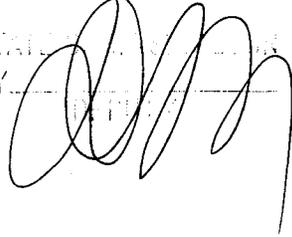


COURT OF APPEALS

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STATE OF WASHINGTON

BY 

No. 38682-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Stephen Shores,

Appellant.

Lewis County Superior Court Cause No. 02-1-761-3

The Honorable Judges James Lawler

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 5

A. Mr. Shores wants to fire his attorney but the court does not ask him about the problems in their relationship.. 5

B. Canell-Parker testifies that Mr. Shores assaulted her; defense counsel does not seek to redact inadmissible material from Mr. Shores’s recorded statement..... 9

C. Mr. Shores repeatedly asserts that he was defending himself and his property..... 10

D. Defense counsel does not propose instructions on the lawful use of force, and does not object to the lack of a unanimity instruction or the court’s failure to instruct the jury about the deadly weapon special verdict..... 12

E. After being denied clarification about the relationship between the multiple acts and the specific assault charges, the jury convicts Mr. Shores of seven counts of assault... 13

F. The trial court includes in Mr. Shores’s offender score (a) six Class C felonies, which (according to the court’s criminal history findings) should have washed out, and (b) two California convictions (which the court did not find equivalent to Washington felonies). 13

ARGUMENT..... 15

I. The trial court violated Mr. Shores’s Fourteenth Amendment right to due process by failing to instruct the jury on self-defense..... 15

II. The trial court’s failure to give a unanimity instruction denied Mr. Shores his state constitutional right to a unanimous jury. 18

III. The trial court imposed a deadly weapon enhancement in violation of Mr. Shores’s Sixth and Fourteenth Amendment rights to due process and to a jury determination of all facts used to increase the penalty of an offense. 21

IV. The trial court should not have sentenced Mr. Shores with an offender score of 9+..... 23

A. The sentencing court should not have included in the offender score prior convictions that had “washed out.”.. 24

B. The sentencing court should not have included in the offender score two prior California convictions, absent a finding that they were comparable to Washington felonies.

25

V. Mr. Shores was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. 26

A. If Mr. Shores’s self-defense claim is not preserved for review, defense counsel provided ineffective assistance by failing to propose instructions on self-defense. 27

B. The trial court erred by failing to inquire into Mr. Shores’s requests for the appointment of new counsel..... 29

C. Mr. Shores was denied the effective assistance of
counsel because a conflict of interest adversely affected his
attorney's performance. 33

CONCLUSION 36

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Apodaca v. Oregon</i> , 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).....	18
<i>Ayers v. Belmontes</i> , ___ U.S. ___, 127 S. Ct. 469, 166 L. Ed. 2d 334 (2006).....	34
<i>Belmontes v. Brown</i> , 414 F.3d 1094 (9th Cir. 2005)	34, 35
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	21, 23
<i>Brown v. Craven</i> , 424 F.2d 1166 (9th Cir. 1970)	29, 30, 32
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).....	33, 35
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....	26
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	15, 16
<i>Lewis v. Mayle</i> , 391 F.3d 989 (9th Cir., 2004)	33
<i>Lockhart v. Terhune</i> , 250 F.3d 1223 (9th Cir., 2001).....	33
<i>McMann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).....	26
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed. 291 (2002).....	33
<i>Neder v. United States</i> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999).....	17
<i>Pope v. Illinois</i> , 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439 (1987).....	17

<i>Sanders v. Ratelle</i> , 21 F.3d 1446 (9th Cir. 1994)	34
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	26, 27
<i>United States v. Nordby</i> , 225 F.3d 1053 (9th Cir. 2000)	30
<i>United States v. Salemo</i> , 61 F.3d 214 (3 rd Cir. 1995)	26
<i>United States v. Shwayder</i> , 312 F.3d 1109 (9th Cir. 2002)	33
<i>United States v. Walker</i> , 915 F.2d 480 (9th Cir. 1990).....	30
<i>United States v. Williams</i> , 594 F.2d 1258 (9th Cir. 1979).....	29, 30
<i>Washington v. Recuenco</i> , 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).....	21
<i>Wood v. Georgia</i> , 450 U.S. 261, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981).....	33

WASHINGTON CASES

<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	26
<i>In re Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007).....	27
<i>State v. Adel</i> , 136 Wn.2d 629, 965 P.2d 1072 (1998).....	30
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002)	17
<i>State v. Coleman</i> , 159 Wn.2d 509, 150 P.3d 1126 (2007).....	19
<i>State v. Cross</i> , 156 Wn.2d 580, 132 P.3d 80 (2006).....	29, 30, 32
<i>State v. Davis</i> , 141 Wn.2d 798, 10 P.3d 977 (2000).....	33
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003)	33
<i>State v. Douglas</i> , 128 Wn.App. 555, 116 P.3d 1012 (2005).....	21
<i>State v. Elmore</i> , 155 Wn.2d 758, 123 P.3d 72 (2005)	19

<i>State v. Greathouse</i> , 113 Wn.App. 889, 56 P.3d 569 (2002).....	19
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	27, 28
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	26
<i>State v. Jensen</i> , 125 Wn. App. 319, 104 P.3d 717 (2005)	33, 35
<i>State v. Jones</i> , 106 Wn. App. 40, 21 P.3d 1172 (2001).....	17
<i>State v. Jury</i> , 19 Wn. App. 256, 576 P.2d 1302 (1978).....	28
<i>State v. Kiehl</i> , 128 Wn. App. 88, 113 P.3d 528 (2005).....	16
<i>State v. Lopez</i> , 79 Wn.App. 755, 904 P.2d 1179 (1995).....	30
<i>State v. Mills</i> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	16
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	27
<i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997).....	15, 21
<i>State v. Recuenco</i> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	21, 23
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	27, 28
<i>State v. Rodriguez</i> , 121 Wn. App. 180, 87 P.3d 1201 (2004).....	28
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	15, 21
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	28
<i>State v. Vander Houwen</i> , 163 Wn.2d 25, 177 P.3d 93 (2008).....	19, 20
<i>State v. Woods</i> , 138 Wn. App. 191, 156 P.3d 309 (2007)	16, 18, 28, 29

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI.....	ii, 1, 2, 3, 4, 22, 25, 28, 32, 34, 36
U.S. Const. Amend. XIV	ii, 1, 2, 3, 4, 15, 19, 22, 25, 28
Wash. Const. Article I, Section 21.....	19, 22, 23

Wash. Const. Article I, Section 22..... 28

Wash. Const. Article I, Section 3..... 15

WASHINGTON STATUTES

RCW 9.94A.030..... 24

RCW 9.94A.500..... 24

RCW 9.94A.525..... 24, 25

RCW 9.94A.602..... 22, 23

RCW 9A.04.110..... 22

RCW 9A.16.020..... 15, 18

RCW 9A.16.110..... 16

RCW 9A.36.021..... 22

OTHER AUTHORITIES

RAP 2.5..... 16, 18, 19

ASSIGNMENTS OF ERROR

1. Mr. Shores's conviction was entered in violation of his Fourteenth Amendment right to due process.
2. The trial judge erred by failing to instruct the jury on self-defense.
3. Mr. Shores's state constitutional right to a unanimous jury was violated when the state failed to elect a single act for each charge, and the judge failed to give a unanimity instruction.
4. The deadly weapon enhancement was imposed in violation of Mr. Shores's Fourteenth Amendment right to due process.
5. The deadly weapon enhancement was imposed in violation of Mr. Shores's right to a jury trial under the Sixth and Fourteenth Amendments.
6. The trial judge erred by failing to instruct the jury on the deadly weapon enhancement.
7. The trial judge erred by failing to define the phrase "armed with a deadly weapon" for purposes of the special verdict.
8. The trial judge erred by submitting a special verdict form to the jury and allowing them to make a deadly weapon finding using the wrong definition of "deadly weapon."
9. The trial judge erred by imposing a deadly weapon enhancement.
10. The trial judge erred by sentencing Mr. Shores with an offender score of 9+.
11. The trial judge erred by including two foreign convictions in Mr. Shores's offender score without finding they were equivalent to Washington felonies.
12. The trial judge erred by including in the offender score six prior felonies that had washed out.
13. The trial judge erred by sentencing Mr. Shores to 96 months in prison.

14. Mr. Shores was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
15. If the absence of self-defense instructions is not preserved for review, then Mr. Shores was denied the effective assistance of counsel.
16. The trial judge erred by failing to inquire into the extent of the conflict between Mr. Shores and his court-appointed attorney.
17. The trial judge erred by failing to appoint new counsel.
18. Mr. Shores was denied his right to the effective assistance of counsel because his attorney's performance seems to have been affected by a conflict of interest.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the court to instruct the jury on all essential elements of an offense. Where an accused person presents some evidence of self-defense, the absence of self-defense becomes an element that the state must prove beyond a reasonable doubt. Did the trial court's failure to instruct the jury on self-defense violate Mr. Shores's Fourteenth Amendment right to due process?
2. When evidence of multiple criminal acts is introduced to support multiple convictions, either the state must elect one act to correspond to each charge, or the court must give the jury a unanimity instruction. Here, the state introduced evidence regarding multiple assaults with different weapons, but did not elect a single act for each count, and the trial judge failed to give a unanimity instruction. Did the trial court's failure to give a unanimity instruction violate Mr. Shores's state constitutional right to a unanimous verdict in light of the prosecutor's failure to make the required election?
3. Before a deadly weapon enhancement may be imposed, a jury must unanimously find beyond a reasonable doubt that the offender was armed with a deadly weapon. The trial judge

submitted a special verdict form to the jury (and imposed a deadly weapon enhancement), but did not define the phrase “armed with a deadly weapon” and did not outline the burden of proof or requirement of unanimity. Did the court’s imposition of a deadly weapon enhancement violate Mr. Shores’s Sixth and Fourteenth Amendment rights to due process and to a jury trial?

4. For enhancement purposes, a deadly weapon is “an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death....” The trial court instructed the jury that a deadly weapon is “any weapon, device, instrument, substance, or article, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm,” and did not define the term “armed.” Did the court’s instructions allow the jury to find Mr. Shores to be armed with a deadly weapon without proof of the facts necessary to support such a finding, in violation of his Sixth and Fourteenth Amendment rights to due process and to a jury trial?

5. Class C felonies are excluded from the offender score if the defendant spent five years in the community without committing additional offenses. The trial court’s criminal history finding included a five-year period with no criminal convictions. Should Mr. Shores’s prior Class C felonies have been excluded from his offender score because they had washed out prior to the commission of this offense?

6. Foreign offenses are excluded from the offender score unless the court finds they are comparable to Washington felonies. The court did not find that Mr. Shores’s two prior California convictions were equivalent to Washington felonies. Should the two prior California convictions have been excluded from the offender score?

7. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, Mr. Shores's trial strategy involved a claim of self-defense, but defense counsel did not propose instructions on self-defense. If the self-defense claim is not preserved for review, was Mr. Shores denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Stephen Shores and his then-girlfriend Lorina Canell-Parker lived together outside of Mossyrock, Washington. In the first week of October of 2008, the two of them fought, and Canell-Parker subsequently contacted police and alleged that Mr. Shores had assaulted her several times. Mr. Shores told police that Canell-Parker had assaulted him. RP (10/8/08) 8.

The state charged Mr. Shores with Assault in the Second Degree – Domestic Violence, Assault in the Third Degree – Domestic Violence (two counts), Assault in the Fourth Degree – Domestic Violence (four counts), Theft in the Second Degree, Malicious Mischief in the Second Degree, and Harassment – Domestic Violence. CP 25-28.

A. Mr. Shores wants to fire his attorney but the court does not ask him about the problems in their relationship.

A hearing was set to consider Mr. Shores' request to fire his attorney, Mr. Havirco. RP (10/23/08) 2. Havirco told the court that Mr. Shores wanted a polygraph test to support a request for release and dismissal of the charges. RP (10/23/08) 2-3. Counsel further explained that (after discussion), it was his understanding that Mr. Shores no longer wanted a new attorney. RP (10/23/08) 4. The court did not ask Mr.

Shores about any potential conflict, and took no further action. RP
(10/23/08) 2-5.

During the trial confirmation hearing and on the first day of trial,
Mr. Shores's attorney told the court they disagreed about whether Mr.
Shores should wear his street clothing. The attorney recommended street
clothing, and Mr. Shores desired to show the jury his custody status by
wearing his jail coveralls. RP (11/26/08) 2-4; RP (12/3/08) 3-4. Mr.
Shores did end up wearing the jail coveralls for his jury trial. RP
(12/3/08) 3.

Mr. Shores expressed his frustration with his attorney on the first
day of trial:

MR. SHORES: I'm trying to find out what's going on
here. My lawyer won't talk to me about nothing.

THE COURT: No. I'll give you a chance. All right? I'll
ask if you have questions and you can ask them. But when I'm
talking I want you to be quiet and I want you to listen.

MR. SHORES: Okay.
RP (12/3/08) 4-5.

At the start of the second day of trial, Mr. Shores had a colloquy
with the court about his attorney and his defense:

MR. SHORES: Hold on. Hold on.

THE COURT: Mr. Shores. Mr. Shores.

MR. SHORES: Yes.

THE COURT: Do you have questions before we get
started?

MR. SHORES: I have a lot of questions, sir, and I have a
lot of evidence that ain't here and this guy won't get it for me.

THE COURT: Mr. Havirco, you need a minute with your client?

MR. HAVIRCO: Yes, give me a minute.

MR. SHORES: I'm tired of the minutes. I need the stuff.

THE COURT: Mr. Shores, talk to your attorney.

(Discussion held off record.)

THE COURT: Mr. Shores, Mr. Shores, you need to stop.

MR. SHORES: I know, but I'm upset.

THE COURT: Mr. Shores, you need to stop. You need to understand that everything you're saying, you're saying this stuff out loud, everybody can hear it, everything that you say can be used against you. Do you understand that?

MR. SHORES: It's against me. Where is my evidence? It is against me. That's right. You already got that point made clear. That's why I'm in jail. Now, where is the evidence?

THE COURT: That's what the trial is going to be about.

MR. SHORES: No. I want the evidence here in court.

....

MR. SHORES: I have no rights.

THE COURT: No. You have a lot of rights. I'm telling—

MR. SHORES: Where is the evidence?

THE COURT: I'm telling you that you need to exercise your rights. One of them is your right to remain silent.

MR. SHORES: Great.

THE COURT: Because if you don't exercise that right, the things that you say can be used against you. Do you understand that?

MR. SHORES: Perfectly.

....

THE COURT: That's how this is going to go. And I'm not going to have any more of these—

MR. SHORES: Hold on.

THE COURT: —outbursts in front of the jury when they come in.

MR. SHORES: Hold on.

THE COURT: Do you understand that?

MR. SHORES: Hold on. Hold on. Where's my pictures? Give me—

THE COURT: No, I'm not going to try the case now. We're going to do this in front of the jury.

MR. SHORES: No. I asked people to have this lady arrested. She's not arrested. I'm the one arrested here, not both of us. This is a two-sided street here and only one side's being seen. I want my evidence because this lady's going to jail when we're done.

THE COURT: Mr. Shores, you are the one who's on trial here.

MR. SHORES: She's the one—

THE COURT: Mr. Shores, that's enough. That's enough.

MR. SHORES: Where's—

THE COURT: You are the one that is on trial. No one else is on trial here today.

MR. SHORES: Yeah.

THE COURT: Do you understand that?

MR. SHORES: I don't understand why.

THE COURT: That's a decision—

MR. SHORES: (Unintelligible.)

THE COURT: Listen to me.

MR. SHORES: —to arrest that—

THE COURT: Listen to me. Listen to me. Are you listening now?

MR. SHORES: I've been listening.

THE COURT: No, you have not been listening.

MR. SHORES: Nobody's listening to me. It's me that they're not listening to.

THE COURT: Be quiet.

MR. SHORES: Oh. Okay. Again, once again, be quiet.

THE COURT: Yes, I want you to be quiet now.

MR. SHORES: Okay.

....

MR. SHORES: —I told three officers of the law to arrest that lady for what she did to me. Did any of them do it?

THE COURT: And do you understand this?

MR. SHORES: What?

THE COURT: That's not your call.

MR. SHORES: I can't tell somebody to arrest the lady?

THE COURT: Correct, you can't.

MR. SHORES: I can't?

THE COURT: Correct, you can't.

MR. SHORES: My rights aren't worth a shit, huh?

THE COURT: That's enough.

MR. SHORES: Thank you.
THE COURT: Okay. Are you through?
MR. SHORES: You got that down, my rights ain't worth nothing?
THE COURT: Are you through?
MR. SHORES: Uh—
THE COURT: Listen, here's how this is going to go. We're going to have this trial today. We can have this trial with you sitting here and participating or you can go down to the jail.
MR. SHORES: That's the problem. I'm not participating because my stuff is not here.
THE COURT: Mr. Shores—
MR. SHORES: I'm—I'm not participating—
THE COURT: Okay. You've pushed this as far as you can push it. Do you understand me? You need to be quiet now—
MR. SHORES: Oh.
THE COURT: —and trial is going to proceed. You need to talk through your attorney at this point. Do you understand that?
MR. SHORES: Sure, I understand.
THE COURT: All right.
MR. SHORES: I told him to get the shit and he ain't got it. That's what I do understand. Okay. Let's do it.
RP (12/4/08) 23-30.

- B. Canell-Parker testifies that Mr. Shores assaulted her; defense counsel does not seek to redact inadmissible material from Mr. Shores's recorded statement.

At trial, Canell-Parker testified that Mr. Shores assaulted her with his hand, his foot, a fire poker, a crowbar, water (through a hose), and a running chainsaw. RP (12/4/08) 36-37, 42-45. She also claimed that he pushed her head through glass, and threw her glasses up on the roof. RP (12/4/08) 37, 42. She said that these assaults took place over the course of

several days, but she acknowledged that she went to work and returned home without calling the police. RP (12/4/08) 31-66.

Mr. Shores gave a taped statement that was played for the jury. RP (12/4/08) 98-130. In his recorded statement, Mr. Shores said that he tried to stop the argument by telling Canell-Parker that he would get four more domestic violence charges. Defense counsel did not seek to have the reference to more domestic violence charges redacted, and it was played for the jury. RP (12/4/08) 111.

C. Mr. Shores repeatedly asserts that he was defending himself and his property.

At his first appearance, Mr. Shores asked if Canell-Parker was going to be charged with assaulting him. RP (10/8/08) 8. At the pretrial hearing, Mr. Shores again told the court that Canell-Parker was lying (when she said he assaulted her), and that she was the one who had assaulted him. RP (11/6/08) 4-6. On the second day of trial, he expressed his frustration that she hadn't been arrested or charged for assaulting him. RP (12/4/08) 23-30.

In his taped statement, Mr. Shores said the couple had been together off and on for four years, and that she would tell him to leave but then try to get him to stay. RP (12/4/08) 109-110. He said that she broke the glass (referred to in her testimony) by hitting it with her hand. RP

(12/4/08) 106-107. He also said that she had attacked him with a poker, bruising his knee, and that she had been coming at him all week. RP (12/4/08) 126-129.

Mr. Shores also addressed the incident involving his car. He said that he tried to drive away but that Canell-Parker grabbed the car and would not let go, so he stopped. RP (12/4/08) 113-115. She opened the car door, took the keys out, climbed on top of him, and tried to hit him. RP (12/4/08) 115-116. He said that when she refused to get out of the car, he got the garden hose and sprayed her to get her to get out. RP (12/4/08) 117-118. She remained in the car for two hours, at which point Mr. Shores said he went into the house and started a chainsaw, hoping she would come in to investigate and he could leave. RP (12/4/08) 120-121. She didn't, so he went to the car with it, and then turned it off and set it down outside the car. RP (12/4/08) 122-124. He said that she was kicking and hitting him, so he grabbed her arms to defend himself. RP (12/4/08) 123-124. He said that he got out of the car and she attacked him again, and he defended himself with a flashlight with a stick attached. RP (12/4/08) 124-126.

At trial, Mr. Shores testified that he did not assault Canell-Parker, and that any injuries she suffered were from when he was defending himself against her. RP (12/4/08) 138-169. During his testimony, he

referred to photos that his attorney had, which were not entered into evidence. RP (12/4/08) 143.

D. Defense counsel does not propose instructions on the lawful use of force, and does not object to the lack of a unanimity instruction or the court's failure to instruct the jury about the deadly weapon special verdict

Defense counsel didn't propose any instructions regarding self-defense (or defense of property), and didn't object to the court's failure to give a unanimity instruction or instructions on the deadly weapon special verdict. Defendant's Proposed Instructions to the Jury, Supp. CP.

The court gave no instructions regarding self-defense or defense of property, and did not give a unanimity instruction. Court's Instructions to the Jury, Supp. CP. The court instructed the jury on the definition of "deadly weapon" (in conjunction with the second-degree assault charge):

Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.
No. 10, Court's Instructions to the Jury, Supp. CP.

The court did not give any instructions relating to a deadly weapon enhancement, but did provide the jury with a special verdict asking if Mr. Shores was armed with a deadly weapon. Court's Instructions, Supp. CP.

- E. After being denied clarification about the relationship between the multiple acts and the specific assault charges, the jury convicts Mr. Shores of seven counts of assault.

During the deliberations, the jury asked, "Which weapon is involved with each assault [sic] charge." Inquiry from the Jury and Court's Response, Supp. CP. The court responded, "You have all of the court's instructions." Inquiry from the Jury and Court's Response, Supp. CP.

The jury returned with guilty verdicts on four counts of Assault in the Fourth Degree, two counts of Assault in the Third Degree, and one count of Assault in the Second Degree.¹ Verdict Forms A, B, C, D, G, H, I, Supp. CP. They acquitted Mr. Shores of Theft in the Second Degree and Harassment. Verdict Forms E, F, Supp. CP. They responded "yes" to the deadly weapon special verdict (relating to the second-degree assault charge). Special Verdict Form A1, Supp. CP.

- F. The trial court includes in Mr. Shores's offender score (a) six Class C felonies, which (according to the court's criminal history findings) should have washed out, and (b) two California convictions (which the court did not find equivalent to Washington felonies).

At sentencing, the state alleged that Mr. Shores had 9+ criminal history points. RP (12/15/08) 2. Mr. Shores signed a stipulation relating

¹ The Malicious Mischief charge was dismissed prior to the conclusion of trial. RP (12/4/08) 209

to his criminal history and offender score. Stipulation on Prior Record and Offender Score, Supp. CP. The agreement included the following felony history:

CRIME	DATE OF SENTENCE	SENTENCING COURT	DATE OF CRIME	ADULT OR JUVENILE	TYPE OF CRIME
Assault 3	01/28/2003	Lewis WA	09/23/2002	A	NV Felony
Assault 3	01/28/2003	Lewis WA	09/23/2002	A	NV Felony
Harassment	01/28/2003	Lewis WA	09/23/2002	A	NV Felony
Harassment	01/28/2003	Lewis WA	09/23/2002	A	NV Felony
Malicious Mischief 2	01/28/2003	Lewis WA	09/23/2002	A	NV Felony
Attempted Unlawful Possession of a Firearm	01/28/2003	Lewis WA	09/23/2002	A	NV Felony
Burglary 1	09/15/1989	Santa Clara, CA	04/16/1989	A	NV Felony
Possession of Stolen Property	04/28/1983	Santa Clara, CA	04/04/1983	A	NV Felony

Stipulation on Prior Record and Offender Score, Supp. CP.

The state asked the court to impose a 12-month enhancement for the jury's deadly weapon finding. RP (12/15/08) 2. Defense counsel did not object to this request. RP (12/15/08).

The court found that Mr. Shores had the criminal history listed in the stipulation. The court did not find any additional criminal history that might have prevented prior offenses from washing out. Nor did the court find that Mr. Shores's California convictions were equivalent to Washington felonies. CP 15-24.

The court sentenced Mr. Shores with an offender score of 9+, and sentenced him to 84 months in prison, including a 12-month deadly weapon enhancement. CP 15-24. This timely appeal followed. CP 4-14.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. SHORES'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY FAILING TO INSTRUCT THE JURY ON SELF-DEFENSE.

Due process requires the state to prove every element of the crime charged beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 941 P.2d 661 (1997).

RCW 9A.16.020 provides that "The use, attempt, or offer to use force upon or toward the person of another is not unlawful... [w]henever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or

personal property lawfully in his or her possession, in case the force is not more than is necessary...” RCW 9A.16.020.²

Where self-defense is raised at trial, the absence of self-defense becomes another element of the offense that the state must prove beyond a reasonable doubt. *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007). An accused person is entitled to instructions on self-defense when she or he presents “some evidence” that the use of force was lawful. *Woods*, at 199. Upon the presentation of “some evidence” of self-defense, the trial court must properly instruct on the law of self-defense (whether or not defense counsel requests such instructions).

This is so because the failure to instruct on all the elements of an offense is a constitutional error that deprives the accused person of her or his constitutional right to due process. *Winship, supra; State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). The error may therefore be raised for the first time on review, and is presumed to be prejudicial. RAP 2.5(a); *State v. Kiehl*, 128 Wn. App. 88, 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn. App. 40, 45, 21 P.3d

² In addition, RCW 9A.16.110(1) provides “No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault...”

1172 (2001). *See State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439 (1987).

In this case, Mr. Shores—through his testimony and his recorded statement—produced “some evidence” that he used lawful force to defend himself against Canell-Parker’s assaults and to prevent her from trespassing or interfering with his personal property. RP (12/4/08) 99-130, 138-177.

In particular, the evidence showed that Canell-Parker threatened him with a crowbar, which he was able to get from her. RP (12/4/08) 141. She threw items, took the keys to his car, got into the car and attacked him by climbing on top of him and trying to hit him (at which point he held her arms). RP (12/4/08) 115-116, 123, 146-147, 158. Mr. Shores also put his feet up to protect himself from being kicked by her while in the car. RP (12/4/08) 124.

Further, when Canell-Parker refused for several hours to get out of his car and allow him to leave, Mr. Shores sprayed her with water. RP (12/4/08) 117-120, 151, 167.

Finally, Canell-Parker hit him in the knee with a stove poker, against which he had to defend himself. RP (12/4/08) 127, 143, 160.

Because Mr. Shores provided “some evidence” of self-defense, the trial court should have instructed the jury on self-defense, regardless of whether or not defense counsel proposed such instructions.³ RCW 9A.16.020; *Woods, supra*. The court’s failure to instruct the jury on self-defense relieved the state of its burden to prove the absence of self-defense beyond a reasonable doubt. *Woods, supra*.

The conviction violates Mr. Shores’s Fourteenth Amendment right to due process and must be reversed. The case must be remanded to the trial court, with directions to instruct the jury on the issue of self-defense if the case is tried a second time. *Woods, supra*.

II. THE TRIAL COURT’S FAILURE TO GIVE A UNANIMITY INSTRUCTION DENIED MR. SHORES HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY.

An accused person has a state constitutional right to a unanimous jury verdict.⁴ Wash. Const. Article I, Section 21; *State v. Elmore*, 155

³ Although Mr. Shores’s recorded statement and testimony unequivocally invoked his right to use self-defense, defense counsel failed to propose instructions on self-defense. In light of Mr. Shores’s clear testimony raising self-defense, the absence of self-defense instructions creates a manifest error affecting his Fourteenth Amendment right to due process. RAP 2.5(a). However, if the absence of self-defense instructions cannot be raised for the first time on review pursuant to RAP 2.5(a), it should be reviewed as an ineffective assistance of counsel claim. Accordingly, the issue is also presented as part of Mr. Shores’s ineffective assistance argument elsewhere in this brief.

⁴ The Federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a criminal defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). If the prosecution presents evidence of multiple acts to support a particular charge, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act to convict the accused person of that particular charge. *Coleman*, at 511. Jurors have a constitutional “responsibility to connect the evidence to the respective counts.” *State v. Vander Houwen*, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

In the absence of an election, failure to provide a unanimity instruction is presumed to be prejudicial.⁵ *Coleman*, at 512; *see also Vander Houwen*, at 38. Without the election or an appropriate unanimity instruction, each juror’s guilty vote might be based on facts that her or his fellow jurors believe were not established. *Coleman*, at 512.

Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman*, at 512. The presumption of prejudice is overcome only if no rational juror could have

⁵ Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); *State v. Greathouse*, 113 Wn.App. 889, 916, 56 P.3d 569 (2002).

a reasonable doubt about any of the alleged criminal acts. *Coleman*, at 512.

In this case, the prosecutor charged seven counts of assault, including Assault in the Second Degree (one count), Assault in the Third Degree (two counts), and Assault in the Fourth Degree (four counts). CP 25-28. The evidence included more than seven incidents in support of these seven charges. RP (12/4/08) 31-66, 98-130. Although the Information included specifics about each charge, the prosecutor made only passing reference tying a specific act to each assault count, and the “to convict” instructions did not designate which act corresponded to each charge. RP (12/4/08) 197-204, 216-219; Court’s Instructions to the Jury, Supp. CP.

Furthermore, the multiple acts evidence confused the jury. In a note to the court, they asked “Which weapon is involved with each assault [sic] charge.” Inquiry from the Jury and Court’s Response, Supp. CP. The court did not clarify this issue for the jury.

The state failed to elect a particular incident to establish each assault charge, and the trial judge failed to give a unanimity instruction. Because of this, the assault convictions violated Mr. Shores’s constitutional right to jury unanimity under Wash. Const. Article I, Section 21. *Vander Houwen, supra*.

III. THE TRIAL COURT IMPOSED A DEADLY WEAPON ENHANCEMENT IN VIOLATION OF MR. SHORES'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TO A JURY DETERMINATION OF ALL FACTS USED TO INCREASE THE PENALTY OF AN OFFENSE.

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to a trial by jury. U.S. Const. Amend. VI. Under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008), citing Wash. Const. Article I, Section 21.⁶

Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555, 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *Thomas*, at 844; *Randhawa, supra*.

⁶ By contrast, harmless error analysis does apply under federal law. *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Under RCW 9.94A.602, a sentence may be enhanced when a person commits a crime is armed with a deadly weapon. For purposes of the statute,

a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.602. This differs from the definition of “deadly weapon” used in the statute defining second-degree assault. *See* RCW 9A.36.021; RCW 9A.04.110(6).

The jury was not provided with an instruction defining the phrase “armed with a deadly weapon.” Court’s Instructions to the Jury, Supp CP. Nor was the jury instructed that the special verdict required a unanimous finding beyond a reasonable doubt. Furthermore, the only definition of the phrase “deadly weapon” was that contained in Instruction No. 10. Supp. CP. This instruction, based on RCW 9A.04.110(6), should have been used solely to determine Mr. Shores’s guilt on Count I (Assault in the Second Degree); however, nothing limited it to that purpose.

Instead, the jury was free to use this definition for its special verdict. But Instruction No. 10, when applied to the special verdict, relieved the state of its burden to show that the chainsaw qualified as a deadly weapon for enhancement purposes. In particular, the jury could have found that the chainsaw qualified as a deadly weapon under Instruction No. 10 if it was (under the circumstances) “readily capable of causing... *substantial bodily harm*,” even if it was not used in a manner “likely to produce” *death* or in such a way that it “may easily and readily produce *death*,” as required by the statute. RCW 9.94A.602.

The trial court’s imposition of the deadly weapon enhancement (without properly instructing the jury on the definition of the enhancement, the burden of proof, or the unanimity requirement) violated Mr. Shores’s Sixth and Fourteenth Amendment rights to due process and to a jury trial. *Blakely*. Accordingly, the enhancement must be vacated and the case remanded to the trial court for resentencing within the standard range. *Recuenco, supra*.

IV. THE TRIAL COURT SHOULD NOT HAVE SENTENCED MR. SHORES WITH AN OFFENDER SCORE OF 9+.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part

of the record...” RCW 9.94A.500(1). Criminal history is defined to include all prior convictions and juvenile adjudications, and “shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.” RCW 9.94A.030(14).

Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

A. The sentencing court should not have included in the offender score prior convictions that had “washed out.”

Prior offenses that are Class C felonies “wash out” after the offender has spent five years in the community “without committing any crime that subsequently results in a conviction.” RCW 9.94A.525(2)(c).

The sentencing court found that Mr. Shores was sentenced for six Class C Washington felonies on January 28, 2003. Finding No. 2.2, CP 6. The court did not make a finding that Mr. Shores was incarcerated for any of these six prior offenses. CP 6-7. Accordingly, the six prior Washington felonies washed out in January of 2008, prior to the commission of the charged offenses (which had offense dates in October

of 2008). CP 25-28. The trial court did not find that Mr. Shores had any subsequent criminal history during the five-year period between January 2003 and January 2008. Under the trial court's criminal history findings, none of the prior Washington offenses should have been included in the offender score.

B. The sentencing court should not have included in the offender score two prior California convictions, absent a finding that they were comparable to Washington felonies.

The sentencing court also found that Mr. Shores had two foreign convictions, a "Burglary 1" and a "Possession of Stolen Property," both nonviolent felonies from California. Finding 2.2, CP 6. The court did not find these foreign offenses comparable to any Washington felonies.⁷

The court's findings do not support an offender score of 9+; instead, they suggest Mr. Shores should have been sentenced with no criminal history. Accordingly, his sentence must be vacated and the case remanded for resentencing without any criminal history.

⁷ Mr. Shores had stipulated that these convictions were "equivalent to Washington State felony convictions of the class indicated;" however, his stipulation did not indicate a class to which the foreign convictions belonged. Stipulation on Prior Record, Supp. CP. If the foreign convictions were Class B or C felonies, they should have been excluded from the offender score under the washout provisions of RCW 9.94A.525.

V. MR. SHORES WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that

defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.")

- A. If Mr. Shores's self-defense claim is not preserved for review, defense counsel provided ineffective assistance by failing to propose instructions on self-defense.

The reasonable competence standard requires defense counsel to be familiar with the relevant legal standards and instructions applicable to

the representation. *See, e.g., State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

A failure to propose proper instructions on the justifiable use of force constitutes ineffective assistance of counsel. *Woods, supra; see also State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004).

Mr. Shores's trial strategy rested on his testimony that he used lawful force to repel multiple attacks initiated by Canell-Parker. RP (12/4/08) 138-177, 205-215. There is "no conceivable legitimate tactic" explaining counsel's failure to propose instructions on self-defense. *Reichenbach*, at 130. Nor is there any indication in the record suggesting that counsel was actually pursuing a strategy that required him not to propose such instructions. *See Hendrickson, supra*. Under these circumstances, trial counsel should have proposed instructions on self-defense, and the failure to do so constituted deficient performance. *Woods, supra*. The error prejudiced Mr. Shores, because without such instructions, the jury was unable to evaluate the self-defense claim, and could not acquit Mr. Shores even if it believed he used lawful force against Canell-Parker.

If Mr. Shores's self-defense claim is not preserved for review, defense counsel was ineffective for failing to propose instructions on self-

defense. *Woods, supra*. The conviction must be reversed and the case remanded for a new trial. *Woods, supra*.

B. The trial court erred by failing to inquire into Mr. Shores's requests for the appointment of new counsel.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused's Sixth Amendment right to the effective assistance of counsel, even in the absence of prejudice. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). To compel an accused to "undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979), quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970).

A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion, guided by three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Cross*, at 607. An adequate inquiry must include a full airing of the concerns and a meaningful evaluation of the conflict by the trial court. *Cross*, at 610. The proper focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent.

United States v. Walker, 915 F.2d 480, 483 (9th Cir. 1990), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).

A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *State v. Lopez*, 79 Wn.App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

In *Brown v. Craven*, *supra*, a dispute arose almost immediately between client and counsel. The accused refused to cooperate or communicate with his attorney, and made four separate motions for new counsel. *Brown v. Craven*, at 1169. The trial judge summarily denied the motions, without inquiring into the disagreement. Because of the judge's failure to adequately investigate, the Ninth Circuit reversed Brown's convictions and granted him a new trial. *Brown v. Craven*, at 1170.

In *Williams*, *supra*, the accused made multiple motions for appointment of new counsel, and outlined facts suggesting an irreconcilable conflict. The defendant's description of the relationship was not disputed, yet the trial judge summarily denied the motions. The Ninth Circuit found that the accused was denied his constitutional right to the effective assistance of counsel.

In *Cross*, by contrast, the accused and his attorney disagreed over whether or not mental health evidence should be presented to the jury.

Despite this disagreement, their relationship was (according to the judge who had observed them from the bench for 18 months) “very good [and] positive,” characterized by “cordial calm conversation” Counsel and Mr. Cross both acknowledged that they had a good relationship and were able to communicate despite their disagreement. *Cross* at 609. The court held that this was “not the type of conflict with counsel that raises Sixth Amendment concerns.” *Cross*, at 609. However, the court added, a violation of constitutional rights occurs when a “disagreement about strategy actually compromises the attorney’s ability to provide adequate representation...” *Cross*, at 611.

In this case, the record is clear that an irreconcilable conflict developed quickly between Mr. Shores and his court-appointed attorney, Mr. Havirco. Mr. Shores wanted to fire Havirco less than a month after Havirco was appointed. RP (10/23/08) 2. The court made no inquiry into the matter. RP (10/23/08) 2-5.

At the start of trial, prior to jury selection, Mr. Shores told the judge “My lawyer won’t talk to me about nothing.” RP (12/3/08) 4. Again, the court did not inquire. RP (12/3/08).

Before the first witness was called to testify, Mr. Shores complained that Havirco wouldn’t obtain or present evidence on his behalf, and specifically mentioned pictures. RP (12/4/08) 23, 24, 26. He

went on to say that he told Havarco “to get the shit and he ain’t got it.” RP (12/4/08) 30. The court did not inquire about these statements. RP (12/4/08).

The issue came up again prior to sentencing. At a scheduling hearing, Mr. Shores told the judge “I’d like to fire this attorney, sir.” RP (12/11/08) 2. When told to renew his request at the sentencing hearing, Mr. Shores said “I tried that at the jury trial,” and complained that his request hadn’t been honored. RP (12/11/08) 3.

The trial judge abused his discretion under all three factors outlined in *Cross, supra*. First, the relationship between Mr. Shores and Havarco had broken down: Mr. Shores wanted to fire Havarco, complained that Havarco wouldn’t talk to him, and asserted that Havarco refused to investigate or present evidence on his behalf. Second, the trial judge failed to even ask Mr. Shores about the problem with the relationship. Third, the conflict was initially raised early in the proceedings, only a week after Mr. Shores’s arraignment. Under these circumstances, the court should have inquired into the conflict and appointed new counsel.

For all these reasons, Mr. Shores was denied his Sixth Amendment right to the effective assistance of counsel. *Cross, supra*. The conviction must be reversed and the case remanded for a new trial. *Brown v. Craven, supra*.

- C. Mr. Shores was denied the effective assistance of counsel because a conflict of interest adversely affected his attorney's performance.

The right to counsel includes the right to an attorney unhampered by conflicts of interest. *State v. Davis*, 141 Wn.2d 798, 860, 10 P.3d 977 (2000) (citing *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981)). An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance. *Mickens v. Taylor*, 535 U.S. 162, 172, 122 S.Ct. 1237, 152 L.Ed. 291 (2002); *State v. Dhaliwal*, 150 Wn.2d 559, 571, 79 P.3d 432 (2003). To establish an adverse effect, a defendant need only show that the attorney's behavior "seems to have been influenced" by the conflict. *State v. Jensen*, 125 Wn. App. 319, 331, 104 P.3d 717 (2005); *Lewis v. Mayle*, 391 F.3d 989, 999 (9th Cir., 2004), citing *Lockhart v. Terhune*, 250 F.3d 1223, 1230-1231 (9th Cir., 2001). Prejudice is presumed once the defendant makes this showing. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

To assess whether or not a conflict "seems to have influenced" defense counsel, a reviewing court must

look beyond [the attorney's] protestations... to see whether independent evidence in the record supports the allegation of divided loyalties. *United States v. Shwayder*, 312 F.3d 1109 at 1119 (9th Cir. 2002) ("Human self-perception regarding one's own motives for particular actions in difficult circumstances is too faulty to be relied upon, even if the individual reporting is telling

the truth as he perceives it”); *Sanders v. Ratelle*, 21 F.3d 1446 at 1452 (9th Cir. 1994) (“The existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney’s behavior seems to have been influenced by the suggested conflict.”)

Belmontes v. Brown, 414 F.3d 1094, 1119 (9th Cir. 2005), *reversed on other grounds sub nom Ayers v. Belmontes*, ___ U.S. ___, 127 S. Ct. 469, 166 L. Ed. 2d 334 (2006).

Here, a conflict arose when Mr. Shores sought to fire Havirco and repeatedly complained about his performance. This conflict “seems to have influenced” Havirco, causing him to lose interest in the details of Mr. Shores’s case.

In particular, Havirco did not propose instructions relating to the lawful use of force (self-defense or defense of property), despite the fact that Mr. Shores repeatedly asserted that his use of force had been justified, not only prior to trial, but also in his recorded statement and in his testimony. RP (10/8/08) 8; RP (11/6/08) 4-6; RP (12/4/08) 98-131, 138-169; Defendant’s Proposed Instructions, Supp. CP. Havirco did not draw the court’s attention to the lack of a unanimity instruction, or ask that the “to convict” instructions include information tying each count to a specific act. RP (12/4/08) 180. He did not notice or object to the lack of instructions relating to the deadly weapon enhancement. RP (12/4/08)

180. In closing, he seemed unaware that the Malicious Mischief charge had already been dismissed. RP (12/4/08) 209.

At sentencing, Havarco had Mr. Shores stipulate to the prosecutor's statement of criminal history and offender score, instead of challenging (1) the inclusion of two foreign convictions, (2) the separate scoring of six prior Washington offenses that were likely the same criminal conduct (at least to some extent, since they shared the same offense date and sentencing date), (3) the inclusion of six Washington offenses and two California offenses that should have washed out of the offender score. Stipulation on Prior Record and Offender Score, Supp. CP. Havarco also failed to object to the imposition of the deadly weapon enhancement, despite the trial court's failure to properly instruct the jury about the special verdict form. RP (12/15/08) 2-10.

Given the conflict of interest, Havarco's actions are subject to heightened scrutiny, and are not entitled to deference. Because the conflict seems to have influenced Havarco's performance at trial and at sentencing, Mr. Shores was denied the effective assistance of counsel. *Cuyler v. Sullivan, supra*. His convictions must be reversed and his case remanded to the trial court for a new trial. *Jensen, supra; Belmontes v. Brown, supra*. In the alternative, the sentence must be vacated and the case remanded for resentencing with a different attorney.

CONCLUSION

For the foregoing reasons, Mr. Shores's convictions must be reversed and the case remanded for a new trial. On retrial, the court must instruct the jury on self-defense.

In the alternative, if the convictions are not reversed, the sentence must be vacated and the case remanded for resentencing without the enhancement and with no criminal history.

Respectfully submitted on May 14, 2009.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Stephen Shores, DOC #851463
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Lewis County Prosecuting Attorney
MS:pro01
360 NW North Street
Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 14, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 14, 2009.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

COURT OF APPEALS
COMM. AS TO 2:15
STATE OF WA
BY 