

NO. 37323-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MAURICE MCDANIEL,

Appellant.

09/MAR 19 PM 1:19
STATE OF WASHINGTON
BY  DEPUTY

COURT OF APPEALS
DIVISION II

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. WHERE THE CASE RESTED ON ONE WITNESS'S DUBIOUS IDENTIFICATION, THE COURT'S MISUNDERSTANDING OF ITS AUTHORITY TO SEPARATE A HIGHLY PREJUDICIAL ALLEGATION MCDANIEL HAD A "SERIOUS" CRIMINAL HISTORY BEFORE HE WAS 16 YEARS OLD WAS AN UNTENABLE FAILURE TO EXERCISE DISCRETION

- a. The court did not understand basic rules of

severance. CrR 4.4 says the court "shall grant a severance of offenses whenever . . . the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." Here, both defendants asked for an easily-accomplished severance – to keep from the jury the prior convictions for "serious offenses" of both teenaged defendants, they wanted the judge to decide the unlawful firearm possession based on the same evidence introduced at trial.

Yet the trial judge refused to consider severance unless McDaniels provided "authority" showing the court had discretion to sever the joined firearm possession charge from the robbery and attempted murder. 11/15/07 98; 11/27/07RP 165. When the defense did not produce the binding authority the court demanded, the court refused to simply apply the general severance factors to

the case, and instead ruled that the defense's failure to show on-point authority must "work against" their motion. 11/28/07RP 193. The court's erroneous view of the law "necessarily" constitutes an abuse of discretion. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); see generally State v. Bryant, 89 Wn.App. 857, 865-67, 950 P.2d 1004 (1998) (setting out considerations for severance).

The prosecution complains that the request to sever was not raised until "trial had commenced." Response Brief, at 12. But the court found the request timely. 11/28/07RP 493.

Furthermore, the prosecutor ignores the actual procedural posture of the case. The severance request was made on November 15, 2007, the day after the parties first appeared before the trial judge for pretrial proceedings, and during which they strenuously requested a continuance and expressed dismay that the case was set for trial. 11/14/07RP 4-18; 11/15/07RP 96-97. The prosecution did not object to the request for delaying the trial but the court ordered that they would begin pretrial proceedings immediately while agreeing to hold off beginning the trial for a few weeks. 11/14/07RP 13, 17. Opening statements and the actual taking of testimony did not occur until November 28, 2007. The

prosecution's vague assertion about the commencement of trial, implying a motion was made too late, should be disregarded.

The prosecution also harps on the defense failure to file a written motion supporting severance, but the court rule does not require a written brief. Further, as the defense explained, it was extremely busy because of the many discovery violations "dumped on us" at the last minute and the court's insistence that the trial be completed by December 14, 2007, to accommodate its own schedule. 11/14/07RP 15; 11/17/07RP 162. The trial prosecutor conceded he was improperly springing gang expert evidence on the defense without notice that he admitted he "should have" given, and had not supplied the defense with tape recordings or reports essential to the case. 11/15/07RP 106, 108, 122; 11/27/07RP 115, 123.

Finally, severance was easily accomplished and highly efficient, as discussed in Appellant's Opening Brief, p. 10-15. McDaniel did not seek a separate jury trial on severed offense. He wanted the court to decide whether he unlawfully possessed a firearm based on the evidence introduced at the same jury trial. 11/28/07RP 189-90. This remedy would have saved McDaniel from the plain prejudicial effect of having the jury speculate that if

he was the kind of person who had committed a serious offense when he was not even 16 years old, than he was the kind of person to follow up those acts with a dangerous and callous shooting. The prosecution rested on an identification by Cashundo Banks, who admitted lying about everything he told the police, and insisted he had not used methamphetamine or cocaine before the incident and only drank one beer, despite hospital tests documenting his ingestion of these mind and perception-altering substances as well as a significant amount of alcohol.

The prosecution flaunted these criminal histories by beginning the lengthy jury trial with this very information. 11/28/07RP 226-28. Before calling any witnesses, the trial deputy told the jury that both defendants had been convicted of serious offenses as juveniles. Id. This tainting of the two charged men by virtue of their prior juvenile convictions permeated the case and irreparably colored the jury's perception of them despite the presumption of innocence. Nowhere was the jury told that this criminal history information could be used only to decide whether the gun used to commit the crime was unlawfully possessed.

The court's failure to understand its authority to sever charges, its determination that the failure to provide persuasive

authority must “work against” the defense, its refusal to hold a simultaneous bench trial on the issue when it would have been so easily accomplished without any additional effort, combined with its failure to provide a promised limiting instruction, is a failure to exercise legal discretion and necessarily constitutes an abuse of discretion.

b. The court ignored its obligation to insure a fair trial.

The court **offered** to give a limiting instruction, because it understood the prejudicial effect of the evidence. 11/28/07RP 194. Yet the court neglected to give any such instruction.

The court’s generic “consider each count separately” instruction segments charges; it does not cabin evidence. It does not tell the jury it may not use evidence of McDaniel’s juvenile criminal past in deciding whether McDaniel was incorrectly identified as the shooter by a man high on methamphetamine, or weighing whether McDaniel is the type of person who would commit a violent and senseless crime. The court’s failure to give a limiting instruction even when it was aware of the critical prejudice attached to the defendants’ commission of serious offenses as juveniles further demonstrates its abuse of discretion and its denial of a fair trial to McDaniel.

2. WHERE DEFENSE COUNSEL ASKED FOR SEVERANCE WITHOUT KNOWING THE CONTROLLING COURT RULE, THEN NEVER CURTAILED THE JURY'S USE OF THE OBVIOUSLY PREJUDICIAL EVIDENCE, COUNSEL'S DEFICIENT PERFORMANCE CLEARLY PREJUDICED THE OUTCOME OF AN OTHERWISE TENUOUS CASE THAT RESTED ON A FLIMSY IDENTIFICATION

a. Defense counsel's failure to request a limiting

instruction explaining the narrow basis on which the jury should use the evidence of McDaniel and Marlow's prior serious convictions as juveniles could not be a reasonable tactical strategy. "When evidence is admitted for a limited purpose and the party against whom it is admitted requests such an instruction, the court is obliged to give it." State v. Freeburg, 105 Wn.App. 492, 501, 20 P.3d 984 (2001). Here, after defense counsel lost his efforts to keep McDaniel's criminal history from the jury, he never asked for a limiting instruction even though the court offered to give one, and would have been legally obligated to do so.

Prior criminal history has an "inherent prejudicial effect." State v. Mills, 154 Wn.2d 1, 8, 109 P.3d 415 (2005), citing State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002). "The danger of prior conviction evidence is its tendency to shift the jury's focus from the

merits of the charge to the defendant's general propensity for criminality." State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 113 (1984). A limiting instruction's purpose is to "minimize the damaging effect of properly admitted evidence of prior convictions . . . by explaining to the jury the limited purpose of that evidence." State v. Summers, 73 Wn.2d 244, 247, 437 P.2d 907 (1968). That limiting instructions curb the prejudicial effect and misuse of prior criminal convictions is neither novel nor obscure.

It would be impossible for the jury to have simply forgotten this information by the time deliberations occurred. The jury was mandated to consider McDaniel's serious criminal history as a juvenile when deliberating upon the charged allegation of unlawful possession of a firearm. The "serious" juvenile offense was an element of that crime. CP 59-60 (Instructions 24 and 25).

It is inconceivable that counsel intentionally preferred no limiting instruction because they thought the jury would forget both defendants had committed serious juvenile offenses. It could not have been a tactical "strategy" when the defense sought severance because of the undeniable prejudice and then never tried to minimize the prejudice it complained of by asking the court to give a limiting instruction. 11/28/07RP 189. The objections the defense

made to the introduction of the evidence showed that counsel did not want the jury to hear about this otherwise inadmissible juvenile criminal conduct and did not want the jury to draw improper inferences from the criminal history – the very purpose served by a limiting instruction.

b. Without any limiting instruction, the jury was free to consider both defendants' serious criminal history in determining whether they were likely to have committed the charged crimes.

The prejudicial effect of deficient attorney performance is not determined by the number of motions filed on irrelevant issues or by counting objections. The question is whether there is a reasonable probability that defense counsel's inadequacies with respect to seeking severance and a limiting instruction could have altered the outcome of the trial. Strickland v. Washington, 466 U.S. 668, 695-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (explaining considerations for assessing prejudice).

Put another way, the question is: is it reasonably probable that defense counsel's failure to inform the court it had authority to sever the charges under CrR 4.4, and ask for a limiting instruction had a "pervasive effect on the inferences to be drawn from the

evidence” and without such errors, the factfinder may have had a doubt about McDaniel’s guilt. Strickland, 466 U.S. at 695-96.

No physical evidence connected McDaniel to the incident. He made no incriminating statements. The State’s case hinged on two bare theories: (1) an identification some 10 months after the incident by an admitted liar and serious drug user, based on an incident that happened on a dark street at night with only a minimal opportunity to observe the perpetrators, who were mostly in a car with tinted windows; (2) Detective Miller’s testimony that McDaniel was “Tony Guns” and “Tony Guns” talked about a shooting that sounded like Banks’s shooting in a telephone call.

The evidence that McDaniel, and Marlow, had been convicted of serious offenses as juveniles substantially bolstered Banks’s identification. The fact that they had serious criminal history at young ages made it far more likely that they were the type of people who may have committed the charged offenses. Failing to corral this inherent and highly prejudicial evidence by instructing the jury not to use this information to judge whether McDaniel was likely to have committed the crimes was absolutely deficient. Without a limiting instruction, it is impossible to believe the jury did not consider and rely on the criminal past of both defendants in

deciding to convict them. It pervasively effected the inferences to be drawn from the evidence, because the jury had no reason to think it could not surmise McDaniel was the type of person who would have committed the offense, and the jury otherwise had no basis to judge McDaniel's character and predispositions. The very shaky identification would not have been enough to convince reasonable jurors of his guilt without it. Reversal is required because of ineffective assistance of counsel.

3. BECAUSE AN ARRESTED SUSPECT TOLD DETECTIVE MILLER DURING AN INTERROGATION THAT MCDANIEL WAS "TONY GUNS," AND MILLER'S TESTIMONY THAT MCDANIEL WAS "TONY GUNS" RESTED ON THIS OUT-OF-COURT TESTIMONIAL STATEMENT, THE STATE VIOLATED MCDANIEL'S RIGHT OF CONFRONTATION

Detective Miller's "knowledge" that McDaniel was the person speaking on taped telephone calls identified as "Tony Guns" was from a statement made to Miller by a person Miller was interrogating about other criminal activity. 11/27/07RP 30, 88; 12/4/07RP 772-73. Thus, McDaniel was accused of being "Tony Guns" based on an out-of-court statement made to a police detective in the course of a police investigation, and this out-of-court statement falls within the "core class" of testimony forbidden

by the confrontation clause. Crawford v. Washington, 541 U.S. 36, 51-52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The error in the trial of Sir Walter Raleigh, central to the Crawford Court's analysis of the Sixth Amendment, was that the prosecution's case used out-of-court statements as evidence, even though the statements were partially self-inculpatory and presumably reliable. Id. at 62. The problem was not that the finder could not assess whether the accusations were reliable, but rather, "the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie." Id.

McDaniel could not confront the person who accused him of being "Tony Guns" by cross-examining Miller, because Miller was simply repeating what he heard from others. No sources, outside of police investigation and interrogation, established McDaniel was "Tony Guns." The prosecution lists other purported "sources," but while these factors could connect Marlow to the telephone calls, they do not apply to McDaniels. Resp. Brf. at 22. The only factor even potentially connecting McDaniels to this nickname and the phone calls is that "Tony Guns" refers to living with his grandmother, and Miller thought McDaniel lived with his

grandmother. But this innocuous and hardly uncommon fact, which may not even be true, does not establish McDaniel must be therefore be “Tony Guns.”

To the extent an “expert” witness could have broader leeway to discuss out-of-court statements, Miller did not testify as an expert on this point. The court denied the State’s request to a blanket qualification of Miller as a gang expert. 11/27/08RP 172.

Miller did not have first-hand knowledge, as the State asserts. Miller had never heard McDaniel’s voice and had no corroborating facts other than the “testimonial” accusations gathered from other arrested suspects being interrogated by police. 11/27/08RP 33 (Miller never spoke with McDaniel); 41-42 (speakers in recorded calls never used true names); 72 (Miller never saw McDaniel with Marlow); 86 (McDaniel connected to “Tony Guns” by arrested homicide suspect); 172 (court ruling barring Miller from giving opinion McDaniel is “Tony Guns”).

The prejudice from this testimony was extraordinary. The complainant was a liar and drug addict whose identification of McDaniels ten months after the incident was otherwise the only evidence against McDaniel. The incident happened quickly and in the dark, with a very limited opportunity to see any perpetrator. But

for hearing that McDaniels was the person laughing about shooting Banks in the telephone call, no reasonable juror would have convicted McDaniels.

4. THE STATE'S BRIEF SHOWS WHY THE
"FLIGHT" EVIDENCE WAS BOTH WRONGLY
ADMITTED AND UNFAIRLY PREDJUCIAL

The prosecution's brief illustrates the fundamental flaw of the weak "flight" evidence that served no legitimate purpose other than casting McDaniel as a person who does not respect and obey the police.

First, McDaniel did not flee from the police. Ten months after the incident, he got into a car driven by his girlfriend. The driver refused to stop for the police. McDaniel was not driving and is not responsible for the driver's actions, especially when no one said he encouraged his girlfriend to flee. 12/4/07RP 831, 835, 839.

Second, McDaniel got out of the car as ordered by the police, but refused to lie on the ground as requested. He did not run, hide, move, scramble, or tussle. He simply stood still. 12/4/07RP 840-42.

Third, his failure to "comply" by refusing to lie on the ground has absolutely no bearing and offers no possible hint into his consciousness of guilt for the charged offenses. Many months had

passed since the incident without any apparent impact on McDaniels's life, and there was no obvious investigation of which he would know or reason for him to speculate he was a suspect.

The purpose of using McDaniel's refusal to comply with the order to lie down, and his girlfriend's failure to stop for the police, was to show he was a bad guy. He was the kind of guy whose friends thumbed their noses at the police. He was a person who did not listen to the police and did not obey them. It showed him to be lawless but offered no insight into whether he may have committed the charged crime. This purported flight evidence was improperly admitted, over defense objection, and carried with it substantial ability to taint McDaniel in a case to which his connections were highly tenuous. In combination with the other propensity evidence admitted, the jury had ample grounds to speculate about McDaniel's character based on unfair and impermissible inferences. The "flight" evidence was the final nail in the coffin in the State's efforts to show McDaniel was the type of person who would have committed the charged crimes.

5. THE JURY WAS INACCURATELY AND INCOMPLETELY INSTRUCTED ON THE ESSENTIAL ELEMENTS OF ATTEMPTED MURDER

The “to convict” instruction for attempted first degree murder did not explain to the jury that McDaniel must have acted with premeditated, deliberate intent when he shot Banks. CP 49 (Instruction 14). “[A] reviewing court may not rely on other instructions to supply the element missing from the “to convict” instruction. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

The failure to fully and correctly define all essential elements of the crime in a “to convict” instruction is a manifest constitutional error that may be raised for the first time on appeal. Mills, 154 Wn.2d at 417 (citing State v. Roberts, 142 Wn.2d 471, 500-01, 14 P.3d 713 (2000); State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996)). A “to convict” instruction is a yardstick that must include every element of the charge. State v. Smith, 131 Wn.2d 258, 262-63, 931 P.2d 156 (1997) (jury has the “right” to rely on the “to convict” as “complete statement of the law” and a violation is a “constitutional defect” requiring automatic reversal).

Here, the “to convict” instruction did not explain that to convict McDaniel of attempted first degree murder, it must find he acted not only with the intent to commit murder (as required for an attempt), but also with the intent to commit premeditated murder (as required for first degree murder).

Here, the “to convict” instruction told the jury it must find merely:

“(2) the act was done with the intent to commit murder in the first degree.”

CP 49. But first degree murder has a different, and far more stringent, intent requirement. By only telling the jury they needed to consider his intent to commit murder, without explaining in a “manifestly apparent” fashion so that a lay person fully appreciated the essential elements, the court did not insure the law was understood and applied by the jurors. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). A juror does not have interpretive tools and is not expected to parse instructions when the “to convict” instruction purports to contain all essential elements. DeRyke, 149 Wn.2d at 910; LeFaber, 128 Wn.2d at 902-03.

Exacerbating the problem, the court did not correctly and clearly explain the essential requirements of “premeditation” in a

separate instruction. The prosecution cites several cases purporting to show that the pattern jury instruction has been approved. Resp. Brf. at 28. But in those cases, the court did not affirmatively articulate a basis to find the pattern instruction to be without error.¹ Premeditation is not the same as the intent to kill, and the jury instructions may not define premeditation to suggest that the intent to kill suffices. By telling the jury in the “yardstick” instruction to focus on whether McDaniels acted with the “intent” to commit first degree murder, and then defining premeditation in a way that does not make clear the necessity of premeditatedly deciding to kill, the jury was not told of the essential elements in a manifestly clear and apparent fashion.

The allegations here were of a very rapid shooting of a complete stranger without even any words exchanged, and the evidence of premeditation was minimal at best. The inadequate jury instructions are particularly prejudicial and add further grounds for reversal.

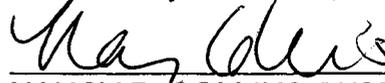
¹ State v. Clark, 143 Wn.2d 731, 770-71, 24 P.3d 1006 (2001) (finding no compelling reason presented to find premeditation instruction inadequate without explaining Clark’s challenge); In re Restraint of Lord, 123 Wn.2d 296, 317, 868 P.2d 835 (1994) (no discussion of challenge raised); State v. Benn, 120 Wn.2d 631, 657, 845 P.2d 289 (1993), reversed on other grounds, sub. nom Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002) (two-sentence discussion without citation to any authority).

B. CONCLUSION.

For the foregoing reasons and those discussed in Appellant's Opening Brief and Statement of Additional Grounds for Review, Maurice McDaniel respectfully requests this Court reverse his convictions and order a new trial.

DATED this 18th day of March 2009.

Respectfully submitted,



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

STATE OF WASHINGTON,)
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 RESPONDENT,)
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 v.)
)
 MAURICE MCDANIEL,)
)
 APPELLANT.)

NO. 37323-8-II

DEPUTY
 STATE OF WASHINGTON
 COURT OF APPEALS
 DIVISION II
 MARCH 19 PM 1:19

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF MARCH, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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