616, 619-20, 845 P.2d 281 (1993).*

n15 *State v. Brett, 126 Wn.2d 136, 155, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996).*

[*9]

The trial court did not abuse its discretion here. Each defendant was charged with attempted first degree murder. Before and after the amendments, each charge alleged each element of that crime. The only effect of the amendment was to manifest that the State was relying on transferred intent, a doctrine embodied in the underlying statute with or without the amendment. Intent was not at the core of either Bonds' or Wilson's defense, for each was claiming mistaken identity (i.e., that he or she was not a shooter). Miller, whose position was similar, expressly acknowledged that he was not prejudiced. The amendment did not significantly affect the charge or defense, and the trial court did not abuse its discretion by allowing it.

III. JURY INSTRUCTIONS

The trial court instructed the jury that in order to convict each defendant, it had to find beyond a reasonable doubt that he, she, or an accomplice took a substantial step toward committing first degree murder, with intent to commit first degree murder. The trial court instructed the jury, "The elements of the completed crime of Murder in the First Degree are: (1) with premeditated intent to cause the death of another person and (2) [*10] causes the death of such person or of a third person." n16 No one objected to any of these instructions.

n16 CP (Miller) at 51; *4 CP (Bonds) at 657*; CP (Wilson) at 91.

Bonds, Wilson, and Miller now claim that these instructions erroneously failed to require the State to prove each essential element of the crime charged. "What was missing," they say, "was an instruction requiring the jurors to find that [the defendant] or an accomplice, with the premeditated intent to cause the death of a named person, caused the death of that named person or a third person." n17 The State responds that they are attacking a definitional instruction, not a "to convict" instruction, and that a definitional instruction cannot be attacked for the first time on appeal. n18

n17 Br. of Appellant (Wilson) at 58.

n18 *See State v. Scott, 110 Wn.2d 682, 691, 757 P.2d 492 (1988).*

[*11]

We know of no authority that requires a trial court in an attempt case to include the name of a particular person in its general definition of the underlying crime. Nor do the defendants cite any. n19 As a general rule, jury instructions are adequate if they inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. n20 The instructions here did that, and they were not erroneous in the manner claimed.

n19 We reject Wilson's reliance on *State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994).* That case was not addressing jury instructions and has no bearing here.

n20 *State v. Kennard, 101 Wn. App. 533, 536-37, 6 P.3d 38, review denied, 142 Wn.2d 1011, 16 P.3d 1267 (2000).*

IV. POLYGRAPH EVIDENCE

In a statement made before trial, Wilson agreed to take a polygraph test that was never arranged. The State used some of her statements at trial but not the one about a polygraph. She then offered to prove her agreement to [*12] take a polygraph and the interviewing officer's failure to arrange one. The State objected, and the trial court sustained.

Wilson now argues that the trial court erred because the officer testified as a witness and the offered evidence showed his bias toward her. She also argues that once the State introduced some of her statements from the interview, she was entitled to introduce the rest under ER 106.

ER 106 provides, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it." ER 611(a) operates similarly for oral statements. ER 403 generally provides that evidence may be excluded when its probative value is substantially outweighed by unfair prejudice, confusion, or waste of time. *State v. Renfro* n21 holds that polygraphs are inadmissible absent the stipulation of both parties and evidence that the results are reliable. *State v. Rowe* n22 specifically upholds a trial court's exclusion of statements offering to take a polygraph.

n21 *96 Wn.2d 902, 905, 639 P.2d 737, cert. denied, 459 U.S. 842, 74 L. Ed. 2d 86, 103 S. Ct. 94 (1982); see also State v. Grisby, 97 Wn.2d 493, 502, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211, 75 L. Ed. 2d 446, 103 S. Ct. 1205 (1983); State v. Gregory, 80 Wn. App. 516, 521-22, 910 P.2d 505, review denied, 129 Wn.2d 1009, 917 P.2d 129 (1996).*

[*13]

n22 *77 Wn.2d 955, 958-59, 468 P.2d 1000 (1970).*

The statement at issue here had minimal probative value. But by injecting polygraphs into the case, it generated substantial danger of unfair prejudice and waste of time. We review for abuse of discretion, n23 and we find no abuse here.

n23 *State v. Larry, 108 Wn. App 894, 910, 34 P.3d 241 (2001), review denied, 146 Wn.2d 1022, 52 P.3d 521 (2002).*

V. PRIOR BAD ACT

Following a pre-trial hearing, the trial court excluded evidence that gang members had perpetrated a drive-by shooting and thrown a pipe-bomb at Harrell's house about a month before the shooting. But during trial, as Wilson was cross-examining Ernest Trent about the victims' having a gun at the AM/PM, the following exchange occurred:

> Q: What kind of guns are typically left in the Cadillac?
> A: Left in the Cadillac?
> Q: Yeah. What is the Cadillac's gun?
> A: There ain't no [*14] gun in - I mean the reason why we went and got the guns in the first place was they shot up the house and threw a bomb. So this was one of the main reasons we started to arm ourselves. n24

Bonds objected as non-responsive, and the trial court sustained.

n24 *RP (Mar. 18, 2002) at 148.*

All three defendants then moved for a mistrial. They argued that curative instructions could not adequately mitigate the prejudice generated by Trent's violation of the court's pre-trial order. The court denied the motion and instructed the jury to "completely disregard" Trent's answer.

The defendants now claim that their right to a fair trial was irreparably prejudiced when Trent said that "they shot up the house and threw a bomb." The State responds that the trial court cured any prejudice by sustaining Wilson's objection and instructing the jury to disregard Trent's comment.

We agree with the State. The trial court immediately sustained Wilson's objection. Shortly thereafter, the trial court, without [*15] repeating the offending words, clearly told the jury to disregard them. At the end of the evidence, the trial court again told the jury not to consider material that had not been admitted or that had been stricken. Though regrettable, the offending words were but nine in number and but one moment in a seven-week trial. The trial court believed that it had adequately rectified the problem, and we cannot say that it abused its discretion. n25

n25 *See State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).*

VI. GANG AFFILIATION EVIDENCE

The State asked leave to prove that the defendants were affiliated with the Hilltop Crips and that the shooting was gang-motivated. The State argued that the jury would need that information to understand acts that otherwise seemed wholly senseless. The defendants objected, contending that the shooting had arisen from a "personal" dispute.

After balancing on the record, the trial court admitted some of the offered evidence. It held that evidence of each defendant's [*16] gang affiliation and expert testimony on gang culture was logically relevant to prove motive, premeditation, plan, preparation and knowledge, and that its probative value for those purposes was not substantially outweighed by the danger of unfair prejudice. The court held likewise with respect to Edwards' encounter with Andre Bonds on the afternoon before the shooting, Andre's purported revocation of Edwards' Hilltop "privileges," and the events at Browne's just prior to the shooting.

At the same time, the court excluded some of the offered evidence. It held that evidence showing the pipe bomb incident, that Miller and other Crips were involved in drug dealing, the defendants' street names, and that Edwards had assaulted Mulligan was too attenuated and that any probative value it might have was substantially outweighed by the danger of unfair prejudice. With respect to the pipe bomb incident, it reasoned that not only would it "be highly inflammatory and prejudicial, but also that "there is no evidence really linking any of the defendants directly to that incident." n26 With respect to the defendants' street names, it instructed that each defendant be addressed throughout trial as [*17] "Mr. Bonds, Ms. Wilson, and Mr. Miller." n27

n26 *RP (Feb. 25, 2002) at 96.*

n27 *RP (Feb. 27, 2002) at 24.*

The defendants now claim that the trial court's rulings of admission were erroneous. According to ER 404, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show conformity therewith, but may be admissible to prove motive, intent, preparation, plan and knowledge. When applying ER 404, a trial court must determine the purpose for which the evidence is offered; whether it is relevant when offered for that purpose; and, if so, whether its probative value when used for that purpose is substantially outweighed by the danger of unfair prejudice. n28 Evidence of gang membership lacks probative value "when it proves nothing more than a defendant's abstract beliefs." n29 It has probative value, however, when it proves premeditation, intent, motive, or the bias of a witness, assuming of course that those are issues in the case. n30 [*18] We review the trial court's rulings for abuse of discretion. n31

n28 *State v. Campbell, 78 Wn. App 813, 821, 901 P.2d 1050, review denied, 128 Wn.2d 1004, 907 P.2d 296 (1995).*

n29 *Campbell, 78 Wn. App. at 822.* Gang membership is not admissible to prove abstract beliefs and associations in part because it is protected by the constitutional rights of freedom of speech and freedom of association. *Dawson v. Delaware, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992).*

n30 *United States v. Abel, 469 U.S. 45, 47, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984)* (bias of witness); *State v. Boot, 89 Wn. App. 780, 789, 950 P.2d 964* (premeditation), *review denied, 135 Wn.2d 1015, 960 P.2d 939 (1998); Campbell, 78 Wn. App. at 822; cf. State v. Johnson, 124 Wn.2d 57, 69, 873 P.2d 514 (1994)* (sentencing case; de-

fendant's gang membership relevant to prove motive).

n31 *State v. Brown, 132 Wn.2d 529, 578, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 140 L. Ed. 2d 322, 118 S. Ct. 1192 (1998).*

[*19]

State v. Campbell n32 is instructive. It involved a gang member who was charged with killing two rival gang-members. The State theorized that the defendant had been motivated to kill the victims because they invaded his "turf" and challenged his authority. The State was allowed to show that the defendant was a gang member, that the victims were rival members who disrespected the defendant and sold drugs on his turf, and that in gang culture these are grounds for violent retaliation. The appellate court held that the trial court had not abused its discretion. n33

n32 *78 Wn. App 813, 901 P.2d 1050.*

n33 *Campbell, 78 Wn. App. at 822.*

Additionally, *State v. Boot* n34 is instructive. It was again a murder case. The trial court properly admitted, as probative of motive and premeditation, evidence that the defendant was a gang member and that killing someone tended to enhance status within the gang. The appellate court affirmed. n35

n34 *89 Wn. App. 780, 950 P.2d 964.*

[*20]

n35 *89 Wn. App. at 789-90.*

Finally, *United States v. Abel* n36 is instructive. It was a case in which the government was allowed to show that a defense witness and the defendant belonged to the same gang; that each member of the gang took an oath to lie on behalf of other members; and thus that the defense witness was arguably biased. The United States Supreme Court affirmed.

n36 *469 U.S. 45, 83 L. Ed. 2d 450, 105 S. Ct. 465.*

As in *Cambell*, *Boot*, and *Abel*, the evidence here showed that each defendant was a gang member or affiliate; that one of the gang's tenets was to retaliate for "disrespect"; and that Edwards exhibited disrespect during the afternoon and evening hours on October 13-14, 2001. It also showed that another tenet was intragroup loyalty and, inferentially, that several of the witnesses were biased for or against each of the parties at trial. The evidence had probative value to the extent it was used [*21] for these purposes, n37 and like the trial court, we do not think such value was substantially outweighed by the danger of unfair prejudice. Accordingly, we hold that the trial court did not abuse its discretion. n38

n37 This conclusion disposes of the defendants' argument that there was an "insufficient nexus" between the offered evidence of gang activity and the shooting at the AM/PM. Under ER 401 and 403, the required nexus is that the evidence have a "tendency" to prove or disprove a fact of consequence to the action and that the evidence have probative value that was not substantially outweighed by unfair prejudice. That nexus existed here.

n38 This conclusion also disposes of the defendants' claims that the gang evidence was mere profile testimony and that certain photos were too prejudicial to be admitted. The trial court admitted five photos while excluding five, and we find no abuse of discretion.

VII. EXPERT WITNESS

Detective Ringer was both the lead investigator on the case and the expert witness [*22] through whom the State chose to present much of its evidence on gang culture and relationships. The trial court allowed him to sit with the prosecutor at counsel table. The defendants now make several arguments related to his participation.

The defendants first argue that the trial court erred by permitting Ringer to testify about gang culture and relationships. They reason that his testimony could not have assisted the jury within the meaning of ER 702 n39 because it involved matters within the common understanding of lay people. The trial court disagreed, and so do we. Accordingly, we find no abuse of discretion. n40

n39 ER 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

> experience, training or education, may testify thereto in the form of an opinion or otherwise.

n40 *Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004)*; *Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)*; *Campbell, 78 Wn. App. at 823*; *State v. Quigg, 72 Wn. App. 828, 837, 866 P.2d 655 (1994)*; *State v. Ward, 55 Wn. App. 382, 385-86, 777 P.2d 1066, review denied, 113 Wn.2d 1029, 784 P.2d 530 (1989)*.

[*23]

The defendants argue that Ringer's "active involvement in investigating the case and preparing witnesses after the start of trial, his presence in the courtroom[,] and the allegations that he pressured witnesses made him too biased and too closely associated with the prosecutor to be an expert witness at trial." n41 A trial court has broad discretion when deciding whether an expert witness is qualified within the meaning of ER 702, n42 and it did not abuse that discretion here. Ringer's bias, if any, was a matter for cross-examination, argument, and jury consideration. n43

n41 Br. of Appellant (Wilson) at 48.

n42 *Harris v. Robert C. Groth, M.D., Inc., 99 Wn. 2d 438, 450, 663 P.2d 113 (1983)*.

n43 *See State v. Bland, 90 Wn. App. 677, 681, 953 P.2d 126* ("If Bland was concerned that the dual position could affect Fox's objectivity as a witness, his remedy was effective cross examination."), *review denied, 136 Wn.2d 1028, 972 P.2d 465 (1998)*.

The defendants argue that [*24] Ringer should not have been allowed to sit at counsel table pursuant to ER 615. That rule "delineates certain witnesses who may not be excluded," narrowing the discretion that the judge had "[u]nder previous law" such as *State v. Weaver*. n44 Such witnesses include "an officer or employee of a party which is not a natural person designated as its representative by its attorney," as well as "a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause." n45 Here then, the court certainly had discretion to allow Ringer to remain. n46

n44 Washington Comment to ER 615 (citing *State v. Weaver, 60 Wn.2d 87, 371 P.2d 1006 (1962)*).

n45 ER 615.

n46 *State v. Adams, 76 Wn.2d 650, 659, 458 P.2d 558 (1969), rev'd on other grounds, 403 U.S. 947, 29 L. Ed. 2d 855, 91 S. Ct. 2273 (1971)*; *Weaver, 60 Wn.2d at 90*; *State v. Schapiro, 28 Wn. App. 860, 867, 626 P.2d 546 (1981)*; *see also State v. McGee, 6 Wn. App. 668, 669, 495 P.2d 670* (sheriff allowed to remain in the court room and testify despite an exclusion order), *review denied, 80 Wn.2d 1010 (1972)*. We do not overlook a recess incident in which Ringer may have spoken inappropriately to a witness. The trial court adequately rectified that problem by prohibiting further contacts and allowing the defendants to use the incident to impeach the credibility of both Ringer and the witness. We do not decide whether ER 615 barred the trial court from excluding Ringer, or, conversely, whether it required the trial court to allow Ringer to remain.

[*25]

VIII. PROSECUTOR'S CLOSING ARGUMENT

The defendants claim they were denied a fair trial because of two remarks the prosecutor made during closing arguments. We address each separately.

A.

A witness named Divens exhibited fear during her testimony. Outside the presence of the jury, the State requested permission to question Divens about individuals who came to her workplace, threatened her with a gun, and told her not to testify. The trial court denied the request as more prejudicial than probative. The court remarked that "the cat [was] out of the bag" anyway because Divens' demeanor on the stand made it obvious that "she was terribly intimidated by somebody or something involved with this case." n47

n47 10 *RP at 1704*.

During closing argument, the prosecutor compared and contrasted the credibility of various witnesses. When he came to Divens, he argued that Divens' testimony was credible because she had no motive to testify falsely and, in fact, had been "deathly afraid" to testify because [*26] "[t]his is the Hilltop Crips on trial." n48 The defendants moved for mistrial, which the trial court denied. The trial

court quickly instructed, however, that there was no evidence that Divens' fear had been due to Hilltop Crips being on trial and that the jury should disregard the prosecutor's remark.

n48 18 *RP at 3011-12.*

The defendants claim that the trial court erred by denying their motion for mistrial. The defendant bears the burden of demonstrating that the conduct complained of was both improper and prejudicial. n49 If the defendant proves the conduct was improper, the prosecutorial conduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. n50 We review for abuse of discretion. n51

n49 *State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996).*

[*27]

n50 *Brett, 126 Wn.2d. at 175.*

n51 *Brett, 126 Wn.2d. at 174.*

We perceive no abuse here. n52 Divens worked the night shift just across the street from the AM/PM, where members of the Hilltop Crips regularly gathered on weekend nights. She had witnessed the shootings and seen individuals run from the AM/PM to a van just outside her office. The defendants' affiliation with the gang was before the jury. The trial judge, and presumably the jury also, had observed from her demeanor on the stand that she had been "terribly intimidated by someone or something in this case." The prosecutor's statement that Judy Divens had been "deathly afraid" to testify because "[t]his is the Hilltop Crips on trial" was made in the context of explaining why the jury should find her testimony credible: Divens had not wanted to be there, and she had no motive to lie. The prosecutor's statement was a reasonable inference from the evidence, and, even if we assume it was not, was rectified by the trial court's prompt curative instruction. n53

n52 *See State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)* (trial court is in best position to determine if prosecutorial misconduct prejudiced right to a fair trial).

[*28]

n53 *See State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990)* (jury presumed to follow trial court's instruction to disregard prosecutor's improper comments), *cert. denied, 498 U.S. 1046, 112 L. Ed. 2d 772, 111 S. Ct. 752 (1991), and cert. denied, 513 U.S. 985, 130 L. Ed. 2d 393, 115 S. Ct. 479 (1994).*

B.

During closing arguments, counsel for Robert Bonds drew the jury's attention to the fact that Andre Bonds and others who might have participated in the incident, including whoever had fired from the area near Absolute Auto, had not been apprehended or brought before the court. He suggested that the State had not pursued those individuals because of a single-minded, misguided determination to convict Bonds. In rebuttal, the prosecutor responded by saying that the jurors should not consider what might have happened to the other individuals, who, for all the jury knew, might be "in [f]ederal custody or anyplace else." n54 No defendant objected.

n54 19 *RP at 3139.*

[*29]

A prosecutor's remarks do not warrant reversal when made in reply to defense counsel's statements, unless the prosecutor's remarks go beyond a pertinent reply and put before the jury extraneous matters not in the record or are so prejudicial that an instruction would not cure them. n55 In closing argument, defense counsel drew the jury's attention to the fact that other persons involved in the incident had not been brought before the court. He then asked the jury to infer from that fact that the State had a single-minded, unjustified fixation on Bonds. In rebuttal, the prosecutor urged the jury to focus on the defendants before it and not to speculate about others who were not before the court. His statement that Andre Bonds' location was unknown was a fair reply to the defense, and his suggestion that Andre Bonds "[may be] in [f]ederal custody" does not warrant reversal.

n55 *State v. Dennison, 72 Wn.2d. 842, 849, 435 P.2d 526 (1967).*

IX. SUFFICIENCY OF THE EVIDENCE

Miller claims that the [*30] evidence is insufficient to support his convictions. Bonds does not make such a

claim, probably because the evidence is amply sufficient as to him. Wilson moved to adopt Miller's claim, and a commissioner of this court granted her motion. n56

n56 We consider Wilson's claim only because a commissioner granted her motion. We are hindered in our review of her claim because the evidence as to her differs from the evidence as to Miller and because she does not argue the evidence as to her. Ordinarily, we would not address a claim not supported by argument. *State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440, cert. denied, 498 U.S. 838, 112 L. Ed. 2d 80, 111 S. Ct. 110 (1990).*

Evidence is sufficient if a rational trier of fact, taking it in the light most favorable to the State, could find each element of the crime. n57 A person is guilty of attempted first degree murder if, with premeditated intent to cause the death of another person, he or she takes a substantial step toward causing the death of the [*31] other person or a third person. n58 A person is an accomplice if with knowledge that it will promote or facilitate the commission of the crime, he requests, assists, or encourages another person to commit the crime. n59

n57 *State v. Kleist, 126 Wn.2d 432, 435, 895 P.2d 398 (1995)*; *State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).*

n58 *RCW 9A.32.030(1)(a)*; *RCW 9A.28.020(1).*

n59 *RCW 9A.08.020(3)*; *State v. Roberts, 142 Wn.2d at 513.*

Taken in the light most favorable to the State, the evidence is sufficient to support Miller's convictions. It is undisputed that Miller was at the AM/PM. Just before the victims arrived, he conferred with other Crips, including Andre Bonds and Robert Bonds. As the victims were arriving, he and the others dispersed to different locations. n60 After Edwards and Andre Bonds had again confronted each other, gunfire erupted from locations [*32] that included the alley behind the AM/PM. A witness saw Miller in the alley next to a car. A second witness saw a man firing from the alley's rock wall. A third witness saw a man standing at the wall with his arm extended, shooting a gun. A fourth witness saw the man behind the wall with his arm extended, but from her vantage point could not see what if anything he had in his hand; later the same morning, however, she saw Miller and recognized from his clothes that he was the man she had seen. Miller gathered with other Crips after the shooting, and he told police the guns had been disposed of in Seattle. Cumulated and taken in the light most favorable to the State, this evidence is sufficient for the jury to have inferred that Miller participated in and knowingly facilitated the shooting.

n60 The State argues in part that Miller asked Henderson to lend him a gun. We omit that fact because it was introduced for impeachment only and not as substantive evidence. *See State v. Newbern, 95 Wn. App. 277, 298, 975 P.2d 1041* (Morgan, J., concurring), *review denied, 138 Wn.2d 1018, 989 P.2d 1142 (1999).*

[*33]

Taken in the light most favorable to the State, the evidence is sufficient to support Wilson's convictions. She was a Crips' "associate" n61 and the girlfriend of Robert Bonds. She had been present outside of Browne's when another person had started to warn Edwards that Robert had a gun, and she had told that person not to interfere. She drove Robert to the AM/PM. She summoned Andre to the AM/PM. Both Andre and Robert were visibly armed. After Edwards and Andre had confronted each other, she drove a station wagon occupied by her and Robert in a direction and at a speed that allowed him to fire at the victims through the car's window. Cumulated and taken in the light most favorable to the State, this evidence is sufficient for the jury to have inferred that Wilson knowingly facilitated the shooting.

n61 2 *RP at 236.*

X. INCONSISTENT VERDICTS

Miller argues that the trial court erred by denying his post-trial motion for new trial based on inconsistent verdicts. Pointing out that the jury convicted [*34] him of attempted first degree murder but also found that he was not armed with a firearm, he argues that he "was found guilty as an accomplice when the evidence did not support it." n62

n62 Br. of Appellant (Miller) at 31.

Because "[j]uries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity," and "[d]espite the inherent discomfort surrounding inconsistent verdicts," n63 both the United States Supreme Court and Washington Supreme Court have

held that a general or special verdict adverse to a defendant will not be vacated merely because it is inconsistent with a general or special verdict favorable to the defendant. n64 It must, in addition, be unsupported by sufficient evidence. If it is supported by sufficient evidence, it will be upheld.

n63 *State v. Goins, 151 Wn.2d 728, 92 P.3d 181, 183 (2004)* (citing *United States v. Powell, 469 U.S. 57, 68, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)* and *Dunn v. United States, 284 U.S. 390, 392-93, 52 S. Ct. 189, 76 L. Ed. 356 (1932)).*

[*35]

n64 *Powell 469 U.S. at 65*; *Dunn, 284 U.S. at 393*; *Goins, 92 P.3d at 183-84*; *State v. McNeal, 145 Wn.2d 352, 357, 37 P.3d 280 (2002)*; *State v. Ng, 110 Wn.2d 32, 48, 750 P.2d 632 (1988).*

The verdict in issue here is the general one by which Miller was convicted of attempted murder in the first degree. For reasons already discussed, it is supported by sufficient evidence. It is not subject to vacation even if inconsistent with the special verdict finding that Miller was not armed with a firearm.

XI. CUMULATIVE ERROR

Each of the defendants argues that the cumulative effect of the trial court's errors denied their right to a fair trial. Having found no error, we hold to the contrary.

Any remaining arguments need not be reached or clearly lack merit.

Affirmed.

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

Morgan, A.C.J.

We concur: [*36]

Armstrong, J.

Hunt, J.

APPENDIX "C"

Acords Record

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

IN RE PERSONAL RESTRAINT PETITION OF: ROBERT BONDS, Petitioner.	NO. 33704-5-II AFFIDAVIT OF THERESE KAHN

STATE OF WASHINGTON)
: ss.
COUNTY OF PIERCE)

The undersigned, being first duly sworn upon oath, deposes and says:

1. I am employed with the Pierce County Prosecutor's Office as a legal assistant.

930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

2. That I have prepared the attached record entitled, "Events for Case #288478". That this is a true and accurate copy of the ACORDS record in this matter from the direct appeal.

Further your affiant sayeth naught.

THERESE KAHN

SUBSCRIBED AND SWORN to before me this 4th day of October, 2005.

NOTARY PUBLIC, in and for the State of Washington, residing at Pierce Co.
My Commission Expires: 5/22/08

930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

Events for Case # 288478

Date	Item	Action	Participant
05/09/2005	Disposed	Status Changed	PONZOHA, DAVID
05/09/2005	Mandate	Filed	PONZOHA, DAVID
05/06/2005	Court of Appeals case file (pouch) ***Comment:*** *from SC*	Received by Court	
05/03/2005	Prv denied ***Comment:*** *Mr. Bond's pro se supp prv is also denied*	Filed	
03/24/2005	Other filing ***Comment:*** *Pet Bond's supp pet for rev is accepted for filing (mot to mod clerk's rul was treated as mot to reconsider R. Carpenter's determination to reject supp prv)*	Information - not filed	
03/14/2005	Notice of Substitution of Counsel **Service Date:** 2005-03-14 ***Comment:*** *Mary Kay High substitutes for P. Mhoon (Miller)*	Filed	
12/03/2004	Letter ***Comment:*** *Enclosed please find one box of verbatim report of proceedings (20 volumes) filed in the above-referenced matter. They were discovered on our exhibit shelf and should have been sent up with our file on 9/21/04. This matter appears to be set on your 5/3/05 calendar. We apologize for any inconvenience.*	Sent by Court	PONZOHA, DAVID
12/02/2004	Report of Proceedings ***Comment:*** *1 box (20 volumes) vrp sent to SC (see let snt 12/3/04)*	Sent by Court	
10/13/2004	Other filing ***Comment:*** *SC#75949-9*	Information - not filed	
09/21/2004	Court of Appeals case file (pouch) ***Comment:*** *2 boxes (4 pouches) w/printed briefs to SC (no ff w/any of three PRV's) SC# 75949-9*	Sent by Court	
09/15/2004	Petition for Review ***Comment:*** *(Miller) w/cc (no ff)*	Filed	MHOON, PATTIE
09/15/2004	Petition for Review	Filed	GRIFFITH, RITA

	Comment: *(Bonds) w/cc (no ff)*		JOAN
09/14/2004	Petition for Review **Service Date:** 2004-09-14 ***Comment:*** *(Bonds) no ff*	Filed	BOUCHEY, REBECCA WOLD
09/09/2004	Other filing ***Comment:*** *lettter rec'd from SC advising Mr. Bonds that his mot to file late prv denied*	Information - not filed	
08/25/2004	Cost Bill **Service Date:** 2004-08-25 ***Comment:*** *by Respondent State for: $4.087.69 (State: $12.69); (A.I.D.F.: $4,075.00) Robert Bonds*	Filed	PROCTOR, KATHLEEN
08/25/2004	Cost Bill ***Comment:*** *by Respondent State for: $6,289.69 (State: $12.69) A.I.D.F.: $6,277.00) (Tonya Wilson)*	Filed	PROCTOR, KATHLEEN
08/25/2004	Cost Bill **Service Date:** 2004-08-25 ***Comment:*** *by respondent State for: $21,519.48 (State: $12.69); A.I.D.F.: $21,506.79 (Spencer Miller)*	Filed	PROCTOR, KATHLEEN
08/17/2004	Decision Filed	Status Changed	MORGAN, J DEAN
08/17/2004	Opinion **Service Date:** 2004-08-17 **Pages:** 22 **Publishing Status:** Unpublished **Publishing Decision:** Affirmed **Opinion Type:** Majority **Opinion Number:** 2004-00992 **JUDGE:** Morgan J Dean **ROLE: Authoring** **JUDGE:** Armstrong David H. **ROLE: Concurring** **JUDGE:** Hunt J. Robin **ROLE: Concurring**	Filed	MORGAN, J DEAN
02/25/2004	Respondent Additional Authorities **Service Date:** 2004-02-25 ***Comment:*** *circulated to panel/lawclerk; ccs for brief shelf*	Filed	PROCTOR, KATHLEEN
02/23/2004	Heard and awaiting decision	Status Changed	
02/23/2004	Oral Argument Hearing ***Comment:*** *9:00 AM Hunt J. Robin Morgan J Dean*	Scheduled	

APPENDIX "D"

Jury Instruction

CERTIFIED COPY

01-1-06020-3 16454094 CTINJY 04-09-02

IOR COURT OF THE STATE OF WASHINGTON

AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

SPENCER LEROY MILLER,
ROBERT CHARLES BONDS, JR.,
TONYA ROCHELLE WILSON,

Defendants.

NO. 01-1-05476-9
NO. 01-1-06020-3
NO. 01-1-06021-1

COURT'S INSTRUCTIONS TO THE JURY

DATED this 2nd day of ~~March~~ April, 2001.

Frank E. Cuthbertson
JUDGE

FILED
IN OPEN COURT
DEPT 21
APR - 2 2002
BOB SANDOUCIE, Clerk
By DEPUTY

ORIGINAL

CLK287 4/18/2002 436[illegible]

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendants of the charges. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the eviden introduced by all parties bearing on the question. Every party is entitled to the benefit of the evider whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be testimony of each. In considering the testimony of any witness, you may take into account

opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdicts. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdicts.

INSTRUCTION NO. 2

Each defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged against each defendant. The State is the plaintiff, and has the burden of proving each element of each crime against each defendant beyond a reasonable doubt.

Each defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

A defendant is not compelled to testify, and the fact that a defendant has not testified cannot be used to infer guilt or prejudice him or her in any way.

INSTRUCTION NO. 6

You may give such weight and credibility to any alleged out-of-court statements of defendants Spencer Miller and Tonya Wilson as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 7

You may not consider an admission or incriminating statement made out of court by one defendant as evidence against a codefendant.

INSTRUCTION NO. 6

Evidence that a witness has been convicted of a crime may be considered by you in deciding what weight or credibility should be given to the testimony of the witness and for no other purpose.

INSTRUCTION NO. 9

A person commits the crime of Attempted Murder in the First Degree when, with intent to commit Murder in the First Degree, he or she or an accomplice does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 10

The elements of the completed crime of Murder in the First Degree are: (1) with premeditated intent to cause the death of another person, and (2) causes the death of such person or of a third person.

INSTRUCTION NO. 11

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. 12

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 13

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

INSTRUCTION NO. 14

If you are convinced that a defendant participated in the crime(s) charged in Counts I and II or their inferior degrees and that the crime(s) have been proved beyond a reasonable doubt, you need not determine whether that defendant acted as a principal or an accomplice.

INSTRUCTION NO. 15

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

INSTRUCTION NO. 16

To convict defendant Spencer Leroy Miller of the crime of Attempted Murder in the First Degree as charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the First Degree;

(2) That the act was done with the intent to commit Murder in the First Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

To convict defendant Robert Charles Bonds, Jr. of the crime of Attempted Murder in the First Degree as charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the First Degree;

(2) That the act was done with the intent to commit Murder in the First Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

To convict defendant Tonya Rochelle Wilson of the crime of Attempted Murder in the First Degree as charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the First Degree;

(2) That the act was done with the intent to commit Murder in the First Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

To convict defendant Spencer Leroy Miller of the crime of Attempted Murder in the First Degree as charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the First Degree;

(2) That the act was done with the intent to commit Murder in the First Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

To convict defendant Robert Charles Bonds, Jr. of the crime of Attempted Murder in the First Degree as charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the First Degree;

(2) That the act was done with the intent to commit Murder in the First Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

To convict defendant Tonya Rochelle Wilson of the crime of Attempted Murder in the First Degree as charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the First Degree;

(2) That the act was done with the intent to commit Murder in the First Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

A person commits the crime of Assault in the First Degree when, with intent to inflict great bodily harm, he or she or an accomplice assaults another with a firearm or with any deadly weapon or by any force or means likely to produce great bodily harm or death.

INSTRUCTION NO. 23

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 24

An assault is an intentional shooting of another person, with unlawful force, that is harmful or offensive, regardless of whether any physical injury is done to the person. A shooting is offensive if it would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 25

The term "deadly weapon" includes any firearm, whether loaded or not.

INSTRUCTION NO. 26

To convict defendant Spencer Leroy Miller of the crime of Assault in the First Degree as alternatively charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice intentionally assaulted another person thereby assaulting Daron Edwards;

(2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 27

To convict defendant Robert Charles Bonds, Jr. of the crime of Assault in the First Degree as alternatively charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice intentionally assaulted another person thereby assaulting Daron Edwards;

(2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 28

To convict defendant Tonya Rochelle Wilson of the crime of Assault in the First Degree as alternatively charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice intentionally assaulted another person thereby assaulting Daron Edwards;

(2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29

To convict defendant Spencer Leroy Miller of the crime of Assault in the First Degree as alternatively charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice intentionally assaulted another person thereby assaulting Keith Harrell;

(2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO 30

To convict defendant Robert Charles Bonds, Jr. of the crime of Assault in the First Degree as alternatively charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice intentionally assaulted another person thereby assaulting Keith Harrell;

(2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 31

To convict defendant Tonya Rochelle Wilson of the crime of Assault in the First Degree as alternatively charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice intentionally assaulted another person thereby assaulting Keith Harrell;

(2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 32

If you are not satisfied beyond a reasonable doubt that one or more of the defendants is guilty of a crime charged, that defendant or those defendants may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish guilt of such lesser crime beyond a reasonable doubt.

The crime of Attempted Murder in the First Degree necessarily includes the inferior degree crime of Attempted Murder in the Second Degree.

The crime of Assault in the First Degree necessarily includes the inferior degree crime of Assault in the Second Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two degrees that person is guilty, he or she shall be convicted only of the lower degree.

INSTRUCTION NO. 33

A person commits the crime of Attempted Murder in the Second Degree when, with intent to commit Murder in the Second Degree crime, he or she or an accomplice does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 34

The elements of the completed crime of Murder in the Second Degree are: (1) with intent to cause the death of another person but without premeditation, (2) causes the death of such person or of a third person.

INSTRUCTION NO. 35

To convict defendant Spencer Leroy Miller of Attempted Murder in the Second Degree, the inferior degree crime of Attempted Murder in the First Degree as charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the Second Degree;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 36

To convict defendant Robert Charles Bonds, Jr. of Attempted Murder in the Second Degree, the inferior degree crime of Attempted Murder in the First Degree as charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the Second Degree;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 37

To convict defendant Tonya Rochelle Wilson of Attempted Murder in the Second Degree, the inferior degree crime of Attempted Murder in the First Degree as charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the Second Degree;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 30

To convict defendant Spencer Leroy Miller of Attempted Murder in the Second Degree, the inferior degree crime of Attempted Murder in the First Degree as charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the Second Degree;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 39

To convict defendant Robert Charles Bonds, Jr. of Attempted Murder in the Second Degree, the inferior degree crime of Attempted Murder in the First Degree as charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the Second Degree;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

To convict defendant Tonya Rochelle Wilson of Attempted Murder in the Second Degree, the inferior degree crime of Attempted Murder in the First Degree as charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice did an act which was a substantial step toward the commission of Murder in the Second Degree;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 41

A person commits the crime of Assault in the Second Degree when, under circumstances not amounting to Assault in the First Degree he or she or an accomplice assaults another with a deadly weapon.

INSTRUCTION NO. 42

To convict defendant Spencer Leroy Miller of Assault in the Second Degree, the inferior degree crime of Assault in the First Degree as alternatively charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice assaulted Daron Edwards with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 43

To convict defendant Robert Charles Bonds, Jr. of Assault in the Second Degree, the inferior degree crime of Assault in the First Degree as alternatively charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice assaulted Daron Edwards with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 44

To convict defendant Tonya Rochelle Wilson of Assault in the Second Degree, the inferior degree crime of Assault in the First Degree as alternatively charged in Count I (Daron Edwards), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice assaulted Daron Edwards with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 45

To convict defendant Spencer Leroy Miller of Assault in the Second Degree, the inferior degree crime of Assault in the First Degree as alternatively charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice assaulted Keith Harrell with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 46

To convict defendant Robert Charles Bonds, Jr. of Assault in the Second Degree, the inferior degree crime of Assault in the First Degree as alternatively charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice assaulted Keith Harrell with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

To convict defendant Tonya Rochelle Wilson of Assault in the Second Degree, the inferior degree crime of Assault in the First Degree as alternatively charged in Count II (Keith Harrell), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant or an accomplice assaulted Keith Harrell with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 48

For purposes of a special verdict, the State must prove beyond a reasonable doubt that each of the defendants or an accomplice was armed with a firearm at the time of the commission of the crimes charged. This instruction applies to both Count I and Count II and to all crimes in each count, including both Attempted Murder in the First Degree and Attempted Murder in the Second Degree as charged and both Assault in the First Degree and Assault in the Second Degree as alternatively charged.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

INSTRUCTION NO. 49

A person commits the crime of Unlawful Possession of a Firearm in the First Degree when he has previously been convicted of a serious offense and knowingly owns or has in his possession or control any firearm.

INSTRUCTION NO. 60

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 51

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.

INSTRUCTION NO. 52

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 53

To convict defendant Robert Charles Bonds, Jr. of the crime of Unlawful Possession of a Firearm in the First Degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of October, 2001, the defendant knowingly owned a firearm or had a firearm in his possession or control;

(2) That the defendant had previously been convicted of a serious offense; and

(3) That the ownership, possession, or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 54

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant or each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

INSTRUCTION NO. 56

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 56

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, two verdict forms A and B for each defendant for each count of attempted murder, two alternative verdict forms, A and B, for each defendant for each alternative count of assault, and one verdict form for Count III.

When you are deliberating Count I, you will first consider the crime of Attempted Murder in the First Degree as charged. If you unanimously agree on a verdict as to any of the defendants, you must fill in the blank provided in Verdict Form A for that defendant the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict for one or the other of the defendants, do not fill in the blank provided in Verdict Form A for that defendant.

If you find any of the defendants guilty on Verdict Form A, do not use Verdict Form B for that defendant and do not consider the alternative crime of Assault in the First Degree for that defendant. If you find any of the defendants not guilty of the crime of Attempted Murder in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will then consider the alternative crime of Assault in the First Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Alternative Verdict Form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Alternative Verdict Form A.

If you find any of the defendants guilty on Alternative Verdict Form A, do not use Verdict Form

B or Alternative Verdict Form B for that defendant. If you find any of the defendants not guilty of the alternative crime of Assault in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will then consider the inferior degree crime of Attempted Murder in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

If you find any of the defendants guilty on Verdict Form B, do not use Alternative Verdict Form B for that defendant. If you find any of the defendants not guilty of the inferior degree crime of Attempted Murder in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will then consider the inferior degree crime of Assault in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Alternative Verdict Form B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Alternative Verdict Form B.

You will use the same procedure when you are deliberating Count II.

For both Counts I and II, you will first consider Attempted Murder in the First Degree, then, if necessary, Assault in the First Degree, then, if still necessary, Attempted Murder in the Second Degree, then, if necessary, Assault in the Second Degree for each defendant.

If you find any of the defendants guilty of the crime of Attempted Murder but have a reasonable doubt as to which of two degrees of that crime that defendant is guilty, it is your duty to find that defendant not guilty on Verdict Form A and to find that defendant guilty of the inferior degree crime on Verdict Form B.

If you find any of the defendants guilty of the crime of assault but have a reasonable doubt as to which of two degrees of that crime that defendant is guilty, it is your duty to find that defendant not

guilty on Alternative Verdict Form A and to find that defendant guilty of the inferior degree crime on Alternative Verdict Form B.

Since this is a criminal case, each of you must agree for you to return a verdict on any count against any defendant. When all of you have so agreed, fill in the proper verdict forms to express your decision. The presiding juror will sign them and notify the judicial assistant, who will conduct you into court to declare your verdicts.

INSTRUCTION NO. 57

You will also be furnished with a Special Verdict Form for each defendant for each count. If you find any defendant not guilty on a count, do not use the Special Verdict Form for that defendant for that count. If you find any defendant guilty, you will then use the Special Verdict Form for that defendant for that count and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer "yes" to the question on any Special Verdict Form, you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".