

FILED
COURT OF APPEALS

Court of Appeals No. 33907-2-II

06 MAR 26 AM 11:21

STATE OF WASHINGTON

BY

FILED

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

FRANKLIN-SCOTT DELA CRUZ,

Defendant/Appellant.

APPELLANT 'S OPENING BRIEF

**Appeal from the Superior Court of Pierce County,
Cause No. 04-1-01624-1
The Honorable Thomas Felnagle, Presiding Judge**

**Sheri L. Arnold
Attorney for Appellant
WSBA No. 18760**

**P. O. Box 7718
Tacoma, Washington 98406
email: SLARNOLD@2002yahoo.com
(253) 759-5940**

TABLE OF CONTENTS

	<u>Page(s)</u>
I. ASSIGNMENTS OF ERROR	1
II. ISSUES PRESENTED.....	1
1. Does a trial court abuse its discretion when it allows highly prejudicial and irrelevant evidence to be presented to the jury?.....	1
2. Does the admission of highly prejudicial and irrelevant evidence deny a defendant his right to a fair trial by an impartial jury?	1
3. Does the trial court invade the fact finding province of the jury when it bases an evidentiary ruling on a determination of witness credibility?	1
III. STATEMENT OF THE CASE.....	1-4
A. Procedural Background	1
B. Factual Background	3
IV. SUMMARY OF TESTIMONY	4
V. ARGUMENT.....	46- 54
The trial court's admission of evidence relating to Mr. Dela Cruz's possession of handguns unrelated to the charges in this case at the time of his arrest violated Mr. Dela Cruz's right to a fair trial	46
A. The trial court abused its discretion in allowing evidence of Mr. Dela Cruz's possession of other firearms at the time he was arrested.....	46-52

i.	Evidence of the other guns was barred by ER 401 and 402.	
ii.	Evidence of the other guns was barred by ER 403.	
iii.	Evidence of the other guns was barred by ER 404(b).	
B.	The trial court’s admission of the evidence prejudiced the jury against Mr. Dela-Cruz, violating his right to a fair trial.....	52
C.	In ruling that evidence of the guns was admissible based on its belief that Mr. Dela-Cruz’s testimony was not credible, the trial court invaded the fact-finding province of the jury.....	52-54
VI.	CONCLUSION	54

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Federal Cases

<u>Moody v. U.S.</u> , 376 F.2d 525 (9th Cir.1967)	49
<u>U.S. Warledo</u> , 557 F.2d 731(10th Circ.1977).....	49

Washington Cases

<u>State v. Freeburg</u> , 105 Wn.App 492, 20 P.3d 984 (2001), <u>appeal after new sentencing hearing</u> , 120 Wn.App. 192, 84 P.3d 292, 152 Wn.2d 1022, 101 P.3d 108 (2004)	49
<u>State v. Holmes</u> , 43 Wn.App. 397, 717 P.2d 766, <u>review denied</u> , 106 Wn.2d 1003 (1986)	51
<u>State v. Jungers</u> , 125 Wn.App. 895, 106 P.3d 827 (2005)	52
<u>State v. Latham</u> , 100 Wn.2d 59, 667 P.2d 56 (1983)	46
<u>State v. McHenry</u> , 88 Wn.2d 211, 558 P.2d 188 (1977)	46
<u>State v. Messinger</u> , 8 Wn.App. 829, 509 P.2d 382 (1973), <u>review denied</u> , 82 Wn.2d 1010 (1973), <u>cert. denied</u> , 415 U.S. 926, 94S.Ct. 1433, 39 L.Ed.2d 483 (1974)	48
<u>State v. Oughton</u> , 26 Wn.App. 74, 612 P.2d 812, <u>review denied</u> , 94 Wn.2d 1005 (1980)	49
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995)	47

State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984),
appeal after remand, 108 Wn.2d 734, 743 P.2d 210 (1987),
cert. denied, Rupe v. Washington, 486 U.S. 1061,
108 S.Ct. 2834, 100 L.Ed.2d 934 (1988), habeas corpus granted,
Rupe v. Wood, 863 F.Supp. 1315 (1994),
affirmed, 93 F.3d 1434 (1996), cert. denied, 519 U.S. 1142,
117 S.Ct. 1017, 136 L.Ed.2d 894(1997)50

Other Authorities

ER 40148

ER 40248

ER 40349

ER 40451

I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in allowing evidence relating to Mr. Dela Cruz's possession of firearms other than the murder weapon at the time he was arrested.
2. The trial court's admission of evidence relating to Mr. Dela Cruz's possession of firearms other than the murder weapon prejudiced the jury against Mr. Dela Cruz and denied him his State and Federal Constitutional right to a fair trial by an impartial jury.
3. The trial court invaded the fact finding province of the jury when it allowed the evidence of Mr. Dela Cruz's possession of other guns when he was arrested based on the court's belief that Mr. Dela Cruz's testimony wasn't credible.

II. ISSUES PRESENTED

1. Does a trial court abuse its discretion when it allows highly prejudicial and irrelevant evidence to be presented to the jury? (Assignment of Error No. 1)
2. Does the admission of highly prejudicial and irrelevant evidence deny a defendant his right to a fair trial by an impartial jury? (Assignment of Error No. 2)
3. Does the trial court invade the fact finding province of the jury when it bases an evidentiary ruling on a determination of witness credibility? (Assignment of Error No. 3)

III. STATEMENT OF THE CASE

A. Procedural Background

On April 2, 2004, Mr. Dela-Cruz was charged with Murder in the Second Degree while armed with a firearm. CP 1-3. On July 21, 2004,

Mr. Dela Cruz filed notice that he intended to claim self defense at trial.
CP 4.

Pre-trial, *inter alia*, Mr. Dela Cruz moved to exclude evidence that he possessed two guns not associated with this case at the time of his arrest on grounds that his possession of guns other than the murder weapon at the time of his arrest was irrelevant and would be more prejudicial to Mr. Dela Cruz than probative of any issue of fact. CP 13-35, RP 12-20, 5-31-05.¹ The trial court granted the motion to exclude the evidence, but also ruled that if the State was able to establish a more specific basis for the introduction of the evidence than mere propensity, the State could introduce the evidence after an offer of proof outside the presence of the jury. RP 20, 5-31-05.

The prosecutor moved for the court to reconsider its ruling and allow evidence that Mr. Dela Cruz had possession of other guns at the time he was arrested, arguing that this evidence would demonstrate that Mr. Dela Cruz was armed with more guns on the night Mr. Reyes was shot and therefore was not acting in self defense when he shot Mr. Reyes. RP 56-57, 7-20-05. The Court denied the prosecutor's motion, agreeing with defense counsel that Mr. Dela Cruz's possession of the guns two months

¹ The Report of Proceedings is not numbered contiguously between volumes. Reference to the transcript will be by page number followed by date the hearing was held.

after the shooting had nothing to do with Mr. Dela Cruz's intent or possession of other guns on the night of the shooting. RP 57-61, 7-20-05.

Later, the prosecutor again moved the court to allow the introduction of evidence that Mr. Dela Cruz had possession of two other guns at the time of his arrest. RP 69, 7-27-05. This time, the prosecutor argued that evidence relating to Mr. Dela Cruz's possession of guns at the time of his arrest was admissible,

Because of the nature of what the charges are in this case and the evidence about possession of the guns and the corroboration of what Mr. Kelderhouse has said, and he's denied that he had the .40 caliber that night on his person, that it was back in the motel room, I think that the State should be allowed to go into the fact that he had two guns on his person when he was arrested.

RP 69, 7-27-05.

Defense counsel again argued that the order in limine should bar this evidence and that the evidence was more prejudicial against Mr. Dela Cruz than it was probative of the facts surrounding Mr. Reyes' shooting. RP 70, 7-27-05.

This time, the trial court reversed its earlier ruling barring evidence that Mr. Dela Cruz had possession of two guns other than the murder weapon at the time he was arrested and held that,

The Court has gone as far as it's going to go with trying to adhere to the idea that we stick to the events

involved...[Mr. Dela Cruz] is on trial, and he has to live with what he's been conveying to the jury, and what he's been conveying to the jury is a clear indication that he doesn't have anything to do with guns and he's unfamiliar with them and this was a terrible accident, and it's not facts. It's not the case in the real world. I am going to allow the State to inquire.

RP 71-72, 7-27-05.

The following day, defense counsel made a motion for the court to reconsider its ruling. RP 3-4, 7-28-05. The court denied the motion and clarified its ruling, giving two grounds for the ruling: first, the evidence of Mr. Dela Cruz's possession of other firearms at the time of his arrest was allowed in to rebut Mr. Dela Cruz's testimony that he was unfamiliar with guns; and second, if Mr. Dela Cruz had access to a number of firearms,

It's much more likely, as is the State's theory, that he's going to the car for the specific purpose of obtaining a gun, because he's got access to all kinds of guns and he knows there are guns around.

RP 5-7, 7-28-05.

Mr. Dela Cruz was found guilty of second degree murder (CP 196) while armed with a firearm. CP 199. Mr. Dela Cruz was sentenced to 244 months plus the 60 month firearm enhancement. CP 213-223.

B. Factual Background

At approximately 10 P.M. on March 15, 2004, Mr. Reyes was returning to his home at 5617 South I Street. CP 1-3. Mr. Reyes

encountered a large green SUV parked in the parking spot in front of his house and began arguing with the female passenger of the SUV, Ms. Jessica Larsen. CP 1-3. Mr. Reyes went to the neighboring home and knocked on the door, telling the occupants that he wanted cars moved. CP 1-3. During the course of the argument, Mr. Dela Cruz approached the SUV from the vicinity of the neighboring home and joined the argument. CP 1-3.

Ms. Larsen said something that greatly increased Mr. Reyes' anger and he quickly approached the SUV, slamming the door. CP 1-3. Witnesses reported to police that the slamming of the SUV door might have closed the door on Ms. Larsen's legs, pinning them. CP 1-3. Mr. Dela Cruz went to the driver's door of the Yukon and retrieved a handgun, and shot Mr. Reyes. CP 1-3. Mr. Dela Cruz then got into the SUV and left the scene. CP 1-3.

On May 21, 2004, Mr. Dela Cruz was arrested. RP 70, 7-20-05. At the time of his arrest he had a backpack. RP 72, 7-20-05. At the time of his arrest, Mr. Dela Cruz had the gun that had shot Mr. Reyes in his backpack, as well as another gun in the backpack and a third weapon tucked in his pants. RP 74-77, 7-27-05.

IV. SUMMARY OF TESTIMONY

David Johnson

David Johnson lives at 56th and I street in Tacoma. RP 52, 7-18-05. At 10 P.M. on the evening of March 15, 2004, Mr. Johnson was in his bed having just turned off the TV to go to sleep. RP 52-53, 7-18-05. Mr. Johnson's bedroom is on the second floor of his home. RP 66, 7-18-05. There is a window in Mr. Johnson's bedroom which faces the street and his bed is next to the window. RP 53, 7-18-05. Mr. Johnson heard an argument coming from the street so he looked out the window. RP 53-18-05.

Mr. Johnson heard two male voices yelling back and forth. RP 58, 7-18-05. He heard what sounded like two people arguing but saw three when he looked out his window. RP 53-54, 7-18-05. Mr. Johnson saw two males and a female. RP 56, 7-18-05. All three were standing around a large SUV. RP 56, 7-18-05. The female was inside the vehicle on the passenger side, one male was on the driver's side, and the other male was to the rear of the vehicle on the passenger's side. RP 56-57, 7-18-05. Mr. Johnson heard the female screaming and heard the man at the back of the SUV saying something to the effect of "that's what you get for putting your hands on my girl." RP 74, 7-18-05.

Mr. Johnson saw the man at the back of the SUV turn around, start walking away, and then turn back towards the SUV and begin to walk back towards it. RP 75, 7-18-05 Mr. Johnson observed the man standing on the driver's side of the SUV reach into the driver's side of the SUV, pull out a handgun, yell at the man behind the SUV for about 30 seconds, then reach over the SUV and shoot the man standing at the back of the vehicle. RP 59-60, 7-18-05. Mr. Johnson could not specifically remember where the man who fired the gun was standing, but he estimated that the man who fired the gun was about ten feet away from the man who was shot. RP 60, 7-18-05. Mr. Johnson heard three or four shots fired in rapid succession. RP 61, 7-18-05. Mr. Johnson testified that it looked the man who was shot was facing the man with the gun and backing up with his hands raised when the shots were fired. RP 60-61, 70, 7-18-05. After the shots were fired the SUV drove off and Mr. Johnson went downstairs and told his wife to call 911. RP 61, 7-18-05.

After being shot, the man at the rear of the SUV staggered backwards and fell down in the yard of a home. RP 61-62, 7-18-05. Mr. Johnson went over to see if he could help the man. RP 62, 7-18-05. After Mr. Johnson arrived at the man's side a woman arrived on the scene, but then ran off quickly. RP 62-63, 7-18-05.

Mr. Johnson saw that the man was bleeding from wounds in his stomach and arm. RP 63, 7-18-05. Mr. Johnson asked the man his name and if the man could identify the man who shot him. RP 63, 7-18-05. The man said he did not know who shot him. RP 64, 7-18-05. Mr. Johnson thought the man told him his name was Jerry. RP 64, 7-18-05.

Mr. Johnson heard the fire crew approaching the scene and his wife calling for him to speak to the dispatcher on the phone, so he left the man who had been shot and went back to his house and spoke with the dispatcher. RP 64-65, 7-18-05. Mr. Johnson spoke to the dispatcher then went back outside until the fire crew arrived on scene. RP 65, 7-18-05. During this time Mr. Johnson did not see anyone else outside. RP 65, 7-18-05.

Mr. Johnson was unable to give a description of the men he saw arguing. RP 69, 7-18-05. When Mr. Johnson contacted the man who had been shot, he smelled a strong odor of intoxicants. RP 72, 7-18-05.

Monica Lapoole

Ms. Lapoole has a fifteen-year-old son, a six-year-old daughter, and is currently attending TCC. RP 83, 7-18-05. Ms. Lapoole has known Jerry Reyes since she was in the eighth grade. RP 84, 7-18-05. Mr. Reyes was in Mr. Lapoole's grade and attended her junior high school. RP 85, 7-

18-05. Ms. Lapoole and Mr. Reyes were boyfriend and girlfriend off and since the eighth grade. RP 85-86, 7-18-05. Ms. Lapoole was 34 at the time of trial. RP 131, 7-18-05.

In 2003, Jerry Reyes moved in with Mr. Lapoole at her house located at 56th & I street in Tacoma. RP 86-87, 7-18-05. Ms. Lapoole's home did not have a garage or a driveway, so Ms. Lapoole parked on the street or in the alley behind her house. RP 89, 7-18-05.

In March of 2004, there was construction in the alley so Ms. Lapoole parked in front of her house. RP 89, 7-18-05. Parking in front of the house was difficult because there was many people coming and going from the house next door to Ms. Lapoole's. RP 90, 7-18-05.

On March 15, 2006, Ms. Lapoole was waiting in her home after 8:30 P.M. for Mr. Reyes to come home. RP 95, 7-18-05. Ms. Lapoole saw Mr. Reyes' vehicle coming down the street, so she went outside to greet him. RP 100-101, 7-18-05. Ms. Lapoole saw Mr. Reyes park his car on the opposite side of the street and ask the white, female passenger of a dark colored Explorer if she could move the Explorer so Mr. Reyes could park closer to Ms. Lapoole's house. RP 102-103, 7-18-05. Mr. Reyes was very agitated and mad. RP 153, 7-18-05.

Mr. Reyes and the female began to argue and Mr. Reyes got out of his vehicle and began to approach the female in the Explorer. RP 103-104, 7-18-05. The discussion between Mr. Reyes and the female became heated. RP 108, 7-18-05. Both Mr. Reyes and the female were angry and yelling at each other. RP 109, 7-18-05.

As Mr. Reyes and the female were arguing, Mr. Dela Cruz ran up to Mr. Reyes and began yelling in his face. RP 109-110, 7-18-05. Mr. Reyes and Mr. Dela Cruz began yelling and cursing at each other. RP 114, 7-18-05. After arguing for awhile, Mr. Reyes stopped speaking with Mr. Dela Cruz and went to speak with the boyfriend of the owner of the house next to Ms. Lapoole's. RP 115-116, 7-18-05.

Mr. Reyes spoke with the neighbor's boyfriend and told him to tell his people to stop parking in front of Ms. Lapoole's house. RP 120, 7-18-05. After speaking to the boyfriend, Mr. Reyes walked back to the street towards Ms. Lapoole's car, but Mr. Reyes was still angry. RP 120, 7-18-05.

Mr. Reyes and Mr. Dela Cruz argued some more and the female passenger of the SUV got out of the SUV and began yelling at Mr. Reyes. RP 121, 7-18-05. During this time Ms. Lapoole did not see where Mr. Dela Cruz was. RP 122, 7-18-05. Mr. Reyes grabbed the passenger door

of the SUV and called the female passenger a bitch. RP 123, 7-18-05. Ms. Lapoole grabbed Mr. Reyes' arm and she and Mr. Reyes began walking back toward her house. RP 123-124, 7-18-05.

As Ms. Lapoole and Mr. Reyes approached Ms. Lapoole's house, Mr. Dela Cruz ran around the SUV to a distance of six feet away from Mr. Reyes and shot Mr. Reyes. RP 125-126, 7-18-05. Mr. Reyes fell to the ground and a man came running from across the street. RP 128, 7-18-05. Mr. Reyes and the female passenger got back in the SUV and drove away. RP 129, 7-18-05.

After the shooting, Ms. Lapoole was shown a series of photographs and asked to identify Mr. Dela Cruz, but she was unable to do so. RP 137, 7-18-05. On another occasion Ms. Lapoole identified somebody else as the man who shot Mr. Reyes. RP 137, 7-18-05.

Mark Golden

Mr. Golden lives in Tacoma at 5640 South "I" Street. RP 41, 7-19-05. On the evening of March 15, 2004, Mr. Golden was home with his wife and stepson. RP 41-42, 7-19-05. Around ten P.M. Mr. Golden was watching TV in his bedroom when he heard an argument outside his home. RP 42, 7-19-05. Mr. Golden heard two men and a woman arguing.

RP 43, 7-19-05. Mr. Golden got up, turned off his porch light and went outside to see what was going on. RP 42, 7-19-05.

Four or five houses down from Mr. Golden's house, and on the other side of the street, Mr. Golden saw two men standing on the sidewalk arguing with each other. RP 43, 7-19-05. Mr. Golden identified Mr. Dela Cruz in the courtroom as one of the men, but could not make the identification based on what he observed the night of the shooting. RP 46. The other man involved in the argument was wearing a white t-shirt. RP 45, 7-19-05. The man in the white t-shirt was by the rear of the SUV, about five feet towards the sidewalk. RP 48-49, 7-19-05.

Mr. Golden saw Mr. Dela Cruz go to the front driver's side of a dark colored SUV, reach inside, walk back around to the front of the car, and then Mr. Golden heard a woman's voice. RP 45, 47, 7-19-05. When Mr. Dela Cruz got to the passenger side headlight, Mr. Golden heard the sound of a gun cocking. RP 49, 7-19-05. After the gun was cocked, Mr. Golden heard a female voice say, "You better put that away." RP 50, 7-19-05. Mr. Dela Cruz then walked to within four feet of the man in the white shirt and shot him. RP 50, 7-19-05. Mr. Golden testified that immediately before the shooting the man in the white shirt appeared to turn as the gun went off. RP 51 7-19-05.

After the shooting, Mr. Dela Cruz got into the SUV and left. RP 52, 7-19-05.

Thomas Kelderhouse

Mr. Kelderhouse testified pursuant to a plea agreement with the State. RP 62, 7-19-05. Mr. Kelderhouse has been charged with and convicted of numerous crimes in both King and Pierce Counties. RP 63-64, 7-19-05. Mr. Kelderhouse knows Mr. Dela Cruz and was his friend at the time of the shooting. RP 65-66, 7-19-05.

On March 15, 2004, Mr. Dela Cruz was driving Mr. Kelderhouse's 1995 Yukon. RP 75, 7-19-05. That evening, Mr. Kelderhouse was visiting with a friend of his who lived at 56th and I. RP 75-76, 7-19-05. Mr. Kelderhouse was standing in the kitchen of his friend's house smoking methamphetamine when he heard arguing outside. RP 78-79, 7-19-05. The voices were male and female and were cussing. RP 79, 7-19-05.

Several minutes later, Mr. Reyes knocked on Mr. Kelderhouse's friend's door. RP 79, 7-19-05. Mr. Kelderhouse's friend, Rob, answered the door. RP 79, 7-19-05. Mr. Reyes was angry and grabbed Rob by the shirt and began pushing him around the porch of the house, yelling and screaming about people parking in front of Mr. Reyes' house. RP 79-80, 7-19-05.. Mr. Kelderhouse could smell alcohol on Mr. Reyes' breath. RP

137-138, 7-19-05. Rob did not yell or fight back, and after a little while Mr. Kelderhouse went outside and told Rob and Mr. Reyes that he was going to move his car to stop the problem. RP 80-81, 7-19-05. As Mr. Kelderhouse walked off the porch of Rob's house to move his car, Mr. Reyes also walked back over to Mr. Dela Cruz and continued arguing with him and the female passenger in the Yukon. RP 81, 7-19-05.

Mr. Dela Cruz's Yukon was parked three to four feet behind Mr. Kelderhouse's car. RP 82, 7-19-05. As Mr. Kelderhouse approached his car he saw Mr. Dela Cruz standing at the passenger side of the Yukon next to the fender. RP 80, 7-19-05. The female passenger was sitting in the passenger seat of the Yukon and her door was open all the way and her feet were on the running board of the vehicle. RP 82-83, 7-19-05. Mr. Kelderhouse got into his car and started the engine. RP 83, 7-19-05.

As Mr. Kelderhouse entered his car, two friends of Mr. Reyes got out of Mr. Reyes' car and approached Mr. Kelderhouse. RP 85, 93-94, 7-19-05. Mr. Kelderhouse got back out of his car and was threatened by Mr. Reyes' friends. RP 95, 7-19-05.. Mr. Kelderhouse told them that he didn't want any trouble and that he was just moving his car. RP 95, 7-19-05. The two men continued to taunt and swear at Mr. Kelderhouse. RP 95, 7-19-05.

At this time Mr. Reyes was arguing with the female passenger of the Yukon and he slammed the door on her legs. RP 96, 7-19-05. Mr. Dela Cruz then went to the driver's door of the Yukon, retrieved a pistol belonging to Mr. Kelderhouse from under the driver's seat, walked back around to the passenger side of the vehicle and shot Mr. Reyes. RP 98-99, 7-19-05. Mr. Dela Cruz was 25-30 feet away from Mr. Reyes when he fired the gun. RP 101, 7-19-05. Mr. Dela Cruz then got into the driver's seat of the Yukon and drove away. RP 102, 7-19-05. Ms. Lapoole was not standing next to Mr. Reyes when he was shot. RP 141, 7-19-05.

Two days after the shooting, Mr. Kelderhouse saw Mr. Dela Cruz and Mr. Dela Cruz told Mr. Kelderhouse that Mr. Reyes "got what was coming to him for hurting Jessica." RP 106, 7-19-05. Mr. Dela Cruz told Mr. Kelderhouse that he used Mr. Kelderhouse's gun to shoot Mr. Reyes because Mr. Kelderhouse's gun wasn't as nice as the one Mr. Dela Cruz had and Mr. Kelderhouse's gun was easier to replace. RP 107, 7-19-05.

The day before Mr. Dela Cruz was arrested, Mr. Dela Cruz picked up Mr. Kelderhouse and took him back to Mr. Dela Cruz's apartment. RP 108, 7-19-05. Mr. Deal Cruz asked Mr. Kelderhouse if he had said anything to the police. RP 108, 7-19-05. Mr. Dela Cruz told Mr. Kelderhouse that if Mr. Kelderhouse had talked to the police and the

police showed up to Mr. Dela Cruz's apartment Mr. Dela Cruz would shoot Mr. Kelderhouse and have a shoot-out with the police. RP 108, 7-19-05.

Patrick O'Neill

Mr. O'Neill is a police officer in Tacoma. RP 4, 7-20-05. He responded to Ms. Lapoole's house on the night of the shooting. RP 5, 7-20-05. When Mr. O'Neill responded to the scene he discovered bullet fragments in Mr. Reyes' clothing. RP 8, 7-19-05. Another officer, Officer White, picked up the bullet fragments and put them in a plastic bag. RP 9, 7-20-05. The fragments were left with Mr. Reyes' clothing in order for the forensics examiners to get them. RP 9, 7-20-05. Mr. O'Neill observed a forensic technician retrieve the bullet fragments, but he could not identify who the technician was. RP 10, 7-20-05.

While on the scene, Mr. O'Neill also found six spent bullet casings in a planting strip between the curb and the sidewalk. RP 10-11, 7-20-05. Mr. O'Neill also spoke to a person named Christin Cerbes who lived at 5613 South I street, the house immediately to the north of the house where Mr. Reyes was shot. RP 12-13, 7-20-05.

Ronald Lewis

Mr. Lewis is a detective with the Tacoma Police Department. RP 36, 7-20-05. The morning after Mr. Reyes was shot, Mr. Lewis was made aware of the shooting at a morning briefing when he was assigned to go back to the area of the shooting and do a canvas. RP 37-38, 7-20-05. r. Lewis and another detective, Mr. Warner, canvassed the west side of the 5600 block of South I street. RP 38, 7-20-05.

After canvassing the neighborhood, Mr. Lewis, Mr. Warner, Detective Pendrak, and another detective went to the location of the shooting and searched the ground in the area of the shooting. RP 39, 7-20-05. Using his fingers and a stick, Mr. Lewis located a copper slug buried an inch or two in the ground. RP 39. Mr. Lewis marked the slug and called forensics who recovered the slug and placed it into evidence. RP 40, 7-20-05.

Alfred Pendrak

Mr. Pendrak is a detective with the Tacoma Police Department. RP 47, 7-20-05. Mr. Pendrak was asked to assist in the canvassing of the 5600 block of I Street the day after the shooting. RP 48, 7-20-05. Mr. Pendrak canvassed the block with the assistance of Detective Devault. RP 48, 7-20-05. When Mr. Pendrak completed canvassing the block, he returned to the scene of the shooting to assist in the search for further

evidence. RP 49, 7-20-05. Mr. Pendrak located a shell casing in the street. RP 49, 7-20-05. Mr. Pendrak pointed it out to the men doing evidence collection and then marked the casing and protected it until it was collected. RP 49-50, 7-20-05.

Ron Tennyson

Mr. Tennyson is a police officer with Tacoma Police Department. RP 64, 7-20-05. On May 21, 2004, Mr. Tennyson responded to an address in Lakewood in order to assist in the arrest of Mr. Dela Cruz. RP 65, 7-20-05. Mr. Tennyson and Sergeant White took up a containment position. RP 65, 7-20-05. Mr. Tennyson heard over the radio that Mr. Dela Cruz had come out of the front door, so he began to approach that area. RP 66, 7-20-05. As Mr. Tennyson approached the front door, Mr. Dela Cruz came through an opening in a hedge. RP 66, 7-20-05. Mr. Tennyson detained Mr. Dela Cruz until he was arrested. RP 67-68, 7-20-05. Mr. Dela Cruz was in possession of a backpack when he was arrested. RP 68, 7-20-05.

Thomas White

Mr. White is a sergeant with the Tacoma Police Department. RP 69, 7-20-05. On May 21, 2004, Mr. White responded with Mr. Tennyson to assist in the arrest of Mr. Dela Cruz. RP 70, 7-20-05. After Mr.

Tennyson detained Mr. Dela Cruz, Mr. White arrested Mr. Dela Cruz. RP 72, 7-20-05. Mr. White also saw the backpack in Mr. Dela Cruz's possession. RP 72, 7-20-05. Mr. White and Mr. Tennyson observed the backpack until Officer Stephen arrived to watch over it. RP 72, 7-20-05.

Patrick Stephen

Mr. Stephen is a Tacoma police officer. RP 74, 7-20-05. On May 21, 2004, Mr. Stephen was ordered to watch the backpack after the arrest of Mr. Dela Cruz. RP 75, 7-20-05. Mr. Stephen eventually opened the backpack and found a gun inside. RP 76, 7-20-05. Sergeant Stringer, Sergeant Gustafson, and a forensics technician were also present when the backpack was opened. RP 76, 7-20-05.

Brandon Cockroft

Mr. Cockroft is a police officer for the city of Tacoma. RP 77, 7-20-05. On March 15, 2004, Mr. Cockroft was working the night shift partnered with Officer Brian Kim. RP 78, 7-20-05. Mr. Cockroft and Mr. Kim responded to a call of shots fired in the area of 5600 South "I." RP 79, 7-20-05. En route the officers were advised that there was a possible shooting victim. RP 79-80, 7-20-05.

Upon arriving at the scene of the shooting, Mr. Cockroft located Mr. Reyes lying on the ground. RP 80, 7-20-05. Mr. Cockroft also saw

Ms. Lapoole. RP 81, 7-20-05. Mr. Cockroft learned Mr. Reyes' identity from Ms. Lapoole. RP 82, 7-20-05.

Mr. Cockroft took Ms. Lapoole inside her house to interview her. RP 84-85, 7-20-05. Ms. Lapoole told Mr. Cockroft that Mr. Reyes had confronted a dark SUV and that there was a heated exchange. RP 86, 7-20-05. Ms. Lapoole told Mr. Cockroft that after the argument Mr. Reyes turned to go back into the house and the driver of the SUV shot Mr. Reyes. RP 87, 7-20-05.

Darren Kelly

Mr. Kelly is a police officer for the City of Tacoma. RP 101, 7-20-05. On March 15, 2004, Mr. Kelly was dispatched to the area of 56th and I Street in response to a report of shots fired. RP 101-102, 7-20-05. Prior to arriving, Mr. Kelly was advised that there might have been a shooting victim. RP 102, 7-20-05. When Mr. Kelly arrived at the scene, he observed a white male lying on his back on the side of the road. RP 102-103, 7-20-05. Mr. Kelly attempted to ask Mr. Reyes what had happened or if he knew who had shot him, but Mr. Kelly received no response. RP 104-105, 7-20-05. Medical aid units arrived shortly thereafter and placed Mr. Reyes in an ambulance. RP 105, 7-20-05. Mr. Kelly followed the ambulance with Mr. Reyes to St. Joseph's Hospital. RP 105, 7-20-05.

Mr. Reyes did not say anything to Mr. Kelly in the hospital. RP 106, 7-20-05.

Roberto Ramoso

Mr. Ramoso is an associate medical examiner for Pierce County. RP 24, 7-21-05. On March 16, 2004, Mr. Ramoso conducted the autopsy of Mr. Reyes. RP 32, 7-21-05.

Mr. Reyes suffered four gunshot wounds. RP 36, 7-21-05. At the time of autopsy, the blood in Mr. Reyes' body had an alcohol content of .08 grams per 100 ML. RP 54-55, 7-21-05. At the time of the shooting, Mr. Reyes' blood alcohol content would have been higher since Mr. Reyes had survived for several hours after being shot and he had received transfusions of blood at the hospital. RP 55-56, 7-21-05.

Based on the direction of the injuries, Mr. Reyes was shot from the left and rear of his body orientation. RP 56, 7-21-05.

Scott Creek

Mr. Creek works for the City of Tacoma Forensic Services Unit. RP 80, 7-21-05. On May 21, 2004, Mr. Creek was deployed to the scene of Mr. Dela Cruz's arrest. RP 81, 7-21-05. Mr. Creek recovered a 9mm handgun from the backpack in Mr. Dela Cruz's possession. RP 81-82, 7-21-05.

Toni Martin

Ms. Martin is a forensic specialist employed by the Tacoma Police Department. RP 4, 7-25-05. On March 15, 2004, Ms. Martin was working when she heard the call on the radio regarding the shooting at Ms. Lapoole's house. RP 5-6, 7-25-05. Ms. Martin proceeded to the scene on her own. RP 6, 7-25-05. When she arrived at the scene, Ms. Martin was informed it would be a death investigation so she began to process the scene by videotaping and photographing it. RP 7, 7-25-05.

Timothy Taylor

Mr. Taylor is a forensic specialist with the Tacoma Police Department. RP 51, 7-25-05. On March 16, 2004, Mr. Taylor was dispatched to the 5600 block of South I Street in Tacoma to collect additional evidence. RP 52, 7-25-05. Mr. Taylor recovered a bullet fragment and two shell casings. RP 57-58, 7-25-05.

Robert Yerbury

Mr. Yerbury is a detective with the City of Tacoma. RP 62, 7-25-05. Mr. Yerbury responded to Ms. Lapoole's house on the evening of March 15, 2004. RP 62, 7-25-05. Mr. Yerbury was assigned to be the lead investigator of the shooting. RP 65, 7-25-05. Mr. Yerbury interviewed Ms. Lapoole. RP 66, 68-69, 7-25-05. Mr. Yerbury was also

present for the interviews of Robert MacDonald, Christin Cerbes, TJ Kelderhouse, and Aslicia Dougherty-Randall which took place in the kitchen of Ms. Lapoole's neighbor's home. RP 68, 7-25-05.

On March 16, 2004, Mr. Yerbury showed Ms. Lapoole a photomontage. RP 71, 7-25-05. At the time Mr. Yerbury showed Ms. Lapoole the photomontage, Mr. Yerbury had developed Joshua Mullens as a person of interest. RP 71-72. Ms. Lapoole picked Joshua Mullens out of the photomontage as a person who looked like the person who shot Mr. Reyes. RP 72, 7-25-05. Mr. Yerbury contacted Mr. Mullens and cleared him as a suspect in the case. RP 73, 7-25-05.

On March 19, 2004, Mr. Yerbury interviewed Mr. Kelderhouse again. RP 73, 7-25-05. Mr. Kelderhouse admitted witnessing the shooting of Mr. Reyes, but did not identify who had shot Mr. Reyes. RP 74, 7-25-05.

At some point, Detective Yerbury showed Ms. Lapoole a photo lineup which included Mr. Dela Cruz's picture, but Ms. Lapoole was unable to identify Mr. Dela Cruz as the man who shot Mr. Reyes. RP 74. 7-25-05.

On April 1, 2004, Mr. Yerbury interviewed Rob MacDonald again. RP 74, 7-25-05. On April 2, 2004, Mr. Yerbury obtained an arrest warrant for Mr. Dela Cruz. RP 74, 7-25-05.

On April 8, 2004, Mr. Yerbury interviewed Mr. Kelderhouse again, and this time Mr. Kelderhouse identified a picture of Mr. Dela Cruz as a picture of the shooter and told Mr. Yerbury that the shooter's name was Bob. RP 75, 7-25-05.

Brenda Lawrence

Ms. Lawrence is a forensic scientist with the Washington State Patrol Crime Laboratory. RP 105, 7-25-05.

On May 25, 2004, Ms. Lawrence received seven cartridge cases from the Tacoma Police Department and asked to do testing on them. RP 111-114, 7-25-05. Ms. Lawrence determined that the cartridges all were fired in the same gun. RP 114, 7-25-05.

Ms. Lawrence also examined three fired bullets and two fired bullet fragments. RP 112-115. Ms. Lawrence determined that the bullets were 9mm Luger bullets and the bullet fragments were consistent with being 9mm Luger bullets. RP 114-115, 7-25-05. Ms. Lawrence determined that the bullets had all been fired from the same gun. RP 115, 7-25-05.

Ms. Lawrence also received a 9mm Ruger pistol in relation to this case for examination. RP 115, 7-25-05. Ms. Lawrence began her examination of the gun on July 22, 2004. Ms. Lawrence determined that the 9mm pistol had fired the cartridges, the three intact bullets, and one of the bullet fragments. RP 120-122, 7-25-05.

Elsa Whitney

Mrs. Whitney lives at 5630 South I Street. RP 83, 7-26-05. On the evening of March 15, 2004, Mrs. Whitney was at home quilting. RP 84, 7-26-05. Mrs. Whitney heard voices then heard gunshots. RP 84-85, 7-26-05. Mrs. Whitney went to her front porch and looked down the street and saw a white car with somebody standing on the driver's side in front of her house. RP 85, 7-26-05. Mrs. Whitney saw the person standing next to the white car converse with the driver, then the white car drove off. RP 88, 7-26-05.

Clyde Whitney

Mr. Whitney is the husband of Mrs. Whitney, and also lived at 5630 South I Street. RP 89, 7-26-05. On March 15, 2004, Mr. Whitney was home with his wife, watching TV. RP 89-90, 7-26-05. That evening, Mr. Whitney heard the squealing of tires, then three to five minutes later heard gunfire. RP 90, 7-26-05. When Mr. Whitney heard the gunshots he

went out onto his porch and saw the white car parked in front of his house. RP 91, 7-26-05. The white car left shortly after the shots were fired. RP 92, 7-26-05.

Manzell Evans

On the evening of March 15, 2004, Mr. Evans went to the store on the corner of 56th and I Street. RP 95, 7-26-05. As Mr. Evans approached the store he heard men arguing about a parking spot. RP 97-98, 7-26-05. Mr. Evans went into the store for about ten minute and when he exited he heard gunshots. RP 98, 7-26-05. After Mr. Evans heard the shots he went to the locations where he heard the shots come from. RP 99, 7-26-05. By the time Mr. Evans arrived at the scene of the shooting, the police had already arrived. RP 100, 7-26-05.

Upon arriving, Mr. Evans saw two bullets on the ground right in front of him on the street. RP 102-103, 106, 7-26-05. Mr. Evans pointed them out to the police and the police put an evidence marker over the bullets. RP 103, 7-26-05.

Amy Narath

In March of 2004, Ms. Narath lived at 5618 South I Street. RP 119, 7-26-05. Ms. Narath was acquainted with Ms. Lapoole. RP 119, 7-26-05.

On March 15, 2004, Ms. Narath was returning home from school around 10:20 P.M. when she heard Mr. Reyes honk his horn three times. RP 121, 7-26-05. Ms. Narath walked to her window and saw Mr. Reyes' car in the middle of the road with the parking lights on and the driver's door open, but Mr. Reyes was not in the vehicle. RP 121-122, 7-26-05. Ms. Narath turned around and walked about five steps back into the room and heard gunshots. RP 126, 7-26-05. There were two minutes, at most, between the honking and the gunshots. RP 126, 7-26-05.

Mr. Reyes' vehicle remained in the middle of the road until after the police came, but was moved when the medics and fire personnel came. RP 127, 7-26-05. Ms. Narath also observed a white Suburban parked on the street which moved. RP 129, 7-26-05.

Hollie Stone

On March 15, 2004, Ms. Stone lived at 5624 South I Street. RP 136, 7-26-05. Ms. Stone knew Ms. Lapoole. RP 137, 7-26-05. Ms. Stone also knows the Whitneys. RP 137, 7-26-05.

At 10P.M. on March 15, 2004, Ms. Stone was sleeping. RP 138, 7-26-05. Ms. Stone was awakened by gunshots. RP 139, 7-26-05. Ms. Stone got out of bed and looked out her front door. RP 139, 7-26-05. Ms. Lapoole didn't see anything so she went to her side window, opened it,

and looked out. RP 139-141, 7-26-05. Ms. Stone saw Ms. Lapoole, then Ms. Stone went outside. RP 141, 7-26-05. While outside, Ms. Stone saw Mr. Reyes' car in the street with its lights on. RP 141-142, 7-26-05.

While outside, Ms. Stone also saw Mr. Evans. RP 145, 7-26-05. Ms. Stone observed Mr. Evans point the bullets out to the police. RP 147-148, 7-26-05.

Franklin-Scott Dela Cruz

Early in the evening of March 15, 2004, Mr. Dela Cruz was with Mr. Kelderhouse, Mr. Kelderhouse's girlfriend, Alicia, and Mr. Dela Cruz's girlfriend, Jessica Larsen. RP 15, 7-27-05. At 8P.M. they left and went to the house of Rob, Mr. Kelderhouse's friend. RP 15, 7-27-05.

After Rob and his girlfriend left, Mr. Dela Cruz and Ms. Larsen went by Mr. Kelderhouse's parent's house then went by Rob's house to tell Mr. Kelderhouse where Mr. Dela Cruz was going. RP 15, 7-27-05. Mr. Dela Cruz was driving Mr. Kelderhouse's 1995 Yukon. RP 15, 7-27-05. Mr. Dela Cruz went to Rob's house around 10 P.M.. RP 16, 7-27-05.

Ms. Larsen is Mr. Dela Cruz's girlfriend. RP 16. Ms. Larsen is the mother of Mr. Dela Cruz's child and is deaf. RP 16, 7-27-05. In order to communicate with Ms. Larsen, Mr. Dela Cruz has to look at her so she may read his lips. RP 16-17, 7-27-05.

Upon arriving at Rob's house, Mr. Dela Cruz went inside to tell Mr. Kelderhouse where he was going. RP 17-19, 7-27-05. While Mr. Derla Cruz was inside Rob's home he heard a car horn beep a few times. RP 19, 7-27-05. Mr. Dela Cruz thought it was Ms. Larsen, so he went back outside. RP 19, 7-27-05.

As Mr. Dela Cruz was walking towards the Yukon, he saw a car parked in the street. RP 19, 7-27-05. The car had its lights on and Mr. Dela Cruz saw a person in the car was yelling. RP 20, 7-27-05. Mr. Dela Cruz walked up to the person in the car and the person in the car began yelling at Mr. Dela Cruz, asking him if the Yukon was his car and telling Mr. Dela Cruz to move the Yukon. RP 20, 7-27-05. The man yelling was "pissed off" and yelling at Mr. Cruz to move his car before the man moved it for him. RP 21, 7-27-05. Mr. Dela Cruz told the person it was no problem and that Mr. Dela Cruz was about to leave anyway. RP 20-21, 7-27-05. Mr. Dela Cruz apologized to the man for being in his parking space and began walking towards the Yukon. RP 21, 7-27-05.

As Mr. Dela Cruz walked towards the Yukon, the man in the car followed Mr. Dela Cruz and continued to yell and cuss at him. RP 21, 7-27-05. Mr. Dela Cruz told the man in the car that he was moving the Yukon and the man in the car drove off fast, "burning out" and making the

tires on his car squeal, and parked his car. RP 22-23, 7-27-05. Mr. Dela Cruz noticed the man reaching for something under the seat of the car. RP 24, 7-27-05. After parking, the man jumped out of his car and ran up to Mr. Dela Cruz yelling that he was about to beat Mr. Dela Cruz up. RP 23, 7-27-05. The man was really mad and drunk. RP 23, 7-27-05.

Mr. Dela Cruz asked the man to get out of his way since the man was in the way of Mr. Dela Cruz getting to the Yukon. RP 24, 7-27-05. The man yelled at Mr. Dela Cruz for five to ten seconds, then Ms. Larsen jumped out of the Yukon to find out what was going on. RP 25, 7-27-05. Mr. Reyes turned around and spat on Ms. Larsen's face. RP 26, 7-27-05. Mr. Reyes began calling Mr. Larsen a bitch and told her she should leave before he hurts her too. RP 26, 7-27-05.

Mr. Reyes began to go after Ms. Larsen when Mr. Lapoole came running out of her house and Ms. Lapoole and Mr. Dela Cruz got in the way of Ms. Larsen and Mr. Reyes. RP 27, 7-27-05. Mr. Reyes was still very angry but he turned around and ran up to Rob's house. RP 28, 7-27-05. Mr. Dela Cruz began to try and get Ms. Larsen into the Yukon and had gotten her onto the running board when he turned around and saw Mr. Reyes standing behind him on the passenger side of the Yukon. RP 29, 7-27-05. Mr. Reyes continued to threaten to beat up Mr. Dela Cruz. RP 29,

7-27-05. Several seconds later Mr. Dela Cruz saw Mr. Kelderhouse. RP 30, 7-27-05.

Mr. Dela Cruz walked around to the front of the Yukon intending to leave, but Mr. Reyes followed him to the driver's side and the driver's side door was locked. RP 30, 7-27-05. Mr. Reyes continued to yell at Mr. Dela Cruz and gesturing as if he was going to pull something out of his pants or strike Mr. Dela Cruz with something. RP 30-31, 7-27-05. At this time Mr. Kelderhouse was at his car and Mr. Reyes approached Mr. Kelderhouse and asked Mr. Kelderhouse if he "wanted some of this" and insulted him. RP 31, 7-27-05.

While Mr. Reyes was engaged with Mr. Kelderhouse, Mr. Dela Cruz walked back around to the passenger side of the Yukon and unlocked the doors. RP 32, 7-27-05. Mr. Dela Cruz walked back around to the driver's side of the vehicle but as he was walking around he heard Ms. Larsen yell and then heard a loud bang. RP 33, 7-27-05. Mr. Dela Cruz ran and opened the driver's door and saw Ms. Larsen laying on the driver's seat trying to get away from Mr. Reyes. RP 33-34, 7-27-05. Mr. Dela Cruz saw Mr. Reyes' hands reaching over the top of the passenger door. RP 34, 7-27-05.

Mr. Dela Cruz reached into the Yukon looking for something he could use to get Mr. Reyes away from Mr. Dela Cruz. RP 34, 7-27-05. Mr. Dela-Cruz found Mr. Kelderhouse's gun under the driver's seat of the Yukon and ran over to the passenger side. RP 34, 7-27-05. Mr. Reyes raised his hands up and said, "Now you're playing my game." RP 34, 7-27-05. Mr. Reyes reached into his pants so Mr. Dela Cruz fired shot into the ground by Mr. Dela Cruz's legs but the gun fired so fast that it bucked up. RP 35, 7-27-05. Mr. Dela Cruz thought Mr. Reyes was going to pull a gun out of his pants. RP 63, 7-27-05. After the shots were fired, Mr. Dela Cruz ran back to the Yukon and drove away. RP 35, 7-27-05.

When he retrieved the gun from the Yukon, Mr. Dela Cruz was scared for his and Ms. Larsen's safety because Mr. Reyes was drunk and Mr. Dela Cruz knows Mr. Reyes. RP 36, 7-27-05. Mr. Reyes' older brother, David, was one of Mr. Dela Cruz's friends. RP 36, 7-27-05. David told Mr. Dela Cruz that he did not want Mr. Reyes around his family because Mr. Reyes was always drinking and in and out of prison and jail. RP 37, 7-27-05. Mr. Dela Cruz knew that Mr. Reyes had been in prison for rape, for beating a kid up with a pipe, and that Mr. Reyes was always in and out of jail for domestic violence and beating up his girlfriends. RP 38, 7-27-05.

Mr. Dela Cruz is five foot six inches tall and Mr. Reyes was a head taller than Mr. Dela Cruz. RP 39, 7-27-05. Mr. Dela Cruz was afraid of Mr. Reyes and believed that he was in danger. RP 40, 7-27-05.

Mr. Dela Cruz did not have any other guns in his possession at the time of the shooting. RP 65-66, 7-27-05.

When Mr. Dela Cruz was arrested he had the gun that shot Mr. Reyes in a sock in his backpack. RP 74-75, 7-27-05. After Mr. Reyes was shot, Mr. Dela Cruz gave the gun back to Mr. Kelderhouse, but Mr. Kelderhouse's girlfriend tried to get rid of it. RP 75, 7-27-05. Mr. Dela Cruz got the gun back several days before he was arrested. RP 75, 7-27-05. Mr. Dela Cruz also had a .45 caliber gun in his possession when he was arrested. RP 75, 7-27-05. Mr. Dela Cruz took it out of his pocket and dropped it on the ground when he was arrested. RP 75-76, 7-27-05. Mr. Dela Cruz had had the gun for a week prior to his arrest. RP 76, 7-27-05. Mr. Dela Cruz also had a .22 gun in his backpack when he was arrested. RP 77, 7-27-05. This gun did not belong to Mr. Dela Cruz and he had only had the gun for a couple days before he was arrested. RP 77-78, 7-27-05.

Between March 15 and may 21, 2004, Mr. Dela Cruz was afraid of the police and of Mr. Reyes' family and friends because they were saying they were going to kill him and Ms. Larsen. RP 79, 82, 7-27-05.

Stephanie Bussell

Ms. Bussell is Ms. Lapoole's sister. RP 89, 7-27-05. Ms. Bussell also had known Mr. Reyes for many years. RP 90, 7-27-05.

After Mr. Reyes was shot, Ms. Lapoole called Ms. Bussell and told her that Mr. Reyes had been shot. RP 92, 7-27-05. Ms. Bussell called her mother and her father and told them what was going on, and then drove over to Ms. Lapoole's house with her friend and son. RP 93, 7-27-05. When Ms. Bussell arrived, Mr. Reyes was being loaded into the ambulance. RP 93, 7-27-05.

Teresa Bell

Ms. Bell is a surgeon specializing in care for trauma patients. RP 13, 7-28-05. Ms. Bell treated Mr. Reyes at St. Joseph Medical Center on March 16, 2004. RP 14-15, 7-28-05. Mr. Reyes received huge amounts of blood products, including multiple units of blood as well as platelets and plasma. RP 15-16, 7-28-05. Additionally, Mr. Reyes received IV fluids non-stop during his treatment. RP 17, 7-28-05. The volume of blood products received by Mr. Reyes would have diluted his blood to the point

that the blood drawn at his autopsy might not have contained any of Mr. Reyes' original blood. RP 17-19, 7-28-05. Blood from a blood bank would not have a high alcohol content. RP 20, 7-28-05.

John Diedrich

Mr. Diedrich works for the Tacoma Fire Department as a firefighter/paramedic. RP 28, 7-28-05.

On March 15, 2004, Mr. Diedrich was dispatched to the area of 56th and I Street. RP 29, 7-28-05. Mr. Diedrich transported Mr. Reyes to St. Joseph Hospital. RP 30, 7-28-05. During the transport Mr. Reyes received a saline IV in each arm. RP 30, 7-28-05. Also during transport a member of Mr. Diedrich's crew smelled the odor of alcohol or intoxicants. RP 31, 7-28-05.

Michael Howard

Mr. Howard is a forensic scientist. RP 32, 7-28-05. Mr. Howard examined some clothing items in this case for gunshot residue or any firearm residue. RP 40, 7-28-05. When Mr. Howard received the clothes, the clothes had not been examined by any other persons and the clothes were all stuffed together in one bag. RP 42, 7-28-05. To avoid cross contamination of trace evidence, clothes should be packaged individually. RP 34-36, 7-28-05.

Mr. Howard found bullet holes in the leg of Mr. Reyes' pants. RP 42-56, 7-28-05. Based on Mr. Howard's examination of the bullet holes, when Mr. Reyes' leg was shot it had to be raised in such a manner that the hem of the pant had to have been towards the shooter as well as above the level of the knee. RP 56-66, 7-28-05.

Mr. Howard also found blood and bullet holes on Mr. Reyes' jacket which matched the bullet wounds discovered on Mr. Reyes in the autopsy. RP 68-98, 7-28-05.

Mr. Howard also examined Mr. Reyes' t-shirt and discovered holes which matched those in the jacket. RP 101-103, 7-28-05.

Robert MacDonald

On March 15, 2004, Mr. MacDonald lived at 5613 South I Street with Christin Cerbes. RP 130, 7-28-05. That evening Mr. Kelderhouse paid a visit to Mr. MacDonald with his girlfriend, Felicia, and his baby. RP 131, 7-28-05. Mr. Dela Cruz and his girlfriend also came by Mr. MacDonald's house. RP 132, 7-28-05. Mr. Dela Cruz came up to Mr. MacDonald's house alone. RP 132, 7-28-05. Mr. Dela Cruz only stayed at the house for a short period of time, but while he was there Mr. MacDonald heard some yelling and screaming outside. RP 132, 7-28-05.

After Mr. MacDonald heard the voices there was a knock on his door. RP 133, 7-28-05. When Mr. MacDonald opened the door Mr. Reyes was standing there. RP 133, 7-28-05. Mr. Reyes was very upset. RP 133, 7-28-05. Mr. Reyes told Mr. MacDonald that he was sick and tired of Mr. MacDonald's friends parking their cars in front of Mr. Reyes' house and that Mr. MacDonald's friends needed to move their cars and if they didn't that there would be fighting. RP 134, 7-28-05. Mr. MacDonald asked Mr. Kelderhouse and Mr. Dela Cruz to move their cars and they left the house to do so. RP 134, 7-28-05. Mr. Reyes followed Mr. Kelderhouse and Mr. Dela Cruz down the steps towards the cars. RP 134, 7-28-05. Mr. MacDonald stepped onto the porch with Mr. Kelderhouse's girlfriend. RP 134, 7-28-05. Mr. MacDonald was able to see what was going on out in the yard. RP 135, 7-28-05.

Mr. Reyes was walking back and forth between the cars, yelling at Mr. Kelderhouse and Mr. Dela Cruz, yelling and swearing at them. RP 135, 7-28-05. While Mr. Reyes was yelling at Mr. Dela Cruz, Mr. Dela Cruz's girlfriend, Ms. Larsen, opened the door of the Yukon and began to yell at Mr. Reyes. RP 136, 7-28-05.

Mr. Reyes responded by hitting Ms. Larsen in the mouth and she fell back onto the passenger seat in the Yukon. RP 138, 7-28-05. Mr.

Reyes then kicked the door of the Yukon shut and it closed on Ms. Larsen's legs, 7-28-05. At that point Mr. Dela Cruz went to the driver's side of the Yukon and grabbed a gun. RP 139, 7-28-05. As Mr. Dela Cruz came back around the front of the Yukon, Mr. Kelderhouse had a gun drawn and pointed at Mr. Reyes. 139, 7-28-05. Mr. Dela Cruz said "Don't ever touch my girlfriend" and fired three shots. RP 141, 7-28-05. Mr. Dela Cruz fired three shots, which Mr. MacDonald thought missed Mr. Reyes, then Mr. Dela Cruz fired three more shots. RP 141, 7-28-05. At that point Mr. Reyes fell to the ground and Mr. MacDonald went back into his house. RP 141, 7-28-05. Mr. MacDonald observed two people in the back of Mr. Reyes' car. RP 152, 7-28-05.

Jessica Larsen

Ms. Larsen is Mr. Dela Cruz's girlfriend. RP 18, 8-1-05.

On the day of the shooting, Ms. Larsen knew that Mr. Dela Cruz did not have a gun tucked into his pants because she was cuddling with him all day. RP 21, 8-1-05.

When Mr. Dela Cruz and Ms. Larsen went to Mr. MacDonald's house that evening, Ms. Larsen stayed in the Yukon and listened to music while Mr. Dela Cruz went inside Mr. MacDonald's house. RP 23-24, 8-1-05. As Ms. Larsen sat in the Yukon, she saw a purple Sable drive down

the quickly and stop in front of the Yukon. RP 25-26, 8-1-05. The Sable stopped in the middle of the street with its lights on, skidding its tires. RP 26, 8-1-05.

A man in the Sable started to yell at Ms. Larsen. RP 26-27, 8-1-05. The man yelling had a beet red face and yelling at Ms. Larsen furiously. RP 27, 8-1-05. Ms. Larsen is deaf, so she couldn't hear what the man was saying, but she could tell by his body language that he was furious. RP 27, 8-1-05.

Eventually, Mr. Dela Cruz came out of Mr. MacDonald's house and approached Mr. Reyes. RP 28, 8-1-05. Mr. Reyes then parked his car and walked up to Mr. MacDonald's house. RP 29, 8-1-05. When Mr. Reyes came back from Mr. MacDonald's house, Mr. Kelderhouse came down with him and Mr. Reyes began yelling at Mr. Dela Cruz. RP 30, 8-1-05.

Mr. Reyes was yelling at Mr. Dela Cruz and at Ms. Larsen. RP 33, 8-1-05. Ms. Larsen was yelling at Mr. Reyes, trying to get him to calm down. RP 34, 8-1-05. Mr. Reyes continued to yell at Ms. Larsen and Mr. Kelderhouse, swearing at them and insulting them. RP 34-35, 8-1-05.

When Mr. Dela Cruz and Mr. Kelderhouse were in the street, Ms. Larsen was partly in the Yukon and partly out of the Yukon. RP 33, 8-1-

05. Ms. Larsen's door was partly open and she had one foot on the curb and one in the Yukon. RP 38, 8-1-05. Mr. Reyes walked over to Ms. Larsen and continued arguing with her. RP 40, 8-1-05. Ms. Larsen was getting scared and tried to get back into the Yukon. RP 40, 8-1-05. Ms. Larsen had one leg out of the Yukon and was closing the door but Mr. Reyes caught his arm inside the door. RP 41-42, 8-1-05.

Mr. Reyes continued yelling at Ms. Larsen and was spitting on the window of the Yukon and trying to punch her. RP 42-43, 8-1-05. Ms. Larsen was afraid that Mr. Reyes was going to hurt her. RP 44, 8-1-05. Mr. Reyes smelled like liquor. RP 44, 8-1-05. Ms. Larsen was trying to pull her leg in and kick Mr. Reyes off at the same time. RP 46, 8-1-05. Ms. Larsen was yelling because she was afraid of Mr. Reyes and Mr. Reyes was hurting her. RP 52, 8-1-05.

Mr. Kelderhouse was standing in front of the Yukon and Ms. Larsen saw Mr. Kelderhouse and Mr. Dela Cruz pull guns at the same time. RP 53, 8-1-05. Mr. Reyes was standing in front of Mr. Dela Cruz and both men were facing Mr. Reyes. RP 55, 8-1-05. Mr. Reyes ran up to Mr. Dela Cruz and began jumping around as if he was going to pull a gun. RP 56-57, 8-1-05. Mr. Dela Cruz then shot Mr. Reyes (RP 60, 8-1-05) then got back in the Yukon and drove away. RP 63, 8-1-05. After Mr.

Dela Cruz shot Mr. Reyes, Mr. Dela Cruz looked scared. RP 76-77, 8-1-05.

As Mr. Dela Cruz and Ms. Larsen drove away, Ms. Larsen told Mr. Dela Cruz that he didn't have to do that. RP 65, 8-1-05. Ms. Larsen said that trying to express he feeling that Mr. Dela Cruz did not have to put his life on the line for her. RP 65, 8-1-05.

Clifford Nelson

Mr. Nelson is a medical examiner and forensic pathologist. RP 132, 8-1-05. Mr. Nelson was hired in this case by the defense team to review the autopsy report and answer questions for the defense team. RP 149, 8-1-05.

During his treatment in the emergency room, Mr. Reyes received between 15 and 17 liters of blood related products and medication. RP 156, 8-1-05. Mr. Reyes had a blood volume of approximately 5.64 liters. RP 156-157, 8-1-05.

Mr. Reyes' blood alcohol level was reported at .08, but it would have been considerably higher prior to his receiving the blood products. RP 157, 8-1-05. Mr. Nelson describes the gunshot wounds to Mr. Reyes. RP 157-176, 8-1-05, RP 5-21, 8-2-05.

Keith Richard Whitehead

Mr. Whitehead has been a practicing criminal defense attorney since 1977. RP 46, 8-2-05. Mr. Whitehead explains the SRA sentencing grid and the ramifications of Mr. Dela Cruz's plea bargain on his sentence. RP 47-68, 8-2-05.

Brian Vold

Mr. Vold is a detective with the Tacoma Police Department. RP 76, 8-2-05.

On April 8, 2004, Mr. Vold contacted Ms. Larsen after she had been arrested and brought to the criminal investigations division. RP 77, 8-2-05. Detective Yerbury and Mr. Vold interviewed Ms. Larsen. RP 78, 8-2-05. No sign language interpreter was present for the interview, even though Mr. Vold knew Ms. Larsen had a hearing impairment. RP 78, 8-2-05.

Initially Ms. Larsen denied being present when Mr. Reyes was shot, but then admitted to being there and fleeing with Mr. Dela Cruz. RP 79, 8-2-05. Ms. Larsen said that the door had been slammed on her leg. RP 85-85, 8-2-05.

Ms. Larsen was asked if she would agree to give a taped statement and she didn't want to, stating that, "If Frank found out that I was talking to you, I would be dead in a day." RP 81, 8-2-05.

On July 15, 2005, Mr. Vold was present at an interview of Ms. Larsen conducted by the prosecutor. RP 82, 8-2-05. Ms. Larsen told the prosecutor that her legs were not injured when Mr. Reyes attacked her. RP 83, 8-2-05.

Ronald Lewis

On April 26, 2004, Ronald Lewis drove Ms. Larsen from a motel in Fife to the Pierce Transit Center at 19th and Mildred in Tacoma. RP 111, 8-2-05. During the ride Ms. Larsen told Mr. Lewis that she could not testify in court because it could get her killed. RP 112-113, 8-2-05.

Alicia Dougherty-Randall

Ms. Dougherty-Randell knows Mr. Dela Cruz and Ms. Larsen and is Mr. Kelderhouse's finacé. RP 116-117, 8-2-05. Ms. Dougherty-Randell also knows Mr. MacDonald. RP 117, 8-2-05.

On March 15, 2004, around 8:30 P.M., Ms. Dougherty-Randall was at a friend's house with Mr. Kelderhouse when she saw Mr. Dela Cruz with a gun in his waistband. RP 118-119, 8-2-05.

Around 9 P.M., Ms. Dougherty-Randall and Mr. Kelderhouse went to Mr. MacDonald's residence to use drugs and buy guns. RP 121, 8-2-05. Once at the house, Ms. Dougherty-Randall, Mr. Kelderhouse, Mr. MacDonald, and Ms. Cerbes smoked meth. RP 122, 8-2-05. About five

minutes later, Mr. Dela Cruz arrived at Mr. MacDonald's house. RP 122, 8-2-05.

About ten minutes after Ms. Dela Cruz arrived, Mr. Reyes knocked on the door and began yelling for the Yukon to be moved. RP 123, 8-2-05. Mr. Kelderhouse and Mr. Dela Cruz stepped out onto the porch and agreed to move their cars. RP 123, 8-2-05. Mr. Reyes followed Mr. Dela Cruz and Mr. Kelderhouse down to their cars and continued yelling. RP 124, 8-2-05. Both Mr. Kelderhouse and Mr. Dela Cruz were being polite and telling Mr. Reyes that they would move their cars. RP 126, 8-2-05.

Ms. Dougherty-Randall saw Ms. Larsen get into the Yukon and saw Mr. Reyes close the door, then Ms. Dougherty-Randall heard Ms. Larsen scream. RP 126-127, 8-2-05. Ms. Dougherty-Randall then saw Mr. Dela Cruz come around the front of the Yukon with a gun drawn and start shooting. RP 127, 8-2-05. Mr. Kelderhouse did not have a gun. RP 130, 8-2-05.

After Mr. Dela Cruz fired the shots, he got in the Yukon and left. RP 131, 8-2-05.

Sometime during the evening, Mr. Kelderhouse and Mr. MacDonald hid guns in the dryer at Mr. MacDonald's house. RP 132, 8-

2-05. When the police arrived, Ms. Dougherty-Randall lied to the police. RP 132, 8-2-05.

On July 13, 2004, Ms. Dougherty-Randall met with Mr. Vold. RP 137, 8-2-05. Ms. Dougherty-Randall told Mr. Vold that Ms. Larsen got into a argument with Mr. Reyes which culminated with Mr. Reyes slamming the open passenger door against Mr. Larsen. RP 139-140, 8-2-05. Ms. Dougherty-Randall told Mr. Vold that she saw Mr. Dela Cruz come around the front of the Yukon with a handgun and Mr. Reyes said something to the effect of, "You gonna play like that?" RP 140, 8-2-05.

On July 28, 2004, Ms. Dougherty-Randall was interviewed by defense counsel. RP 142, 8-2-05. Ms. Dougherty-Randall told defense counsel that when Mr. Reyes came to the door was screaming, mad, and making threats, and encouraging people to get into a fistfight. RP 146, 8-2-05. Ms. Dougherty-Randall also told defense counsel that Mr. Reyes slammed the door of the Yukon on Mr. Larsen's legs. RP 146, 8-2-05.

David Reyes

David Reyes is Mr. Reyes' brother. RP 5, 8-3-05. David also knew Mr. Dela Cruz. RP 6, 8-3-05.

James Fijalka

Mr. Fijalka knows Mr. Dela Cruz. RP 11-12, 8-3-05. Mr. Fijalka also knows Mr. Kelderhouse and Ms. Alicia Dougherty-Randall. RP 12, 8-3-05. On March 15, 2004, Mr. Kelderhouse, Ms. Dougherty-Randall, Ms. Larsen, and Mr. Dela Cruz came to Mr. Fijalka's house. RP 12-13, 8-3-05. Mr. Dela Cruz was going to help Mr. Fijalka install a stereo in his truck. RP 13, 8-3-05. Mr. Fijalka did not see a weapon on Mr. Dela Cruz. RP 14, 8-3-05.

V. ARGUMENT

The trial court's admission of evidence relating to Mr. Dela Cruz's possession of handguns unrelated to the charges in this case at the time of his arrest violated Mr. Dela Cruz's right to a fair trial

Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury. State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). However strong the government's case, the fundamental right to a fair trial demands minimum standards of due process. State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). When a trial right as fundamental as the presumption of innocence is abridged, reversal is required. Id.

- B. The trial court abused its discretion in allowing evidence of Mr. Dela Cruz's possession of other firearms at the time he was arrested.

A trial court's rulings on the admissibility of evidence is reviewed under an abuse of discretion standard. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion exists when the trial court's exercise of discretion is manifestly unreasonable or is based upon untenable grounds. Id.

The reasons given by the court when it reversed its ruling barring the evidence of the other guns appear to be a ruling that the defendant's testimony that he was unfamiliar with the gun used to shoot Mr. Reyes on the night of the shooting (RP 65, 7-27-05), that he did not fire guns often (RP 65, 67, 7-27-05), and that he didn't have any other guns on him when he shot Mr. Reyes (RP 66, 7-27-05), somehow opened the door to allow the evidence of the other guns or somehow made Mr. Dela Cruz's possession of those guns when he was arrested relevant to Mr. Dela Cruz's possession of and knowledge about guns on the night of the shooting. Essentially, the court's reasoning in allowing the evidence of the other guns is an improper propensity argument -- because Mr. Dela Cruz had multiple guns on him at the time he was arrested, he is the kind of person

who always possess guns and has a high level of knowledge and familiarity guns. This ruling was in error.

The true test of whether evidence of activities subsequent to a crime should be admitted is whether the evidence is necessary and relevant to prove an essential ingredient of the crime charged. State v. Messinger, 8 Wn.App. 829, 836, 509 P.2d 382 (1973), review denied, 82 Wn.2d 1010 (1973), cert. denied, 415 U.S. 926, 94S.Ct. 1433, 39 L.Ed.2d 483 (1974), citing, State v. Lew, 26 Wn.2d 394, 174 P.2d 291.

i. Evidence of the other guns was barred by ER 401 and 402.

Irrelevant evidence is inadmissible. ER 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

Mr. Dela Cruz's possession of firearms two months after the shootings has little, if any probative value as to Mr. Dela Cruz's familiarity with or knowledge about guns on the night of the shooting. Further, the fact Mr. Dela Cruz possessed guns when he was arrested in no way indicates whether Mr. Dela Cruz did nor did not have any other guns in his possession when he shot Mr. Dela Cruz.

The only issue before the jury was whether or not Mr. Dela Cruz acted in self defense. While evidence that Mr. Dela Cruz was armed with an additional handgun on the night of the shooting may be probative of the reasonableness of his belief that he or Ms. Larson was in danger, Mr. Dela Cruz's possession of guns two months after the shooting is not such evidence. Further, evidence that Mr. Dela Cruz possessed handguns at the time of his arrest is not probative of Mr. Dela Cruz's possession of, or familiarity with, firearms on the night of the shooting, two months prior.

ii. Evidence of the other guns was barred by ER 403

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

“Evidence of weapons is highly prejudicial, and courts have ‘uniformly condemned...evidence of...dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged.’” State v. Freeburg, 105 Wn.App 492, 501, 20 P.3d 984 (2001), appeal after new sentencing hearing, State v. Freeburg, 120 Wn.App. 192, 84 P.3d 292, 152 Wn.2d 1022, 101 P.3d 108 (2004), citing, U.S. v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977). See also State v. Oughton, 26 Wn.App. 74, 83-84, 612 P.2d 812, review denied, 94 Wn.2d 1005 (1980) (evidence of a knife totally unrelated to the murder knife

found to be of highly questionable relevance; reversed and remanded on other grounds); Moody v. U.S., 376 F.2d 525, 532 (9th Cir.1967) (evidence a defendant had a gun that had no relation to the charge of smuggling is irrelevant and prejudicially erroneous: “[A] revolver could only be regarded by the jury as indicating that the appellant was a bad man engaged in a criminal enterprise...”). See also State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984), appeal after remand, 108 Wn.2d 734, 743 P.2d 210 (1987), cert. denied, Rupe v. Washington, 486 U.S. 1061, 108 S.Ct. 2834, 100 L.Ed.2d 934 (1988), habeas corpus granted, Rupe v. Wood, 863 F.Supp. 1315 (1994), affirmed, 93 F.3d 1434 (1996), cert. denied, 519 U.S. 1142, 117 S.Ct. 1017, 136 L.Ed.2d 894(1997) (“Many individuals view guns with great abhorrence and fear...[I]ndividuals might believe that [the] defendant was a dangerous individual...just because he owned guns.”)

Evidence that Mr. Dela Cruz possessed two firearms at the time of his arrest which were completely unrelated to the shooting of Mr. Reyes is both highly prejudicial to Mr. Dela Cruz and irrelevant as to whether or not he was acting in self defense at the time he shot Mr. Reyes. The trial court initially correctly ruled this evidence was inadmissible. No testimony or evidence presented at trial prior to the court’s reversal of its

ruling changed the fact that this evidence was both extremely prejudicial to Mr. Dela Cruz and not probative of any issue before the trier of fact. The trial court's ruling was in error.

iii. Evidence of the other guns was barred by ER 404(b)

ER 404(b) provides that evidence of a defendant's other acts is not permissible to show action in conformity therewith, but may be admissible to prove such things as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The fact that Mr. Dela Cruz possessed two guns several months after shooting does not prove anything in relation to the shooting of Mr. Reyes. Mr. Dela Cruz's possession of the guns is so remote in time as to render it non-probative as to the facts of the shooting of Mr. Reyes.

ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. See State v. Holmes, 43 Wn.App. 397, 400, 717 P.2d 766 ("once a thief always a thief" is not a valid basis to admit evidence), review denied, 106 Wn.2d 1003 (1986). By extension, the argument apparently adopted by the court here that "once a thief, was probably previously a thief," would be an even less valid basis for the admission of the evidence that Mr. Dela Cruz possessed the handguns at the time of his arrest.

Assuming, *arguendo*, that the evidence of Mr. Dela Cruz's possession of the other handguns at the time of his arrest was relevant and admissible under ER 401, 402, and 403, it would still be inadmissible under ER 404 as "propensity evidence." It was error for the trial court to allow introduction of evidence of the other handguns.

B. The trial court's admission of the evidence prejudiced the jury against Mr. Dela Cruz, violating his right to a fair trial

As stated above, evidence relating to the possession of handguns is highly prejudicial to the defendant, especially when the evidence is presented, as here, in the context of a propensity argument. Allowing the jury to learn that Mr. Dela Cruz possessed the murder weapon as well as two other firearms at time he was arrested prejudiced the jury against Mr. Dela Cruz in that the jury was left with the impression that Mr. Dela Cruz was a heavily armed, violent, dangerous criminal with a propensity towards violence. This prejudice denied Mr. Dela Cruz his State and Federal Constitutional right to a fair trial by an impartial jury.

C. In ruling that evidence of the guns was admissible based on its belief that Mr. Dela Cruz's testimony was not credible, the trial court invaded the fact-finding province of the jury.

Issues of witness credibility are for the jury alone to decide. State v. Jungers, 125 Wn.App. 895, 901, 106 P.3d 827 (2005).

Here, the trial court admitted the evidence of the other handguns because, in the court's opinion, Mr. Dela Cruz had

been conveying to the jury...a clear indication that he doesn't have anything to do with guns and he's unfamiliar with them and this was a terrible accident, and it's not facts. It's not the case in the real world. I am going to allow the State to inquire.

RP 71-72, 7-27-05.

When defense counsel moved the court to reconsider its ruling the court and clarified its ruling, explaining that if Mr. Dela Cruz had access to a number of firearms,

It's much more likely, as is the State's theory, that he's going to the car for the specific purpose of obtaining a gun, because he's got access to all kinds of guns and he knows there are guns around.

RP 5-7, 7-28-05.²

The determination that Mr. Dela Cruz's testimony did not reflect "the case in the real world," that that the State's theory was "much more likely," was clearly determination by the court that Mr. Dela Cruz was not a credible witness. Issues of witness credibility are for the jury alone to decide, but in ruling the

² Not only was this an incorrect decision based on a determination of Mr. Dela Cruz's credibility by the court, but it also is an incorrect conclusion since the fact that Mr. Dela Cruz had the other guns in his possession at the time of his arrest does not prove that "he's got access to all kinds of guns and he knows there are guns around" two months prior on the night of the shooting. The court's ruling was not only improper, it was illogical and untenable.

evidence of the guns was admissible on these grounds the trial clearly made a credibility determination and invaded the fact-finding province of the jury. This denied Mr. Dela Cruz his State and Federal Constitutional right to a fair trial by an impartial jury.

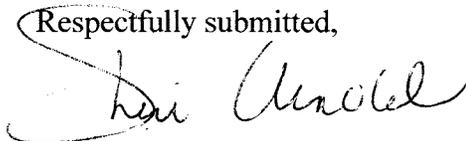
VI. CONCLUSION

The evidence that Mr. Dela Cruz possessed other handguns at the time he was arrested was highly prejudicial to him and highly irrelevant to the issues before the jury. The trial court's admission of this evidence was error and an abuse of its discretion based on an improper determination of witness credibility. The evidence prejudiced the jury against Mr. Dela Cruz, denying him his State and Federal Constitutional right to a trial by a fair and impartial jury.

This court should vacate Mr. Dela Cruz's convictions and remand for a new trial.

DATED this 26th day of May, 2006.

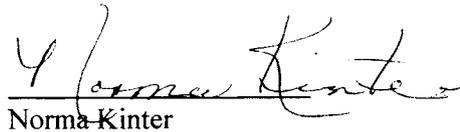
Respectfully submitted,



Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on May 26, 2006 she hand delivered to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by U.S. mail to appellant, Franklin-Scott Delacruz, DOC # 885716, Washington State Penitentiary, 1313 North 13th Ave., Walla Walla, WA., 98362, true and correct copies of this Opening Brief. 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 May 26, 2006.


Norma Kinter