NO. 35269-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DARIUS ASAFO VAIELUA

Appellant.

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

The Honorable Kathryn Stolz, Judge

BRIEF OF APPELLANT

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P.M. 8/28/2007

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Mr. Vaielua of murder in the second degree.
2. Mr. Vaielua was denied his right to the effective assistance of counsel when his attorney failed to request a mandatory lesser included jury instruction to murder in the first degree.
3. Mr. Vaielua was denied his right to a unanimous jury verdict when the state failed to elect between multiple means of committing felony murder.
4. Mr. Vaielua was denied his right to a unanimous jury verdict when the state failed to elect between multiple acts in committing felony murder.
5. The accomplice liability jury instruction was constitutionally deficient because it was ambiguous and allowed the jury to convict Mr. Vaielua of felony murder based on an unidentified crime rather than on assault in the first or second degree, which created a reasonable likelihood that the jury misapplied the instruction in a manner that relieved the state of its burden of proving each element of the felony murder beyond a reasonable doubt.
6. The trial court abused her discretion by admitting the irrelevant and prejudicial jail cell graffiti from a co-defendant jail cell.

7. The trial court abused her discretion and denied Vaielua his right to a fair trial when she refused to remove a sleeping juror from Vaielua's trial.

8. The trial court abused her discretion by permitting Detective Ringer to testify as a gang expert when he admittedly had no knowledge of the supposed gang at issue in the instant case and where he had no knowledge of Samoan culture, a foundation Ringer deemed essential to being able to understand the group at issue in this case.

9. The trial court abused her discretion by permitting the introduction of gang evidence through unsubstantiated hearsay.

10. The prosecutor committed prejudicial misconduct by the use of a power point presentation during closing argument that misstated the law.

11. The prosecutor committed prejudicial misconduct by the arguing facts not in evidence.

12. Mr. Vaielua was denied his right to a fair trial by the trial court's refusal to grant his motions to sever his case from his co-defendants where the gang evidence and other incriminating and prejudicial evidence would not have been admissible in Mr. Vaielua's trial and where the jury was likely to find guilt based on association rather than on the facts in evidence.

13. Cumulative Error denied Mr. Vaielua his right to a fair trial.

14. The accomplice liability instruction although technically compliant with the statute, should not have been used because of the unfair result.

15. There was insufficient evidence that Mr. Vaielua participated in any type of assault.

Issues Pertaining to Assignment of Error

1. Was the evidence sufficient to convict Mr. Vaielua of murder in the second degree?

2. Was Mr. Vaielua denied his right to the effective assistance of counsel when his attorney failed to request a mandatory lesser included jury instruction to murder in the first degree?

3. Was Mr. Vaielua denied his right to a unanimous jury verdict when the state failed to elect between multiple means of committing felony murder?

4. Was Mr. Vaielua denied his right to a unanimous jury verdict when the state failed to elect between multiple acts in committing felony murder?

5. Was the accomplice liability jury instruction constitutionally deficient because it relieved the state of its burden of proving each element of the crimes charged?

6. Did the trial court abuse her discretion by admitting the irrelevant and prejudicial jail cell graffiti of a co-defendant?

7. Did the trial court abuse her discretion and deny Vaielua his right to a fair trial when she refused to remove a sleeping juror from trial?

8. Did the trial court abuse her discretion by permitting Detective Ringer to testify as a gang expert when he admittedly had no knowledge of the supposed gang in the instant case and where he had no knowledge of Samoan culture, a foundation Ringer deemed essential to being able to understand the group at issue in this case?

9. Did the trial court abuse her discretion by permitting the introduction of gang evidence through unsubstantiated hearsay.

10. Did the prosecutor commit prejudicial misconduct by the using of a power point presentation during closing argument that misstated the law?

11. Did the prosecutor commit prejudicial misconduct by the arguing facts not in evidence?

12. Did the trial court abuse her discretion by denying Mr. Vaielua's many motions to sever his case from his co-defendants?

13. Was Mr. Vaielua denied his right to a fair trial by the trial court's refusal to grant his motions to sever his case from his co-defendants where the gang evidence and other incriminating and prejudicial evidence would not have been

admissible in Mr. Vaielua's trial and where the jury was likely to find guilt based on association rather than on the facts in evidence?

14. Was the accomplice liability instruction although technically compliant with the statute, prejudicial?

15. Was there sufficient evidence that Mr. Vaielua participated in any type of assault?

16. Did cumulative error deny Mr. Vaielua his right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

Darius Vaielua was charged under RCW 9A.32.030(1)(a) and RCW 9A.32.030(1)(b) with one count of murder in the first degree by premeditation or extreme indifference to human life while armed with a hand gun. Vaielua was also charged with one count of felony murder in the second degree by the predicate felony of assault in the first, second or third degree contrary to RCW 9A.32.050(1)(b). CP 297-98. Vaielua was convicted of felony murder in the second degree and acquitted of murder in the first degree; the jury determined that Vaielua was not armed with a hand gun, Kathryn Stolz presiding. CP 344, 345, 346, 347, 338, 349. This appeal follows. CP 432.

a. 3.6 Hearing

(i) Motion to Sever

Defense counsel moved to sever Mr. Vaielua's trial from his co-defendants and moved to suppress any evidence of gang involvement on grounds that Mr. Vaielua would be implicated in gang activity and presumed guilty by virtue of his association with gang members, rather than by virtue of his own involvement in gang activity. The judge denied the motion to sever and denied the motion to suppress hearsay evidence of gang activity. RP 34, 180, 184. 1

Throughout the trial, Mr. Vaielua moved to sever his case from his co-defendants and for a mistrial on ongoing grounds of prejudice due to testimony about gang members and gang association when there was no credible evidence that Vaielua was a gang member. These motions were all denied. RP 218-17, 270-71, 350, 561-67. James Fola testified on direct that he knew Vaielua to be a member of K-Blok, but on cross examination admitted that he had no first hand knowledge of K-Blok, but just heard about it from others. RP 274, 392-93, 595-99.

Detective Ringer testified that gang members, "generally, they're felons; and we can go after them, getting in possession of firearms, and get them hefty sentences for illegally having firearms. Gangs and firearms are synonymous." 2RP 759. The defense moved for a mistrial under ER 404(b) and ER 609. 2RP 760-61. The trial court denied the motion for a mistrial and gave a curative instruction where she told the jury to disregard the testimony and repeated that "all gang members are felons". 2RP 763, 769.

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1 RP refers to the verbatim report of the trial proceedings in Pierce County Superior Court Cause No. 04-1-05574-3.

The trial judge denied the defense motion for a mistrial based on the court allowing the prosecutor to ask James Fola, if he was intimidated by anyone in the galley, presumably gang members. Defense was concerned with Vaielua being unfairly associated with known gang members. RP 350. The judge also commanded that all of the state's supporters in the galley move tone side of the court room and all of the defendants' supporters move to the other side of the court room. RP 348.

b. Half Time Motion To Dismiss

Vaielua moved to dismiss the charges against him on grounds that there was no evidence of his participation in a murder in the first or second degree; there was no plan to go to the waterfront; and there was no evidence of an assault. 2RP 827-30. The trial court denied the motion ruling: "whether the evidence is strong or weak is going to be up to the jury to decide.". 2RP 850.

c. Sleeping Juror

The trial court denied the defense motion to remove a sleeping juror. RP 544-45, 547.

d. Prosecutorial Misconduct

The state twice called witness Devault a liar. 2RP 1716, 1722. The prosecutor's entire power point presentation during its closing argument was improper and served to mislead the jury regarding the correct law to apply to

the facts. 2RP 1944, 2969-70, 1976-78. (See power point attached as Exhibit A.)

(i). Prosecutor's summation in Rebuttal of Evidence of Accomplice Liability

The prosecutor argued his theory of accomplice liability in rebuttal as follows:

> There's plenty of circumstantial evidence, the snow on the ground; and the only reason you don't have any direct evidence is because Ben Asaeli won't tell you the truth. Do you really expect him to get up on that stand and say, yeah, there was a plan. We went down there, and we were going to shoot him, or we were going to kill him, and I was going to be there with the gun in case things got out of hand.

2RP 2210

"Asking for Blacc, that's premeditation". Eroni an accomplice by "calling Blacc out when the car is surrounded." 2RP 2212. According to the state , Vaielua was an accomplice by:

> driving Eroni Williams down there, in addition to waiving the bandanna around, he asked for Blacc". . . It's difficult to imagine that that Darius Vaielua would have been asking for Blacc for any other purpose. It's difficult to imagine that Darius Vaielua would have been holding a bandanna, twirling a bandanna, possibly putting a bandanna on for any other purpose

2RP 2213

> Williams goes down there, assaults Blacc in the legal sense that I talked about earlier. Maybe Darius Vaielua knows what is going on. He has to know what's going on. He drove Eroni Williams down there. He's asking for Blacc with Eroni Williams. He's putting up bandannas. You have an assault. Eroni Williams, even if he's with Darius Vaielua just to that point, even if Ben Asaeli is with Eroni just to that point, makes them accomplices to the crime of assault. Felony murder, they are accomplices to the crime of assault. . . . In this case the crime [predicate felony] is assault. Eroni is committing an assault. What do you know? The next thing you know one of his accomplices elevates a level of assault to a first- or second degree assault when they pull out a gun.

2RP 2215-16.

> If you determine that these defendants have knowledge, and they're willing to aid or assist in Eroni Williams' assault or Ben Asaeli's assault, you must find them guilty of the crimes for which they stand charged.

2RP 2217. Many of the "facts" argued were not based on actual facts in evidence. 2RP 2213-16.

e. Denial of Motion to Voir Dire Jurors

Vaielua moved the court for an order to allow him to voir dire the jurors to determine what evidence the jury relied on in convicting Vaielua

of murder in the second degree when they the jury determined that neither he nor Williams caused Blacc's death and as instructed, the jury could have erroneously relied on Vaielua as an accomplice to Williams to find guilt, which would have been legally insufficient under both the felony murder statute and under the accomplice liability statute. 2RP 2262-64, 2269.

f) Exceptions to Jury Instructions

Vaielua objected to the accomplice liability jury instruction #6 on grounds that it was ambiguous and too tenuous to attach liability to an accomplice to a felony murder which premised on accomplice liability as well. 2RP 1781-83, 1794, 1866. The court responded by stating that it had to follow State v. Langford, 67 Wn. App. 57,; 837 P.2d 1037 (1992), review denied, 121 Wn.2d 1007, 848 P.2d 1263, remanded on related grounds, 124 Wn. App. 1046 (2004); 2RP 1869. Vaielua also objected to the lack of a unanimity instruction as to the means of committing murder in the first degree. 2RP 1795. The trial court overruled the objections. 2RP 1799.

2. Substantive Facts

Darius Vaielua spent the afternoon of October 22, 2004 playing pool at his house with his best friend Ishmail Asaeli who had just returned from a 2 year tour in Iraq. 2RP 862-65. Later that evening, Vaielua and

Ishmail went to a popular club called Papayas to hang out and play more pool. Id. The club was crowded to capacity, mostly with young Samoans and African Americans. 2RP 866-67, 911, 1332. Vaielua and Ishmail saw people they knew at the club, but spent the night at the pool tables playing pool. 2RP 866-67. Vaielua was into basketball and received a scholarship to go to college. 2RP 1607-08, 1707-08.

After the club closed, Ishmail was tired and wanted to get some sleep so Vaielua took him home. 2RP 873. Not ready to end the evening, Vaielua decided to go to the waterfront to hang out with friends. The waterfront is a popular after hours hang out for Samoans and many people from the club went to the waterfront that night. RP 283, 287, 395, 695; 2RP 202.

When Vaielua arrived a the waterfront he got out of his car and went over to say hello to James Fola and Tai Gago who were already at the waterfront hanging out and drinking beer. 2RP 291. Vaielua joined Fola and Gago for a beer. 2RP 253, 291. Fola admitted to drinking heavily that night which could have impaired his memory and also admitted that he was not paying attention when Vaielua arrived because he was talking to a girl. RP 299, 374, 383. Gago was not drunk and not preoccupied and likely had a better recall of the events that followed. RP 244.

Fola thought that Vaielua came over said hello and asked for Blacc. RP 310. Gago was certain that Vaielua did not ask for Blacc. 2RP 292. Tami Missionare one of the women with Blacc, Gago and Fola testified that she heard Vaielua (identified as the driver of the Blue SUV) greet Fola and Gago but did no hear him ask for Blacc. RP 1369-70, 1461, 1545.

Fola could not remember if Vaielua had a flag. RP 310. Tami Missionare, thought that Vaielua walked over to Fola and Gago waiving a red bandanna in a friendly goofy manner as he said "hi, what's up " and shook hands with Fola. RP 1369-70. Tami did not think that there was anything special about Vaielua waving a bandanna. RP 1544. Tiare Missionare, Tami's sister had consumed 1 1/2 40 oz malt liquors before arriving at the waterfront. RP 625-28. She thought that Vaielua had a blue bandanna around his neck. RP 676. Gago was certain that Vaielua, who standing next to him socializing, did not have a bandanna. 2RP 413.

Fola, Gago, Tiare, Tami, Ramaley, Blacc and all of whom met at the waterfront before anyone else arrived were not nervous or afraid of Vaielua. RP 308-09, 1369-70, 1462; 2RP 299, 386. Blacc whose given name was Faalata Fola, was a cousin and good friend of Gago and James Fola. RP 263-64, 1122, 2RP 232.

While Vaielua was standing next to Gago, Gago saw two other men approach Breanne Ramaley's red Nissan where Blacc was seated and say "whose Blacc? " or "where's Blacc". 2RP 292. Fola, thought the guys walked over with Vaielua; Fola told the guys that Blacc was in Ramaley's car. 2RP 293. Gago was not certain if one or two guys had brown bandannas over their faces, but he was sure that the person who asked for Blacc had a brown bandanna over his face. 2RP 294, 324, 343. Gago saw this guy approach Blacc and speak with him, but the guy with the bandanna did not shoot Blacc. 2RP 343-44. Eugene Van Camp, the driver of the green Jetta who arrived sometime after Vaielua, saw one person with a brown bandanna over his face. RP 1024. Van Camp went over to Blacc and had a conversation with him and then left to get a beer. RP 1024-25, 1027.

The guy that approached Blacc before the shooting was having what sounded like an argument with Blacc. 2RP 371. Fola too heard what sounded like an argument, but could not hear the words, likely because the music was on in Ramaley's car. RP 703, 314. Vaielua likely could not hear the argument either because he was standing next to Gago. 2RP 260-61. Tiare, who was in the back seat of the car while Blacc was sitting in the driver's seat, heard a guy approach Blacc and say, "this be Twix", "let's go heads up", meaning let's fist fight. RP 639, 710. Tiare was not sure what

Blacc said in response but it could have been "I'm going to bust a cap in your ass". RP 738.

After Blacc said something to Twix, Blacc reached over toward the glove compartment where a .25 mm gun was located and Tiare heard some one say "this nigga got a gun, this nigga got a gun". RP 649, 707-08, 710. Van Camp, also heard someone say "oh shit , he's got a strap, he's got a gun". The person sounded "shocked". RP 1012-13. The guy, identified as Eroni Williams who also goes by "Twix" fell back , jumped back into the guy behind him. Then Tiare heard gunshots. RP 649-50.

It was dark outside and Tiare could not see anything outside the window. RP 653, 709. Once the gun shots began, Tiare fell back on the seat and laid there. RP 652. After hearing someone say that Blacc had a gun, Van Camp saw Ben Asaeli approach the red Nissan while the two guys near Ramaley's car backed away. RP 1012-14. The two guys were not communicating with or assisting Asaeli. RP 1014-15.

Gago did not see who fired the first shot, but he heard shots followed by a pause and then more shots. 2RP 359. Fola too did not know who fired the first shot. RP 316. Tiare heard two pauses in the series of gunshots. RP 740. Tami too heard a pause in the series of gun shots. RP 527. Fola was standing over by grass when Gago heard the shots and Vaielua was standing next to Gago. 2RP 360-61. When Williams yelled

that Blacc had a gun, Vaielua did not attempt to intervene or come to his aid when Asaeli begin shooting, Vaielua did not get involved. Vaielua had nothing to do with the shooting. 2RP 361.

Asaeli was at the club Papayas earlier in the evening of October 30, 2004. He went to the club by himself and ended up talking and dancing with some women he just met. 2RP 1002, 1005. Asaeli saw Vaielua playing pool and he also saw Ishmail at the club; Asaeli spoke with Ishmail about being home from Iraq, but did not converse with Vaielua. 2RP 1002, 1005, 1082, 1088. Asaeli also saw Williams at the club and said hello; Williams was not with Vaielua. 2RP 1082, 1088. It was not unusual for Asaeli not to have a conversation with everyone he knew. 2RP 1402.

After leaving the club, Asaeli stopped in front of the club to talk to his cousin Williams and others in front of the club. Vaielua was not one of the people Asaeli spoke with. RP 1209-10. Asaeli drove to the waterfront with his friend Rosette Flores to hang out. 2RP 1011. Asaeli and Flores went to several different places before going to the waterfront where they finally found people to hang out with. 2RP 1012-13. Asaeli obtained a gun after the bar closed from a friend of Flores' who was too drunk to safely keep the gun. 2RP 1009-10. Asaeli did not have any plan to use the gun at

the waterfront and did not have any specific plans to meet anyone at the waterfront. 2RP 1006-07.

When Asaeli arrived at the waterfront, he got out of the car and went to socialize with some people he knew. RP 1045, 1180, 1212. Vaielua was not among the people Asaeli greeted. RP 1182, 1212. There were at least 30 people at the waterfront. RP 850, 1178. Shortly after Asaeli and Flores arrived, Asaeli heard someone say "I'm going to cap your ass motherfucker". Asaeli then saw Williams throw up his hands and say "he's got a gun". 2RP 1036. Asaeli saw Blacc point a gun at his cousin Williams. 2RP 1037. Asaeli yelled "no!" as Blacc then trained his gun on Asaeli: Asaeli started shooting. 2RP 1037, 1188.

Vaielua was standing near Gago and Fola during the shooting. 2RP He did not communicate with Williams or Asaeli or intervene or assist Williams or Asaeli in any way. 2RP 360 Gago was Blacc's best friend and knew that Vaielua had nothing to do with the shooting. 2RP 361.

With no way to connect Vaielua to the shooting of Blacc, the state hired Detective Ringer as a gang expert to testify in preparation for trial. 2RP 698, 804. Ringer was not involved in the investigation of the shooting of Blacc. Rather he was hired to create a gang connection between Asaeli, Vaielua and Williams so that the state could present their case as a gang retaliation shooting. 2RP 698, 804. After conducting his research,

Detective Ringer was unable to locate in the gang data base, the names of Vaielua, Asaeli or Williams. 2RP 699-700.

The state's theory of its case, was that Williams and Vaielua were members of a gang called Kushmen Blokk, and Asaeli was a "wannabe". RP 494. Detective Werner who investigated the shooting of Blacc interviewed a man named Feleti Asi. During the interview Asi was not under oath, but said that Asaeli was a "wannabe". RP 484-86. Werner did not ask Asi what this meant and Asi did not explain. Rather, Werner testified to what he thought the term meant. RP 494.

Ringer's research and investigation did not reveal any information on the existence of a group called Kushmen Blokk, except for an isolated incident in 1999 which did not involve Vaielua, Williams or Asaeli, but rather, involved a known gang member of the known Royal Pirus gang, a Blood group. 2RP 664, 738, 786, 808-10. Even though Ringer is one of the Tacoma Police Department Gang experts who appears as a state's witness in "gang" cases, he had never heard of a group called Kushmen Blokk. 2RP 689, 795.

Ringer also admitted that he knew nothing about Samoan culture or the existence of any Samoan gangs. He also he did not have any Samoan gang informants but he informed the jury that he obtained most of his information from gang informants. 2RP 659-60, 705, 718, 721, 744,

749, 750 . Ringer testified extensively about his knowledge of the Crips and Bloods. RP 656-57, 663-68. He testified that the gangs use colors, such as red and blue, but it is safe to wear yellow or brown. 2RP 670-71, 707. Ringer also stated that just because someone had a red bandanna and used "K' did not mean that they were in a gang. 2RP 696. Ringer informed the jury that graffiti that replaced the letter "c" with "k" meant that a group was a Blood gang and that Crip gang member graffiti usually had the letter "b" crossed out. 2RP 672-73.

Although not admissible as evidence against Vaielua, Ringer was permitted to testify extensively about jail cell graffiti found in Williams cell. 2RP 684-94. Ringer could not determine who wrote the graffiti but he compared it to some graffiti on a fence along Cushman street and 73rd which had the name Kushmen Blokk on it along with similar artwork found in the jail cell.2RP 676, 680, 684-85, 708. Ringer testified that the graffiti was a way to mark territory. Vaielua did not live on or near Cushman Street. 2RP 883. The waterfront was considered neutral territory and not gang territory. 2RP 669.

The civilian witnesses who testified about Kushmen Blokk referred to it as a group of guys who live on Cushman street, mostly family, who hung out together to drink and make music. RP 877. Vaielua and Asaeli

did not live on or near Cushman Street and there was no testimony indicating that Williams lived on or near Cushman Street. 2RP 883, 985.

No one was able to say from personal knowledge that it was a gang and no one was able to identify Vaielua as a member of a gang. No witness had any first hand knowledge of a gang called Kushmen Blokk. RP 272, 391, 877, 884-86, 1241, 1321; 2RP 295-98; 1537, 1544. Some of the witnesses had heard of a group of Samoan family guys who were referred to as Kushmen Blokk who just hung out together. Id.

The only known gang members were Blacc and Gago. Blacc was a member of the gang Everybody Killa a Crip set, and Gago was a West Side USO gang member in West Seattle. RP 265, 406-407, 1485; 2RP 297-98, 373. Tami also knew that Blacc had been involved with another gang called "Connect Gang". RP 1485.

The week before the shooting, Asaeli was at the waterfront on October 22, 2004. 2RP 1026-28. Asaeli was certain that Vaielua was not at the waterfront but either Williams or another guy named Shake was there. 2RP 1320 Blacc, Fola and Gago were also at the waterfront with Ramaley and Tiare Missionare. RP 288-87, 602-04, 616, 621. Gago and Fola had been drinking heavily that night and Blacc had a new gun he wanted to shoot. 2RP 439. Blacc got the gun out of his girlfriend, Ramaly's car. He did not need a key to get the gun out of the car. 2RP 391-94. Blacc and

Gago both shot the gun, sending some shots toward the water, and others toward a globe behind the parking lot where people were located. 2RP 403-04.

Ramaley denied being at the waterfront and denied ever lending Blacc her car. Tami, Ramaley's best friend remembered being at the waterfront with Ramaley and described how excited Ramaley was that Blacc had a gun. Ramaley denied ever handling the gun, but Tami described in detail how Ramaley showed her the gun and how she discussed her fears that the police would find it after the shooting on October 30, 2004. RP 1426,1524, 1538, 1541; 2RP 106-08, 131, 154, 203, 209.

On October 22, 2004, Asaeli saw Blacc shoot off his gun but did not approach Blacc or speak to him. 2RP 1026-28, 1032. Some Asian guy asked what was going on and Blacc ran towards the Asian guy's car and shot off a bunch of shots towards car. 2RP 1026-30. The Asian guy jumped in car and he and the occupants left. Id. Tiare who was at the waterfront with Breanne and Blacc and Gago and Fola in Breanne's red Nissan heard beer bottles breaking and gunshots from the lighted area in the parking lot near the but did not know that Blacc fired the shots or threw the bottles. At a car full of Asian men. RP 505-612. Asaeli too saw Blacc throw the bottles. 2RP 1162 . Asaeli never saw Blacc before that

night. 2RP 1026-28, 1032. Vaielua was not at the waterfront on October 22, 2004. 2RP 1320.

Before the shooting on October 30, 2004, no one was nervous or afraid of being near Vaielua: he was welcomed by Gago, Blacc's best friend. RP 308-09, 404, 1369-70, 1461-62; 2RP 253, 266, 361, 368. During the entire incident, Vaielua was next to Gago who the prosecutor in closing described as a big guy that would not be easily intimidated by anyone. RP 299, 306-07; 2RP 2213??.

Vaielua was friendly and social, while he hung out with Gago and Fola and drank a beer. No one was nervous or afraid of Vaielua. RP 308-09, 1369-70, 1369-70, 1462; 2RP 253, 299, 386. Vaielua had no idea that Williams was going to ask Blacc to fight and he did not have any idea that Blacc would pull a gun or that Asaeli would show up with a gun and shoot and kill Blacc.

(g) Forensic Evidence

In Asaeli's bedroom, Detective Werner found the .9mm High Point handgun that Asaeli used to shoot Fola. RP 456-57. There was nothing in Asaeli's bedroom linking Vaielua to Asaeli or to the handgun. RP 480.

(h) Asaeli Testimony

Asaeli was 22 years old on October 30, 2007. 2RP 982. He was a student at college and he worked part time. Id. He is related to Williams

through his mother and has known Vaielua since middle school. 2RP 995-96. He lived with his parents in Parkland and never lived on Cushman Street. 2RP 985. Asaeli and Rosette Flores are best friends. 2RP 999.

C. ARGUMENTS

1. VAIELUA WAS CONVICTED OF MURDER IN THE SECOND DEGREE BASED ON INSUFFICEINT EVIDENCE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

The state in its final pitch to the jury in rebuttal argument informed the jury that Vaielua was guilty of murder because he drove Williams to the waterfront he waived a bandanna around and asked for Blacc and those acts were for the sole purpose of assisting Williams and Asaeli in the commission of an assault. According to the state Williams assaulted Blacc by asking Blacc to go heads up and Asaeli assaulted Blacc with a gun. 2RP 2213, 15-16. In rebuttal argument the prosecutor argued in part as follows:

> **Maybe Darius Vaielua knows what is going on. He has to know what's going on. He drove Eroni Williams down there. He's asking for Blacc with Eroni Williams**. . . . Felony murder, they are accomplices to the crime of assault. . . . . Eroni is committing an assault. What do you know? The next thing you know one of his accomplices elevates a level of assault to a first- or second degree assault when they pull out a gun.

2RP 2215-16. This argument that Vaielua asked for Blacc was disputed by the majority of witnesses. The testimony actually revealed that there was only a possibility that Vaielua knew what was going on, not a certainty beyond a reasonable doubt.

a. Summary

The facts at their worst do not establish beyond a reasonable doubt the elements of murder in the second degree by the predicate crime of assault as charged in count III.

The facts establish (1) that Vaielua knew co-defendants Williams and Asaeli. (2) Vaielua, Asaeli and Williams are all young Samoan men. (3) Vaielua and a couple of hundred other young Samoans and African Americans were out partying at a popular night club called Papaya's the night of the shooting. 2RP 1003. (4) Vaielua did not go to the night club with Asaeli and did not hang out with Asaeli that night. 2RP 1083, 1088 (5) Vaielua went to Papaya's to play pool with his best friend Ishmail who had just returned from 2 years of military duty in Iraq. 2RP 862-63 (6) Asaeli left the bar Papaya's with Flores. Before leaving he removed a gun from Flores' friend Shamira's car because he believed she was too drunk to be in possession of a gun.

(7) Rosette Flores told the police that at some point after leaving Papaya's she followed Vaielua' car to the waterfront, but she and Asaeli had not planned to do this earlier in the evening. RP 1240, 1316. (8) Some of Asaeli's cousins live on Cushman Block and are in a group called K-Blokk, but Vaielua is not one of Asaeli's cousins and he does not live on or near Cushman Street. RP 1241, 1314. Vaielua lived on McKinley and 64th Street. 2RP 883. (9) The waterfront where Blacc was shot is a popular after hours hang out. 2RP 1114, 1319-20. (10) Vaielua has a nickname "Skills because he is a superb athlete, particularly skilled in basketball. 2RP 905, 995-96.

(11) The night of the shooting, Vaielua was already at the waterfront when Asaeli arrived. It was pitch dark and there were around 30 people hanging out at the waterfront. 2RP 1033. (12) Vaielua drove up in a dark colored SUV. After his arrival he went over to talk to Fola and Gago. According to Gago, Vaielua did not ask for Blacc. 2RP 291. According to Fola, Vaielua might have asked for Blacc but Vaielua did not approach Blacc and he did not have a brown flag. RP 309-310, 312-13, 387. Tiare Missionare said she believed that Vaielua had a blue bandanna around his neck. RP 676-77. Tami Missionare testified that Vaielua was waiving a red bandanna in a friendly, goofy manner when he approached James Fola. RP 1369-70, 1462. Tami told the police in an interview closer to the date of the shooting that Vaielua never asked for Blacc. RP 1454. During her testimony

Tami added that she thought Vaielua did ask for Blacc. RP 1369-70. It is impossible to determine which of the multiple versions of Tami's story might be the truth.

(13) After Vaielua arrived in the SUV, a Green Jetta arrived, followed by a white car. RP 304. (14) According to Gago, some other guy or guys with brown bandannas over their faces asked for Blacc. Vaielua did not have a brown bandanna. 2RP 292, 294, 324, 343. (14) No one saw Williams exit from Vaielua's car, rather the state just assumed that Williams had been in Vaielua's car. (15) Vaielua never approached Blacc and had nothing to do with the shooting. 2RP 306-07, 361.

(16) Asaeli shot and killed Blacc. No one knew he had a gun and no one knew he was going to shoot Blacc. Asaeli did not plan to shoot Blacc, but he did so after Blacc pulled a gun on Williams who had just wanted to fist fight with him. If William's wanted to scare Blacc he would have threatened him or attacked him; but he did not. Tiare who was in the car testified that Blacc scared Williams enough that Williams jumped back to get away from Blacc; this testimony was uncontroverted. RP 647-52, 739.

b. Standard of Proof

For a conviction to be upheld the State must prove every essential element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970); State v. Acosta,

101 Wn.2d 612, 615, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983); State v. Green, 94 Wn.2d 216, 224, 616 P.2d 628 (1980). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The jury decides what evidence is credible. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court defers to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

c. Insufficient Evidence of Assault in The Second Degree

In Count III Vaielua was charged as a principle and as an accomplice with murder in the second degree by the predicate crimes of assault in the first, second or third degree. CP 1-7; 197-198. The jury rejected the state's charges of murder in the first degree by premeditation as to Vaielua, Williams and Assaeli, and further found that Vaielua did not

possess a firearm and was not the shooter. CP 344, 345, 346, 347, 348, 349. The jury therefore must have concluded that Vaielua acted as an accomplice to the murder in the second degree charge. CP 344. As charged in Vaielua' case, a person is guilty of second degree murder:

Felony Murder as charged in the instant case in Count III reads in relevant part:

> That DARIUS ASAFO VAIELUA, or someone to whom he was acting as an accomplice, on or about the 30th day f October 2004, did unlawfully and feloniously, while committing or attempting to commit the crime of **Assault in the First, Second or third Degree,** and in the course of an in furtherance of said crime or in immediate flight therefrom, shot or caused to be shot Faalata Fola, and thereby causing the death of Faalata Fola, a human being, not a participant in said crime. . . . and in the commission thereof the defendant , or an accomplice was armed with a firearm, to-wit: a handgun. . . . .

(Emphasis added) CP 1-7; 197-198; RCW 9A.32.050(1)(b). RCW 94.36.020 describes assault in the second degree in relevant part as:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
>
> (b) . . . . or
>
> (c) Assaults another with a deadly

weapon.

The state argued that there were two predicate felonies for the felony murder charge: one for assault in the first degree and one for assault in the second degree. 2RP 2215-16.2 The state did not identify which acts created the assault in the first and second degree, but in rebuttal described assault in the second degree as Williams asking Blacc to fist fight. 2RP 2200, 2215. The state then argued that the assault was elevated to an assault in the first or second degree when "they pull out a gun". 2RP 2215. Blacc pulled out a gun before Asaeli became involved in William's asking Blacc to figh, and Asaeli responded to Blacc threatening Williams' by opening fire.

Under the state's theory, Vaielua was guilty as an accomplice because he knew that Williams was going to ask Blacc to fight and he knew that Ben was going to pull a gun on Blacc and he was ready to assist Williams and Asaeli. 2RP 2217. The facts do not support the state's theory.

The jury, by rejecting the murder in the first degree charge by premeditation, agreed that the scenario that unfolded on October 30, 2004 did not involve any advance planning to shoot Blacc. When Williams asked Blacc to fist fight, Vaielua was drinking a beer with Blacc's best

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2 The state abandoned its theory that Vaielua, Williams or Asaeli

friend Gago. Vaielua did not come to William's assistance when Williams jumped away in fear after Blacc pulled out a gun and Vaielua did not get involved or assist Asaeli when he shouted no for BLacc to not shoot Williams.

As a matter of law, Williams' asking Blacc to fight is not an assault in the second degree unless: (i) he intended to cause Blacc to have fear of bodily injury; (ii) and Blacc actually had a reasonable apprehension of imminent bodily harm. RCW 94.36.021. Jury instruction 29 defined assault in the second degree as:

> an act with unlawful force done with intent to create in another apprehension and fear of bodily injury which, in fact, creates in another reasonable apprehension , an imminent fear of bodily injury, even though the actor did not actually intend to inflict bodily injury

Supp CP (Jury Instruction # 29, 8-4-05)

The Supreme Court defined assault as "'an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.'" State v. Byrd, 125 Wn.2d 707, 712, 887 P.2d 396 (1995), quoting, Howell, 58 Wash. at 438).

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committed assault in the third degree as the predicate felony.

The Supreme Court also defined assault as "putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm[.]" State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994), quoting, State v. Bland, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993). Moreover, "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." Byrd, 125 Wn.2d at 713; see also, State v. Finley, 97 Wn. App. 129, 135, 982 P.2d 681 (1999) ("Intent is a non-statutory element of assault.").

In short, the second degree assault statute, which includes the common law definition of assault, requires that: (1) the principal have the intent to create in another apprehension and fear of bodily injury; and (2) the principal actually creates in another a reasonable apprehension and imminent fear of bodily injury. Byrd, 125 Wn.2d at 713-14. The accomplice must have knowledge that the principle intended to create fear of bodily harm. Vaielua challenges these two elements.

In Vaielua's case, the facts relied on do not establish assault in the second degree as described above, because there was no evidence that Williams intended to cause Blacc to have fear of bodily injury and there was no evidence that Blacc actually had reasonable fear of imminent bodily harm. The evidence established that William's asked Blacc to go

heads up, to fist fight. There was no testimony that any one was afraid or nervous as a result of William's behavior, there was no evidence that Blacc was afraid. Rather Williams was the only person to respond in fear when Blacc pulled out a gun. Vaielua was merely presence at the waterfront; he did nothing to assist and there was no testimony direct or circumstantial to suggest that Vaielua knew Williams would ask Blacc to fist fight or that Williams wanted to scare Blacc.

d. Insufficient Evidence of Assault In the First or Second Degree Using a Firearm.

The jury found that Vaielua was unarmed, therefore to find him guilty as an accomplice to felony murder based on first or second degree assault with a firearm, the jury had to find beyond a reasonable doubt that Vaielua **knew** that Asaeli was armed and that Vaielua aided Asaeli in the commission of an assault with a firearm. State v. Sarausad, 109 Wn. App. 824, 837, 39 P.3d 308 (2001); State v. Rice, 102 Wn.2d 120, 125, 683 P.2d 199 (1984); State v. Davis, 101 Wn.2d 654, 656-57, 682 P.2d 883 (1984). There was no evidence, direct or circumstantial to support this critical element of felony murder in the second degree. The jury by returning verdicts of not guilty to murder in the first degree and not in possession of a firearm, specifically rejected any notion that Vaielua was part of a plan to shoot Blacc.

Assault in the first degree, RCW 9A.36.011(1) provides in relevant part:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> (a) **Assaults another with a firearm** or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

Id. (Emphasis added). RCW 9A.36.021. The Supreme Court in Rice, affirmed the holding in Davis, that for an accomplice to be liable for the acts of the principal, the accomplice must have general knowledge of the substantive crime committed. For this argument, the substantive crime is assault in the first degree or second degree with a firearm. State v. Rice, 102 Wn.2d at 125; State v. Davis, 101 Wn.2d at 657.

There was no evidence presented that Vaielua or anyone else knew that Asaeli was armed. There was no evidence that Asaeli and Vaielua interacted at the club Papaya's, and there was no evidence that Vaielua and Asaeli interacted with each other at the waterfront. The evidence suggested that Asaeli spoke with some people outside of Papaya's, but the nature of the conversation was unknown and Vaielua was not named as one of those people. 2RP 1175 1210.

Flores hung out with Asaeli at Papaya's, and not with Vaielua. 2RP 1169, 1315. Vaielua was playing pool with Ishmail who had just arrived

home form a tour of duty in Iraq. 2RP 863-65. There was no evidence to suggest that Vaielua made any plans with Asaeli or Williams or had any discussion about a fight or a gun. The jury rejected the state's theory that the murder was planned therefore they must have concluded that Vaielua did not know that Asaeli had a gun.

The only evidence of any conversations between Vaielua and others came from Fola, Gago and Ishmail. Fola and Gago testified that Vaielua was friendly and greeted them and Ishmail testified that he and Vaielua just hung out and played pool. None of these individuals testified that Vaielua had a conversation with Williams or Asaeli or anyone else about Asaeli being armed because Vaielua did not have such a conversation.

Asaeli arrived at the waterfront after Vaielua, and Asaeli did not approach or speak to Vaielua. The evidence does not establish that Vaielua had knowledge that Asaeli was armed or that he intended to commit an assault with a weapon. The facts when reviewed in the light most favorable to the state fail to establish beyond a reasonable doubt that Vaielua had general knowledge that Asaeli was armed and that he was going to commit an assault with a weapon. Without specific knowledge that Asaeli was armed and intended to commit an assault with a firearm, the state could not prove Vaielua guilty as an accomplice to felony murder

by assault with a weapon. State v. Sarausad, 109 Wn. App. 824, 837, 39 P.3d 308 (2001).

Sarausad is on point. In Saurasad, the defendant was convicted of murder by accomplice liability for being the driver in a drive by shooting. The Supreme Court ultimately held that to prove Sarausad guilty of murder, he had to know that the occupant in his car was armed with a firearm because the predicate crime was a drive by shooting that resulted in the death of another person. Id. Because there was no evidence that Sarausad knew that the occupant was in possession of a gun, his conviction for felony murder was reversed. Sarausad, 109 Wn. App. at 837.

In Vaielua's case as in Sarausad, the state failed to prove Vaielua knew that Asaeli had a firearm. Accordingly, the state failed to prove that Vaielua had the necessary general knowledge required to establish guilt of felony murder by any degree of assault with a firearm.

(e) Assault Completed Before Shooting

Under the felony murder statute, the state was also required to prove beyond a reasonable doubt that the shooting of Blacc occurred "in furtherance" of the assault, "or in immediate flight from" the assault. RCW 9A.32.050(1)(b). The evidence established that William's calling

Blacc out ended and was complete when William's jumped away from the car.

Blacc's decision to pull out a gun and point it at William's was not in furtherance of William's asking him to fight, and Blacc was not shot because William's backed away from Blacc. Blacc was shot because he assaulted William's with a gun. Blacc intended to scare Williams and succeeded in doing so. The evidence does not support the element of the crime of felony murder that Blacc was killed in furtherance of William's asking Blacc to fight, because that act ended when Blacc scared Williams away. Asaeli's approach with a gun was an independent and unplanned act. No one knew that Asaeli had a gun.

f. Insufficient Evidence Vaielua Acted as An accomplice to Felony Murder by Assault

Assuming for the sake of argument that William's actions could possibly be considered sufficient to establish assault in the second degree, there is insufficient evidence that Vaielua acted as an accomplice to that act. There is also insufficient evidence that Vaielua knew that Asaeli was armed, and therefore, it is legally impossible for Vaielua to be held accountable to an assault by Asaeli.

An individual is guilty as an accomplice if "[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a). An individual aids or agrees to aid if he is "'ready to assist'" in the commission of the crime. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981), quoting, In re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

An individual's presence and assent do not establish accomplice liability. In re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Presence is only sufficient if the individual is "'ready to assist.'" Wilson, 91 Wn.2d at 491, quoting, State v. Aiken, 72 Wn.2d 306, 349, 434 P.2d 10 (1967).

Vaielua did not know that Asaeli was going to be at the waterfront; he did not know that Asaeli had a gun; he did not know that Williams would call Blacc out to fist fight; he did not know that Blacc would pull a gun on Williams; he did not know that Asaeli would shoot Blacc; and finally, Vaielua did not aid or assist Asaeli or Williams in the commission of any crime. When Williams was in trouble, Vaielua did not assist or aid in any way.

Asaeli came forward and shot Blacc to prevent Blacc from shooting Williams. Vaielua was not involved; he was merely present along with 30 or so other people. This evidence when viewed in the light most favorable to the state does not support a conviction for felony murder based on the predicate felony of assault. In sum, the state did not prove that Vaielua acted as an accomplice to the murder of Blacc.

The State proved that Vaielua was present at the waterfront; he arrived in a car he drove; there were other unidentified occupants in the car. Someone else approached Blacc and that person asked Blacc to fight. A number of state's witnesses heard someone yell that Blacc had a gun. The state and defense witnesses then heard a gun shot followed by a pause and then a series of gunshots. During this time, Vaielua was drinking a beer, socializing, while standing near Gago and Fola. These facts taken in the light most favorable to the state do not prove beyond a reasonable doubt the elements of murder in the second degree, either as a principle or accomplice. The appropriate remedy for insufficient evidence of each essential element is reversal of the charge and dismissal with prejudice.

2. THE ACCOMPLICE LIAIBLITY JURY INSTRUCTIONS RELIEVED THE STATE OF PROVING EVERY ELEMENT OF MURDER IN THE SECOND DEGREE.

a. Ambiguous Jury Instructions

The accomplice liability jury instruction #6 (Supp CP Jury Instruction #6, 8-4-05) violated Vaielua's constitutional right to due process because it was ambiguous in the context of the instructions as a whole, such that the jury likely misunderstood it, and misapplied the instruction in a manner that relieved the state of proving beyond a reasonable doubt each and every element of the crime of felony murder. Sarausad v. Porter, 479 F.3d 671, 692 (9th Cir. 2007), quoting, Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). When there is a "a reasonable likelihood" that the jury did misapply the challenged instruction, it is unconstitutional. Id.

In Sarausad v. Porter,3 all three defendants were charged with one count of first-degree murder, two counts of attempted first-degree murder, and one count of second-degree assault. The state's theory against Sarausad and Reyes was that they were accomplices, and were therefore guilty of murder despite not having fired any shots. Sarausad was convicted of the lesser-included crimes of one count of second-degree murder and two counts of attempted second-degree murder, and one count of second-degree assault. Sarausad v. Porter, 479 F.3d at 765. He challenged the second degree murder and second degree attempted murder

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3 Subsequent citations to this case are abbreviated Sarausad v. Porter rather than Sarausad to avoid confusion with the Washington State Court of Appeals case.

charges based on a defective accomplice liability instruction that the jury likely misapplied.

Vaielua objected to the accomplice liability instruction which was applied to the charges of murder in the first degree by premeditation, murder in the first degree by extreme indifference to human life, and murder in the second degree by assault in the first or second degree. Counsel objected to the accomplice liability instruction due to concerns regarding the potential confusion with applying an accomplice liability instruction that only specified "the crime" to two crimes commissionable with four different levels of mens rea. 2RP 1781-83, 1794, 1866. Counsel also moved the court for permission to voir dire the jury on the issue of accomplice liability to make sure that the jury did not rely on an improper reading of the accomplice liability instruction. 2RP 1781-82, 1794, 1930, 2260-63, 2268. The judge denied the motion to voir dire the jury. 2RP 2269.

The accomplice liability instruction in Vaielua's case is virtually identical to the accomplice liability instructions used in Sarausad's case. In Vaielua's case, the jury determined that Asaeli was armed with a gun, he was the shooter and that he guilty of both murder in the first degree as well as murder in the second degree and guilty of assault against Tami Missionare. Supp. 2RP 224-44. The jury determined that Vaielua was

unarmed and not guilty of murder in the first degree but guilty of felony murder. CP 345, 347, 349.

As instructed, for Vaielua to be held liable as an accomplice to the murder in the second degree, the jury needed only to determine that Vaielua knew that Williams or Asaeli would commit "the crime". "The crime" however could have been any crime. The accomplice liability instructions did not define "the crime" as first or second degree assault or as first degree murder; nor did any of the other instructions define "the crime". Rather there were approximately 60 jury instructions that provided many different definitions of assault, murder, intent, necessity, etc and many more instructions defining specific terms within each instruction. Supp CP (Jury Instructions 8-4-06).

To add confusion to the matter, the accomplice liability instruction applied to all of the charges against all of the three defendants, including the murder in the first degree charges, the felony murder and the six other charges against Asaeli and Williams. The accomplice liability instruction did not specify the actor, the purported accomplice or the "the crime". The accomplice liability instruction was ambiguous, it did not require the jury to find that Vaielua knew that Williams or Asaeli would commit an assault.

Recently, the Ninth Circuit in Sarausad held this ambiguity in an accomplice liability instruction to be unconstitutional. Sarausad v. Porter, 479 F.3d at 692. The accomplice liability jury instruction in both Sarausad v. Porter and Vaielua's case contained the same language the Court in State v. Roberts, 142 Wn.2d 471, 14 P.3d 713, 735 (2000), i.e., "the crime". The instructions in Sarausad v. Porter read as follows.

> [Number 45:] You are instructed that a person is guilty of **a crime** if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of **the crime**.
>
> [Number 46, in part:] 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**.

(Emphasis in original.) Sarausad v. Porter, 479 F.3d at 690. These instructions are virtually identical to the accomplice liability instruction

#6 in Vaielua's case. The accomplice liability instruction #6 in Valielua's case provided:

> A person is guilty of **a crime** if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he she is an accomplice of such other person in the commission of the crime.
>
> 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 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 presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.
>
> A person who is an accomplice in the commission of **a crime** is guilty of **that crime** whether present at the scene or not.

Supp CP (Jury Instruction #6 8-4-05). In both Sarausad v. Porter and in Vaielua's case, the accomplice liability instructions failed to provide an "explicit statement that an accomplice must have knowledge of the actual

crime the principal intends to commit". Sarausad v. Porter, 479 F.3d at 690.

Both sets of instructions merely called attention to "'a crime,' which could have meant either 'the crime' actually committed by the principal (whatever it turned out to be), or it could have meant 'the crime' the accomplice had knowledge the principal intended to commit." Id.

The Court in Sarsausad v. Porter, held that even though these instruction complied with State v. Roberts, the compliance was merely technical because it did nothing to clarify the inherent ambiguity in the language "the crime". Sarausad v. Porter, 497 F.3d at 690. The fact remained that nothing in the modified instructions directed the jury that it had to find that Sarausad knew that the principal would commit a murder as a result of a drive by shooting rather than some other crime.

> T**]he simple change from "a crime" to "the crime" in Instruction 45 does not, in our view, make the jury instructions in Sarausad's case unambiguous**, for the basic problem identified above remains: There is no sentence in the instructions specifically instructing the jury that a person can be guilty of "a crime" as an accomplice only if that person knows that "a crime" is "the crime" the principal intends to commit.

(Emphasis added) Sarausad v. Porter, 497 F.3d at 690-91. Similarly, the accomplice liability instruction in Valielua's case did nothing to clarify the

inherent ambiguity in the language "the crime". The fact remained that the instruction did not require the jury to find Vaielua knew that Williams or Asaeli would commit assault in the first or second degree or murder.

In Sarausad, 109 Wn. App. 824, 39 P.3d 308 (2001), the Washington Courts agreed with the principle that the accomplice needs to know that the principal intended to commit the actual crime committed, yet failed to require the trial court to protect this requirement. Id. The Court of Appeals denied Sarausad's personal restraint petition and the Washington Supreme Court affirmed the denial.

The Ninth Circuit reversed and held that by simply mirroring the language of an ambiguous statue in a jury instruction cannot satisfy due process where the statute itself is ambiguous. Sarausad v. Porter, 497 F.3d at 691. By way of example of ambiguous statutes, the Ninth Circuit cited to Liparota v. United States, 471 U.S. 419, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985) (Remaining citations omitted). The Ninth Circuit held that the accomplice liability instructions in Sarausad v. Porter which used the terms "the crime" were ambiguous. The accomplice instruction in Vaielua's case, like that in Sarausad v. Porter was also ambiguous for the same reason.

b. Likelihood of Misapplication

Once it is determined that the jury instructions are ambiguous, the appellant must next establish that there is a "reasonable likelihood" the jury misapplied the ambiguous instructions in a way that relieved the state of its burden of proving each element of the crime charged beyond a reasonable doubt. Sarausad v. Porter, Estelle, 502 U.S. at 72, citing, Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990).

The Court in Sarausad v. Porter, relied on four factors in finding that there was a likelihood that the jury misapplied the instruction in a manner that relieved the state of its burden of proving every element of the crime charged beyond a reasonable doubt. First, the evidence supporting the conclusion that Sarausad knew that Ronquillo intended to commit murder on the return trip to Ballard High School was "thin". There was no direct evidence that Sarausad knew his friend's intentions. There was no evidence of a conversation between Sarausad and his friend prior to the return to the high school.

Thus, even when viewed in the light most favorable to the state as required under Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), the evidence was insufficient to support the conclusion that Sarausad knew his friend would commit murder. The Court in Sarausad v. Porter noted that the fact that the jury convicted Sarausad on

such thin evidence suggested that "the jury incorrectly believed that such proof was not required." Sarausad v. Porter, 497 F.3d at 693.

In Vaielua the evidence that Vaielua knew that Asaeli or Williams would assault Blacc was also "thin". There was no evidence of any conversations between Vaielua, Williams and Asaeli, no evidence of a plan, and no apparent coordination of efforts. Once Vaielua arrived a the waterfront he began socializing with Blacc's friends; and once Williams' was in trouble, Vaielua did nothing to assist him, and when Asaeli shouted "no" to Blacc, Vaielua did not intervene or participate. The facts do not support the finding that Vaielua had any idea that Asaeli or Williams would commit an assault.

Second, the prosecutor in Sarausad v. Porter argued the "in for a dime, in for a dollar" theory of accomplice liability, meaning that if you know your friend is going to commit a crime and you assist, you are guilty of whatever crime your friend commits. Id. In Vaielua, the prosecutor had a difficult time arguing accomplice liability with respect to Vaielua because there was so little evidence of his knowledge or participation in any crime.

In Vaielua's case, the prosecutor summarized the law on accomplice liability by using an analogy to baseball. The prosecutor argued that because outfielders were ready to assist the pitcher they were

his accomplices. The prosecutor argued that Vaielua like baseball players by virtue of his knowledge and readiness to assist in the commission of "the crime" was an accomplice to the person who committed "the crime". 2RP 1967-68.

The prosecutor continued by arguing that to be an accomplice the person must be "willing[] to participate". . .and that's exactly what we have here by both accomplices in different ways." 2RP 1969. The prosecutor then argued that Vaielua drove Williams to the waterfront, that he surrounded Gago and Fola and placed himself in between them and Blacc and Vaielua communicated with Asaeli and Williams to plan to kill Blacc. 2RP 2213-16.

There was no evidence that: (i) Williams was in Vaielua's car; (ii) that Blacc was surrounded; (iii) that Vaielua was in between Blacc and Fola; that Vaielua spoke with Willaims or Asaeli at any time that evening; (iv) that Vaielua met with either Willims or Asaeli or anyone else at a lamp post; (v) or that there was any coordinated plan to shoot Blacc. 2RP 2213-16.

Contrary to the prosecutor's argument, there was no evidence that Vaielua drove Williams to the waterfront. First, it was very dark outside at the waterfront, and no one could identify the occupants of the white trooper. 2RP 111, 250-53. Second, Tiare Missionare did not see Williams

get out of Vaielua's car. RP 635-36. Feleti Asi testified that he could not remember with whom he went to the waterfront, just a bunch of people from the bar. RP 829. Asi did not remember seeing Vaielua or Williams at the waterfront. RP 849. Eugene Van Camp never saw Vaielua before trial. RP 885, 1016. Van Camp arrived after other cars and did not know who traveled with whom. RP 897. Tami Missionare did not see Williams get out of Vaielua's car.

Breanne Ramaley saw five cars arrive, but she did not see Williams get out of Vaielua's car and could not identify anyone else who got out of the other cars and did not recognize Vaielua or Williams as the people standing around her car. RP 1704; 2RP 61, 70-71, 162-64. Gago thought everyone got out of Vaielua's car but he did not see who the occupants were and could not identify the occupants of the White trooper. 2RP 250, 252-253, 356. Fola also did not see Williams exit Vaielua's car. RP 420.

Not a single eyes witness saw Williams in Vaielua's car and not a single eyewitness saw Williams exit Vaielua's car and not a single eyewitness identified the occupants of the white Trooper. The prosecutor argued facts not in evidence.

The evidence was disputed regarding who asked for Blacc. Gago testified that Vaielua never made any reference to Blacc. 2RP 291. But rather that he saw 2 other guys get out of the Ford and walk in front of

Ramaley's car and say "whose Blacc" or "where's Blacc". 2RP 291-92. The tone of the voice was normal and not hostile. Id. Ramaley did not see the person who asked for Blacc and did not see the occupants of any of the cars. 2RP 162-63, 2RP 164, 2RP 293. According to Gago, the person who asked for Blacc had a brown flag over his face and was therefore unidentifiable. 2RP 294. Vaielua did not have a flag on his face. 2RP 413.

Fola, who admitted to being "blackout" drunk and preoccupied with talking to a girl when Vaielua arrived, but he believed that Vaielua said "what's up" and asked for Blacc, but Fola was certain that Vaielua did not go over to Blacc. RP 309, 374, 383. Tami was certain that Vaielua never asked for Blacc. RP 1494.

The prosecutor argued that Vaielua physically placed himself in between Blacc and Blacc's friends Gago and Fola to prevent them from accessing Blacc in need. There is no evidence to support his contention. Rather the evidence is to the contrary. Gago testified that Vaielua greeted him in a friendly manner, shook his hand and stayed to drink a beer. 2RP 253, 291. Gago also testified that Vaielua had nothing to do with the shooting. 2RP 361. Fola provided a similar description of Vaielua and both Gago and Fola specifically testified that they were not at all uncomfortable with Vaielua's presence at the waterfront. RP 308, 417.

The prosecutor argued impermissible inferences and "facts" that were contradicted by the evidence presented. In Sarausad v. Porter, the prosecutor also impermissibly argued facts not in evidence, specifically that Sarausad's friends had a conversation with him about planning to shoot someone before arriving at their destination.

The Court in Sarausad v. Porter held that the Court of Appeals assertions that the prosecutor did not argue facts not in evidence was "flatly contradicted by the record". Sarausad v. Porter, 479 F.3d at 689. Similarly, in Vaielua's case, the reviewing Court cannot assert that the prosecutor did not argue facts not in evidence because the record proves otherwise.

Third, the jury in Sarausad v. Porter, sent three notes to the court asking questions about the accomplice liability instructions and whether intent applied to the accomplice as well as to the principal. Sarausad v. Porter, 497 F.3d at 693. Fourth, the Court of Appeals and the Supreme Court commission rejected Sarausad's PRP based on their misreading of the record and mischaracterization of the prosecutor's improper argument. Id

The Court in Sarausad v. Porter, held that the ambiguous accomplice liability instruction created a "reasonable likelihood" that the jury misapplied the law and thereby relieved the state of its burden of

proving each and every element of the crime charged. It concluded that the error was not harmless for the same reasons. Sarausad v. Porter 479 F.3d at 689.

In Vaielua's case as in Sarausad v. Porter, the same accomplice liability instruction was ambiguous. Additionally as in Sarausad v. Porter, there was a "reasonable likelihood" that the jury misapplied the law and thereby relieved the state of its burden of proving each and every element of felony murder.

First, the evidence that Vaielua knew that either Williams or Asaeli might commit an assault was "thin". Second, the prosecutor spent a great deal of energy arguing damaging facts not in evidence in an attempt to persuade the jury that Vaielua could be held accountable as an accomplice based on facts not in evidence. Third, counsel repeatedly challenged the accomplice instruction as confusing and asked permission to voir dire the jurors to determine the basis of the accomplice liability finding against Vaielua. Fourth and finally, the trial court, like the Court of Appeals and Supreme Court allowed the prosecutor to argue facts not in evidence and permitted the same ambiguous and prejudicial accomplice liability jury instruction.

As a result of the foregoing errors, the state was relieved of proving that Vaielua was an accomplice to the crime of felony murder because

there was insufficient evidence that the jury was required to find that Vaielua knew that Asaeli or Williams would commit assault in the first or second degree rather than some other crime, such as harassment or assault in the fourth degree. Such constitutional error can never be harmless. Sarausad v. Porter 479 F.3d at 689.

The remedy is reversal of the conviction and remand for a new trial.

3. VAIELUA WAS DENIED DUE PROCESS AND JURY UNANIMITY WHERE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF EACH ALTERNATE MEANS OF ASSAULT RELIED ON TO ESTABLISH MURDER IN THE SECOND DEGREE AND FOR FAILING TO ELECT WHICH OF MULTIPLE ACTS THE JURY RELIED ON IN FINDING GUILT.

Vaielua was convicted of murder in the second degree by alternate means: either by assault in the first or second degree, committed in a variety of unspecified possible ways. CP 344. Vaielua was charged with felony murder based on assault in the first and second degree commissionable in 4 different ways. CP 197-98.

The state argued that two or three different acts could have constituted the predicate assault to the felony murder charge. The unanimity defect in Vaielua's case is based on insufficient proof of both

alternative acts and alternative means of committing murder in the second degree.

a. Alternate Means

The trial court's failure to give a unanimity instruction denied Vaielua his constitutional right to a unanimous jury verdict on Count III charging second degree murder as a principal or as an accomplice. Defense counsel objected to the jury instructions, and requested a unanimity instruction on murder in the first degree but did not request a unanimity instruction for the felony murder charge. 2RP 1795, 1799, 2262-63. This Court may however, decide this issue without an objection. RAP 2.5(a); Wash. Const. art. I, §21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993).

A unanimous jury verdict is required in all criminal cases. Const. art. 1, sec. 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where a crime may be committed by alternative means and there is insufficient evidence on one of the alternate means, jury unanimity as to the means by which the defendant committed the crime is necessary. State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); Ortega-Martinez, 124 Wn.2d at 707-08. "Sufficient evidence is evidence adequate

to justify a rational trier of fact to find guilt beyond a reasonable doubt." Ortega-Martinez, 124 Wn.2d at 708.

To determine whether there is sufficient evidence to support each of the alternative means, the reviewing Court must determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt when the evidence is viewed in the light most favorable to the prosecution. State v. Pirtle, 127 Wn. 2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 135 L. Ed. 2d 1084, 116 S. Ct. 2568 (1996).

Criminal assault in is an alternate means crime. There are 17 different means of committing assault in the first and second degree. Smith, 159 Wn.2d at 784; See RCW 9A.36.011-.031. The common law definitions of assault in the first degree amongst themselves however do not constitute alternate means of committing that crime, nor do the various subsections of assault in the second degree. Smith, 159 Wn.2d at 786. The Court in Smith reiterated that where Smith was charged with only one means of committing assault in the second degree, it did not matter how many different ways the instructions described and defined that means, because ultimately it represented only a single means of assault. Smith, 159 Wn.2d 787, 790.

Assault in the first degree and assault in the second degree can be committed by different means and therefore a unanimity instruction is necessary when one or more of the means is insufficient to support guilt beyond a reasonable doubt. Smith, 159 Wn.2d at 790. This is distinguishable from an instruction that defines a single means, which is referred to as a "means within a means scenario" that does not require a unanimity instruction. Smith, 159 Wn.2d at 790 n. 9, citing, State v. Richardson, 24 Wn. App. 302, 304, 600 P,.2d 696 (1979), and State v. Gallo, 20 Wn. App. 717, 730, 582 P.2d 558 (1978).

In Smith, the Court distinguished the "means within a means scenario" and indicated that different degrees of assault set forth in RCW 9A.36 do represent alternate means. Smith, 159 Wn.2d 789-90. "In absence of legislative intent to the contrary, we limit the reach of the alternative means doctrine to those alternative means directly provided for by the assault statutes." Id. (footnote omitted).

Smith is instructive. In Smith the defendant was only charged with a single means of committing second degree assault: to-wit, with a handgun. In Vaielua's case, Vaielua was charged with committing felony murder by either assault in the first, second or third degree based on his presence and readiness to assist either Williams and/or Asaeli.

The state did not elect which degree of assault it would rely on in trying to establish felony murder. Rather the to-convict instruction merely recited both assault in the first and second degree without delineating which of several possible means within each degree or which of the two possible degrees the state was going to proceed under. Supp CP (jury instruction 42 4-8-05).

The court did not provide a unanimity instruction and there was insufficient evidence to support each alternate means of committing assault in the first and second degree. The state argued that Vaielua committed assault in the second degree by being present and willing to assist Williams' in calling out Blacc. The state argued that the next thing you know, one of his [Williams] accomplices [Vaielua or Asaeli] elevates a level of assault to a first or second degree assault when they pull out a gun." 2RP 3326. Vaielua

The state was unable to articulate in any more detail precisely what constituted the assault and what Vaielua did to assist, because the facts simply did not support any sort of assault. The state argued that because Vaielua:

> drove Eroni Williams down there. He's asking for Blacc with Eroni Williams. He's putting up bandannas. You have an assault. Eroni Williams, even if he's with Darius Vaielua just to that point, even if Ben Asaeli is with Eroni Williams just to that point,

> makes them accomplices to the crime of assault. Felony murder, they are accomplices to the crime of assault.

RP 2213-16.

There was no evidence of an assault for the simple reason that the state did not present sufficient evidence that Williams intended to cause Blacc to fear imminent bodily harm and there was no evidence that Blacc had any fear. The evidence indicated that he was angry and said something like " I'm going to bust a cap in your ass" as he pulled a gun on Williams. RP 738. Because there was insufficient evidence of an assault by intending to create fear, Vaielua was entitled to a unanimity instruction when the state proceeded to argue an alternate means of committing an assault, namely by one of the accomplices pulling a gun.

There was also insufficient evidence that Vaielua acted as an accomplice to Asaeli when he pulled a gun because there was no evidence to suggest that Vaielua knew that Asaeli had a gun or that he was ready and willing to assist Asaeli in the commission of an assault with a handgun.

The jury was instructed on 4 different possible means of committing assault in the first and second degree. Supp CP (Jury Instructions: 27, 29, 32, 44 8-4-05).

Jury instruction 27, provided that

> A person commits assault in the first degree when, with intent to commit great bodily harm, or [i] he assaults another and inflicts great bodily harm, or [(ii)] assaults another with a firearm or with a deadly weapon or by any force or means likely to produce great bodily harm".

Supp CP (Jury Instruction #27 8-4-05). Jury instruction 27 contains two alternate means of committing assault in the first degree under subsection 1(a) and (c). Jury Instruction 32 provides that assault in the second degree is committed when::

> A person commits the crime of assault in the second degree when he or she [iii] intentionally assaults another and thereby recklessly inflicts substantial bodily harm or [iv] assaults another with a deadly weapon.

Supp CP (Jury Instruction #32 8-4-05). Jury instruction 32 also provided two alternate means of committing assault in the second degree. CP 297-98. Vaielua was also charged with felony murder based on three different degrees of assault. According to Smith, Vaielua's case was an alternative means case and the state's failure to elect a means or request a unanimity instruction denied him his right to a unanimous jury verdict because: (i) there was insufficient evidence that Vaielua knew Asaeli was armed; (ii) there was insufficient evidence that Vaielua knew that Williams would assault Blacc; (iii) there was no evidence that Vaielua was ready to assist

Williams' in any way; and (iv) there was no evidence that Vaielua was ready and willing to assist Asaeli. Smith, 159 Wn.2d at 790. 4

Ultimately, the jury was permitted to pick and choose from four potential means of committing assault without needing to be unanimous as to the means (assault in the first degree with and without a gun and assault in the second degree with and without a gun). While this is generally permissible, it is not in Vaielua's case because there was insufficient evidence of each means. The failure to give a unanimity instruction under these circumstances was not harmless error

b. Harmless Error Analysis

Harmless error is analyzed using the test set forth in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). State v. Jennings, 111 Wn. App. 54, 64, 44 P.3d 1 (2002), citing, Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Error is harmless when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Neder, 527 U.S. at 15, quoting, Chapman, 386 U.S. at 24.

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4 But cf State v. Richardson, 24 Wn. App. 302, 600 P.2d 696 (1979) (even though Richardson was charged with assault by the alternate means set forth in the statute, his conviction was affirmed because there was substantial evidence of each means).

In Neder, the omission of an element in a jury instruction was not harmless error because the evidence was disputed.. Neder, 527 U.S. at 18. If there is any evidence in the record that "could lead to a rational contrary finding regarding the misstated or omitted element", the error is nor harmless. Neder, 527 U.S. at 19. "Where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding--[the reviewing court] should not find the error harmless." Neder, 527 U.S. at 19.

In Jennings, the misstatement in the instructions permitted the jury to convict Jennings based on a mere verbal threat, rather than because he was armed. This necessitated reversal of his first degree robbery charges. Jennings, 111 Wn.2d at 65, citing, In re Matter of the Personal Restraint of Bratz, 101 Wn. App. 662, 676, 5 P.3d 759 (2000).

In Vaielua's case, the instructions permitted the jury to convict Vaielua based on insufficient evidence of either assault in the first or second degree. Given the paucity of facts supporting the alternate means of committing assault in the first or second degree, it is impossible to determine that the lack of unanimity did not contribute to the verdict. Rather it is likely that the instructions led the jury to improperly rely on varying means that were not supported by proof beyond a reasonable doubt standard. Reversal is required.

c. Multiple Acts

A defendant's federal and state constitutional rights to a jury trial and a unanimous jury verdict are in jeopardy when the State presents evidence of several acts that could form the basis of a charged crime. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988), citing, U.S. Const. amend. VI; Const. art. I, § 22; State v. Badda, 63 Wn.2d 176, 182, 385 P.2d 859 (1963). To safeguard those rights, the State must make an election as to which act it is relying on for a conviction, or the trial court must instruct jurors that they must agree unanimously that the same underlying act has been proven beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), modified on other grounds by Kitchen, 110 Wn.2d at 410.

Under the Petrich rule, a unanimity instruction is required when "a rational juror could have reasonable doubt whether at least one incident supporting the charge occurred". State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). The unanimity rule applies when the evidence presented indicates there are "several distinct acts." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). In Coleman because there were multiple acts of molestation charged, and the evidence of some of the acts was in controversy, the risk of lack of unanimity was prejudicial and therefore reversible error. Coleman, 159 Wn.2d at 515.

In Vaielua's case, as in Coleman, multiple acts were suggested to support the crimes charged. Vaielua was charged with murder in the first degree by premeditation or extreme indifference to human life based on his participation in the planning of the killing of Blacc and by his extreme indifference to human life or by his participation and knowledge that Asaeli possessed a gun and would kill Blacc. CP 197-98

Vaielua was also charged with second degree murder based on his intent to assist in an assault that was described as committed by William's asking Blacc to fight, by Asaeli having a gun and intending to shoot Blacc and by Asaeli having a gun and recklessly injuring Blacc. Id. The state also argued that Vaielua was guilty of assault by his intentional intimidating presence which caused reasonable apprehension of fear. 2RP 2215-16. There is no dispute that Vaielua did not commit an assault as a principal. There is however considerable question surrounding whether the underlying acts of the principals were legally sufficient and whether Vaielua had the requisite knowledge and willingness to assist the principals to be held legally accountable for their acts.

There were almost 60 jury instructions in Vaielua's case and many defining assault without specifying which acts the jury was to rely on in to support each method of committing assault. Supp CP (jury instruction 8-4-06). Based on a review of the record and the jury instructions as a whole, it

is possible that the jury could have believed that Vaielua by his "intimidating presence" alone committed an assault on Blacc even though there was no evidence that Blacc was aware of Vaielua's presence.

The jury could also have relied on the state's argument that Vaielua's readiness to assist Williams was sufficient to constitute an assault, even though there was no evidence that Vaielua knew that Williams would call out Blacc. As a third alternative, the jury might have believed that Asaeli's pointing a gun at Blacc was an assault for the split second before he shot and killed him and that Vaielua knew that Asaeli had a gun and was a part of a plan to support Asaeli in assaulting Blacc.

While the jury could have relied on any of these possible fact scenarios, not a single one was sufficient to establish beyond a reasonable doubt either an assault or that Vaielua was an accomplice to an assault. The state was unable to present sufficient evidence that Vaielua was aware of and ready to assist the principal in any of the acts the state characterized as an assault.that ultimately lead to the death of Blacc

In Bland, the State charged the defendant with two counts of second degree assault with a deadly weapon, one for each of two victims. Bland, 71 Wn. App. at 351-52. On appeal, he argued that because the assault convictions could have been based on three different acts- threatening one victim with a gun, shooting the gun and nearly missing

another victim, and earlier hitting the first victim in the face-the trial court was required to give unanimity instructions. The Court of Appeals held that a unanimity instruction was not required because the State's closing argument, the charging document, and the special verdict forms, all mentioned that the charge dealt with a gun or deadly weapon. Since there was no doubt that the jury relied on the gun activity for the two assault counts, the jury could not have become confused into considering the defendant's hitting the victim as a charged activity. Id.

In Vaielua's case, unlike in Bland, it was impossible to determine which acts the jury relied on in finding Vaielua guilty of murder in the second degree. The corrected information charged Vaielua as a principle or as an accomplice with one count of murder in the first degree by premeditation or by extreme indifference and one count of murder in the second degree as an accomplice or principle by assault in the first or second degree as either a principle or accomplice. In closing argument the prosecutor argued that the assault was committed by putting Blacc in fear by the presence of a group of people “”Kushman Blokk” and by Williams asking hin1 to fight, and that the assault was elevated to assault in the first or second degree by the use of a gun. RP 2014-16.

The "to convict" instructions in this case did not help the jury differentiate the underlying acts of committing assault and felony murder.

There was no specificity with regards to what act committed by what assailant formed the predicate assault to the felony murder. Even though the jury was instructed that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.", this did nothing to clarify which acts constituted the assault underlying the felony murder. Supp CP (Jury Instruction #___8-4-05). Additionally, even though the jury was instructed "to deliberate in an effort to reach a unanimous verdict" and it could only convict unanimously. Supp CP (Jury Instruction # ___8-4-05). This was insufficient to guarantee unanimity. State v. Kitchen, 46 Wn. App. 232, 235-36, 730 P.2d 103 (1986), aff'd, 110 Wn.2d 403, 756 P.2d 105 (1988).

"'Normally, a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications form the basis of the guilty verdict.'". State v. Whitney, 108 Wn.2d 506, 512, 739 P.2d 1150 (1987), quoting United States v. Payseno, 782 F.2d 832, 835 (9th Cir. 1986). However, such a general instruction on jury unanimity is insufficient in an alternative act case, such as Vaielua's. State v. Kitchen, 46 Wn. App. at 235-36.

Even though the jury found Vaielua not guilty of murder in the first degree and not guilty of possession of a firearm, it was impossible to

determine which acts the jury considered to be the assaults underlying the murder in the second degree. There is nothing in the argument, jury instructions or verdict that could assure this Court that the jury agreed on the same acts when there were at least three acts identified as possible (yet legally insufficient) assaults.

There was only a general verdict on count III. "If one of the alternative means upon which a charge is based fails and there is only a general verdict, the verdict cannot stand *unless* the reviewing court can determine that the verdict was founded upon one of the methods with regard to which substantial evidence was introduced." State v. Bland, 71 Wn. App. at 354.

Sections (2) of the jury instruction, based on RCW 9A.32.050 expressly required the state to prove Vaielua acted as an accomplice to assault one or two and section (3) required the state to prove that Vaielua acted as an accomplice to the shooter in killing Blacc. The State argued three alternate means and acts in closing: (i) accomplice to Asaeli in the commission of the murder of Blacc by planning with Williams and Asaeli to go to the waterfront to shoot Blacc, (ii) Vaielua physically placing himself between Gago, Fola and Blacc to shield Asaeli and Willimas from Blacc's friends; (iii) Vaielua intimidating Blacc's friends; and (iv) Vaielua standing by ready to. From the arguemtns to the jury, the jury instructions

and the verdicts rendered it is impossible to determine whether the jury was unanimous as to the act relied on and which act was used to support which means. Bland, 71 Wn. App. at 358.

Where the State and the trial court both fail respectively to make the election and to instruct the jury, there is constitutional error. Kitchen, 110 Wn.2d at 411. The error is not harmless when a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. Coleman, 159 Wn.2d at 510, 515; State v. Bland, 71 Wn. App. at 351; Kitchen, 110 Wn.2d at 411).

The instructional error in Valielua's case was not harmless in light of the multiple acts argued as constituting assault, the prosecutor's inability to focus on a single act or identify a single act that actually constituted an assault, together with the witnesses' inconsistent statements and their attendant credibility issues.

4. THE TRIAL COURT'S REFUSAL TO SEVER VAIELUA' CASE FROM HIS CO-DEFENDANT'S DEPRIVED HIM OF HIS RIGHT TO A FAIR TRIAL.

Vaielua moved to sever his case from the case against Williams and Asaeli before, during and at the end of the trial. 1RP 113, 121, 175, 1214; 2RP 447-448, 1409. A court should sever the trials of properly joined defendants where severance is necessary to promote a fair determination of guilt. Under CrR 4.4(c)(2):

> The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:
>
> (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
>
> (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

A trial court's denial of a motion to sever is reviewed under the abuse of discretion standard. State v. Phillips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). Where a defendant is prejudiced by a joint trial, it is an abuse of discretion to deny a severance motion. State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994).

On appeal, an appellant must show manifest prejudice resulting from a joint trial outweighed concerns for judicial economy. The appellant must point specific prejudice. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982), cert. denied sub nom., Frazier v. Washington, 459 U.S. 1211 (1983). Specific prejudice may be demonstrated by:

> (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining

> each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting United States v. Oglesby, 764 F.2d 1273, 1276 (7th Cir. 1985)), rev. denied, 128 Wn.2d 1025 (1996).

Here, the massive and complex quantity of gang evidence against the co-defendants made it impossible for the jury to properly allocate that evidence between the co-defendants and Vaielua Specifically, the evidence of the co-defendants' association with Kushman Blokk, including the graffiti on Williams' cell walls, and the related evidence suggesting that Kushman Blokk was a gang made it impossible for the jury to fairly determine Vaielua's guilt or innocence. RP 218-17, 270-71, 274, 350, 392-93, 561-67, 595-99. 2RP 472-73; 2RP 520; 567, 569, 570, 573. 567.

From the beginning it was the State's theory that Blacc was shot for some gang related reason. See RP 20-29 (July, 13, 2006) (prosecutor's opening argument). Based on that theory, the court allowed the State to present evidence that Williams was a gang member of Kushman Blokk and Asaeli was a "wannabe" member of Kushman Blokk, which the State characterized as a gang, and to present Ringer's testimony on gangs. RP 494; 2RP 609, 659-60, 705, 718, 721, 744, 749, 750. There was no evidence,

however, that Vaielua was a member of Kushman Blokk. Nonetheless, the gang evidence admitted only against Williams and Asaeli was used by the State to infer Vaielua was connected with the Kushman Blokk and therefore this was the intentional killing of a rival gang member. RP 272, 391, 877, 884-86, 1241, 1321; 2RP 295-98; 1537, 1544.

Asaeli admitted he shot Blacc. He claimed he shot Blacc because Blacc was shooting at his cousin, Williams. 2RP 1037, 1188. There was voluminous gang evidence admitted against Williams and significant substantive and impeachment testimony against Asaeli from witness Devault. The impeachment testimony from Devault was extremely damaging against Vaielua (guilt by association) and would not have been admissible had Asaeli's case not been joined with Vaielua's. 2RP 1522, 1545-56

Even though the judge gave a limiting instruction that Devault's testimony could not be used as substantive evidence against Vaielua, given the volumes of gang related testimony that was only to be used against Williams' and the criminal evidence only to be used against Asaeli it would have been difficult, if not impossible, for the jury to separate these volumes of evidence to be used only against Williams and Asaeli from the paucity of properly admitted evidence related only to Vaielua's case.

The evidence likely led the jury to impermissibly infer that Vaielua, like the co-defendants, was likewise a "wannabe" or a member of the Kushman Blokk, that Kushman Blokk was a violent gang that controlled criminal activity on the same order as the Crips and Bloods and therefore Vaielua, as a member or because he associated with its members, was a violent person with a criminal propensity who would likely murder a member of another gang. That inference made it likely the jury rejected the paucity of evidence that was only to used against Vaielua in favor of using all of the evidence even that evidence which was limited to establishing the guilt of William's and Asaeli.

Vaielua made over 10 motions to sever his case from co-defendants Williams and Asaeli. RP 34, 180, 184, RP 218-17, 270-71, 350, 561-67; 2RP 609, 2RP 611-12, 635, . 2RP 850-52, 2RP 1522. Many of the motions were based on the prejudicial impact of gang evidence that was not relevant or admissible against Vaielua, but that the jury was certain to consider in determining his guilt, regardless of whether or not the court gave a limiting instruction. Id.

Additional examples of irrelevant and highly prejudicial evidence that was admitted and which formed the basis of the motions to sever included: (1) evidence that Asaeli stole the gun he used in the shooting of Blacc. RP 561-567 (the trial court refused to give a limiting instruction that

the evidence of the stolen gun was only to be used against Asaeli RP 570); (2) the judge allowed evidence of the jail cell graffiti where Williams was housed (counsel objected stating that a curative instruction would not prevent the jury form considering this evidence against Vaielua- even though it was inadmissible against Vaielua) 2RP 609, 611-12, 635.

(3) After losing a half time motion to dismiss, Vaielua again renewed his motion to sever the trial on grounds that even though the jury was instructed to disregard the graffiti when considering Vaielua' case, once the bell was rung it could not be un-rung, and Vaielua was being denied his right to a fair trial. 2RP 850-52. The trial court denied the motion to sever stating that the limiting instruction was sufficient. 2RP 854; (4) Vaielua moved for a mistrial and to sever his case from Williams's and Asaeli's cases on grounds that Devault's testimony was not admissible in his case and was extremely prejudicial because it involved Asaeli and witness tampering and Vaielua could not confront Asaeli about statements after Devault's impeachment testimony. 2RP 1522; (5) repeated statements by civilian witnesses regarding second or third hand information about Kushmen Blokk and its participants.

Vaielua's case presents the classic problems articulated in Oglesby, supra, "a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant

when determining each defendant's innocence or guilt; . . . .[and a [] gross disparity in the weight of the evidence against the defendants. State v. Canedo-Astorga, 79 Wn. App. at 528, quoting, Oglesby, 764 F.2d at 1276.

Because of the complexity and volume of evidence that was admitted against the co-defendants in Vaielua's case, it was likely impossible for the jury to separate the scant evidence against Vaielua from the massive evidence submitted against his codefendants.

Because the prejudice from the inadmissible evidence in Vaielua's case alone outweighed judicial economy, the severance motions should have been granted. The court therefore abused its discretion in denying the severance motion and Vaielua's murder conviction should be reversed. State v. Bythrow, 114 W.2d 713, 717, 790 P.2d 154 (1990).

5. VAIELUA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO REQUEST A LESSER INCLUDED INSTRUCTION OF MANSLAUGHTER TO THE CHARGE OF MURDER IN THE FIRST DEGREE.

Although not convicted of murder in the first degree, Vaielua was charged with premeditated first degree murder and first degree murder by extreme indifference to human life. CP 197-198. Vaielua's defense attorneys did not request a manslaughter jury instruction. This Court may

however, decide this issue without an objection because it raises a manifest error affecting a constitutional right. RAP 2.5(a); Wash. Const. art. I, §21; Ortega-Martinez, 124 Wn.2d at 707; Ashcraft, 71 Wn. App. at 465.

Manslaughter is a lesser included offense of murder in the first degree. State v. Gamble, 154 Wn.2d 457, 469 n.9, 114 P.3d 646 (2005); State v. Shaffer, 135 Wn.2d 355, 358, 957 P.2d 214 (1998); State v. Berlin, 133 Wn.2d 541, 550-51, 550, 947 P.2d 700 (1997). When there is sufficient evidence to support the lesser charge of manslaughter, the defendant is entitled to that instruction. State v. Shaffer, 135 Wn.2d at 358. Because there was sufficient evidence to support the lesser charge in Vaielua's case, he was entitled to an instruction on manslaughter. State v. Shaffer, 135 Wn.2d at 358.

First degree murder requires that the defendant:

> (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or (b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person;

RCW 9A.32.030(1)(a),(b).

First degree manslaughter requires the defendant recklessly cause the death of another person. RCW 9A.32.060(1)(a). RCW 9A.08.010(2). The state of mind of recklessness is necessarily included within intent, therefore the state of mind of recklessness is a "necessary element[ ] of the greater crime of first degree murder." Gamble, 154 Wn.2d at 469, quoting, Berlin, 133 Wn.2d at 551; see also State v. Jones, 95 Wn.2d 616, 620-21, 628 P.2d 472 (1981).

In Shaffer, the defendant was charged with premeditated murder and second degree felony murder and two counts of assault in the second degree for injuring two other people in addition to killing Magee. Schaffer, 135 Wn.2d at 357. Schaffer argued with someone named Magee while both were inside a night club dancing, After Schaffer and Magee left the nightclub, Schaffer approached Magee, who responded by shaking his fists at Schaffer and threatening to kill him. When Magee put his arms down toward his back, Schaffer believed that Magee was reaching for a gun. Schaffer pulled out his own gun and began shooting. He spent seven shots; five hit Magee and two hit others. Magee died on scene. Schaffer, 135 Wn.2d at 357.

In Shaffer, the Supreme Court held that the defendant was entitled to a jury instruction on manslaughter where he reasonably believed that he was in imminent danger and acted in self defense, "but recklessly or

negligently used more force than was necessary to repel the attack". Schaffer, 135 Wn.2d at 358, citing, State v. Jones, 95 Wn.2d at 623; see also, State v. Hughes, 106 Wn.2d 176, 190, 721 P.2d 902 (1986). The trial court gave a self-defense instruction but refused to give a manslaughter instruction. Schaffer, 135 Wn.2d at 357.

Schaffer is both legally and factually on point. Vaielua like Schaffer was charged with murder in the first degree and second degree felony murder. Self defense was approved in both cases. In Schaffer, as in Vaielua's case the fact that the shooter expended many shots was sufficient evidence to determine that the shooter or his accomplice recklessly or negligently used more force than was necessary to repel Blacc. Schaffer, 135 Wn.2d at 358. The evidence also supported the self-defense theory that Asaeli reasonably believed that he and Williams were in imminent danger.

In Vaielua's case, Asaeli acted in self-defense; he kept shooting Blacc who had apparently not continued to return fire. This factual scenario is almost identical to Schaffer, except that in Schaffer accomplice liability was not an issue. The Court in Schaffer held that the evidence of a reasonable belief of imminent danger and continued shooting or use of more force than necessary to repel, is sufficient to suggest manslaughter and entitle the defendant to a manslaughter instruction. The evidence of

Asaeili's fear/self-defense and continued shooting of Blacc was sufficient to entitle Vaielua to a manslaughter instruction.

Vaielua's acquittal on the murder in the first degree charge precludes retrial on that count but does not alter his right to a manslaughter instruction on retrial. Schaffer, 135 Wn.2d at 358, citing, Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1980). Even though Vaielua may only be retried on the second degree felony murder charge, he is nonetheless entitled to the manslaughter instruction because he was originally entitled to that instruction when first tried. Schaffer, 135 Wn.2d at 358-59.

The trial court's error requires this court reverse Vaielua's conviction, and if retried on felony murder in the second degree, the trial court must give a manslaughter instruction.. Id.

a. Ineffective Assistance of Counsel

Vaielua's attorney was ineffective when he failed to request a jury instruction on the lesser included offense to murder one: manslaughter. Although the reviewing court gives some deference to trial counsel's performance, counsel is ineffective when counsel's performance was deficient; and the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed.

2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Legitimate trial strategy or tactics cannot be used to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

For Vaielua to prevail on his ineffective assistance claim he must establish prejudice. In the Matter of the Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Vaielua establishes prejudice because the outcome of his trial would likely have been different if his attorney had offered the lesser included instruction. State v. Brett, 126 Wn.2d 136, 199, 892 P.2d 29 (1995).

The evidence in Vaielua's case was weak; the state charged Vaielua as a principle and as an accomplice but had little evidence to support either. There is a significant likelihood the jury would have believed that Vaielua did not intend for Asaeli to kill Blacc, but that Asaeli recklessly used more force than was necessary. Brett, 126 Wn.2d at 200.

But for trial counsel's failure to request an instruction on manslaughter, the jury could have found Vaielua guilty of manslaughter

rather than murder two and Vaielua would have received a significantly shorter sentence. This is actual prejudice.

The standard range sentence for manslaughter is significantly less than that for murder two. Vaielua had a zero offender score, therefore the standard range sentences for second degree felony murder, a level XIV offense, was 123-220 months; and for first degree manslaughter, a level XI offense, 78-102 months; and for second degree manslaughter, a level VIII offense, 21-27 months. RCW 9.94A.510. Gambrel, 154 Wn. 2d at 472-73 (Justice Madsen concurring). Given this sentencing reality, it is not possible to consider the failure to request a lesser included instruction as a tactical decision.

In State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004), the Court of Appeals held that trial counsel was ineffective for failing to request a lesser included jury instruction where the evidence suggested that the defendant may not have committed assault in the second degree by displaying a gun but could have been found guilty of unlawful display of a weapon. Ward, 125 Wn. App at 250. Ward testified he believed the men were trying to steal his car and that one of them came toward him with a crowbar. Both Ward and his girl friend testified that Ward did not point his gun at the men, but rather told them he had a gun and opened his jacket to show it to them. Ward, 125 Wn. App. at 249-50.

The Court discussed counsel's failure to request a lesser included instruction as an "all or nothing" approach and determined that it was not a viable defense strategy because the jury could have believed that he only committed the lesser offense and because there was a significant difference in penalties between second degree assault and unlawful display of a weapon.

The Court in Ward underscored the importance of giving lesser included instructions where the evidence supports such an inference. Keeble v. United States, 412 U.S. 205, 212-13. 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973):

> It is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely [**19] because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

(Emphasis on original) Id..

In Vaielua's case, his counsel's failure to request a lesser included offense instruction left him in the tenuous position the Keeble opinion described as undertaking "substantial risk". There were too many elements in doubt in the first degree murder charge for the jury to return a verdict of guilty against Vaielua. However, the jury could have believed that Vaielua by his actions was an accomplice to Asaeli who recklessly used more force than was necessary to repel Blacc's attack (real or perceived). Schaffer, 135 Wn.2d at 358.

Vaielua's claim of ineffective assistance of counsel is as strong as both Ward and Keeble because as in those cases, there was some evidence of guilt but there were also great weaknesses in the evidence on certain elements. The jury did not believe Vaielua was a principal or accomplice to murder in the first degree by any means, but the jury did find him guilty of felony murder. The facts supported, and it is reasonable to believe that the jury could have found that Vaielua's actions supported manslaughter, rather than felony murder in the second degree.

Counsel for Vaielua clearly thought that Vaielua was not guilty of murder in the first degree and said so during closing argument. 2RP 2141-42. Counsel also moved for dismissal of the charges based on lack of evidence of Vaielua's premeditation to commit a murder. 2RP 827-28. Vaielua's defense was the same for both offenses: that he did nothing to

contribute to the criminal acts that occurred. This defense would have applied as well to manslaughter.

Counsel knew that there was insufficient evidence of premeditation yet he never asked for a lesser included instruction on manslaughter. As in Ward, counsel's failure to do so was not legitimate trial strategy under the circumstances, rather it was deficient performance which prejudiced Vaielua's right to a fair trial. Reversal and remand for a new trial is required.

6. THE ADMISSION OF GANG EVIDENCE VIOLATED VAIELUA'S RIGHT TO A FAIR TRIAL

Vaielua has a nickname for his superb athleticism in basketball: he is called Skills. 2RP 905. He is not however a gang member and there was no evidence direct or circumstantial that established that Vaielua was a member of a gang. The defense objected before during and at the end of trial to evidence the state sought to characterize as gang related. 2RP 515; Supp CP (Vaielua's Motion to Suppress Gang evidence 11-22-05)

The trial court permitted the state to introduce evidence of a group called Kushman Block and characterize it as a gang, even though none of the civilian w'tnesses had any personal knowledge of the group and the sole "expert" witness had never heard of the group.

The state did not have a strong case against Vaielua or Williams: the only way to attempt to stretch criminal liability to Vaielua and Williams was by creating a theory about a gang hit. It was undisputed at trial that Blacc

and his friends were gang members, but the evidence of a Samoan gang seemed created for this case alone. 2RP 373, 375.

The "gang" evidence against Vaielua consisted of conflicting evidence of bandannas. Vaielua may or may not have had a bandanna. RP 310, 676, 1544, 2RP 413. It may or may not have been in his hand; it may or may not have been around his neck. It might have been blue, red or brown or none existent. Id. Someone may or may not have said "k" after the shooting.RP 726, 781

All of the civilian witnesses who testified about "Kushman Block", testified that it was a group of friends and family who hung out together and lived on Cushman Block. RP 272, 820-21, 871, 1241, 2RP 295. Neither Vaielua nor the codefendants lived on Cushman Block.. 2RP 883, 985, 1277.

No witness was able to describe Kushman Block as a real gang and no one had any personal knowledge of Vaielua's association with the group. RP 272, 820-21, 871, 1241, 2RP 295. The testimony about Vaielua indicated that he was into sports and spent his time playing basketball and was on his way to college with a basketball scholarship. 2RP 905, 1707. There was no evidence that Kushman Block guys played sports. Rather all of testimony indicated that a group of guys, most extended family and some friends, all of whom lived on or near Cushman Block, hug out together, drank and made music. RP 272, 820-21, 823, 871, 1241, 2RP 295.

The state impermissibly asserted that Vaielua was a member of the group Kushman Blok and thus had a "criminal character". 2RP 659-60,

705, 718, 689, 721, 744, 749, 750. 795. The state used Detective Ringer to explain the nature of gangs even though Ringer knew noting about Samoans, Samoan gangs or a group called Kushman Blok. Ringer told the jury that "all gang members are felons". Id. Even though this was inadmissible and the judge instructed the jury to disregard, this is precisely the sort of testimony that is impossible to disregard; and precisely the message the state intended. State v. Stith, 71 Wn. App. 16, 18, 856 P.2d 415 (1993),. The state's theory of their case was that Vaielua's participation in the murder related to his supposed connection to the Kushman Blok group, which the state needed to be a gang to be able that the murder was a gang retaliation murder.

ER 404(b) prohibits evidence of any prior crimes, wrongs, or acts to establish the defendant's propensity to behave in a certain manner. Ringer's testimony and the hearsay from the civilian witnesses was used to show that Vaielua was associated with a gang, even though there was no credible evidence of a gang, and the impermissible "gang" evidence was used to show a propensity to commit criminal acts.

ER 404(b) provides:

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

> identity, or absence of mistake or accident.

Evidence of prior bad acts is presumptively inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "To admit evidence of other crimes or misconduct under ER 404(b), the trial court must identify on the record the purpose for which it is admitted." State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). ER 404(b) evidence must also be relevant to a material issue and its probative value must outweigh its prejudicial effect. Id. at 571.

ER 403 which governs the exclusion of relevant evidence when it is unfairly prejudicial, confusing or misleading to the jury. Id. The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). In determining whether the probative value of evidence outweighs its unfair prejudice, a court should consider the availability of other means of proof and other factors. Powell, 126 Wn.2d at 264. When evidence is unduly prejudicial, "the minute peg of relevancy is said to be obscured by the dirty linen hung upon it." State v. Turner, 29 Wn. App. 282, 289, 627 P.2d 1324 (1981).

Evidence of prior misconduct "is inadmissible to show that the defendant is a dangerous person or a 'criminal type' and is thus likely to

have committed the crime for which [the defendant] is presently charged." Karl B. Tegland, Washington Practice: Courtroom Handbook On Washington Evidence, Author's cmt. (3), at 207 (2002). "[A]cts" inadmissible under ER 404(b) include any acts used to show the character of a person to prove the person acted in conformity with it on a particular occasion.

The state argued at trial that that evidence of "gang affiliation and motivation" is admissible under 404(b) as "prior misconduct" to prove motive and to prove the premeditation element of murder. CP 182-193. The state's assertion and the trial court admission of gang evidence were both contrary to law for several reasons.

The trial court ruled the evidence admissible because "based on the evidence that is in front of me I think that the State has carried its burden and the gang evidence will come in. RP 82. This ruling fails to satisfy the requirement under ER 404(b) that the court identify the purpose for which the gang evidence is to be admitted and it fails tot satisfy the requisite ER 403 balancing of probative versus unfair prejudice.

In Everybodytalksbout, 145 Wn.2d 456, 468, 39 P.3d 294 (2002), the state sought to introduce the testimony of detective Martin regarding his observations of the defendant from the middle of 1992 to the beginning

of 1996. The state wanted the detective to testify to his impression that the defendant was a leader in his relationship with Lopez who killed Jones and therefore was a leader when Lopez killed Jones on February 3 or 4, 1996, even though Martin did not observe the defendant and Lopez on either of those days. The Court held that the state failed to establish that this testimony was relevant. Id.

Relevant evidence is "evidence having a 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." Everybodytalksabout, 145 Wn.2d at 468, quoting, State v. Stenson, 132 Wn.2d at 701-02. In Everybodytalksabout, the detective had no observations of the killing on February 3 and 4 and therefore his earlier impressions had nothing to do with the relationship between Lopez and the defendant on the day that Lopez killed Jones. Id.

The Court in Everybodytalksabout, held that even if the evidence was relevant it would be inadmissible under ER 404(b) because it was offered to show that the defendant acted in conformity with leadership qualities at the time Mr. Jones was killed; and he therefore must have participated with Mr. Lopez in killing Mr. Jones. Everybodytalksabout, 145 Wn.2d at 468.

In Vaielua's case, the state sought to introduce evidence that Vaielua was a gang member and therefore working in concert with Williams and Asaeli. The state had less information on Vaielua and his alleged association with a group called Kushman Blok, then the detective in Everybodytalksabout,. Here, the judge did not identify the purpose for the admission of the gang evidence and she did not attempt to determine how it could be considered relevant. RP 82.

Assuming for the sake of argument that Vaielua was associated with a group called Kushman Blok: (1) there was no evidence that the group was a gang; (2) there was no evidence that the group had a criminal purpose; (3) there was no evidence that the group had an issue with Blacc; (4) there was no evidence that Vaielua was acting in concert with anyone; (5) there was no evidence of a plan to do anything illegal; and (6) there was no evidence that Vaielua lived on Cushman Street.. Even if Vaielua was associated with a group of guys who lived on Cushman Street, that fact was of no relevance to the shooting of Blacc.

The gang evidence was designed to show that Vaielua was a dangerous, criminal type, that he was a gang member, and if he was a gang member than he was likely to commit crimes. Ringer testified that most gangs have some sort of criminal purpose. He also testified that all gang members were felons. RP 761. This is precisely the type of evidence

forbidden under ER 4040(b). The evidence had nothing to do with motive or premeditation. It was inadmissible.

When gang membership is not in dispute, and the gang's criminal purpose is not in dispute, the Courts have held that gang evidence may be relevant if there is a close nexus between the gang's criminal purpose and the crime. State v. Campbell, 78 Wn. App. 813, 821-22, 901 P.2d 1050, review denied, 128 Wn.2d 1004, 907 P.2d 296 (1995), and State v. Boot, 89 Wn. App. 780, 788, 950 P.2d 964, review denied, 135 Wn.2d 1015, 960 P.2d 939 (1998); See also State v. Monschke, 133 Wn. App. 313, 135 P.3d 966 (2006) (evidence of white supremacist beliefs was held admissible to prove motive, premeditation, and to show the context of the crime where the State's theory was that defendant killed victim out of hatred for anyone deemed inferior and to enhance his status among white supremacists.).

Unlike in Vaielua's case, in Campbell, there was abundant evidence that the defendant was a Crip gang member and a drug dealer and that the crime was committed in retaliation for the victim encroaching on his drug turf. Thus the state was able to establish both relevance and a nexus between the drug activity, the gang membership and gang turf and the crime. State v. Campbell, 78 Wn. App. at 821-22.

In Vaielua's case, there was no solid evidence that Kushmen Blok was a gang and no evidence that Vaielua was a gang member. Moreover, Ringer testified that the waterfront was not the turf of any particular gang or group, but rather was neutral territory. There was simply no nexus between the murder and alleged Kushman Blok group.

In Boot, also unlike in Vaielua's case, the defendant admitted that he was a gang member. Boot, 89 Wn. App. at 789. The evidence also established a series of gang and gun related intimidations by the defendants. Boot, 89 Wn. App at 784-85. Boot argued that the gang and gun evidence was inadmissible because it was overly prejudicial rather than irrelevant. Boot did not challenge the gang and gun evidence as being too attenuated to the crime. The Court ruled the evidence was admissible under 404(b) to show motive, intent and premeditation. Boot, 89 Wn. App. at 788-90.

Both Boot and Campbell are distinguishable. In Vaielua's case there were no admissions to gang membership or gang affiliation and there was no evidence of a series of bad acts related to the crime. Vaielua had no criminal record and no evidence of any bad behavior at all. The evidence of prior bad acts in Boot was overwhelming, and the nature of the prior bad acts was closely related to the murder: Boot used a gun on many

occasions to intimidate others. In Boot the gang evidence was relevant and there was a nexus between it and the murder.

In Vaielua's case, because the evidence of gang association was tenuous at best and in dispute, the court did not have enough evidence to initially establish the base line of relevance. Secondly, even if the trial court had been able to establish relevance, there was insufficient evidence to establish a nexus between the alleged gang association and the crime.

a. First Amendment Issues

The admission of gang association, if verifiable violated Vaielua's First Amendment right to the freedom association because it was designed to establish that Samoan's are a tight kit culture that stick together and therefore by deduction would commit crimes for each other. This is impermissible evidence of an abstract belief the state wished the jury to believe each of the defendants possessed. Dawson v. Delaware, 503 U.S. 159, 164-67, 112 S.Ct. 1093, 1097-98, 117 L.Ed.2d 309 (1992).

Evidence of gang membership is inadmissible when it proves no more than a defendant's abstract beliefs. Dawson v. Delaware, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) (gang membership inadmissible to prove abstract belief because it is protected by constitutional rights of freedom of association and freedom of speech); Campbell, 78 Wn. App. at 822. In State v. Monschke, 133 Wn. App. at

335, evidence of white supremacist beliefs was held admissible because it proved more than abstract beliefs. It was to prove motive, premeditation, and to show the context of the crime where the State's theory was that defendant killed victim out of hatred for anyone deemed inferior and to enhance Monschke's status among white supremacists. Id.

Gang affiliation is both highly prejudicial and implicates constitutional rights of freedom of association and freedom of expression. Gang is essentially synonymous with criminal behavior. "Gang" is defined as: "a group of persons associated for some criminal or other antisocial purpose". Webster's Encyclopedic Unabridged Dictionary, (Gramercy 1989 Ed). at p. 583. Gang evidence carries a great danger of unfair prejudice, especially where, as here, there is no evidence that Vaielua ever acted in any manner associated with any gang or group..

b. Gang Evidence Not Harmless Error

Evidentiary errors, such as erroneous admission of ER 404(b) evidence, require reversal when the error, "within reasonable probability, materially affected the outcome." Everybodytalksabout, 145 Wn.2d at 469, quoting, Stenson, 132 Wn.2d at 709. Errors are prejudicial when within "reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Errors are only harmless if

insignificant against the backdrop of all of the evidence presented. Everybodytalksabout, 145 Wn.2d at 469, citing, Bourgeois, 133 Wn.2d at 403. If the outcome of the trial would have differed without the evidence it is not harmless. In Everybodytalksabout, 145 Wn.2d at 471, the Court held that the evidence was not harmless because, the outcome of the trial probably would have been affected. Without the testimony, there insufficient evidence to convict the defendant.

In Vaielua's case, without the gang evidence the state would not have been able to argue that Vaielua had any connection to the commission of the crime. The state argued in closing that Vaielua acted as an accomplice to Williams by being present and ready to assist him in his endeavor to fight Blacc, who, according to the state had offended a group of "Asians". Vaielua is Asian, but there was no evidence that he knew Blacc or had ever been offended by him. To piece together an argument, the state needed to somehow show that because Vaielua is Samoan and because he knew Williams and Asaeli who are also Samoan, that they as a group would have been offended by Blacc's behavior towards a group of other "Asians" the week before. The gang evidence was central to the state's case; the error was not harmless.

The trial court's rulings allowed the evidence of gang association to improperly permeate the trial, resulting in an unfair trial. Reversal and remand for a new trial is required.

7. THE TRIAL COURT ERRED BY PERMITTING AN "EXPERT" TO TESTIFY ABOUT MATTERS THAT WERE NOT RELEVANT AND THAT WERE OUTSIDE HIS AREA OF EXPERTISE.

Being Samoan and living on Cushman Block does make one a gangster. RP 1322. The court abused her discretion by allowing the state to call Detective Ringer to testify as a gang expert in spite of the fact that he knew absolutely nothing about Samoan culture or Samoan gangs in general and nothing about the so called Kushman Blokk in particular. Without a proper foundation, the court improperly determined that Ringer's testimony was admissible. RP 2RP 573-75.

The State was allowed to present Ringer's expert testimony on the history and general characteristics of gangs and how gangs operate in the Tacoma area. 2RP 655-672. Ringer's testimony about gangs violated Vaielua's right to a fair trial.

The court held an evidentiary hearing prior to Ringer's testimony. At the hearing Ringer said that with any gang, the culture of its members had to be considered when determining its structure, rules and activities. 2RP 517-518. He then admitted he knew very little about Samoan culture and had

never testified as an expert on Samoan gangs. 2RP 516. During his testimony Ringer admitted he had never heard of the group Kushman Blokk until he was asked to review this case. 2RP 698-699. He also admitted he spoke with his informants who are gang members and none of them had ever heard of the Kushman Blokk. 2RP 704.

The admissibility of expert testimony is governed by ER 702, ER 703 and ER 404(b). 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.

Under this rule, (1) the witness must be qualified as an expert, (2) the opinion must be based upon a theory generally accepted by the scientific community, and (3) the expert testimony must be helpful to the trier of fact. Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 93 (2004), citing, State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984).

Expert opinion is helpful to the trier of fact when it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999). Under certain circumstances, expert testimony about gangs is admissible for limited purposes. See State v. Campbell, 78 Wn. App. at 823

(upholding the admission of expert testimony on the meaning of gang symbols). The trial court's admission of evidence under ER 702 is reviewed under the abuse of discretion standard. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999).

Expert opinion is inadmissible over objection "unless the witness has first been qualified by a showing that he has sufficient expertise to state a helpful and meaningful opinion." 5A K. Tegland, Wash Prac., Evidence 289, at 381 (3d ed. 1989). To qualify as an expert, a witness must have sufficient specialized knowledge to assist the jurors in the case. State v. Maule, 35 Wn. App. 287, 294, 667 P.2d 96 (1983).

Although Ringer may be an expert on gangs like the Crips or the Bloods, by his own admission he knows nothing about Samoan gangs and knew nothing about a group called Kushman Blokk. On this basis alone Ringer's expert opinion testimony should not have been admitted under ER 702 because he had no expertise on the subject of the Kushman Blokk or whether it was even a gang.

Even if Ringer was qualified to testify, his testimony did not help the jury reach the ultimate decision whether Vaielua's behavior could have been sufficient to hold him liable as either a principle or as an accomplice. Ringer's testimony described the history of the modern urban gangs the Crips and Bloods and the general characteristics common to those gangs in

Tacoma, such as turf, signs and symbols and their general purpose to control criminal activity in a particular neighborhood. 2RP 661-674. There was no evidence, however, that Vaielua or any of the co-defendants were members of the Crips or Blood gangs, and there was no evidence Vaielua was a member of the Kushman Blokk. Additionally, there was no substantive evidence that the motive for the shooting was in anyway related to gang activity.

Ringer's testimony was simply irrelevant and not helpful. The evidence was not probative to the central issue of whether Vaielua committed an assault that resulted in death. The impact of Ringer's gang testimony was to plant in the minds of the jurors a visceral prejudice against Vaielua, stimulate the jurors' biases against gangs and gang members and instill the fear that the Tacoma area is a hotbed of violent gang activity and the defendants, including Vaielua, were part of that activity. Furthermore, the evidence carried a high potential for prejudice because it allowed the jury to impermissibly infer guilt by Vaielua's association with people of his own heritage who may have belonged to the Kushman Blokk.

The court erred in admitting Ringer's testimony and, like the gang evidence, its admission denied Vaielua a fair trial. Thus, Vaielua's felony murder conviction should be reversed.

8. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN HIS POWER POINT PRESENTATION DURING CLOSING ARGUMENT; DURING REBUTTAL ARGUEMNT WHERE HE ARGUED FACTS NOT IN EVIDENCE AND WHEN A STATE'S EXPERT WITNESS INVADED THE PROVINCE OF THE JURY.

The prosecutor engaged in deliberate misconduct when he used a power point during his closing argument which blatantly misstated the law and misled the jury. The state engaged in further misconduct when after a lengthy voir dire, its gang expert Detective Ringer testified that all gang members were felons. 2RP 761. The prosecutor also twice called a defense witness a liar (Devault). 2RP 1716, 1722. Finally, the prosecutor engage din deliberate misconduct by arguing facts not in evidence. 2RP2213-16.

Prejudicial prosecutorial misconduct denies a defendant his constitutional right t o a fair trial. Washington Constitution Article 1 § 22; United States Constitution, Sixth and Fourteenth Amendments; State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1992).

> We realize that attorneys, in the heat of a trial, are apt to become a little over-enthusiastic in their remembrance of the testimony. However, they have *no right to mislead the jury*. This is especially true of a prosecutor, who is a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial.

(Emphasis added in Davenport) Davenport, 100 Wn.2d at 763, quoting, State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955)

In Washington State prosecutors have a special duty in trial to act impartially in the interests of justice and not as a "heated partisan". State v. Stith, 71 Wn. App. at 18, citing, State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984), quoting, People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899).

A new trial is required when misconduct in prejudicial. Misconduct is viewed against the backdrop of the entire argument. Stith, 71 Wn. App. at 19, citing, State v. Graham, 59 Wn. App. 418, 426, 428, 798 P.2d 314 (1990). Misconduct is prejudicial when there is, "a substantial likelihood" the misconduct "affected the jury's verdict." State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). See also, Davenport, 100 Wn.2d at 762, citing, State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). The defendant bears the burden of proving that there is a substantial likelihood that the misconduct affected the jury's verdict. Stith, 71 Wn. App. at 19, quoting, Barrow, 60 Wn. App. at 876.

Arguments that are designed to inflame the passions and prejudice are improper and prejudicial. State v. Torres, 16 Wn. App. 254, 264-65, 554 P.2d 1069 (1976).

> [T]he safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims.

State v. Torres, 16 Wn. App. at 264-65. Arguments that are based on facts not in evidence and that mislead the jury are equally as improper and prejudicial. Davenport, 100 Wn.2d at 760; State v. Rose, 62 Wn.2d 309, 312 382 P.2d 513 (1963)

a. Improper Comments From State's Expert

In Vaielua' case, during the lengthy voir dire of Detective Ringer, the trial court expressly ruled in Ringer's presence that Ringer could not testify to anything regarding gangs other than: (1) how gangs were formed; (2) how turf is treated; (3) regarding territory issues; (4) how older gang members relate to younger gang members; and (5) the meaning of "wannabe". The trial court prohibited any testimony from Ringer on any other matter related to gangs. 2RP 574-75.

In direct violation of the trial court's ruling in limine, the detective testified that **all gang members were felons**. 2RP 761. The trial court

denied the motion for a mistrial but directed the jury to disregard the testimony. 2RP 763, 769.

In Stith, in violation of a motion in limine the prosecutor told the jury that Stith was already a criminal because he was just out dealing drugs again. Stith, 71 Wn. App. at 19. The Court in Stith held this to be prejudicial misconduct. Stith, 71 Wn. App at 22. In Vaielua's case, the state's chief expert on gangs, Detective Ringer, who testified as an expert in many cases, testified in violation of a motion in limine by telling the jury that all gang members were felons. The impact was the same as in Stith, telling the jury that Vaielua was already a criminal. As in Stith, this was prejudicial misconduct. Stith, 71 Wn. App. at 22.

In State v. Rose, 62 Wn.2d 309, 316, 382 P.2d 513 (1963) the Supreme Court reversed a conviction where the prosecutor argued facts not in evidence by calling the defendant a "drunken homosexual". In Rose, the immediate purpose was to inflame the passion and prejudice of the jury so that they would find guilt based on thin evidence. The Supreme Court reversed Rose's conviction and remand for a new trial. Id. Calling all gang members felons is as prejudicial as calling a person a drunken homosexual. Rose, 62 Wn.2d at 316. Reversal and remand for a new trial is required.

b. Arguing Facts Not In Evidence

During rebuttal argument the prosecutor argued facts not in evidence. The prosecutor created a not existent scenario and described it as the means by which Vaielua was guilty as an accomplice. The prosecutor argued that Vaielua was at the waterfront to intimidate Blacc's friends to make sure that they could not access Blacc. Valielua supposedly did this by inserting himself in between Blacc and his friends. 2RP 2215-16. These are not facts in evidence. Rather, Valielua was socializing drinking a beer with Gago and Fola. There was no testimony that he was in between Gago, Fola and Blacc or that he could have or would have done anything to interfere had Gago or Fola attempted to intervene. The prosecutor made clear that Gago was a huge man, not to be toyed with in any way. Id.

In Stith, the Court held that the prosecutor's remarks in closing that "probable cause" had already been established and there were "incredible safeguards" invaded the province of the jury by informing that guilt had essentially been predetermined. The comment that Stith was out "dealing drugs again" also argued facts not in evidence. The trial court in Stith, sustained the defense objections to all of these improper and prejudicial comments and gave a strongly worded curative instruction to disregard the comments. The court also admonished the jury that it could only consider evidence given in testimony. Stith, 71 Wn. App. at 22.

> Unlike the earlier remarks at issue, these comments clearly reflect the prosecutor's

> personal assurances to the jury as to the defendant's guilt. Taken together these comments not only implied that the trial was a useless formality because the real issues had already been determined but also directly stated that Stith was out on the streets, dealing again. Such comments strike at the very heart of a defendant's right to a fair trial before an impartial jury. Once made, such remarks cannot be cured.

Stith, 71 Wn. App. at 22.

The purpose of arguing facts not in evidence was to establish that Vaielua was an accomplice in spite of the fact that none of the "facts" argued were supported by the evidence or any inference that could have been drawn there from. The arguing of facts not in evidence was designed to create a reason for the murder of Blacc where none existed. This was misconduct.

c. Improper Power Point in Closing

In Vaielua' case, the prosecutor used a power point that reinstructed the jury on its home drawn version of the law. Mr. Schact delivered a closing argument that lasted 2 hours: one hour before the noon recess and one hour after the noon recess. Rebuttal last an additional 50 minutes. Supplemental Clerk's papers (Clerk's Papers pages 58-59, 8-7-06). The prosecutor's power point was projected during the entire closing

argument, thus the jury was forced to view the mis-statements of law and fact over an extended period of time. 2RP 1939, 2019.

The defense objected vigorously to the following improper statements of law.

(1) **"When a challenge to a fight is used as an excuse to kill, it's murder"**. 2RP 1944.

The Court overruled the objection. 2RP 1945.

(2) **"Self-Defense: killing after a challenge to a fight is not a lawful defense. It is murder."** 2RP 1969.

The court overruled defense objections that the self-defense power point misstated the law. 2RP 1970.

(3) **Four <u>Required</u> Elements [self-defense]**

1. "...committed in the lawful defense..."
2. "...reasonably [actually] believed..."
3. "...imminent danger..."
4. **"...such force and means as a reasonably prudent person would use..."**
State's burden is to disprove <u>one</u> of these elements.

Self Defense Is
A near death experience
Unforgettable
A him or me decision
Apparent to those around
Something that affects what happens afterward

> **In short, true self defense is known to the 'slayer' and to those who saw what the 'slayer' did!**
> **Killing Is Not Lawful When....**
>
> **No provocative behavior by the victim.**
> **No verbal warning: "Stop or I'll shoot"**
> **No warning shot**
> **No attempt to hold at gunpoint**
> **No taking cover**
> **Victim is shot seven times and had no means to shoot back**
> **Putting other people at risk**
> **Killing is not unlawful as the first, last and only action taken against a person sitting in his own car minding his own business!**

The court overruled the objections to all of this language stating that it was "just argument". 2RP 1976-78.

The state also redefined the following legal terms:

> **Lawful Defense**
> ". . .lawful defense of the slayer or any person in the slayer's presence..." MEANS Once can't plan or threaten to do harm to a person then shoot him, that's not "lawful defense."
>
> **From An Attack**
>
> "...reasonably believes that the person slain intended to inflict death or great personal injury ..." **MEANS** An actual belief (not one made up for trial) that he WILL be (not just possibly) killed or mortally wounded.
>
> **Imminent Danger**

> "...that there was an imminent danger of [death or great personal injury] being accomplished..." **MEANS** If a killing, it was the slayer's life or the victims.
>
> **Reasonable Amount of Force**
> "...such force and means as a reasonably prudent person would use..." **MEANS** Overreaction in not permitted. If there was a non-lethal alternative it must be used if reasonable.

The prosecutor's re-writing the law is improper and prejudicial; it is not merely argument. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). In Callahan a Division Two case, the Court recited the evidence necessary to prove self-defense:

> there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable, , *State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495, 22 A.L.R.5th 921 (1993);* (3) the defendant exercised no greater force than was reasonably necessary, *State v. Hendrickson, 81 Wn. App. 397, 400, 914 P.2d 1194 (1996);* and (4) the defendant was not the aggressor, *State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). RCW 9A.16.020(3).*

Id. The standard is the defendant's subjective belief in the danger, not, as misstated in the power point. Id.

> The standard for self-defense is well settled. A jury may find self-defense on the basis of

> the defendant's subjective, reasonable belief of imminent harm from the victim. A finding of actual imminent harm is unnecessary. Rather, the jury should put itself in the shoes of the defendant to determine reasonableness from all the surrounding facts and circumstances as they appeared to the defendant.

State v. LeFaber, 128 Wn.2d 869, 899, 913 P.2d 369 (1996). The court and not the prosecutor is charged with instructing the jury. When the prosecutor oversteps his bounds, he commits misconduct. Davenport, 100 Wn.2d 701.

In Davenport, the prosecutor argued an accomplice liability theory even though the trial court did not instruct the jury on accomplice liability. Davenport, 100 Wn.2d at 760. The Supreme Court held that the prosecutor committed prejudicial misconduct when he "introduced to the jury the extraneous matter of accomplice liability, which was not before the jury. " Davenport, 100 Wn.2d at 701. The prosecutor misled the jury by arguing law that was not properly before it. The Supreme Court reversed the Court of Appeals finding of harmless error and remanded for a new trial.

In Vaielua, the prosecutor argued facts not in evidence and misstated the law throughout his closing argument. As in Davenport, it is prejudicial misconduct to discuss law that is not before the jury and as in

Stith it is prejudicial misconduct to discuss matters that were inadmissible at trial.

In Vaielua' case, the prosecutor's power point was also flagrant, ill-intentioned and tantamount to telling the jury that the defense theory was not possible and that the defendants were guilty because prosecutor Schacht's law precluded a finding of acquittal. In State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988), aff'd, 119 Wn.2d 711, 599 P.2d 837 (1992), the Supreme Court reversed a conviction for prosecutorial misconduct, where the "remarks were flagrant, highly prejudicial and introduced 'facts' not in evidence." The prosecutor called AIM, a group Belgarde associated with, a bunch of "madmen" and Butchers".

In Stith, citing to Belgrade, the court recognized that "[i]nstructions to the jury to disregard the comments cannot cure such prejudice. The mandatory remedy is a mistrial." Stith, 71 Wn. App. at 16. As in Belgarde and Stith the prosecutor inflamed the prejudice of the jury by telling them Vaielua was a gang member, a felon and could not possibly be innocent under the mis-statements of law presented in the power point

Standing alone, the misstatements of law in the power point presentation during closing were prejudicial misconduct and reversible error, with or without an objection. Belgarde, 110 Wn.2d at 508; Stith, 71

Wn. App at 22; State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992). Adding the additional misconduct or arguing facts not in evidence and the expert's opinion that all gang members are felons, made it impossible for Vaielua to receive a fair trial.

Reversal is required because the improper comments were highly prejudicial and cut to the heart of the defense case. The jury was mis-informed by the state that their defense was impossible and that the defendants were already felons and therefore most assuredly guilty in the instant case. No jury instruction could cure such prejudice.

9. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO REMOVE A SLEEPING JUROR IN A MUDER TRIAL RESULTING IN DENIAL OF A FAIR TRIAL

A sleeping juror who misses an essential portion of a trial cannot fairly consider the case during deliberations. This denies the accused his right to a fair trial. United States v. Hendrix, 549 F.2d 1225, 1229 (9th Cir.), cert. denied, 434 U.S. 818, 98 S. Ct. 58, 54 L. Ed. 2d 74 (1977). Such a juror is also unfit to serve.

In Washington State, the determination of whether a juror is fit to serve is governed by statute:

> It **shall** be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, **inattention** or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

(emphasis added) RCW 2.36.110. CrR 6.5 requires the judge to seat an alternate juror when another juror is unfit to serve. CrR 6.5 provides in part: "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court **shall** order the juror discharged." Id. (Emphasis added.) "RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." State v. Jorden, 103 Wn. App. 221, 226-27, 11 P.3d 866, rev. denied, 143 Wn.2d 1015, 22 P.3d 803 (2001).

Review of the standard of proof used by the judge in determining whether or not to dismiss a juror under RCW 2.36.110 is a question of law reviewed de novo. State v. Elmore, 121 Wn. App. 758, 767-68,123 P.3d 72 (2005). (error to dismiss a juror unless judge is certain that the juror misconduct is not related to his or her evaluation of the evidence). The determination of whether or not to dismiss a juror is reviewed for an abuse of discretion. Id.

A trial court abuses her discretion by refusing to excuse a juror who is sound asleep during cross examination of the state's primary forensic expert. State v. Jorden, 103 Wn. App. at 226, 230; Accord, Elmore, 155 Wn.2d at 761.

In Jorden, the Court of Appeals citing to RCW 2.36.110 and CrR 6.5 held that the judge's removal of a juror for sleeping was not an abuse of discretion because "the record establishes that the juror engaged in misconduct." Jorden, 103 Wn. App. at 229-230. The record in Jorden included the prosecutor's and the judge's observations of the juror sleeping during several days of testimony in the first degree murder trial. Jorden, 103 Wn. App. at 229.

Even though the juror in Jorden was observed sleeping more than the juror in the instant case, the Court, citing to United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983), a case decided on constitutional grounds, recognized that "[m]ost importantly, the allegation [of sleeping during testimony], if true, prejudiced Barrett's right to a fair trial; he was convicted by a jury that included one member who had not heard all the evidence." Jorden, 123 Wn. App. at 228.

In Barrett, supra, the trial judge (1) refused to dismiss a juror who asked to be removed because he slept during part of the trial; and (2) without further investigation, the trial court took judicial notice of the fact

that "'there was no juror asleep during this trial'". Barrett, 703 F.2d at 1083. The Ninth Circuit held that the trial court abused its discretion by failing to investigate the admission and reversed and remanded for an evidentiary hearing to determine if Barrett's due process rights to a fair trial were prejudiced. Barrett, 703 F.2d at 1083, citing, Hendrix, 549 F.2d at 1229.

In United States v. Monreal-Miranda, 103 Fed. App. 83 (9th Cir. 2004), after being informed that several jurors were sleeping, the district court, outside the presence of other jurors, directly questioned the juror who was sleeping and dismissed the juror who admitted to sleeping. The other juror denied sleeping and was not dismissed. The Court on review held that the judge conducted an adequate investigation and did not abuse her discretion in dismissing one juror and retaining another. . Monreal-Miranda, 103 Fed. App. at 85.

In Vaielua's case juror number 11 was sound asleep during cross examination of the Tacoma Police Department forensic expert. RP 481, 544. Defense attorney Clark characterized juror number 11 as being "sound as'eep" and moved for his removal from the jury. RP 544. The defense also reminded the court that this juror admitted during voir dire that he had a tendency to "nod off".5 Defense attorney Demming informed

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5 Defense attorneys stated that several jurors indicated this problem with

the court that juror number 11 was asleep during the morning session that day. RP 545. The prosecutor witnessed the juror with his eyes closed at different moments during the morning session. RP 545-46. Counsel for Vaielua joined in the motion to remove the juror. RP 545.

The judge did not doubt the attorneys' word but decided that the problem would not be considered "serious" until she witnessed additional sleeping. RP 546. This is both contrary to statute and case law. RCW 2.36.110; Barrett, supra; Jorden, supra. Once the judge learned that a juror was asleep during a portion of a murder trial, the judge was required to investigate to confirm (if there was doubt) and then to remove that juror to preserve the Vaielua's due process right to a fair trial. Barrett, 703 F.2d at 1083, citing, Hendrix, 549 F.2d at 1229. Failure to protect Vaielua's right to a fair trial requires reversal and remand for a new trial.

10. IRRELEVANT TELEPHONE CALL EVIDENCE DENIED VAIELUA HIS RIGHT TO A FAIR TRIAL.

Vaielua moved to exclude the testimony from Blacc's sister, Roseanne Fola, that two weeks before the shooting a man called the Fola house and told her Blacc was "marked" and that a week before the shooting another man called and said he was going to "drop" Blacc. RP 173, 175, 187-89. Roseanna Fola testified that the voices sounded like a girl giggling during one call and a male caller on the other call. Roseanna thought they

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nodding off and at least one was previously excused for cause.

were just kids playing. RP 1125, 1127, 1131. Blacc was not concerned when Roseanna told him about the calls. RP 1131-32. Vaielua argued that because there was no evidence that Williams or Asaeli or anyone connected with Vaielua made the telephone calls, the evidence was irrelevant and unfairly prejudicial. RP 197-189. The court denied the motion. RP 193-94.

Relevance means that a logical nexus exists between the evidence and the fact to be established. State v. Peterson, 35 Wn. App. 481, 484, 667 P.2d 645, rev. denied, 100 Wn.2d 1028 (1983). 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. Under ER 403 admission of evidence, even if slightly relevant, is prohibited if it is unfairly prejudicial, confuses the issues or misleads the jury. State v. Vreen, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). A trial court's ruling as to the relevance of evidence is reviewed for an abuse of discretion. State v. Hutchins, 73 Wn. App. 211, 214, 868 P.2d 196 (1994).

The alleged threatening telephone calls Blacc's sister received from the unknown callers were irrelevant to any issue at trial. The State argued the calls were relevant because they showed Blacc was not shot in self-defense, but that the shooting was pre-planned. 1RP 192. The State's argument would have some merit if there was evidence the calls were made by Vaielua, one of the co-defendants or even someone associated with Vaielua. There is no such evidence.

Because there is no nexus, however tenuous, between the calls and Vaielua, the evidence did not make it more or less probable that Vaielua was involved in the commission of an assault that led to the shooting of Blacc. Absent that nexus the threatening telephone calls from unknown and unidentified callers a few weeks before the shooting does not lead to the logical inference that Vaielua had anything to do with the shooting of Blacc.

The evidence of the calls, however, was unfairly prejudicial. Even though there was no evidence linking the calls to Vaielua or anyone associated with Vaielua it allowed the jurors to make the same impermissible inference the State argued made the calls relevant--that Vaielua or someone associated with Vaielua made the calls. 1RP 192-193. Thus, the erroneous admission of the telephone calls was unfairly prejudicial.

An evidentiary error requires reversal if, within reasonable probability, the error materially affected the verdict. State v. Everybody-talksabout, 145 Wn.2d 456, 468-469, 39 P.3d 294 (2002). The error was not harmless because the irrelevant evidence of the calls allowed the jurors to make the impermissible inference that Vaielua intended to kill Blacc weeks before the shooting. When that impermissible inference is made, Vaielua's challenges to the accomplice liability is vitiated because jurors would have been compelled to reject Vaielua's theory that he was merely present at the waterfront. Thus, Vaielua's felony murder conviction should be reversed.

11 VAIELUA'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES WAS DENIED BY THE TRIAL COURT LIMITING CROSS EXAMINATION OF

KEY WITNESSES AND BY REPEATED PROSECUTORIAL INTERRUPTIONS DURING CROSS EXAMINATION A KEY WITNESS.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. U.S. Const. amend VI; Const art. I, § 22; Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Under the constitution, "confrontation" means more than mere physical confrontation. Davis, 415 U.S. at 315. The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses. State v. Foster, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998).

The purpose is to test the perception, memory, and credibility of witnesses. State v. Parris, 98 Wn.2d 140, 144, 654 P.2d 77 (1982); State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). Confrontation therefore helps assure the accuracy of the fact-finding process. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. Id. As such, the right to confront

must be zealously guarded. State v. Kilgore, 107 Wn. App. 160, 184-85, 26 P.3d 308 (2001).

However, the right to cross-examine adverse witnesses is not absolute. Chambers, 410 U.S. at 295. Courts may, within their discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). The confrontation right and associated cross-examination are limited by general considerations of relevance. See ER 401, ER 403; Hudlow, 99 Wn.2d at 15.

The Supreme Court in State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002), applied the "basic rules of evidence" to assess whether the trial court's limiting a defendant's cross examination was constitutional error. Id. First, the evidence must be of at least minimal relevance. Darden, 145 Wn.2d at 624; Washington v. Texas, 388 U.S. at 16. As stated earlier in Vaielua's brief, evidence is relevant if it has a tendency to make the existence of any fact of consequence more probable or less probable than it would be without the evidence. ER 401.

In Vaielua's case, the fact of consequence was that Kushmen Blok was not a known gang with a criminal history. However, by denying defense the ability to fully cross examine Ringer, the "gang" expert was able to mislead the jury into believing that Kushmen Blok was a gang with

a known criminal past, when in fact, Ringer knew that the isolated criminal incident in 1999 in which the name "Kushmen Blok" appeared, was committed by a gang member from the Royal Pirus, and was not a criminal enterprise involving Kushmen Blok.

This testimony allowed the state to argue that Vaielua was a gang member of Kushmen Blok, and Kushmen Blok was a gang with a criminal purpose. This evidence allowed the jury to convict Vaielua of second degree murder for merely being present where a crime was committed because the jury could have believed that he was involved in a gang with a known criminal purpose. None of the civilian witnesses had personal knowledge of Kushmen Blok, and the ones who testified about it unanimously described it as a bunch of guys, mostly family that hung out together drinking and making music. RP RP 821-23, 877. Ringer was the only witness to characterize the group as a criminal gang.

Under ER 403, the evidence was relevant. Relevant evidence may only be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. The state bears the burden of proving the justification for preventing full cross examination on the issue it wishes to avoid revealing. Darden, 145 Wn.2d at 625-26.

In Darden, the Supreme Court reversed the Court of Appeals affirming the limitation of defense counsel's cross examination of the sole eyewitness to a series of drug transactions. The state sought to limit the defense from finding out the police observer's vantage point; and the defense needed the information to be able to establish that the officer's view might have been impaired. The Supreme Court held that the state could not justify its desire to guard the location of the observation site by pointing to the safety of the owners of the premises. The trial court abused its discretion and Darden was denied his constitutional right to confront his accuser. Darden, 145 Wn.2d at 626.

In Vaielua's case, the state could not justify limiting cross examination by stating that Asaeli would be prejudiced by the information because the perpetrator to the 1999 incident was a relative of Asaeli's. Asaeli would only have been a child in 1999, and there was no need to identify the name of the perpetrator, rather the salient fact was that the perpetrator was a Royal Pirus gang member. As in Darden, the evidence was relevant and the state's justification for keeping it out insufficient to outweigh the prejudice to Vaielua's right to confrontation. Reversal and remand for a new trial is the remedy. Darden, 145 Wn.2d at 628.

12. THE CONVICTION FOR FELONY MURDER WITH SECOND DEGREE ASSAULT AS THE PREDICATE FELONY

MURDER MUST BE REVERSED BECAUSE ANDRESS LEADS TO AN ABSURD AND UNFAIR RESULT.

In In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), the Washington Supreme Court held that the second-degree felony murder statute did not permit conviction where the predicate felony was assault. The Legislature subsequently amended the felony murder statute, to include assault as a predicate felony for second degree felony murder. See Laws of 2003, ch. 3, §2. The original statute had provided that a person was guilty of second degree murder if

> He commits or attempts to commit any felony, other than those enumerated in RCW 9A.32.030(1)(c), and in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants[.]

RCW 9A.32.050(1)(b) (1975). With the 2003 amendments, the first two clauses now read, "[h]e commits or attempts to commit any felony, including assault." Laws of 2003, ch. 3, §2. The "course of and in furtherance of" language was not amended. Id.

In Andress, the Court relied upon statutory construction and prior case law and held that the phrase "in furtherance of" as contained within the felony murder statutes did not mean that the defendant had to cause the death while taking some act to further the underlying felony. 147 Wn.2d

at 609. Instead, "in furtherance of" means simply that the death "was sufficiently close in time and place" to the underlying felony "to be part of the res gestae of that felony." 147 Wn.2d at 609, quoting, State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990). The Andress Court held that, if assault were one of the predicate felonies for felony murder, the "in furtherance of" language in the statute would be "meaningless as to that predicate felony," because the assault is "not independent of the homicide." 147 Wn.2d at 610. Assuming that the Legislature did not intend this "absurd result," the Court held that assault could not be the predicate felony for the murder charge. Id.

In amending the statute to include felony murder, the Legislature has now indicated that it does currently intend this "absurd result." It is now up to the courts of this state to determine whether the new statutory scheme passes muster.

Put simply, it does not. The statute still suffers from the absurdity found in Andress, because it still includes the "in furtherance of" language but now specifically includes assault.

More importantly, permitting the prosecution the discretion to choose between charging a second degree felony murder with assault as the predicate felony, instead of manslaughter, violates the state and federal rights of equal protection. Both Article 1, § 12 and the Fourteenth

Amendment protect against granting the prosecution discretion to choose from "different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations." Olsen v. Delmore, 48 Wn.2d 545, 550, 295 P.2d 324 (1956). Further, "the principle of equality before the law is inconsistent with the existence of a power in a prosecuting attorney to elect, from person to person committing this offense, which degree of proof shall apply to his particular case." State v. Collins, 55 Wn.2d 469, 470, 348 P.2d 214 (1960).

Under RCW 9A.36.021, to prove assault in the second degree as charged, the prosecution had to prove that Mr. Smith intentionally assaulted the child and thereby recklessly inflicted substantial bodily harm and death resulted. To prove first-degree manslaughter, the prosecution had to prove that he "recklessly caused the death of another person." RCW 9A.32.060. Second degree murder is a level XIV offense, while first degree manslaughter is a level XI offense, with significant differences in the sentences served for each. RCW 9.94A.505; RCW 9.94A.510.

Thus, if a defendant commits an intentional assault and unintentionally but recklessly inflicts substantial bodily harm which results in death, the prosecution can charge either second degree murder or manslaughter, with the resulting differences in punishment and

consequence. Similarly, with assault as the predicate felony for second degree felony murder, "a negligent third degree assault resulting in death can be second degree murder," and can also be second degree manslaughter. See RCW 9A.32.070(1); Andress, 147 Wn.2d at 615.

The unfairness which can result from such discretion is evident and the harshness of punishing an unintentional homicide this way has been recognized by the Supreme Court itself. See Andress, 147 Wn.2d at 612. By giving the prosecution this expansive discretion to charge a higher or lesser crime for the same conduct, RCW 9A.32.050 as currently written violates the prohibitions against equal protection.

In addition, it is time for Washington to reconsider its ill-conceived notion of refusing to follow the vast majority of jurisdictions which have adopted a "merger" rule for felony murder with an underlying assault in order to prevent such drastic unfairness as currently exists in Washington. Under the merger rule, if a person is assaulted and then dies, the assault merges into the resulting homicide and cannot be the predicate felony for felony murder, "because it is not a felony independent of the homicide." Andress, 147 Wn.2d at 606. As the Court noted in Andress, the original rejection of the merger rule was based upon the statutory scheme and case law in existence at the time. 147 Wn.2d at 607-608, citing, State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966). The most recent rejection of the

merger rule was in State v. Wanrow, 91 Wn.2d 301, 306-310, 588 P.2d 1320 (1978). Since that time, however, the harshness of Washington's uniquely broad felony murder rule permitting assault as the predicate felony has "become more obvious as various issues have come before the appellate courts of this state." Andress, 147 Wn.2d at 612-13.

The Andress Court relied on this harshness as evidence that the Legislature must not have intended assault to serve as a predicate felony. 147 Wn.2d at 613. And the Court signaled the likelihood that it is receptive to overturning the cases rejecting the merger rule, declaring that the present second degree murder statutory scheme "occupies a place in the homicide statutes more analogous to that of the New York first degree felony murder statute discussed in Harris than recognized at that time" the Harris Court was rejecting the necessity for the merger rule. Andress, 147 Wn.2d at 614-15.

In addition, Washington case law and the decision in Andress support application of the merger requirement. Washington recognizes, as part of the "merger doctrine," the concept that one crime may be so incidental to another that it does not amount to the independent crime. See State v. Saunders, 120 Wn. App. 800, 816-17, 86 P.3d 1194 (2004). Thus, in State v. Green, 94 Wn.2d at 227, the defendant was charged with aggravated murder with kidnapping as an element of the crime, where the

crime involved taking the victim from an alley, moving her about 50 feet, and then killing her. The Court held that the prosecution failed to prove the kidnapping element because, although the child had been moved, that movement was "an integral part of and not independent of the underlying homicide." 94 Wn.2d at 227.

Applying those principles here, this Court should hold that the predicate assault merged with the death and felony murder does not apply. The purpose of the felony murder rule is to ensure that a person who commits a homicide which results in a murder may be punished by what is, effectively, "vicarious liability." State v. Carter, 154 Wn.2d 71, 78-79, 109 P.3d 823 (2005). Proof of felony murder has thus been described as proof both that a person "committed or attempted to commit a predicate felony *and* that he or she, or a coparticipant, committed homicide in the course of commission of the felony." 154 Wn.2d at 78-79 (emphasis in original). Thus, when assault is the predicate felony, to prove second degree murder the prosecution has to prove that the person committed or attempted to commit an assault and that she or a coparticipant committed homicide in the course of commission of the felony.

In Leech, supra, the Supreme Court was faced with the question of when a death had to occur and in what relationship to the underlying felony for felony murder to apply. The defendant had committed arson

and a firefighter had died in the subsequent fire. 114 Wn.2d at 610. The Court construed the "in furtherance of" requirement to mean that the death had to occur "sufficiently close in time and place" to be "part of the res gestae" of the felony.

Applying that standard and that language to an underlying felony of assault, the Andress Court held:

> It is nonsensical to speak of a criminal act - - an assault - - that results in death as being part of the res gestae of the same criminal act since the conduct constituting the assault and the homicide are all the same. Consequently, in the case of assault there will never be a res gestae issue because the assault will always be directly linked to the homicide. . . . In short, unlike the cases where arson is the predicate felony, the assault is not independent of the homicide.

147 Wn.2d at 610-611.

Thus, the Supreme Court has declared that a predicate assault effectively merges and is not independent of the homicide. Although Andress did not take the further step and declare adoption of merger in Washington, it clearly indicated its willingness to do so. This Court should follow the path cleared by Andress and should adopt the merger doctrine in this state to protect against the "absurd result" the Andress Court noted would result from including assault as a predicate felony for

felony murder. In addition, this Court should reverse the conviction for felony murder with the predicate of second-degree assault.

13. CUMULATIVE ERROR DENIED VAIELUA HIS RIGHT TO A FAIR TRIAL

Where multiple errors occur during trial which deny the defendant his right to a fair trial, due process is violated and the defendant is entitled to a new trial. In re Personal restraint of Lord, 123 Wn.2d 269, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). The cumulative error doctrine applies when there are multiple errors at trial, but none standing alone is sufficient to warrant reversal. State v. Hodges, 118 Wn. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1013, 94 P.3d 960 (2004). State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997).

Under the cumulative error doctrine when multiple errors deny a defendant his right to a fair trial, he is entitled to a new trial. As argued above and hereunder, the errors at trial were so prevalent and prejudicial, that Vaielua was denied his right to a fair trial. For these reasons, he is entitled to a new trial.

The combined and repeated errors at trial denied Vaielua his right to a fair trial. In sum, the errors were: (1) the multiple instances of improper introduction of irrelevant and prejudicial gang evidence; (2) prosecutorial misconduct throughout the closing and rebuttal arguments where the prosecutors misstated the law and argued facts not in evidence; (3) voluminous admissions of hearsay on Kushman Blok without any foundation; (4) the prosecutors 27 objections during the cross examination of Tami Missionare designed to destroy the defendants right to cross examination; (5) numerous confrontation clause violations including: (i) the admission of William's jail cell graffiti without the opportunity to confront Williams; (ii) the admission of Flores testimony based on hearsay where she had no independent recollection of her original statements; (iii) Vaielua was not allowed to question Flores about her conversation with Asaeli under the hearsay exception ER 804(b)(3), statements against interest unless the defense called Flores in their case in chief, thus requiring defense to put on a case if they wanted this testimony, which would have violated Vaielua's Fifth Amendment Rights;. (iv) the court denied the defense objection to Detective Pendrak's testimony regarding Blacc's involvement and his gun's association with the gang Everybody Killa gang of Crip's based on a Brady violation as the state failed to disclose this exculpatory information to the defense. RP 266-285 ; (v) Vaielua was not permitted to

ask Ringer about the fact that the 1999 incident involving Kushman Blok centered round a known Royal Samoan Pirus named Isako Malo; and that there had been no criminal activity since 1999 involving Cushman Block; (vi) that there was no continuity between the 1999 incident and the current defendants. 2RP 808-810; (vii) the judge permitted Devault's testimony against Asaeli as substantive evidence and against Vaielua and Williams as impeachment evidence but given the 60 plus instructions to the jury and the months of testimony, it is unlikely that the jury was able to segregate out the improper evidence and sustain from using it against Vaielua.. 2RP 1522.

Vaiuelua was denied his right to a fair trial by the magnitude and volume of the cumulative errors at trial. As a result of these combined errors, Vaielua's entire case was reduced to guilt by association. This Court should reverse Vaielua's conviction.

D. CONCLUSION

Vaielua respectfully requests this Court reverse his conviction and dismiss his charge with prejudice because the state failed to present evidence of guilt beyond a reasonable doubt. Alternatively, this Court should reverse Vaielua' conviction and remand for a new trial based on ineffective assistance of counsel, denial of Vaielua's his right to a fair trial based on the trial court abusing her discretion in admitting irrelevant and overly prejudicial gang evidence that denied Vaielua his right to a fair trial, denial

of the right to fully cross examine two key witnesses, prosecutorial misconduct, admission of hearsay regarding Kushmen Blok and its members, lack of a unanimity instruction, sleeping juror, constitutionally defective accomplice liability instructions and cumulative error.

DATED this 28th day of August, 2007.

Respectfully submitted
LAW OFFICES OF LISE ELLNER

Lise Ellner, WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Darius Vaielua DOC# 302267 AC08 Clallam Bay Corrections Center 1830 Eaglecrest Way, Clallam Bay WA 98326 a true copy of the document to which this certificate is affixed, on August 28, 2007. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature