

NO. 39598-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TERRY NOLAN, APPELLANT
MIKE MCCREVEN, APPELLANT
BARRY FORD, APPELLANT
CARL SMITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 08-1-01751-8
08-1-01749-6
08-1-01752-6
08-1-01750-0

BRIEF OF RESPONDENT

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COURT OF APPEALS, DIVISION II
TACOMA, WA

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court error in sealing the juror questionnaires where defendant McCreven invited the error and cannot show that his right to a public trial was violated? If the court disagrees, is the proper remedy remand for reconsideration of the sealing order? (Pertains to McCreven's assignment of error #6, Issue #6, adopted by Nolan)

2. Did the trial court abuse its discretion in its rulings on the admission of evidence where each ruling was based on case law and tenable reasons? (Pertains to Ford's assignment of error # 6, issue #10, adopted by McCreven and Smith and assignments of error #5 & 6, issue #3, adopted by McCreven, Nolan, and Smith; McCreven's assignment of error #10, Issue #10, adopted by Nolan and assignment of error #1, issue #1, adopted by Nolan and Smith; Nolan's assignment of error #1, issue #1, adopted by Ford, McCreven and Smith; and Smith's assignment of error #1, Issue #11, assignments of error #1-2, issue #1, adopted by McCreven and Nolan and assignments of error #8 &9, issue #3, adopted by McCreven and Nolan)

3. Is the post-*Andress* statute controlling where the Legislature expressed clear intent in amending the felony murder statute and defendants have failed to show that the statute is unconstitutional? (Pertains to Smith's assignment of error #s 11-12, issue #7, adopted by McCreven and Nolan; and Ford's assignment of error #20, issue #13, adopted by McCreven and Nolan)
4. Was there sufficient evidence to find defendants Ford and McCreven guilty of murder in the second degree where there was evidence of participation? Was a unanimity instruction required where there was a continuous course of conduct? (Pertains to Ford's assignments of error #1 & 2, issue #1, and assignment of error #3, issue #2, adopted by McCreven and Nolan; and McCreven's assignment of error #11, issue #11)
5. Did the trial court abuse its discretion in denying defendants' motion to sever where defendants failed to meet their burden in showing that severance was necessary for a fair trial? (Pertains to Ford's assignment of error #4, issue #7, adopted by Nolan and McCreven's assignment of error #11, issue #11, adopted by Nolan)
6. Was defendant denied the right to a fair trial where the State did not commit prosecutorial misconduct and defendants cannot show prejudice from any prosecutorial error? (Pertains to

Ford's issue #4, assignment of error #7, issue #4, adopted by Nolan, assignment of error #8, adopted by McCreven, Nolan, and Smith, assignment of error #9, issue #4, adopted by McCreven, Nolan, and Smith, assignment of error #10, issue #4, adopted by McCreven, Nolan, and Smith; McCreven's assignment of error #2, issue #2; Nolan's assignment of error #4, issue #4; Nolan's assignment of error #5, issue #5, adopted by McCreven and Smith; and Smith's assignment of error #1, issue #1, assignment of error #5, issue #1, adopted by Nolan and McCreven, assignment of error #7, issue #2)

7. Did the trial court abuse its discretion when its instructions to the jury accurately stated the law and allowed the parties to argue their cases? (Pertains to Ford's issue #6; McCreven's assignments of error #7, 8, & 9, issues #7, 8, & 9, adopted by Nolan; Nolan's assignments of error #7 & 8, issues #6 & 7, adopted by McCreven and Smith; and Smith's assignments of error #10 & 13, issues #4 & 5, adopted by McCreven and Nolan)

8. Did the trial court abuse its discretion in determining after proper inquiry that the jurors' discussion did not prejudice defendants? (Pertains to McCreven's assignment of error #4, issue #4, adopted by Nolan)

9. Did the trial court abuse its discretion in denying defendants' motions for mistrial after proper consideration? (Pertains to Ford's assignments of error #13, 17, Issue #11, adopted by McCreven, Nolan, and Smith; Nolan's assignment of error #3, Issue #3, adopted by Ford and McCreven; and Nolan's assignment of error #6, Issue #4, adopted by McCreven and Smith)
10. Have defendants failed to meet their burden of showing deficient performance and resulting prejudice necessary to succeed on their claims of ineffective assistance of counsel? (Pertains to Ford's assignments of error #15 & 18, issue #5, adopted by McCreven, Nolan, and Smith and assignment of error #14, issue #5, adopted by McCreven and Nolan; Nolan's assignment of error #2, issue #2, adopted by McCreven; and Smith's assignments of error #1, 10, 13, & 14 issues #1, 4, 5, & 6)
11. Did the trial court abuse its discretion in denying defendant McCreven's motions to dismiss when defendants failed to show that the State acted arbitrarily and that it prejudiced defendants? (Pertains to McCreven's assignment of error #3, issue #3, adopted by Nolan and Smith)
12. Did the trial court error in denying defendant Ford's motion to arrest the judgment where there was sufficient evidence of his guilt? (Pertains to Ford's assignments of error #21-22, issue #8)

13. Did the trial court error in calculating defendant McCreven's offender score? (Pertains to McCreven's assignment of error #12, issue #12)

14. Did the trial court error in calculating defendant Smith's offender score? (Pertains to Smith's assignment of error #6, issue #14)

15. Have defendants failed to demonstrate the existence of any prejudicial error in their trial much less an accumulation of it necessary for application of the cumulative error doctrine?

(Pertains to Ford's assignment of error #19, issue #12, adopted by Nolan; McCreven's assignment of error #13, issue #13, adopted by Nolan; Nolan's assignment of error #10, issue #9; and Smith's assignment of error #16, issue #8, adopted by McCreven and Nolan)

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendants, Barry Ford, Mike McCreven, Terry Nolan, and Carl Smith, on April 9, 2008 with one count each of murder in the second degree and assault in the second degree. FCP 399-400, MCP 1-

2, NCP 677-687, SCP 1044-1045.¹ Both counts carried deadly weapon enhancements. *Id.* The State filed an amended information in the case of defendants Ford, Nolan, and Smith on January 30, 2009. FCP 433-434, NCP 852-853, SCP 1096-1097. The amended information added the accomplice language. *Id.* In addition, on defendant Smith, the State added the aggravating factors that defendant's criminal history and/or his offender score would result in a sentence that was clearly too lenient. SCP 1096-1097, 1/30/09 RP 5-8.² Defendant McCreven objected to the arraignment as the State was also seeking to add a count of unlawful possession of a firearm to his information and so the filing of the information and defendant McCreven's arraignment was postponed. 1/30/09 RP 4-5. A motion was held on the State's ability to add the new charge. 3/6/09 RP 3, MCP 51-58. The trial court ruled that the State could not file the new count under the current cause number. 3/6/09 RP 14, 3/13/09 RP 2.³ Defendant McCreven was arraigned on the new amended information that added the accomplice language on March 13, 2009. 3/13/09 RP 1, MCP 59-60.

¹ The Clerk's Papers will be referred to as follows: for defendant Ford: FCP, defendant McCreven: MCP, defendant Nolan: NCP, and defendant Smith: SCP.

² The State will refer to the verbatim report of proceedings as follows: The 20 sequentially paginated volumes referred to as 1-18 and 20-21 will be referred to as RP. The remaining volumes non-sequentially paginated will be referred with the date prior to RP.

³ The unlawful possession of a firearm charge was filed under a different cause number. 3/13/09 RP 2.

The cases were assigned to the Honorable Brian Tollefson. 11/14/08 RP 2, SCP 1051. Several pre-trial motions were held. A CrR 3.5 hearing was held as to the admissibility of statements made by defendants McCreven and Smith. 1/30/09 RP 22. The trial court ruled that the statements made by both defendants McCreven and Smith were admissible. 1/30/09 RP 194-5. Defendants Ford and Nolan both waived the CrR 3.5 hearing and stipulated to the voluntariness of their statements. 1/30/09 RP 14-17.

Defendants McCreven, Nolan, and Smith all moved to sever the cases. 2/5/09 RP 9-11, MCP 39, NCP 817-824, SCP 1085-1095. A redaction hearing was held on February 5, 2009. 2/5/09 RP 17-60. The trial court denied the motions for mandatory severance finding that the State's redactions satisfied the applicable case law. 2/6/09 RP 2-4. Defendants McCreven, Nolan and Smith also moved for discretionary severance. 3/13/09 RP 5, 9, MCP 39, NCP 817-824, 854-878. The trial court denied the motions for discretionary severance. 3/13/09 RP 39.⁴

Defendant Smith brought a motion to suppress the discovery of a vehicle in his garage and the statements he made to law enforcement when

⁴ The motions to sever were renewed in passing by defendants McCreven and Nolan on April 9, 2009. 4/9/09RP 4, 10. At that same time, defendant Ford, for the first time, indicated that he wanted to join in the motions to sever. 4/9/09 RP 14-15. Defendants Smith, Nolan, and Ford renewed their motion on May 4, 2009. RP 726-7. Defendants Ford, McCreven, and Smith renewed their motions on May 11, 2009. RP 1347-49. All four defendants renewed their motions to sever on June 1, 2009. RP 2311-12. All defendants renewed their motions on June 4, 2009. 6/4/09RP 38-40.

they came to his house. 4/9/09 RP 15, SCP 1124-1132. A CrR 3.6 motion was held. 4/9/09 RP 15-102, 4/13/09 A.M. RP 3-74, 4/13/09 P.M. RP 2-5. The trial court ruled the officer finding the specific car law enforcement was looking for in the garage was not a search and denied the motion to suppress. 4/13/09 P.M. RP 5.

Extensive motions in limine were also raised by all parties. Among them, the State stipulated to exclusion of testimony about weapons found at defendants' homes. 4/9/09 RP 113, 134. The State also agreed not to use the word "gang" or have law enforcement testify about motorcycle clubs or gangs. 4/9/09 RP 118, 134. The trial court did grant the defendants' motion to exclude membership in the Hidalgos motorcycle club for the sake of showing membership. 4/9/09 RP 116-17, 129. However, the trial court ruled that the State could talk about what defendants were wearing the night of the murder. 4/9/09RP 129. The trial court denied defendant McCreven's motion to suppress Shannon Ford's out of court identification of defendants. RP 32, 57-8. The trial court also denied the challenge to the State's in-life photo of the victim. RP 60, 69. The State moved to exclude evidence of the victim's character. RP 81. The court granted the motion in part noting that since this was a self-defense case, the victim's reputation may be relevant after foundation had been laid. RP 94, 97. The issue of the defendants' right to association was also raised in terms of their membership in the Hidalgos motorcycle club. RP 135-141. The State stated that they were not using the information for

a gratuitous reason but for identification purposes. RP 138. The trial court ruled that the State could not talk about membership but could describe the jackets defendants were wearing and note that the jackets said Hidalgos on them. RP 140-141.

During the trial, some transcripts were given to certain witnesses that had markings on them. RP 746-8, 824. All four defendants moved for dismissal. RP 825, 829, 830, 850, MCP 124-137. The court found that the annotations did not affect the witnesses' testimony and denied the motions to dismiss. RP 859-61.

It was brought to the attention of the court by juror #7 that some jurors were talking about witness Reyna Blair after she testified. RP 776. The court conducted an inquiry into which jurors had participated and who had overheard the conversation. RP 777-816. Defendant McCreven moved to strike two of the jurors. RP 817. The court denied the motion. RP 823.

During testimony about the search warrant served on defendant Smith's residence, defendant McCreven objected to the admission of photos found in the house. RP 871, 877. The State clarified that the pictures were being admitted to show defendants friendship and not their membership in any organization. RP 892, 897. The trial court ruled that all the challenged photos were admissible. RP 885, 886, 888. The trial court also said it would give a limiting instruction on association at the end of trial. RP 894. During testimony of a search warrant at defendant

Ford's house, defendant Nolan objected to a photo. RP 916. The trial court ruled the photo admissible. RP 953.

During the testimony of Detective Donlin, the Detective accidentally mentioned that knives were found in an outbuilding at defendant's Smith's. RP 1596. All four defendants asked for a mistrial or dismissal. RP 1596. The trial court denied the motions but did give a curative instruction. RP 1602, 1604.

Defense counsel for defendant Smith tried to admit defendant Smith's own statements to Detective Wood during the defense case. RP 2648. The trial court denied defendant Smith's motion. RP 2655.

Defendant McCreven made a motion to dismiss for governmental misconduct and prejudice. 6/4/09RP 42, MCP 138-149. The other three defendants joined. 6/4/09RP 45. The trial court denied the motion. 6/4/09RP 53.

After the State's rebuttal closing, defendant Smith made a motion for mistrial. RP 2954. The other three co-defendants joined but each had their own reasons. RP 2955. The trial court treated the motion as a motion for mistrial based on flagrant misconduct on behalf of the State. RP 2957. The trial court read the transcript of the closing, conducted research and found that nothing in the closing rose to the level of misconduct. RP 2959. The trial court denied the motions. RP 2960.

On June 15, 2009, the jury found all four defendant's guilty of murder in the second degree. RP 2976-77, FCP 553, MCP 311, NCP 994,

SCP 1242. The jury found defendant Nolan guilty of assault in the second degree as it related to Vincent James but found the other three defendants not guilty of assault in the second degree as well as the lesser included charges of assault in the third and fourth degree. RP 2977-79, FCP 554-56, MCP 309, NCP 995, SCP 1243-44, 1248. The jury also answered yes to all four special verdict forms finding that each defendant or an accomplice was armed with a deadly weapon during the commission of murder in the second degree. RP 2979-80, FCP 557, MCP 310, NCP 996, SCP 1245. They also found that defendant Nolan was armed with a deadly weapon during the commission of assault in the second degree. RP 2981, NCP 997.

Further motions took place after defendants were convicted. Defendant Smith's attorney was allowed to withdraw after trial. 6/23/09RP 2-3. A new attorney was appointed. 8/7/09RP 2. Defendant McCreven brought a motion to arrest the judgment or in the alternative for a new trial. 6/23/09RP 10, MCP 320-331. Defendants Ford and McCreven joined in the motion. 6/23/09RP 10. The trial court denied the motions to arrest the judgment and for a new trial. 6/23/09RP 49.

Sentencing for defendants Ford and Nolan was held on July 24, 2009. 7/24/09 RP 2, FCP 625-638, NCP 1002-1015. Defendant Nolan's offender score was determined to be a two and his sentencing range was 144-244 months on the murder charge and 12+ - 14 months on the assault charge. NCP 1002-1015. The deadly weapon enhancements added 24

months on the murder charge and 12 months on the assault charge. NCP 1002-1015. The court sentenced Nolan to a midrange sentence of 158 months on the murder charge plus 24 months for the enhancement with 14 months on the assault charge plus 12 months for the enhancement with counts to run concurrent and the flat time consecutive for a total of 194 months. 7/24/09RP 40,⁵ NCP 1002-1015. Defendant Ford's offender score was determined to be a zero. 7/24/09RP 41, FCP 625-638. The standard range was 123-220 months plus 24 months for the enhancement. 7/24/09RP 41, FCP 625-638. The court sentenced defendant to a midrange sentence of 135 months plus 24 months for the enhancement for a total of 159 months. 7/24/09 RP 52, FCP 625-638.

Sentencing for defendant McCreven was held on August 10, 2009. 8/10/09 RP 1, MCP 337-351. Argument was held on defendant's offender score. 8/10/09 RP 5-18, MCP 335-368. The court determined defendant's offender score to be a six. 8/10/09 RP 18-19, MCP 337-351. The standard range was 195-295 months plus 24 months for the enhancement. MCP 337-351. The court sentenced defendant to a midrange sentence of 245 months plus 24 months for the enhancement for a total of 269 months. 8/10/09 RP 23, MCP 337-351.

⁵ There appears to be a typo in the transcript as it says 15 months on the murder charge. 7/24/09 RP 40. This is not near the standard range and the judgment and sentence is clear as to the correct sentence.

Defendant Smith's new counsel had concerns about his competency so defendant Smith was evaluated by Western State. 8/28/09 RP 1, 8, SCP 1336-39. Defendant was found to be competent. 10/29/09 RP 1-2, SCP 1351-52. Defendant Smith's motion for a new trial was heard on December 11, 2009. 12/11/09 RP 11-35, SCP 1268-1276. The trial court denied defendant's motion. 12/11/09 RP 35. Sentencing immediately followed. 12/11/09 RP 35. Defendant Smith's offender score was determined to be a 9+. 12/11/9 RP 40, SCP 1366-1379. His standard sentencing range was 298-397 months plus 24 months for the enhancement. SCP 1366-1379. The court sentenced Smith to the high end of the sentencing range with 397 plus 24 months for the enhancement for a total of 421 months. 12/11/9 RP 47, SCP 1366-1379

Defendants all filed these timely notice of appeals. FCP 669, MCP 369-384, NCP 1022-1039, SCP 1413-1425.

2. Facts

On April 5, 2008, members of the Pierce County Sheriff's Department were dispatched to a stabbing at the Bull's Eye Tavern. RP 419. The victim was identified as Dana Beaudine. RP 635, 678. Mr. Beaudine died of the injuries he sustained at the Bull's Eye. RP 1049.

Vincent James knew the victim for a few months before he died. RP 2207. On April 5, 2008, he had gone to the victim's house to work on the victim's motorcycle. RP 2208. They had some beers and then went to the Bull's Eye. RP 2209-2210. Mr. James did not observe any heated

words between the victim and anyone else. RP 2211. Later in the parking lot he heard someone scream. RP 2214. When he ran to see what was happening, he saw the victim on the ground getting beat up. RP 2215. More than one person was beating the victim up. RP 2216. Mr. James tried to grab his feet to pull him out but couldn't and was hit in the back of the head. RP 2216-17, 2616. Mr. James did not see who hit him because he did not want to get hit in the face. RP 2218. All at once, the beating stopped. RP 2219. Mr. James helped pick the victim up and put him in a vehicle. RP 2219. The victim was gasping and there was a lot of blood. RP 2219, 2225. Mr. James told Deputy Simmelink that the men involved were all Hidalgos bikers. RP 2268.

Reyna Blair is the girlfriend of Vincent James. RP 693. The victim was an acquaintance of hers. RP 694. On April 5, 2008, she went with Mr. James to the victim's house. RP 695. She was in the house drinking and was "pretty buzzed." RP 697. Mr. James was also buzzed. RP 698. They left the victim's house and went to the Bull's Eye. RP 697. The victim drove Mr. James in Mr. James' truck and Ms. Ford drove Ms. Blair in Ms. Ford's truck. RP 698. Eventually, they decided to leave the Bull's Eye. RP 705. The next thing that happened was a few people beat the victim up. RP 709-10. Ms. Blair yelled to Mr. James and then ran away. RP 711. Ms. Blair did not see the victim strike back at any of the men. RP 711. The victim was surrounded. RP 712. Ms. Blair had not

seen the men before and was not concerned about confronting the defendant's in court.⁶ RP 712, 734.

Gary Howden was the DJ at the Bull's Eye. RP 177. Mr. Howden recognized Vince James and Reyna Blair but had never seen the victim at the Bull's Eye before. RP 204. Mr. Howden saw Mr. James and Ms. Blair leave the bar and almost immediately after they left someone said there was trouble in the parking lot. RP 206, 238. Mr. Howden observed a fight in progress behind the second row of cars. RP 207. The victim and Mr. James were both involved in the fight. RP 208. Mr. James was getting punched in the back of the head. RP 208. Four other men were also involved in the fight. RP 208, 340. A man in a white shirt stood out and was definitely throwing punches. RP 242. The man repeatedly punched the victim while he was on the ground. RP 286. A lot of punches were being thrown by more than one person. RP 211. It looked like some of the men were holding the victim while the others punched him. RP 312-13. A tall stocky man with the crew cut put out his hand to Mr. James and Mr. James backed off. RP 210. Mr. Howden could not tell if the victim was throwing punches or not. RP 213. Mr. Howden described the victim as having a shaved head and wearing a Harley jacket. RP 205.

⁶ In response to being asked if looking at her statement would refresh her recollection, Ms. Blair gave a non-responsive answer and stated that, "No. If I had to pick out any killer, I wouldn't want to be known because I have kids at home." RP 733. The objection to the statement was sustained and the statement was struck. RP 734.

Mr. Howden was able to describe the four men in the fight. Mr. Howden said the first man had brownish, red hair that was shoulder length and bushy. RP 208. The man was big and stocky wearing a long white shirt. RP 208, 648. The other three men were wearing biker jackets that said *Hidalgos* and were gold and red on the back. RP 212. The second man had curly blond hair that was shorter. RP 208. The third guy was a big guy with a crew cut. RP 208. Howden could not recall the fourth man. RP 208.

Heather Diamond was also at the Bull's Eye on April 5, 2008 to celebrate a friend's birthday. RP 343. There were four men at their table that were not part of their group. RP 344. The men were wearing leather jackets and vests. RP 344. Ms. Diamond did not hear any arguments between the men in the jackets and anyone else while they were in the bar. RP 347-8. Ms. Diamond did see the men again outside the bar. RP 349. She also saw a bald man with a Harley shirt on walk across the parking lot. RP 358-9. She heard the bald man say, "Fuck your colors." RP 361, 386. Two of the four men she had seen earlier went to the bald man as he was standing by his car and pushed him into the parking lot. RP 362-3. As they were fighting, the other two men she had seen joined in and all were fighting. RP 364. The victim was being held by one man and there were a lot of fists and a lot of punching. RP 364. The victim was being held by his arms and the four men were fighting him. RP 365. Ms. Diamond also heard a woman scream and saw a woman run back to the bar with blood

on her clothes. RP 370. Ms. Diamond was able to identify the four defendants as the men she saw that night. RP 356.

Jennifer Abbott was at the bar for a bachelorette party. RP 454. She observed a few guys wearing leather jackets and chaps. RP 459. The patches on the jackets were mostly red with dark yellow. RP 460. She interacted with a couple of the men. RP 462. The first one had dark hair and a bandana and was wearing a leather jacket, vest, and chaps. RP 462. Ms. Abbott was not able to identify this person in the courtroom. RP 462. The second person had sandy hair and also had a bandana, leather jacket, and vest. RP 463. Ms. Abbott identified the second man as Terry Nolan. RP 463. Ms. Abbott did not recall anyone being belligerent or obnoxious while inside the bar. RP 478. Ms. Abbott observed the group of bikers run across the parking lot, a fight broke out and a woman was screaming. RP 466-67, 512. Ms. Abbott witnessed a group of people throwing punches and observed one person being punched. RP 472. She observed one man being held while another man hit him. RP 496.

Kathryn Baccus was also at the bar for a bachelorette party and testified for defendant Nolan. RP 2318. All the girls at the party were drinking. RP 2322. She witnessed the fight though indicated it was hard to see in the parking lot. RP 2326, 2333. Ms. Baccus said there were two guys fighting and that one was bald and one had brown hair. RP 2328-29. She said it never looked like anyone got jumped but there was a bunch of commotion by the fight. RP 2333-34. Ms. Baccus said there were 6-10

bikers, some women with them and that they were wearing leather jackets and leather vests with red and gold patches. RP 2346. The bikers went toward the fight and were moving around but she could not see what they were doing. RP 2357. The bald man was getting hit in the face and the throat. RP 2358-59. She saw the bald man fall to the ground and it looked like he had been hit in the face a few times. RP 2335, 2336, 2358.

Joy Hutt testified for defendant Smith. Ms. Hutt was the bartender at the Bull's eye. RP 2389. On April 5, 2008, she exchanged greetings with Ms. Blair. RP 2390. She also saw men at the bar wearing motorcycle garb. RP 2392. There were five men in the group and three were wearing motorcycle leathers. RP 2524. Ms. Hutt identified all four defendants as being a part of that group and had told the liquor board that she served four Hidalgo bikers that night. RP 2524, 2567, 2566, 2592. The four defendants were Hidalgos and had their jackets with their patches. RP 2549, 2567. She was not sure if the fifth man was actually part of the group or not. RP 2564. Ms. Hutt did not know the victim. RP 2395. Ms. Hutt had known defendant Ford since 2005 and knew him as Sarge. RP 2534. When she saw him that night, she came out from behind the bar and gave him a hug. RP 2535. She described him as wearing a dress coat, pants and shirt. RP 2535. Defendants McCreven and Nolan would always come in with defendant Ford. RP 2553. While Ms. Hutt did not notice any disturbance between the group and the victim, she did see the victim walk by defendants' table and say something to the effect of

their patch being stupid or that their colors weren't worth anything. RP 2525. Defendants did not react to the victim's comment and she was not even sure if they heard it. RP 2531, 2544. Ms. Hutt also heard the victim proclaim on the other side of the bar that he was H.A. RP 2526. The victim's behavior was a red flag for her. RP 2544. He was wearing a Harley Davidson shirt. RP 2547.

When Ms. Hutt heard there was a fight, she ran outside and saw the victim and a big guy wearing a light colored shirt. RP 2527, 2528, 2529. Both the victim and the other guy were covered in blood and each one told her that the other one had started it. RP 2530, 2578. Defendant Ford was not in parking lot and was over by the Radio Shack, smoking. RP 2537. She saw Mr. Howden pick up a wand and throw it in the back of a truck. RP 2581-82. She also said a bigger man called out, "Terry, let's get out of here." RP 2585. The person who said that could have been defendant Ford. RP 2585. She told defendant Ford to leave because she was calling the cops. RP 2585-88.

Ms. Hutt had told law enforcement that four men were involved in the fight. 6/4/09RP 5. She described the first man as white, 50-55 years old, six foot tall, 300 pounds with short hair, clean cut and had a motorcycle. 6/4/09 RP 6. The second man was white, 25-40 years old, five foot five, skinny with a goatee, had a red rag on his head with medium brown hair, wore a Hidalgos patch and rode a motorcycle. 6/4/09 RP 6-7. The third man was white, 40 years old, five for eight, stocky and 40 years

old with a short goatee, wearing a Hidalgos patch and a leather jacket with a vest over the coat. 6/4/09RP 7. He also had a motorcycle. 6/4/09 RP 7. The fourth man was white, 40 years old, six foot tall, heavy build and a large beard. 6/4/09 RP 7-8. The man was wearing a white t-shirt covered in blood. 6/4/09 RP 7-8. Ms. Hutt said the four were all members of the Hidalgos and were regulars. 6/4/09 RP 8, 25. She did not give law enforcement any names and did not mention the name Sarge until over a year later. 6/4/09 RP 9-10. She also told Detective Wood that she had problems with the victim. 6/4/09 RP 15-16. Ms. Hutt told Detective Wood that she did not see the fight. 6/4/09RP 30-31.

Shannon Ford was the victim's fiancé. RP 972. She spoke with Detective McCarthy and Deputy Fernando on the night of the murder. RP 420, 637. Detective McCarthy observed that Ms. Ford was distraught, worried and crying and had blood on her clothing. RP 421. Ms. Ford said 4-5 men had been involved in the fight and described them. RP 422, 640. The men were described as white and between 35-45 years of age. RP 422. She said they were wearing Hidalgos jackets. RP 640. She also said they had been watching her and making her nervous. RP 641. The first man was 5'10-5'11 and a heavier build with a skull bandana and a scruffy unshaven look. RP 422-23. He had on a black motorcycle jacket with a patch on the back that said "Hidalgos, Pierce County." RP 423. The second individual was not wearing a jacket and was clean shaven with a shorter haircut and wearing a grayish shirt and jeans. RP 423. The third

man had on a jacket and was medium build. RP 434. The fourth man wore a skull bandana and a jacket and people referred to him as Mike. RP 435. The fifth man was wearing a jacket. RP 436. Ms. Ford said that the victim tried to get away but the men beat him. RP 642-43.

Ms. Ford testified that friends, including Ms. Blair and Mr. James, had come over to their house that day to help the victim work on his motorcycle. RP 975, 977. She and Ms. Blair had a glass of wine and then they all left and went to the Bull's Eye around 8 p.m. RP 978. She drove her Tahoe with Ms. Blair and the victim drove Mr. James truck. RP 979. While they were at the bar, Ms. Ford saw four men wearing jackets with patches on them and one man, defendant Ford, not wearing a jacket. RP 981, 1009. The jackets were leather and had patches on them that said, "Hidalgos, Pierce County." RP 1009. She had never seen the men before that night and did not know who they were. RP 984. She subsequently learned their names at their arraignment. RP 1006. Ms. Blair and Mr. James said hi to one of them and called him Mike. RP 985. The man had a black bandana on. RP 986, 1012. Defendant Ford was clean cut. RP 1010. Defendant Nolan was unshaven with blondish hair. RP 1010.

Ms. Ford said the men at the table kept looking over at their table. RP 983. There were lots of glares and she remembered defendant Nolan in particular glaring at them. RP 1002-04, 1137-38, 1193, 1195. She also recalled one of the men turning to defendant Ford at some point and then watching defendant Ford make a cell phone call. RP 1006, 1008, 1058,

1195. There were no words exchanged between the two tables. RP 997-98. The victim did not get into any arguments with anyone in the bar. RP 999. The victim was happy and social. RP 1000. The victim was wearing a Harley T-shirt that night. RP 1114, 1171. Ms. Ford did not tell anyone at the table about the glares and just told everyone she wanted to go home to spend time with the victim. RP 1005, 1009, 1072.

When they walked to the car, she went to the driver's side and the victim went to the passenger's side. RP 1021. She saw someone approach the victim out of the corner of her eye. RP 1022. The person had his fist cocked back. RP 1022. She had seen the person earlier in the bar wearing a jacket with a patch. RP 1024-25. Ms. Ford identified the man as defendant Smith. RP 1026, 1082-83. Smith threw the first punch and the victim blocked it. RP 1107. She then saw someone grab the victim from behind. RP 1026. She could not see the man's face or clothes. RP 1028. The fight took place at the back of her truck. RP 1028. Ms. Ford said she tried to pull people off but was pushed. RP 1030. The fight continued by the coffee stand. RP 1031. She saw defendant Nolan go over to the motorcycles and take something out of his saddlebag before returning to the fight. RP 1036, 1039.

The fight eventually stopped. RP 216. It did not last long. Witness said a couple of minutes to 5-10 minutes. RP 214, 483, 2337. Ms. Ford heard someone yell that the cops were coming. RP 1039. Mr. Howden does not remember Ms. Hutt coming out or saying anything to the

men involved. RP 253, 331. Mr. Howden found a baton type item wrapped in leather on the ground near the rear of the Tahoe. RP 222, 559. He turned it over to Deputy Simmelink. RP 559, 567. Mr. James was observed with blood on him. RP 579, 590. He had been hit in the head. RP 605, 2612, 2616. Witnesses reported seeing jackets that said, "Kid Lo" while others said they were Hidalgos. RP 594. Mr. James said the bikers were Hidalgos. RP 626.

After the fight, at least three of the men went to sit on their motorcycles. RP 216. The motorcycles then left the scene. RP 367, 474, 1040, 2336. At least one of the motorcycles was burgundy. RP 1087. Ms. Ford said the last one that rode out was defendant McCreven. RP 1041, 1057. The three men on the motorcycles all had on leather jackets. RP 217. The guy in the white shirt got into a car and drove away. RP 217. Mr. Howden got the license number of the vehicle: 750 RCA. RP 217, 579, 648, 1221. The car took off quickly. RP 386. It was later determined that the car was registered to Sally Mickelson. RP 1222. Her address was the same as defendant Smith's. RP 1222.

Initially the victim was standing after the fight. RP 1042. The victim was then placed in the back of Ms. Ford's truck. RP 1044. Ms. Ford saw a stab wound on the victim's neck and tried to put pressure on the wound. RP 1044, 1045. The victim tried to speak but was unable. RP 1045. He was bleeding badly. RP 1046.

When law enforcement arrived on the scene, defendants had already left. RP 557. The victim was in the back of a black Chevy Tahoe. RP 557. Ms. Ford was trying to administer aid to the victim. RP 561, 635. She was very shaken, crying and had blood on her hands and clothes. RP 562, 638. There was blood on the ground and on the passenger's seat of the Tahoe. RP 557-58. There was also blood on the rear of the Tahoe, on the front end of a red truck and on the front of a Honda. RP 564, 1856, 2008. There was blood on the ground between the cars, on the rear of a white van, and by the espresso stand. RP 565. The area around the Tahoe had the largest concentration of blood. RP 565.

The espresso stand was 50-80 feet from the entrance to the Bull's Eye. RP 524. There were six separate pools of blood observed in the parking lot. RP 530. Numerous spots of blood were found between the vehicles and the espresso stand. RP 1571. An open pocket knife was found at the scene near the espresso stand. RP 533-34, 565, 566, 1570, 1818, 1864, 2008. It was next to a pool of blood. RP 1818, 1866. There was blood on the clip of the knife. RP 1822. No fingerprints were found on the knife. RP 1867. The knife was later analyzed and found to have the victim's DNA on the handle. RP 1939-40. The sap, the leather baton, was found less than 40 feet from the knife. RP 608. It was raining on the night of the murder and the rain did interfere with the evidence. RP 566-67, 1859-60, 2007.

The victim was very bloody and non responsive when paramedics arrived on scene. RP 673, 678. He was unconscious and could not breathe. RP 678. The victim had puncture wounds to the left side of his neck, his left arm, two in his chest and a laceration on the back of his head. RP 679. The victim stopped breathing on the way to the hospital. RP 685. Detective Merod viewed the body at the hospital. RP 1531. The victim had stab wounds to the left torso and neck. RP 1532. He had a jacket that had the Harley Davidson logo. RP 1536.

Detective Loeffenholz and Detective Merod went to defendant Smith's address at about 2:40 a.m., shortly after the fight. RP 1222, 1224, 1538. Defendant Smith was there and allowed the officers onto his property. RP 1228. The vehicle seen leaving the Bull's Eye was found in a shed on his property. RP 1232, 1544. A nametag was found in the car with the name Carl on it. RP 1243. There were blood smears on the armrest and the driver's side headrest. RP 1244, 1314, 1870-71, 1875. A Hidalgos vest was found in defendant Smith's master bedroom as well as a pair of jeans with dried blood. RP 1245-46, 1868. There was a fresh scratch on defendant Smith's cheek as well as abrasions on his forehead and face. RP 1234-35, 1363, 2029. There was also dried blood beneath his nose and mustache. RP 1364, 2104. Defendant Smith claimed he had been hit in the back of the head but no injury was observed. RP 2106-07, 2192.

Defendant McCreven's burgundy motorcycle was not found at his residence but was at his sister's house. RP 1256-57. Inside the saddlebag was a black bandana with skulls on it tied into a knot. RP 1310. A burgundy motorcycle was also found in defendant Nolan's garage. RP 1329. Defendant Nolan had a swollen middle knuckle on his right hand, an abrasion on his left hand and redness and swelling under his left eye. RP 1550, 2029.

Boots were found in defendant McCreven's bedroom that had blood on them. RP 906-08. Two leather vests were found in the master bedroom at defendant McCreven's but no leather chaps. RP 911, 915. No bloody clothes were found at defendant Smith's house, defendant Ford's house or defendant McCreven's house. RP 918-19. Evidence was also discovered during the investigation that the victim had applied to be a member of the Hidalgos in 2005. RP 2200.

Rebecca Dobiash is defendant McCreven's girlfriend. RP 1416. She and defendant McCreven both knew defendants Ford, Nolan, and Smith. RP 1416-17. On April 5, 2008, defendant McCreven drove his motorcycle to a meeting wearing chaps and a leather jacket that did not have the Hidalgos logo on it. RP 1425, 1429, 1430. He also wore a vest that said Hidalgos. RP 1440. When defendant McCreven came home, she thought she saw a smear of blood on his chaps. RP 1468. Defendant McCreven told her that the blood was from a fight and that the other guy had a little cut on his head. RP 1469. Defendant Nolan was with him

when he came home that night. RP 1471. They both seemed upset and defendant Nolan told her that he had lost his sap. RP 1472, 1473.

Defendant Nolan said he hit a guy over the head with it and lost it in the fight. RP 1474. Defendant Nolan had blood on his jeans. RP 1477.

The victim died at 10:19 p.m. RP 1652. The victim had tattoos of a skull, dagger, lightening bolts, an unfinished military tattoo and a demonic tattoo. RP 1692-93. The victim's blood alcohol level was .18. RP 1767. The victim had a scrape on his nose, blunt impact to the back of the head that caused a one inch gaping laceration, scratches on his chest, and contusion on his right thigh and tiny abrasions on his right knee. RP 1654-55. The victim also had a stab wound on the left side of his neck which hit the external jugular and was three inches deep. RP 1657. In addition, the victim had three stab wounds to the torso and one to the forearm. RP 1662-63. One of the stab wounds perforated the victim's diaphragm. RP 1690. The medical examiner testified that the knife found at the scene could have caused the stab wound to the neck. RP 1658. The sap could have cause the injury to the victim's head. RP 1674. Death was due to the stab wounds to the neck and torso. RP 1693.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERROR IN SEALING THE JURY QUESTIONNAIRES AS DEFENDANT MCCREVEN INVITED THE ERROR AND HIS RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED. SHOULD THIS COURT DISAGREE, THE PROPER REMEDY IS REMAND FOR A RECONSIDERATION OF THE COURT'S SEALING ORDER.

Criminal defendants have a right to a public trial. The Sixth Amendment to the United States Constitution, and article I, section 22 of the Washington Constitution, both protect a defendant's right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004); *Waller v. Georgia*, 467 U.S. 39, 44-45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). The right to a public trial applies not only to the evidentiary phase of a criminal trial, but also to other proceedings such as jury voir dire. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1999); *Press-Enterprise v. Superior Court of California*, 464 U.S. 501, 509-10, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) ("*Press-Enterprise I*"); *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).

A court errs in closing the courtroom to the public without weighing the five factors listed in *State v. Bone-Club*. The *Bone-Club* factors are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

128 Wn.2d at 258-59. While many cases dealt with closures of the courtroom to the general public during trial proceedings, the Washington Supreme Court first applied the *Bone-Club* analysis to jury selection in *In re Orange*. There, the defendant was charged with several violent felonies including murder in the first degree, attempted murder in the first degree, and assault in the first degree. The trial court tried to balance or resolve space limitations for the venire panel with the interests of both the defendant's and victim's families to attend the trial. The court was also faced with trying to keep the families separated to avoid potential conflict. The court ruled that no family members or spectators would be allowed in the courtroom during jury selection. 152 Wn.2d at 802. Using the *Bone-Club* analysis, the Supreme Court reversed, holding that the trial court erred by closing the courtroom during jury selection. *Orange*, 152 Wn.2d at 812.

The following year, the Supreme Court addressed a similar issue in *State v. Brightman*. Brightman was charged with murder in the second degree. As in *Orange*, the trial court had to deal with a large venire panel and limited space in the courtroom as well as accommodating the wishes of family members or interested parties who wished to attend the proceedings. The court resolved the issue by excluding “the friends, relatives, and acquaintances” during jury selection. *Brightman*, 155 Wn.2d at 511. The Supreme Court reversed the conviction, holding that the trial court was required to do a *Bone-Club* analysis before closing the courtroom during jury selection. *Brightman*, 155 Wn.2d at 509.

The individual questioning of a juror in an open courtroom outside the presence of the rest of the venire panel does not raise a situation where the court must weigh the *Bone-Club* factors. *State v. Vega*, 144 Wn. App. 914, 917, 184 P.3d 677 (2008).

Defendant McCreven contends that the trial court erred in “closing” part of the voir dire by sealing the juror questionnaires. This claim must be rejected because defendant invited any error and he fails to show any violation of his rights to open or public trials.

- a. Should this Court find error, defendant McCreven invited the error.

Even assuming this Court were to follow Division I and decide that jury questionnaires should be deemed to be presumptively open to the

public, defendant may not seek relief on that account, because he invited the purported error. A defendant who invites error -- even constitutional error -- may not claim on appeal that he is entitled to a new trial on account of the error. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999); *State v. Aho*, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); *State v. Smith*, 122 Wn. App. 294, 299, 93 P.3d 206 (2004). The doctrine of invited error applies regardless of whether counsel intentionally or inadvertently encouraged the error. *Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The invited error rule recognizes that “[t]o hold otherwise [i.e. to entertain an error that was invited] would put a premium on defendants misleading trial courts.” *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

A defendant who is merely silent in face of manifest constitutional error does not “invite” the error. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). But, a defendant who “affirmatively assents” to error may invite it. For example, it has been suggested that, for purposes of applying the doctrine of invited error, there is a distinction between “whether defense counsel merely failed to except to the giving of the instruction, or whether he affirmatively assented to the instruction or proposed one with similar language.” *State v. LeFaber*, 128 Wn.2d 896, 904, 913 P.2d 369 (1996)(Alexander, J. dissenting); see *People v. Thompson*, 50 Cal. 3d 134, 785 P.2d 857 (1990)(failure to object to private voir dire not reviewable where procedure was for defendant’s

benefit and the defendant participated without objection). A defendant need not expressly waive constitutional rights; a waiver can be inferred from conduct. *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996)(court inferred waiver of right to testify by defendant's failure to take the witness stand at trial); *State v. Momah*, 167 Wn.2d 140,155-56, 217 P.3d 321 (2009)(Momah's participation in and affirmative agreement with the closure of the courtroom caused any error to not be structural, and to not warrant reversal).

Here, the parties agreed to the questionnaires and stated that they did not have any objections to them. 4/9/09RP 104-5. The agreed upon questionnaires contained language that the questionnaires would be sealed. MCP 1400-1410, page 1. In addition, the court order sealing the jury questionnaires indicates that it has "come on regularly by stipulation/motion of the parties to seal jury questionnaires." MCP 113. All attorneys involved in the case signed the stipulation, including both of defendant McCreven's attorneys and defendant Nolan's attorney. MCP 113.

As the record indicates, defendant affirmatively asked the court to seal the juror questionnaires and agreed to the language on the questionnaire that informed the jury of such. He cannot now claim it as a basis for error. He is precluded from raising this claim under the doctrine of invited error.

b. Defendant's right to a public trial was not violated.

However, should the court review the merits of the claim, the State believes that the trial court did not error. The State does not dispute that voir dire proceedings are included within the open trial right. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (“*Press –Enterprise I*”). In that case, the Court explained why voir dire proceedings should be included within the open-trial right:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S., at 569-571.

Press-Enterprise I, 464 U.S. at 508. Subsequently, in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12-13, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (“*Press-Enterprise II*”), the Court set forth a framework for determining what is - and what is not -within the scope of the public-trial right. In that case, the Court applied an “experience and logic” test that had been first announced by Justice Brennan in his concurring opinion in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). *Press-Enterprise II*, 478 U.S. at 8-9. This test looks to whether such a right is consistent with “experience and logic.” *Press-Enterprise II*, 478 U.S. at 9.

The “experience” inquiry considers whether there has been a “tradition of accessibility.” *Press-Enterprise II*, 478 U.S. at 8. In other words, a court looks to “whether the place and process have historically been open to the press and general public.” *Id.* A “tradition of accessibility implies the favorable judgment of experiences.” *Id.*

The “logic” inquiry focuses on “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* In conducting this inquiry, a court should consider whether the process enhances the fairness of the criminal trial as well as “the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise II*, 478 U.S. at 9.

These two considerations are related as they “shape the functioning of governmental processes.” *Id.* If the right asserted is grounded in both experience and logic, then a right of access to the proceedings in question exists under the constitution.

There is a presumption under Washington’s court rules that juror questionnaires are not public documents and this fact is conveyed to prospective jurors. For example, GR 31(j) provides that “individual juror information, other than name, is presumed to be private.” The policy and purpose statement for this rule reflects that it is designed to balance competing constitutional interests:

It is the policy of the courts to facilitate access to court records as provided by article I, section 10 of the Washington State Constitution. Access to court records is

not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article 1, section 7 of the Washington State Constitution.

GR 31(a). The juror handbook prepared by judges' associations (and appearing on the Washington Courts website) clearly anticipates that questioning may occur in private:

After you're sworn in, the judge and the lawyers will question you and other members of the panel to find out if you have any knowledge about the case, any personal interest in it, or any feelings that might make it hard for you to be impartial. This questioning process is called voir dire, which means "to speak the truth." ...Though some of the questions may seem personal, you should answer them completely and honestly. ... If you are uncomfortable answering them, tell the judge and he/she may ask them privately.

http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.jury_guide#A3; See also *State v. Strode*, 167 Wn.2d 222, 239-40, 217 P.3d 310 (2009)(C. Johnson, J., dissenting). In July 2000, the Washington State Jury Commission issued its Report to the Board for Judicial Administration and recommended that jurors be given an opportunity to discuss sensitive matters in private:

Recommendation 20 ... The court should try to protect jurors from unreasonable and unnecessary intrusions into their privacy during jury selection. In appropriate cases, the trial court should submit written questionnaires to potential jurors regarding information that they may be embarrassed to disclose before other jurors.

http://www.courts.wa.gov/committee/?fa=committee.display&item_id=277&committee_id=101. As one justice recently noted:

When jurors respond to the questions, they should reasonably expect courts to be truthful and maintain the confidentiality of extremely sensitive, personal, and perhaps traumatic experiences.

Through the above methods, as well as other means, courts routinely assure jurors that their private information will remain private. The courts' assurances serve at least two purposes: to respect individuals' privacy interests and to guarantee an impartial jury.

State v. Strode, 167 Wn.2d at 240 (C. Johnson, J., dissenting). Thus, keeping juror information obtained by use of questionnaires out of the public document realm protects the jurors' constitutional right to personal privacy under article 1, section 7 as well as the defendant's right to an impartial jury by promoting disclosure of juror information that might be embarrassing to the juror and detrimental to his or her ability to be fair and impartial. The right to an open trial is satisfied by having the questioning of the jurors occur in an open courtroom.

Nor is Washington alone in this conclusion. Indeed, most of states that have addressed the issue by statute or rule have concluded that juror questionnaires should not be available to the general public. *See* Ala. R. Ct. 18.2(b) ("If a juror questionnaire containing personal information is obtained from a prospective juror in any case appealed to the Court of Criminal Appeals, that questionnaire shall not be included in the clerk's portion of the record on appeal. ... Any such questionnaires supplemented into the appellate record shall be available for inspection only by the court and the parties to the appeal."). Alaska R. Admin 15(j)(2)-(3) ("Trial

questionnaires and trial panel lists are confidential. ... The parties, their attorneys, and agents of their attorneys shall not disclose ... the trial questionnaires...”); Ariz. S. Ct. R. 123(e)(9)(“information obtained by special screening questionnaires or in voir dire proceedings that personally identifies jurors summoned for service, except the names of jurors on the master jury list, are confidential, unless disclosed in open court or otherwise opened by order of the court.”); Colo. Rev. Stat. §13-71-115(2) (“With the exception of the names of qualified jurors and disclosures made during jury selection, information on the questionnaires shall be held in confidence by the court, the parties, trial counsel, and their agents. ... The original completed questionnaires for all prospective jurors shall be sealed in an envelope and retained in the court’s file but shall not constitute a public record.”); Conn. Gen Stat. 51-232(c)(questionnaires may be viewed only by court and parties and are not public records); Idaho R. Civ. P. 47(d)(“In order to provide for open, complete and candid responses to juror questionnaires and to protect juror privacy, information derived from or answers to juror questionnaires shall be confidential and shall not be disclosed to anyone except pursuant to court order.”); Idaho Crim. R. 23(1)(same language); Idaho Admin R 32(g)(7)(providing for confidentiality); Kan. Dist. Ct. R. 167 (suggested form informs jurors that “[t]he juror questionnaire is not a public record and is only made available to court personnel and the attorneys and parties to the case being tried.”); 14 Maine Rev. Stat. § 1254-A(7)-(9)(questionnaires “may at the discretion

of the court be made available to the attorneys and their agents and investigators and the pro se parties at the courthouse for use in the conduct of voir dire examination” and such information may not be further disclosed without court authorization); Mass. Gen. Laws, ch. 234A, § 22 (“A notice of the confidentiality of the completed questionnaire shall appear prominently on the face of the questionnaire.”); Mass. Gen. Laws, ch. 234A, § 22 (information in questionnaires not to be disclosed except to court and parties and is not a public record); Mich. Ct. R. 2.510(C)(1) (questionnaires available only to parties and court absent court order); Mich. Ct. R. 6.412(A) (applying R. 2.510 to criminal cases); Mo. S. Ct. R. 27.09(b)(“Jury questionnaires maintained by the court in criminal cases shall not be accessible except to the court and the parties. Upon conclusion of the trial, the questionnaires shall be retained under seal by the court except as required to create the record on appeal or for post-conviction litigation. Information so collected is confidential and shall not be disclosed except on application to the trial court and a showing of good cause.”); N.H. Super. Ct. R. 61-A (attorneys are entitled to a copy of the questionnaire, but “shall not exhibit such questionnaire to anyone other than his client and other lawyers and staff employed by his or her firm.”); N.J. R. Gen. Applic. 1:38(c)(questionnaires are confidential and not public records); N.M. Stat. § 38-5-11(C)(“questionnaires obtained from jurors shall be made available for inspection and copying by a party to a pending proceeding or their attorney or to any person having good cause for

access”); Pa. R. Crim. Pro. 632(B)(“The information provided by the jurors on the questionnaires shall be confidential and limited to use for the purpose of jury selection only. Except for disclosures made during voir dire, or unless the trial judge otherwise orders pursuant to paragraph (F), this information shall only be made available to the trial judge, the defendant(s) and the attorney(s) for the defendant(s), and the attorney for the Commonwealth.”); Vt. R. Civ. P. 47(a)(2)(questionnaires may be made available to public only after names and addresses have been redacted); Vt. R. Crim. P. 24(a)(2)(same); Tex. Gov’t Code § 62.0132(f)-(g)(questionnaires are confidential and may be disclosed only to court and parties); cf., Ark. Code § 16-32-111(b)(questionnaires may be sealed on showing of good cause); La. Code Crim. Pro. art. 416.1(C)(jury questionnaire “may” be made a part of the record); Minn. R. Crim. P. Form 50 (advising jurors that answers are part of the public record).

The common practice in this country, as documented by court rule and law, is that jury questionnaires are not matters of public record. The experience prong of *Enterprise Press II* thus militates against petitioner’s claim.

The logic prong does not support defendant, either. In *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569-72, 100 S. Ct. 2814, 2834, 65 L. Ed. 2d 973 (1980) the Court identified the following purposes served by openness in criminal proceedings: (1) ensuring that proceedings are conducted fairly, (2) discouraging perjury, misconduct of participants, and

unbiased decisions, (3) providing a controlled outlet for community hostility and emotion, (4) securing public confidence in a trial's results through the appearance of fairness, and (5) inspiring confidence in judicial proceedings through education on the methods of government and judicial remedies.

A procedure like that used in petitioner's case will protect juror privacy and encourage candid responses. As noted above, this is the general approach that has been recommended and followed in Washington. The American Bar Association likewise recommends private inquiry into sensitive matters. *See* American Bar Association, *ABA Principles for Juries and Jury Trials (and Commentary)*, at 42-43, http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

Studies have shown that jurors will respond more frankly if sensitive questions are asked privately:

A number of empirical studies have found that prospective jurors often fail to disclose sensitive information when directed to do so in open court as part of the jury selection process. A 1991 study of juror honesty during voir dire found that 25% of jurors questioned during voir dire failed to disclose prior criminal victimization by themselves or their family members. In a more recent study of the effectiveness of individual voir dire, Judge Gregory Mize (D.C. Superior Court) found that 28% of prospective jurors failed to disclose requested information during questioning directed to the entire jury panel. ... Thus, failure to protect juror privacy can actually undermine the primary objective of voir dire – namely, to elicit sufficient information about prospective jurors to determine if they can serve fairly and impartially.

Paula L. Hannaford, *Making the Case for Juror Privacy: A New Framework for Court Policies and Procedures* (State Justice Institute, 2001)(footnotes omitted).

A juror should not be forced to disclose intensely private information to the general public simply because he or she received a jury summons and was called upon to sit on this case. Response rates to juror summons are notoriously low. If jurors are not offered the modicum of privacy granted by this in camera screening process, that rate is not likely to improve, and it could drop further. This threatens the functionality of the entire justice system.

These concerns exist whenever a juror is called to serve and must answer questions in a room full of strangers. The concerns are even more acute, however, when the juror is called to answer such questions in public in a small community. In small communities, a juror who is required to answer private questions will necessarily expose sensitive information to neighbors, friends, acquaintances, co-workers, and fellow parishioners. Although this risk of public exposure of personal information cannot be completely eliminated – i.e. the court can exclude the rest of the venire for individualized questioning but not close the court room- it can be greatly minimized. Consequently, the right to a public trial may be protected without requiring such a high price be paid by jurors performing their civic duty.

Additionally, court records are becoming increasingly available over the internet. Unsealed juror questionnaires could be read by persons seeking information about jurors for reasons that have nothing to do with their potential jury service and the fact that the jurors had to attend a public trial or court proceeding. Such information would be available for years, long after a defendant's trial has been concluded. This poses a huge threat to the personal privacy of jurors with no corresponding benefit to the right to a public trial. This provides a critical reason why sealing juror questionnaires should be treated differently than open courtrooms.

In view of the foregoing, both the experience and logic prongs of the *Press-Enterprise II* test support the conclusion that jury questionnaires are not within the scope of the right to a public trial. Because defendant fails to demonstrate that his right to a public trial was abridged, this claim should be rejected.

Defendant relies on two cases out of Division I of the Court of Appeals. Defendant cites to *State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009), and *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009). However, as stated above, the State disagrees with Division I's analysis as it pertains to juror questionnaires and the open courtroom analysis. In addition, this Court can affirm on any basis that is supported by the law and the record. See *State v. Bradley*, 105 Wn. App. 30, 38, 18 P.3d 602 (2001). In reviewing the *Bone-Club* factors, it is clear that the compelling interest was the privacy of the jurors, no one made any

objections to the process, the least restrictive means was to seal the questionnaires but to maintain an appellate record by filing them so that Court of Appeals and the attorneys of record could still have access to them, the order reflects that the parties weighed the need for them to be part of the record with the need to respect the jurors privacy, and the order was no broader in its duration than necessary to serve its purpose. MCP 113. While not articulated as such, the jury questionnaires and the order sealing reflect a thought process that is consistent with the aims of *Bone-Club* and so defendant's rights were not violated. The trial court did not error in sealing the juror questionnaires.

- c. Should this Court decide that the sealing order is in error, the proper remedy is to remand for reconsideration of the sealing order.

Should this Court decide to follow Division I and find that the court should have conducted a *Bone-Club* analysis, the State would then dispute defendant McCreven's argument that under *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212, *review granted*, 236 P.3d 206 (2010) that this constitutes a structural error and the remedy is a new trial. Under *Coleman*, the appropriate remedy is to remand for a reconsideration of the order sealing the questionnaires. 151 Wn. App. at 162-63.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS AS TO THE ADMISSIBILITY OF EVIDENCE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

- a. The trial court did not error in excluding defendant Smith's out of court statement to law enforcement. (Pertains to Smith's assignments of error #1, Issue #11).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *Rehak*, 67 Wn. App. at 162; *In re Twining*, 77 Wn. App. 882, 893, 894 P.2d 1331, *review denied*, 127 Wn.2d 1018 (1995). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997).

Limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice. *Montana v. Engelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996)(stating that the "accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence" (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988))). Similarly, the Washington Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)(discussing Washington's rape shield law).

Defendant Smith sought to introduce his out of court statement to law enforcement by claiming that it was not hearsay because it went to his state of mind. RP 2648-2649. However, ER 801(d)(2) concerns the admission of a party opponent and makes it clear that a statement is not hearsay only when it is offered *against* the party. Out-of-court statements by a non-testifying party are admissible only if offered against that party and not in favor of that party. *State v. Larry*, 108 Wn. App. 894, 34 P.3d 241, *review denied* 146 Wn.2d 1022, 52 P.3d 521 (2001). Self-serving out of court admissions by a party are not admissible as an exception to the hearsay rule. *State v. Stubsjoen*, 48 Wn. App. 139, 738 P.2d 306 (1987). Further, ER 803(a)(3) concerns the declarant's existing state of mind and not a "statement of memory or belief to the prove the fact remembered or believed." Defendant Smith tried to admit his out of court statement to law enforcement to show his state of mind without getting on the stand and testifying. If the law allowed this, defendants would routinely make self-serving out of court statements for the purpose of having someone else come in and recite their self-serving statement. The rules of evidence do not allow for this.

In *State v. Sanchez-Guillen*, 135 Wn. App. 636, 145 P.3d 406 (2006), the court addressed the very same situation as the one presented in the instant case. In *Sanchez- Guillen*, defendant made a statement to the law enforcement after the murder had occurred. *Id.* at 640. The State initially sought to have those statements admitted and the court ruled that

the statements were admissible. *Id.* However, the State chose not to introduce them at trial. *Id.* Defendant did not testify at trial but tried to have his own statement to law enforcement introduced as part of his defense. *Id.* The court refused to admit the statement. *Id.* The Court of Appeals upheld the trial court's ruling. *Id.* at 646. The court found that the defendant's statements were inadmissible hearsay because defendant himself was seeking to introduce them. *Id.* at 645-46. The court also found that defendant's state of mind at the time he made the statement to law enforcement was not relevant. *Id.* at 646. The time that the statement is made is the state of mind and not the earlier time the statement refers to. *Id.* In other words, as the plain language of the rule states, defendant's memory or belief of what had occurred previously was not admissible.

The instant case presents the same scenario. A CrR 3.5 hearing was held as to the admissibility of statements made by defendant Smith. 1/30/09 RP 22. The trial court ruled that the statements made by defendant Smith were admissible. 1/30/09 RP 194-5. However, the State did not seek to admit these statements. RP 99. Subsequently, counsel for defendant Smith sought to have the statements admitted as part of his defense case. RP 100-104, 2648-2649, 2651-2653, 2654-2655. Counsel sought to have them introduced under the state of mind exception. *Id.* Defendant Smith did not testify. Initially, the court heard argument from both sides and granted the State's motion to exclude defense counsel from bringing in the statements but allowed defense counsel a chance to brief

the issue and argue it later on when he presented his case. RP 105-06. After briefing and argument from both sides, the trial court denied defendant's motion to introduce the statements. RP 2655. The analysis in *Sanchez-Guillen* applies. The evidence rules do not allow defendant to bring in his own statements made outside of court. They are not a statement by party opponent when defendant himself is seeking to introduce them. In addition, they do not fall under the state of mind exception because they were made after the incident and are statements of memory or belief of what occurred during the incident. Defendant Smith has not shown why the evidence rules should not apply to him. The evidence rules and case law are clear. The trial court did not error in ruling that defendant Smith could not admit his own out of court statements as part of his defense.

- b. The trial court did not error in admitting Shannon Ford's out of court identification as it was not impermissibly suggestive and her in-court identification of defendants did not violate due process. (Pertains to McCreven's assignment of error #10, Issue #10, adopted by Nolan)⁷

The trial court's admission of evidence regarding identification procedures is reviewed by this Court for an abuse of discretion. *State v.*

⁷ Defendant McCreven was the only defendant who challenged the out of court identification in the trial court. Defendant Nolan now joins this issue on appeal but did not preserve it in the trial court.

Kinard, 109 Wn. App. 428, 431-32, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022, 52 P.3d 521 (2002). An appellate court will only disturb the trial court's ruling if it is manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.*

The defendant bears the burden of showing that an identification procedure was impermissibly suggestive. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984)). When a defendant fails to show impermissible suggestiveness, the inquiry ends. *Vaughn*, 101 Wn.2d at 609-10. Only after the defendant first shows impermissible suggestiveness does the inquiry turn to whether the identification was nevertheless reliable. *Id.* 610-11. The court then reviews the totality of the circumstances to determine whether that suggestiveness created a substantial likelihood of irreparable misidentification. *State v. Taylor*, 50 Wn. App. 481, 485, 749 P.2d 181 (1988). To determine reliability, the court must consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) (concluding that "reliability is the linchpin" for determining the admissibility of identification testimony). Even an impermissibly suggestive identification may be overcome if it is otherwise

sufficiently reliable. *State v. Ramires*, 109 Wn. App. 749, 761, 37 P.3d 343 (2002). If the suggestive nature of a pre-trial identification did not involve any State action then it does not invalidate a later in court identification. *State v. Knight*, 46 An. App. 57, 59, 729 P.2d 645 (1986).

In the instant case, Shannon Ford provided a description of the men involved to law enforcement on the night of the incident. RP 43-44, CP Supp 1438-1453. She then attended defendants' arraignments. RP 44, CP Supp 1438-1453. A year later, she was in an interview in the prosecutor's office and was shown photos of the four defendants. RP 46, CP Supp 1438-1453. Defendant McCreven challenged Ms. Ford's out of court and in court identification on the basis of CrR 3.6 governmental misconduct and the fact that both Ms. Ford's viewing defendants at arraignment and seeing their photos in the prosecutor's office was unnecessarily suggestive. RP 32, MCP 70-93. On appeal, defendant does not allege governmental misconduct. The trial court heard extensive argument from both sides, reviewed the five factors of reliability and denied the defense motion to exclude the identifications. RP 57-58.

The trial court did not abuse its discretion in admitting both the out of court and in court identifications of Ms. Ford. First, Ms. Ford did give descriptions of each individual to law enforcement the night of the incident. RP 43-44, CP Supp 1438-1453 (page 8-9). Specifically, Ms. Ford was able to describe each of the four men individually, including their different builds and hair styles. *Id.* She was also able to describe

which one jumped Mr. Beaudine, which one made a cell phone call while in the bar, and which one withdrew an object from his saddlebag during the fight. *Id.* Ms. Ford's descriptions the night of the incident was detailed and specific to each of the four individuals.

Second, the fact that Ms. Ford attended the arraignment of defendants' was not the result of State action nor was it impermissibly suggestive. Ms. Ford attended the arraignment at her own behest after she was notified about it pursuant to the Victim's Bill of Rights. CP Supp 1438-1453 (page 9). At the arraignment, she was able to put names with the faces that she recognized. There is nothing that shows Ms. Ford seeing defendants at arraignment in anyway contradicts her descriptions given to law enforcement on the night of the incident. Defendant cannot show that Ms. Ford attending the arraignment compromised Ms. Ford's descriptions of defendants obtained on the night of the incident.

Third, the meeting with the State was not impermissibly suggestive. Almost a year after the arraignment, Ms. Ford was in the prosecutor's office for an interview. CP Supp 1438-1453 (page 10). At that time, Ms. Ford was referring to defendants by name. RP 46. The State asked Ms. Ford how she knew their names and she said she had seen them at arraignment. RP 46. The State laid out a picture of each defendant and asked Ms. Ford if she could correctly identify what name went with each picture. RP 46. Ms. Ford had already seen defendants at arraignment and had already recognized their faces. The State did not

suggest any information to her and merely confirmed who she was identifying when she described what each defendant did. In fact, Ms. Ford was still able to differentiate defendants by saying that she wasn't sure defendant McCreven and defendant Ford were involved in the fight, only that she knew that they were wearing Hidalgos jackets and the men she saw in the bar were wearing Hidalgos jackets. RP 45-46. There was nothing impermissibly suggestive about the State asking Ms. Ford to confirm her statements as to which defendant was which.

Fourth, even if the identifications were impermissibly suggestive, the trial court considered the five factors outlined above. Ms. Ford had a good opportunity to view defendants as she was in the bar for more than an hour, she walked by the table at least twice and she was paying attention to the table since the men were glaring at her fiancé. RP 40-41, CP Supp 1438-1453. She also clearly observed the man who jumped her fiancé as well as the man who withdrew an object from his saddlebag. *Id.* Ms. Ford was paying attention to the man since their glaring inside the bar was making her uncomfortable and she was paying attention to what was happening during the fight. When Ms. Ford was asked to describe the men on the night of the incident, she gave detailed descriptions of each individual and was able to describe hair style, build, as well as what each one had done individually during either the fight or the time inside the bar. Ms. Ford was confident in her identification when she saw them at arraignment. There were only four days between the arraignment date and

the incident. The five factors weight in favor of admissibility of the identifications.

Finally, there was no violation of due process in admitting the in court identification. As detailed above, the identifications were not impermissibly suggestive and even if they were, they were reliable as they met the five factors outlined above. Further, Ms. Ford's descriptions to law enforcement on the night of the incident were an independent source for the in-court identifications. Finally, defense counsel had an opportunity to cross-examine Ms. Ford as to her ability to identify defendants and the circumstances of those identifications. The trial court heard argument, considered the case law and the briefs submitted by the parties, reviewed relevant parts of Ms. Ford's interview with law enforcement and considered the five factors of determining the reliability of the identifications. The trial court's decision was based on tenable grounds and was not an abuse of discretion.

- c. The trial court did not abuse its discretion in excluding evidence of the victim's reputation for violence. (Pertains to Ford's assignment of error # 6, issue #10, adopted by McCreven and Smith; Nolan's assignment of error #1, issue #1, adopted by Ford, McCreven and Smith; and Smith's assignment's of error #1-2, issue #1, adopted by McCreven and Nolan.)

Evidence of a person's character is generally inadmissible for the purposes of proving action in conformity therewith on a particular

occasion. ER 404(a). However, ER 404(a)(2) allows the admission of evidence of the character of a victim in a criminal case under certain limited circumstance. The victim's reputation for using weapon and for being quarrelsome and having a violent disposition can be admissible to show that defendant had a reasonable apprehension of danger. *State v. Ellis*, 30 Wash. 369, 70 P.963 (1902). However, defendant must have known defendant's reputation in order for it to be admissible. *State v. Munguia*, 107 Wn. App. 328, 26 P.3d 1017 (2001). When there is an issue of self-defense, the defendant may show that the victim was the first aggressor by character evidence of the victim's reputation of a violent disposition. *State v. Adamo*, 120 Wash. 268, 270, 207 P. 7 (1922).

To be admissible as reputation evidence, testimony concerning a victim's reputation for violence or quarrelsomeness must be based on the victim's reputation in the "community." *State v. Callahan*, 87 Wn. App. 925, 934, 943 P.2d 676 (1997). The "reputation evidence must be based upon the witness' personal knowledge of the victim's reputation in a relevant community during a relevant time period." *Callahan*, at 934; *State v. Riggs*, 32 Wn.2d 281, 201 P.2d 219 (1949). The party seeking to introduce the evidence has the burden to establish foundation. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). In order to establish a valid community, the party seeking to introduce the evidence must show that the community is both neutral and general. *Id.* Other factors the court can consider include: "the frequency of contact between members of the

community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community.” *Id.* Whether or not foundation has been met is within the discretion of the trial court. *Id.*

In the instant case, the trial court did not abuse its discretion in ruling that Joy Hutt could not testify as to defendant’s reputation. The State initially moved in limine to exclude character evidence of Mr. Beaudine. RP 81. The court granted the State’s motion in part but denied it in part because, “if the issue is self-defense, then defense counsel are entitled to raise the reputation of the victim for quarrelsome and violent disposition. But it’s only reputation evidence, as I understand it, they are allowed to raise, not specific instances of behavior.” RP 94. The court then clarified its ruling, “what I want to make sure is that the foundation is laid. And if I have any concerns about the accuracy of the foundation, I am going to sustain the objection to let it in.” RP 97. The trial court was correct in ruling that the reputation evidence could come in but only after proper foundation was laid.

There was no evidence that defendants were aware of any reputation of the victim. Despite the fact that defendants had initially sought to get the reputation evidence in through the testimony of Brad Moran and Ms. Hutt, Mr. Moran was never called to testify. The only person who was asked to testify about the victim’s reputation was Ms. Hutt. There was absolutely no testimony at trial and no offer of proof

from any defendant that any of them knew of the victim or where aware of any reputation for violence. As such, the trial court's ruling that the evidence could not come in to show defendants' reasonable apprehension of the victim was proper. However, defendants argue on appeal that the trial court still should have let the evidence in since the foundation had been established.

The reputation evidence that defendants sought to admit did not meet the foundational requirements. The trial court indicated that it did not believe the proper foundation had been laid but he allowed the parties to present further argument. RP 2400. The issue of foundation was argued extensively by the parties, the proper case law was cited to the court and the trial court indicated that it had reviewed everything. RP 2509-2521. The trial court had previously ruled in defendants' favor and had allowed the reputation evidence in if they could meet the foundation requirements. It is therefore logical to assume that defendants failed to meet their burden and so while not expressly ruled upon, the trial court had already stated that he did not think that foundation, specifically the community, had been established. RP 2400. The further arguments by counsel obviously did not change the trial court's opinion otherwise the evidence could have been admitted under the court's previous ruling. The trial court did not abuse its discretion.

However, an appellate court may affirm a defendant's conviction on any theory supported by the record and the law. *State v. Bradley*, 105

Wn. App. 30, 38, 18 P.3d 602 (2001). Defendants did not meet their burden of showing that there was foundation for the reputation testimony. Despite the offers of proof by defense counsel that Ms. Hutt would say she knew the victim and that he was obnoxious and threatening, Ms. Hutt did not testify in accordance. RP 2396, 2514. Ms. Hutt testified that she did not know the victim personally and that she only knew his reputation from what she heard from other people. RP 2395. The witness clearly did not have personal knowledge of the victim. If she were going to testify that she herself had seen his obnoxious and threatening behavior, then she would not have testified that she did not know him and only knew of his reputation from other people. The time limit and neutrality of the community was also suspect. The defense offer of proof was that within a 12 month period Ms. Hutt had spoken to patrons and employees of the Bull's Eye as well as other establishments that the victim frequented. RP 2514. However, defense counsel said that this had occurred within the last year. RP 2514. So it is not clear whether this was the 12 months leading up to the incident or after the incident. The timing effects the neutrality of the community. It also was not clear what prompted these discussions, if Ms. Hutt had just heard things during normal course of business or had actively sought out the reputation evidence. The generality of the community was also hard to establish. Defense counsel said that in a year period it could be over 1,100 people that were in the community but there was no offer of proof that people who come in and out of bar, consisting of

both new customers and regulars and unspecified amounts of each, constitute a community. Further, it was never offered by defense how many of these people had talked about or knew of the victim's reputation. None of those people were on the witness list, identified or discussed. The defense offer of proof was comprised of generalities and no specifics, certainly not enough to meet their burden of showing foundation. The trial court did not error in stating that foundation had not been met and the record does not support a finding that foundation had been met.

Further, defendants were still able to present a defense and testimony was still admitted as to the victim's reputation and actions on the night of the incident. There was testimony that the victim had started a confrontation with defendants when he walked up to the defendants and said, "Fuck your colors." RP 361. Another witness testified that the victim told defendants that their patch was a joke and that their colors were not worth anything. RP 2525. There was evidence that the victim had applied in 2005 to be a member of the Hidalgos, but no evidence that he was ever granted membership. RP 2200. There was testimony that the victim had numerous tattoos but one in particular was described as demonic. RP 1692-93. Ms. Hutt was able to testify that the victim's behavior was a red flag for her. RP 2544. In addition, Detective Wood testified that Ms. Hutt had said that she did not have problems with defendants but that she did have problems with the victim. RP 15-16. The only "good character" evidence that was admitted was from Ms. Ford, the

victim's fiancé. Ms. Ford was asked what the victim's demeanor was like the night of the incident at the Bull's Eye. RP 1000. Ms. Ford answered, "He was happy and social, and that's how he is." RP 1000. The State's question was specific to the night in question. No defendant objected to this question or the answer given by Ms. Ford. No other "good character" evidence was admitted. This evidence was rebutted with the fact that the victim insulted defendants' colors or patches, that his behavior was a red flag for Ms. Hutt that night, and that Ms. Hutt had experienced problems with the victim in the past. Defendants were still able to argue their theory of the case and there was evidence that contradicted Ms. Ford's assertion that defendant was happy and social that night. The jury was then the one to judge the credibility of the witnesses and their accounts of what happened that night. Defendants were not prejudiced by the trial court's decisions. Defendants failed to meet their burden as to the foundation for the reputation evidence and therefore it was not admissible. The trial court did not abuse its discretion.

- d. The trial court did not error by admitting limited evidence of defendants' association with the Hidalgos. (Pertains to Ford's assignments of error #5 & 6, issue #3, adopted by McCreven, Nolan and Smith; McCreven's assignment of error #1, issue #1, adopted by Nolan and Smith; and Smith's assignments of error #8 &9, issue #3, adopted by McCreven and Nolan)

- i. **The evidence that defendants wore Hidalgos jackets on the night of the incident and were members of the organization was used for limited and relevant purposes.**

As discussed above, the trial court's admission of evidence is reviewed for an abuse of discretion. ER 401 and ER 403 are used to determine if the evidence is relevant and whether its probative value is outweighed by the danger of prejudice. ER 801(d) allows witnesses to identify people by describing their clothing. *State v. Stratton*, 139 Wn. App. 511, 517, 161 P.3d 448 (2007).

In the instant case, the State informed the court that witnesses statements regarding identification of the suspects had included descriptions of clothing and membership in the Hidalgos. 4/9/09RP 118, RP 114-15, 118. The State was clear that they were not trying to use the evidence to show prior bad acts or other misconduct. 4/9/09RP 120. The State's purpose is seeking to admit evidence that defendants were members of Hidalgos gang was to prove identity. 4/9/09RP 120. The

State was clear that evidence was not being used for a gratuitous purpose. RP 138. In addition, there was evidence that the victim had insulted defendants' colors and that was evidence of motive for the fight. 4/9/09RP 126. The trial court heard argument from all parties and then made its decision. 4/9/09RP 118-129. The trial court found that evidence of what people were wearing was admissible including evidence of clothing found in defendants' homes for purposes of identity. 4/9/09 RP 128, 131, RP 140-41. However, the trial court ruled that showing membership for flat our membership sake was not admissible. 4/9/09 RP 129. The trial court reserved ruling on the motive issue. 4/9/09 RP 129.

Defendants' membership did become relevant in regards to motive or at least to put the events of the night into context. In addition to the non-exhaustive list of exceptions identified in ER 404(b), Washington courts recognize a res gestae or "same transaction" exception to the rule. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Same transaction evidence of prior misconduct is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime. *State v. Lillard*, 122 Wn. App. 422, 93 P.3d 969, 974 (2004) (citing *State v. Tharp*, 27 Wn. App. 198, 205, 93 P.3d 969 (1981)). "A defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented

version of the events.” *Lillard*, 122 Wn. App. at 431. However, if the story is complete without the proffered testimony, the exception is not applicable. *State v. Mutchler*, 53 Wn. App. 898, 902, 771 P.2d 1168 (1989).

In the instant case, the State was not even seeking to admit any evidence of any alleged prior bad acts. The only thing the State sought to do was to help put this fight and murder into context. Two witnesses testified that the victim insulted defendants’ colors prior to the fight. RP 361, 386, 2525. The fact that defendants were members of the Hidalgos and wearing their jackets that night puts the events into context and helps explain how the fight started. The evidence was used for a very limited purpose and no evidence of any prior bad acts was admitted. In terms of motive for the assault and murder or at the very least to show the res gestae of the incident, the limited evidence of defendants’ affiliation was admissible.

RCW 9A.08.020(3) addresses accomplice liability and in relevant part:

“A person is an accomplice of another person in the commission of a crime if: (a) With 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.”

More than physical presence and knowledge of the criminal activity of another must be shown to establish a person is an accomplice. *In re*

Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Defendant must give aid in order to be considered an accomplice. Aid is defined as any assistance given by words, acts, encouragement, support, or presence.

State v. Galista, 63 Wn. App. 833, 839, 822 P.2d 303 (1992). “A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.” *Id.*

The fact that State proceeded under an accomplice liability theory means the relationship between the defendants was relevant and necessary evidence for the jury. It is one piece of the equation and can be used in conjunction with other evidence. The fact the defendant’s knew each other and were friends is different than evidence introduced to show membership in a group. In *State v. Coleman*, 155 Wn. App. 951, 963, 231 P.3d 212 (2010), the court found the evidence of a past relationship between the two co-defendants showed why one would trust the other to help with a robbery. In addition, the evidence that the two co-defendants had previously been involved in a drug deals together was also relevant to show preparation, plan, knowledge, and absence of mistake. *Id.*

In the instant case, the State offered no evidence of any prior bad acts. The purpose of admitting photos of the defendants together was to show that they had a bond and were friends. RP 892-93. As in *Coleman*, this is relevant to show that these men have more than just a passing relationship but that in fact they were friends, knew each other, and combined with other evidence, were willing to work together. These men

were not four random individuals at a bar who got in a fight; they were friends. RP 987. The evidence offered in this case was less prejudicial than the evidence of prior drug deals offered in the *Coleman* case.

The evidence that defendants were members of the Hidalgos, wearing Hidalgo gear on the night of the incident, had a previous friendship with each other, and were not just random strangers at the bar was relevant for the limited purposes of identity, motive, *res gestae*, and accomplice liability. The trial court did not abuse its discretion in allowing in this evidence.

ii. The trial court did not allow, and the State did not seek to introduce, any evidence of prior misconduct on behalf of the Hidalgos.

Defendants argue that the admission of their membership in the Hidalgo motorcycle club violated their right to association and free speech under the 1st amendment. However, no evidence was ever admitted or proposed to be admitted that showed that just because defendants were members of the Hidalgos they were guilty of the crimes. Defendants McCreven and Ford rely on *U.S. v. Roark*, 924 F.2d 1426 (8th Cir. 1991) as supporting their argument that the trial court erred in allowing in evidence that defendants were members of the Hidalgos. However, as argued above, the evidence was admitted for limited and relevant purposes. In addition, *Roark* is distinguishable. In *Roark*, the evidence

put on was in fact aimed at trying the Hells Angels Motorcycle for wrongs the club as whole had committed. *Id.* at 1433. The government discussed the Hell's Angels' general reputation in voir dire and opening. *Id.* at 1430. The government also called an expert who had no relation to the case or the defendant to testify about the Hells Angels and their illegal activities. *Id.* A second witness was also called to discuss his undercover dealings with the Hells Angels, none of which were related to the defendant. *Id.* at 1430-31. The appellate court found that the government had attempted to tie defendant's guilt to his association with the Hells Angels and that it was reversible error. *Id.* at 1434. Evidence of uncharged conduct to show criminal propensity was inadmissible. *Id.*

The instant case is distinguishable. The State did not ask the trial court to admit any evidence about the Hidalgos in terms of their activities or what they stood for. No experts on the Hidalgos were called. 4/9/09RP 126-27, RP 897. No evidence was ever presented that the Hidalgos or any of the defendants were associated in anyway with the Banditos. In fact, the limited evidence that did come in was that the Hidalgos did toy runs and barbeques. RP 1491-92. There is nothing in the record of the instant case that comes close to the evidence that was presented in *Roark*. Everything that was admitted was relevant to the incident at hand and to the defendants themselves. General evidence of prior misconduct of the Hidalgos organization was never sought to be admitted.

Defendant McCreven also cites to *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) in support of their position. The Supreme Court reversed because evidence of defendant's membership in a racist prison gang, the Aryan Brotherhood, at sentencing was not relevant to the issues being decided. *Id.* at 1094. The Supreme Court did note that, "The Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.*

In the instant case, no negative connotation or blanket statement about the Hidalgos was ever made. The instances of membership evidence were shown for identification, motive, and res gestae. There was a connection between the evidence and the date of the murder. Nothing was introduced for gratuitous sake. Defendants' right to association was not violated, they were not prejudiced by the relevant testimony as its probative value outweighed any prejudice and the State did not seek to convict them just because they were Hidalgos. A limiting instruction was even given to the jury at the end of the trial. FCP 490-552, MCP 246-308, NCP 931-993, SCP 1179-1241 (instruction #8). The evidence was introduced for specific purposes. The trial court did not error.

- iii. **The fact that the trial court erred in failing to suppress a witnesses' fear of defendant is both raised in passing and incorrect.** (Pertains to Ford's assignment of error #12, adopted by McCreven, Nolan and Smith.)

An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Defendant Ford's assignment of error #12 says that the trial court abused its discretion in failing to suppress a witness' fear yet the assignment of error is not argued in the brief or the brief of any other defendant. Defendant Ford includes a discussion of the testimony of Ms. Blair on page 48-49 of his brief but does not specifically argue this point, instead seeming to lump this testimony in with above argument on the Hidalgos. First, this issue is raised in passing and should not be considered by this court. Second, the court struck the statement by the witness, which was non-responsive to the question asked. RP 733-34. In fact, Ms. Blair testified that she had no concerns about confronting defendants. RP 734. It's difficult to see how the court abused its discretion in failing to suppress a statement that it struck. Third, the statement had nothing to do with the Hidalgos or any such evidence. This court should decline to address this assignment of error.

3. CLEAR LEGISLATIVE INTENT IN AMENDING THE SECOND DEGREE MURDER STATUTE OVERRULED THE SUPREME COURT'S DECISION IN *ANDRESS* AND THE POST-*ANDRESS* STATUTE IS CONTROLLING.⁸
 - a. Defendants have failed to meet the heavy burden of proving the felony murder statute is unconstitutional.

A statute is presumed to be constitutional, and the party challenging it bears the burden to prove that it is unconstitutional beyond a reasonable doubt. *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). An appellate court reviews the constitutionality of a statute de novo. *Id.* Defendant Smith challenges the constitutionality of the statute that defines felony murder in the second degree when the predicate felony for murder in the second degree is assault claiming that the statute violates equal protection. None of the defendant's raised this issue in the trial court. Defendant has failed to demonstrate that the felony murder statute, when predicated on assault, violates equal protection.

The Equal Protection Clause of the United States Constitution's Fourteenth Amendment requires that all persons "similarly circumstanced

⁸ Defendant Ford assignment of error #20 states that the ruling in *Andress* should be overruled. The State agrees and submits that it has been overruled by the Legislature's amendments in 2003.

shall be treated alike.” The equal protection clause of state constitution, Article I, § 12, provides the same protection as the federal constitution. *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); *Tunstall v. Bergeson*, 141 Wn.2d 201, 225, n. 20, 5 P.3d 691 (2000). The equal protection clause does not require equal treatment under the law for things that are different in fact or opinion. State legislatures have the initial discretion to determine what is “different” and what is the “same.” In exercising authority, states have substantial latitude to establish categories that roughly approximate the nature of the problem, where it is necessary for a state to balance competing public and private concerns and take into consideration the limited ability of the state to address every problem.

One of three standards of review is employed when analyzing equal protection claims. *State v. Shawn*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993).

Strict scrutiny applies when a classification affects a suspect class or threatens a fundamental right. *Intermediate or heightened scrutiny*, used by this court in limited circumstances, applies when important rights or semisuspect classifications are affected. The most relaxed level of scrutiny, commonly referred to as the *rational basis or rational relationship test*, applies when a statutory classification does not involve a suspect or semisuspect class and does not threaten a fundamental right.

State v. Manussier, 129 Wn.2d at 672-673 (emphasis in original).

Normally, the equal protection clause merely requires that a classification in some state action bears some fair relationship to a

legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d. 786 (1982). Essentially this means the state action will be upheld unless it is wholly irrelevant to the achievement of a legitimate state objective. The equal protection clause generally prohibits government from engaging in intentional or purposeful discrimination by giving disparate treatment to classes of individuals. *State v. Handley*, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). If there are reasonable grounds for distinguishing between those who are members of the class and those who are not, and the action applies equally to all members of the class, then the governmental action will be upheld unless the action is wholly irrelevant to the achievement of a legitimate state objective. If the action affects an inherently suspect class (race or religion) or a fundamental right, the state action will only be upheld if the State can demonstrate a compelling state interest. *Plyler*, 457 U.S. at 217, n.16. Intermediate scrutiny has generally only been applied to discriminatory classifications based upon gender and legitimacy (of children). *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 456 (1988). Washington courts have also considered socioeconomic status – the poor- to be a suspect class. See *State v. Coria*, 120 Wn.2d 156, 170, 839 P.2d 890 (1992).

Intermediate scrutiny will not be applied in an equal protection challenge involving classification that is not gender based unless the statute implicates both an important right and a semi-suspect class not accountable for its status. *City of Richland v. Michel*, 89 Wn. App. 765,

771, 950 P.2d 10 (1998); *In Re. Pers. Restraint of Runyan*, 121 Wn.2d 432, 448, 853 P.2d 424 (1993). Under intermediate scrutiny, a statutory classification must be substantially related to an important government objective.

The State agrees with defendant that in analyzing this claim, the rational basis test is the appropriate test to apply. See *State v. Armstrong*, 143 Wn. App. 333, 337-338, 178 P.3d 1048 (2008). Division I found that the inclusion of assault as a predicate felony on which the charge of felony murder may be brought was rationally related to a legitimate goal-punishing under the applicable murder statute those who commit a homicide in the course and in furtherance of a felony. *Armstrong*, 143 Wn. App. at 339-340. The purpose of the felony murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. *State v. Leech*, 114 Wn.2d 700, 708, 790 P.2d 160 (1990). Statutes that deter persons from committing felonies, in general, and homicides during the commission of a felony, in particular, promote the public peace and make the community safer for its citizens. This is a legitimate legislative goal and the felony murder statute is rationally related to this goal. Defendants' claim that the statute violates equal protection is without merit.

Defendants' further challenge the second degree felony murder statute on equal protection grounds, stating it gives the prosecution too much discretion in making a charging decision. The Washington Supreme

Court rejected this challenge as it pertained to the pre-1975 felony murder statute. *State v. Wanrow*, 91 Wn.2d 301, 312-313, 588 P.2d 1320 (1978). It held that there is no equal protection violation when the crimes that the prosecuting attorney has the discretion to charge require proof of different elements. *State v. Leech*, 114 Wn.2d 700, 711, 790 P.2d 160 (1990); *State v. Wanrow*, 91 Wn.2d at 311. As the elements of felony murder differ from those of first degree manslaughter there is no violation of equal protection. *State v. Parr*, 93 Wn.2d 95, 97, 606 P.2d 263 (1980). Divisions I and III of the Court of Appeals rejected this claim as it pertained to the former felony murder statute in effect from 1975 until 2003. *State v. Gilmer*, 96 Wn. App. 875, 981 P.2d 902(1999); *State v. Goodrich*, 72 Wn. App. 71, 79, 863 P.2d 599 (1993). Division I of the Court of Appeals has rejected this claim as it pertains to the current felony murder statute. *Armstrong*, 143 Wn. App. at 340-341. Further, in *State v. Gordon*, 153 Wn. App. 516, 527, 223 P.3d 591 (2009),⁹ Division I stated:

The statute achieves the legislature's express goal of punishing those who commit a homicide in the course of and in furtherance of a felony in the same manner as those who intend to kill. *Armstrong*, 143 Wn. App. at 340, 178 P.3d 1048. Including assault as a predicate felony is rationally related to achieving that objective. *Manussier*, 129 Wn.2d at 673, 921 P.2d 473. While this is certainly a harsh policy, and does vest immense discretionary power in the prosecutor, it is nevertheless a policy choice well within

⁹ The Supreme Court only accepted the State's petition for review on the aggravating factors issue. The Court denied the defendants' petitions for review and so the issues before this court are not pending before the Supreme Court.

the province of the legislature. See *Armstrong*, 143 Wn. App. at 340, 178 P.3d 1048.

No Washington court has ever found any merit to defendant's contention and the court should reject defendants' argument.

Defendants Smith and Ford also argue that there is no difference between the elements in manslaughter in the second degree and felony murder when it is predicated on assault in the second degree.

Manslaughter in the second degree requires proof that the defendant: 1) engaged in conduct of criminal negligence, and 2) that a person died as a result of the defendant's negligent acts. RCW 9A.32.070(1); WPIC 28.06. The elements of manslaughter do not require proof of reckless infliction of "substantial bodily harm" or assault with a deadly weapon which must be shown for a felony murder conviction predicated on assault in the second degree. The elements of the two offenses are not the same so there is no violation of equal protection.

It is important to note that a person who causes an unintentional death while in the course of committing a felony is not in the same position as a person who causes an unintentional death. A person who causes an unintentional death while engaged in felonious activity has a greater degree of culpability than someone who causes a death recklessly or negligently but is not engaged in felonious conduct. This is not a matter of differing punishments for similarly situated persons. The Washington Supreme Court found the felony murder statute constitutional in *Wanrow*

and the current version of this statute is the functional equivalent of the statute upheld in *Wanrow*. Defendants' have failed to meet their burden of proving the statute is unconstitutional and their challenge must be rejected.

b. RCW 9A.32.050(1)(b) is not ambiguous.

The court's primary duty in interpreting any statute is to discern and implement the intent of the legislature. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). The court starts with "the statute's plain language and ordinary meaning." *Id.* When the plain language is unambiguous, in that the statutory language admits of only one meaning, the legislative intent is apparent and the statute needs no construction. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Courts may not add words or clauses to an unambiguous statute when the legislature has chosen not to include that language; nor may courts delete language from an unambiguous statute. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The plain meaning of a statute may be discerned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002); *State v. Clausing*, 147 Wn.2d 620, 630, 56 P.3d 550 (2002) (Owens, J., dissenting).

Up until the decision in *In Re Personal Restraint Petition of Address*, 147 Wn.2d 602, 56 P.3d 981 (2002), the Washington State

Supreme Court consistently rejected arguments that the merger doctrine should preclude the use of a felony assault as a predicate crime for felony murder. *State v. Wanrow*, 91 Wn.2d 301, 588 P.2d 1320 (1978); *State v. Roberts*, 88 Wn.2d 337, 344 n.4, 562 P.2d 1259 (1977); *State v. Thompson*, 88 Wn.2d 13, 558 P.2d 202, *appeal dismissed for want of federal question*, 434 U.S. 898 (1977); *State v. Harris*, 69 Wn.2d 928, 421 P.2d 662 (1966). These decisions made it clear that the use of assault as a predicate felony presented an issue that was a question of legislative intent rather than of a constitutional dimension. See *Thompson*, 88 Wn.2d at 17-18.

But in *In Re Personal Restraint Petition of Andress*, the Court made it clear that the comments it had made in *Wanrow*, *Thompson*, and *Roberts* were not equivalent to actually analyzing the changes to the statutory language and held that it had not, in fact, previously analyzed whether the changes to the statute enacted in 1975 somehow signaled a legislative intent to exclude felony assault as a predicate for felony murder. *Andress*, 147 Wn.2d at 609-616. The Court in *Andress* interpreted that the legislative addition of the “in furtherance of” language to the felony murder statutes signaled an intent by the legislature to remove assault as a predicate felony from the felony murder rule. *Id.* at 616.

Following the *Andress* decision, the legislature amended the second degree felony murder statute, effective February 12, 2003, to

expressly declare that assault is included among the predicate crimes under the second degree felony murder statute. Laws of 2003, ch. 3, § 2. The statute proscribing felony murder in the second degree now reads, in the relevant part:

(1) A person is guilty of murder in the second degree when:

(b) He or she commits or attempts to commit any felony, **including assault**, 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 she, or another participant, causes the death of a person other than one of the participants;

RCW 9A.32.050 (emphasis added). At the same time the legislature enacted an intent statement; it stated, in part:

The legislature finds that the 1975 legislature clearly and unambiguously stated that any felony, including assault, can be a predicate offense for felony murder. The intent was evident: Punish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony. This legislature reaffirms that original intent and further intends to honor and reinforce the court's decisions over the past twenty-eight years interpreting "in furtherance of" as requiring the death to be sufficiently close in time and proximity to the predicate felony. The legislature does not agree with or accept the court's findings of legislative intent in *State v. Andress*, [sic] Docket No. 71170-4 (October 24, 2002), and reasserts that assault has always been and still remains a predicate offense for felony murder in the second degree.

Laws of 2003, ch. 3, § 1. Whether a felony assault can act as a predicate for felony murder is a question of legislative intent. For crimes committed after February 12, 2003, it is beyond dispute that the legislature intended

felony assault to be a predicate crime for felony murder. It is also clear that the Legislature did not agree with the *Andress* court's interpretation of its prior intent and sought to nullify the impact of the *Andress* decision with the 2003 amendment. Thus, Defendant Smith's argument, which seeks to interpret the current felony murder statute in accord with the principles stated in the *Andress* decision, ignores the legislative statement of intent. The legislature did not want to incorporate the principles announced in *Andress*, it wanted to render them moot.

In Washington, the determination of whether felony assault can be a predicate felony for the felony murder statute has always been an issue of legislative intent rather than a constitutional question.

[W]e are now firmly convinced that adoption of the merger doctrine is not compelled either by principles of sound statutory construction or by the state or federal constitutions, and that adoption of the doctrine by this court would be an unwarranted and insupportable invasion of the legislative function in defining crimes. We therefore reaffirm this court's refusal to apply the doctrine of merger to the crime of felony-murder in this state.

Wanrow, 91 Wn.2d at 303. Apparently, the Legislature does not agree with the majority opinion in *Andress* that including assault as a predicate felony for felony murder leads to "absurd results." The "legislative branch has the power to define criminal conduct and assign punishment for such conduct." *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing *Whalen v. United States*, 445 U.S. 684, 689, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)). Division I in *Gordon* reviewed the exact issue raised by

defendant and found that the statute was not ambiguous. *Gordon* at 529. They also went on to say that even if they did find it to be ambiguous and looked at the Legislative intent, it is clear that the Legislature “want assault to be a predicate felony.” *Id.* The Legislature has made its intent clear with regard to whether it wants felony assault to function as a predicate offense for the felony murder statute. Defendants ask this court to overstep its bounds by invading the province of the legislature. This court should decline such an invitation to violate the separation of powers.

4. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANTS FORD AND MCCREVEN GUILTY OF MURDER IN THE SECOND DEGREE. IN ADDITION, A UNANIMITY INSTRUCTION WAS NOT REQUIRED WHERE THERE WAS A CONTINUOUS COURSE OF CONDUCT.

- a. There was sufficient evidence to find defendants Ford and McCreven guilty of murder in the second degree. (Pertains to Ford’s assignments of error #1 & 2, issue #1, and McCreven’s assignment of error #11, issue #11)

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the

State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

“Evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence.” *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965).

“Flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution.” *Id.* The law does not define what circumstances constitute flight and as such, what may be shown as evidence of flight is broad. *State v. Jefferson*, 11 Wn. App. 566, 571, 524 P.2d 248 (1974).

“The State need not show that the principal and accomplice share the same mental state.” *State v. Bockman*, 37 Wn. App. 474, 491, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984). As long as the jury is unanimous that the defendant was a participant, it is not necessary that the jury be unanimous as to whether the defendant was a principal or an accomplice where there is evidence of both manners of participation. *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974), *overruled on other grounds in State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984), *see also State v. Munden*, 81 Wn. App. 192, 196, 913 P.2d 421 (1996).

The Supreme Court summarized its cases addressing what must be shown regarding an accomplice’s mental state in order for the accomplice

to be liable for the principal's acts. *In re Personal Restraint of Domingo*, 155 Wn.2d 356, 119 P.3d 816 (2005). The Court began with the premise that the complicity statute, RCW 9A.08.020, requires that a defendant charged as an accomplice must have general knowledge of the charged crime in order to be convicted of that crime, but that specific knowledge of the elements of a co-participant's crime is not required. *Id.* at 358, 364. The court established these principles in *State v. Davis*, 101 Wn.2d 654, 682 P.2d 883 (1984), and *State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984). Davis had stood lookout while his associate held up and robbed a pharmacy. Davis claimed that he did not know that his associate was armed and thus could not be convicted as an accomplice to first degree (armed) robbery. But the Supreme Court rejected this argument holding that Davis was validly convicted as an accomplice to first degree robbery even if he did not know the principal was armed because the State proved he had general knowledge that he was aiding in the crime of robbery. *Davis*, 101 Wn.2d at 658. The facts of *Rice* are even more relevant to the issues in the case now before the court. Rice and his codefendant Luna were charged and convicted of felony murder predicated on second degree assault. After discussing whether the two defendants were charged as principals or accomplices, the court noted that ultimately it did not affect their liability for the crime. It made the following statement on the nature of accomplice liability in this context:

[W]here criminal liability is predicated on the accomplice liability statute, the State is required to prove only the accomplice's general knowledge of his coparticipant's substantive crime. Specific knowledge of the elements of the coparticipant's crime need not be proved to convict one as an accomplice. Consequently, even assuming Rice and Luna were charged as accomplices to felony murder, the State would only have been required to prove their knowledge of their coparticipant's criminal assault on the victim. *It would have been unnecessary for the State to prove the defendants' actual knowledge of their coparticipant's possession of a deadly weapon or his mental intent.*

Rice, 102 Wn.2d at 125-126 (emphasis added). In *In re Pers. Restraint Petition of Domingo*, 155 Wn.2d 356, 119 P.3d 816 (2005), the Supreme Court noted that, despite some contrary opinions expressed in decisions from the Court of Appeals, that it has never departed from the principle expressed in *Davis* and *Rice*. *Domingo*, 155 Wn.2d at 365-367; *see also*, *State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) (to prove accomplice liability for crime of assault in the first degree, State had to show defendant possessed general knowledge that he was aiding in the commission of the crime of assault) .

In the instant case, the jury was instructed that to convict defendants of the crime of murder in the second degree (felony murder) as charged in Count I, the following elements had to be proved beyond a reasonable doubt:

(1) That on or about the 5th day of April, 2008, the defendant or an accomplice committed or attempted to

commit the crime of Assault in the Second Degree against Dana Beaudine;

(2) That the defendant or an accomplice caused the death of Dana Beaudine in the course of and in furtherance of such crime or in immediate flight from such crime;

(3) That Dana Beaudine was not a participant in the crime of Assault in the Second Degree or an attempt to commit Assault in the Second Degree; and

(5) That any of these acts occurred in the State of Washington.

FCP 490-552, MCP 246-308, Instruction #s. 34 (McCreven) and 37

(Ford). The jury was also given an instruction on accomplice liability.

See Id., Instruction #20.

In the instant case, there was sufficient evidence for the jury to find that defendant McCreven was guilty of murder in the second degree. Mr. Howden testified that four men, besides the victim and Mr. James, were involved in the fight. RP 208, 340. Ms. Diamond also testified that there were four men in leather jackets and vests. RP 344. Ms. Diamond saw those same men in the parking lot fighting. RP 362-63. Two men pushed the victim into the parking lot and then other two joined and all were fighting. RP 362-64. The victim was held down while he was punched. RP 312-13, 364-65, 496. Ms. Diamond identified the four defendants as the ones she saw that night. RP 356. Ms. Ford recalled defendant Ford making a phone call during the glaring incident in the bar. RP 1006, 1008, 1058, 1195. Ms. Ford recalled that Ms. Blair and Mr. James acknowledged

one of the men and called him Mike. RP 985. Ms. Hutt also told the liquor board that she served four Hidalgo bikers that night and identified the four defendants as being part of that group. RP 2524, 2549, 2566-67, 2592. Defendants McCreven, Nolan, and Ford would always come into the bar together. RP 2553.

Defendants McCreven and Ford were both identified as being in the group of Hidalgo bikers in the bar. They were also identified by Ms. Diamond as being part of the four men she saw involved in the fight. The testimony of the witnesses was that all of the men involved were punching and beating up on the victim. There was evidence that the two defendants were involved in the fight. The fact that no one was able to identify the two defendants by name is irrelevant.¹⁰ Defendants matched the descriptions given by witnesses and were identified as being in the bar that night. Defendant McCreven was identified as wearing a Hidalgo patch that night. RP 1440. Defendant Ford was not described as wearing his jacket in the bar but that does not mean he did not put it on when he left. It is a reasonable inference that in the bar, he had his jacket off. There was evidence that defendants participated in the fight that killed the victim.

Boots with blood on them were found in defendant McCreven's bedroom. RP 906-08. In addition, defendant McCreven's girlfriend

¹⁰ Ms. Blair only testified that she didn't know if defendant McCreven was involved not that he was not involved. RP 1622.

testified that he came home that night with defendant Nolan and had a smear of blood on his chaps. RP 1468, 1471. Defendant McCreven told her that the blood was from a fight and the other guy had a little cut on his head. RP 1469. A bandana with skulls on it, like the one described by Ms. Ford, was found in defendant McCreven's saddle bag with a knot tied in it. RP 435, 1310. His burgundy motorcycle also had been moved from his house to his sister's house. RP 1256-67.

Defendant McCreven admitted to being in a fight to Ms. Dobiash. In addition, he was wearing a skull bandana as described by at least one witness and had blood on his chaps and blood on his boots. This evidence further supports that defendant McCreven was involved in the fight. Defendant McCreven also left the scene on his burgundy motorcycle before the police arrived. This is evidence of consciousness of guilt.

A tall stocky man with a crew cut held up his hand to Mr. James and Mr. James backed away from the fight. RP 210. Mr. Howden said that three men were wearing Hideos jackets. RP 212. One of those men was a big guy with a crew cut. RP 208. The only person who described defendant Ford as wearing dress clothes was Ms. Hutt. RP 2535. Ms. Ford testified that he was wearing grayish jeans and a long sleeve grayish shirt. RP 423, 1124-25. Ms. Hutt was the only one who testified that it was fist fight between two men and that she was the one who broke it up. RP 2530, 2578. Ms. Hutt also testified that she told defendant Ford to leave because she was calling the cops and that defendant Ford could have

been the person that told defendant Nolan they needed to leave. RP 2585-88.

Defendant Ford was identified as the man who stopped Mr. James from coming to the victim's aid in the fight. The description of a heavy set, clean cut man with a crew cut fit defendant Ford and no one else.¹¹ Again, since all reasonable inferences have to be in favor of the State and drawn against defendants, the reasonable inference here is that Mr. Ford was aiding when he stopped Mr. James from assisting the victim. Further, Ms. Hutt testified that she told defendant Ford to leave because she was calling the cops. If defendant Ford was not involved, he would have no reason to be warned by his friend to leave or for him to encourage others, like Mr. Nolan, to leave the scene. This is evidence of flight and is evidence of consciousness of guilt.

Whether or not defendants were aware there was a knife involved is also not relevant as the case law above shows. They were aware there was a fight and participated in it. Contrary to defendant Ford's assertion

¹¹ Defendant Ford argues that there were several men that met defendant Ford's description. Brief of Ford, page 26. However, despite the list of cites to the record given, only a couple contain any descriptions of men. RP 767 concerns a man named Cameron who was 250 pounds with short hair and who it was determined was not at the bar. The person who put Mr. Stilton at the bar was Ms. Dobiash who testified that he was there with defendant McCreven, however, Ms. Dobiash was not at the Bull's Eye that night. RP 2072-73, 2085. Further, Mr. Stilton was described as having short brown hair with a medium build, about 220 pounds. RP 1487, 1522, 2132-33. However, defendant Ford was described as 300 pounds with short, gray hair. RP 1010-2203. He was repeatedly described as heavy set. The two descriptions do not match and there was no clear evidence that Mr. Stilton was even at the bar that night.

in his brief, there was absolutely no evidence that the victim ever brandished a knife. The evidence was such that the victim likely owned the knife but the evidence showed that he was jumped and held down. There was no evidence that he had an opportunity to draw a knife. Again, construing all the evidence in the light most favorable to the State, it is not a reasonable inference that the victim brandished a knife.

When looking at the totality of the evidence, the jury had sufficient evidence to convict both defendants Ford and McCreven of murder in the second degree. This was not a case where, as defendants argue, the two defendants were convicted just because they were *Hidalgos*. Both defendants were identified by witnesses as not only being in the bar that night but also being involved in the fight. There was sufficient evidence for the jury to find them guilty.

- b. A unanimity instruction was not required as the assault was a continuous course of conduct. (Pertains to Ford's assignment of error #3, Issue #2, adopted by McCreven and Nolan)

In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the facts show two or more criminal acts that could constitute the crime charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified

criminal act. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). A separate unanimity instruction is not required, however, where the criminal acts are merely part of a continuing course of conduct. *Crane*, 116 Wn.2d at 330. Evidence tends to indicate a continuing course of conduct if each of the defendant's acts promotes one objective and occurred at the same time and place. See *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395, review denied, 129 Wn.2d 1016, 917 P.2d 575 (1996). "To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner." *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). In *Crane*, the Supreme Court held that the "continuous course of conduct" exception applied to an assault that occurred during a two-hour span. 116 Wn.2d at 330.

When spatial and temporal separations between acts are short, they can be said to be a continuing course of conduct. See *Love*, 80 Wn. App at 361 (citing *Petrich*, 101 Wn.2d at 571). When making this inquiry, the court looks to each of the acts that constitute the same course of conduct that make up one criminal charge. *Id.*

Defendant Ford's conduct meets the definition set out in *Love*, because he assisted with a single enterprise with one objective. The fight was one continuous event with punches being thrown, the victim being held down, hit with a sap, and eventually stabbed and the series of events were inextricably linked and were done with the same objective: the

ultimate death of the victim. The testimony was such that no one could testify when the knife was introduced into the fight. There were not two separate fights, there was one fight, one continuous course of conduct that involved the victim being assaulted with hands, a sap, and a knife. The fight was short and took anywhere from a couple minutes to 10 minutes. The State did not separate any acts out because they were the same course of conduct. A unanimity instruction was not required.¹²

Even if the court finds that there were two separate acts as defendant argues, a fist fight and knife fight, there was still sufficient evidence of both assault inflicting substantial bodily harm and assault with a deadly weapon. The victim was beaten by several different men and was held down while he was punched. RP 312-13, 364-65, 496. The medical examiner testified that the victim had blunt force injury to his head that resulted in a one inch laceration and had scrapes and contusions on his body. RP 1654-55. In addition, the victim had multiples stab wounds to his torso and neck. RP 1675, 1662-63, 1690. There was sufficient evidence of both means of assault. No unanimity instruction was required.

¹² It should be noted that none of the defendants requested such an instruction at the trial court level and no defendant raises this as an ineffective assistance of counsel issue on appeal.

5. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION TO SEVER AS DEFENDANTS FAILED TO MEET THEIR BURDEN IN SHOWING SEVERANCE WAS NECESSARY FOR A FAIR TRIAL.

Washington law disfavors separate trials. *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). The granting or denial of a motion for severance of jointly charged defendants is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Alsup*, 75 Wn. App. 128, 131, 876 P.2d 935 (1994); *State v. Barry*, 25 Wn. App. 751, 611 P.2d 1262 (1980). Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). To support a finding that the trial court abused its discretion, the burden is on the defendant to come forward with facts sufficient to warrant the exercise of discretion in his favor. *State v. Alsup*, 75 Wn. App. 128, 876 P.2d 935 (1994). Severance is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial. *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982), *cert. denied sub nom, Frazier v. Washington*, 459 U.S. 1211 (1983), *overruled on other grounds by State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994). Defendants seeking a separate trial must demonstrate manifest prejudice in a joint trial which

outweighs the concern for judicial economy. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

A trial court has the discretion to grant a motion to sever defendants whenever it is “deemed appropriate to promote a fair determination of the guilt or innocence of a defendant.” CrR 4.4(c)(2). Under this rule, separate trials are not favored, and the defendant bears the burden of proof that a joint trial is so manifestly prejudicial as to outweigh concerns for judicial economy. *State v. Jones*, 93 Wn. App. 166, 171, 968 P.2d 888 (1998), *review denied*, 138 Wn.2d 1003 (1999).

A defendant can demonstrate specific prejudice by showing: “(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 inculcating 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).

Existence of mutually antagonistic defenses is not alone sufficient to compel separate trials. *State v. Hoffman, supra; State v. Davis*, 73 Wn.2d 271, 438 P.2d 185 (1968). The defense must demonstrate that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. If the defendants agree on the details leading up to the shooting, but

disagree on who killed the victims, the conflict is not sufficient to warrant a severance. *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982). All of the participants in a crime will invariably be in conflict when all are tried for that crime. If such conflicts are regarded as requiring separate trials, then joint trials will be the exception and not the rule. *State v. Grisby, supra*. If defenses are inconsistent, they are not necessarily irreconcilable. To be irreconcilable, and thus mutually antagonistic, they must be “mutually exclusive to the extent that one must be believed if the other is disbelieved.” *State v. McKinzy*, 72 Wn. App. 85, 90, 863 P.2d 594 (1993).

A jury is presumed to follow a court’s instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Some presumptions must be indulged in favor of the integrity of the jury and their ability to follow limiting instructions and scrutinize cases separately. If the courts were to assume that jurors are so quickly forgetful of duties of citizenship as to stand “continually ready to violate their oath on the slightest provocation[,]” the inevitable conclusion is that trial by jury is a farce. *State v. Pepoon*, 62 Wash. 635, 644, 114 P.2d 449 (1911).

The fact that some evidence may be admitted against one defendant which is inadmissible against another is not in itself a sufficient reason for multiple trials growing out of a closely related series of transactions. Such evidence does not automatically negate a fair trial. *State v. Courville*, 63 Wn.2d 498, 387 P.2d 938 (1963); *State v. Walker*, 24 Wn. App. 78, 599 P.2d 533 (1979).

In the instant case, defendant Ford argues that the gross disparity in evidence and inability of the jury to be able to separate the evidence against the defendants prejudiced him.¹³ Defendant McCreven argues that he and defendant Ford had antagonistic defenses and that there was a gross disparity between the evidence against defendant McCreven and the evidence against defendants Nolan and Ford.

The trial court did not abuse its discretion in refusing to sever defendants' cases. There was differing evidence as to each defendant but in terms of it being too complex for the jury to separate, it was not. There was evidence related to each defendant separately. Each defendant was described separately by a number of witnesses. RP 208, 212, 356, 422-6, 462,463,648, 6/4/09 RP 6-8. In addition, each defendant identified as being involved in the fight. RP 362-64. There was also individualized evidence for each defendant. Defendant Smith was identified as the one who initially grabbed the victim. RP 1022, 1026, 1082-83. Defendant Nolan was the one who had grabbed the sap. RP 1036, 1039, 1472-74. Defendant McCreven was identified as being in the bar and also told his girlfriend that he had been in a fight. RP 435, 1469. Defendant Ford was the person who had been on the phone in the bar earlier and who held up his hand to keep Mr. James out of the fight. RP 210, 1006, 1008, 1058,

¹³ It should be noted that defendant Ford initially did not join in the motion to sever. 3/13/09 RP 18.

1195. The evidence was not, as defendant suggests, that just because they were all members of the Hidalgos they all did it and were guilty. If that were the case, the jury would have, by defendants' logic, convicted all four defendants of assault in the second degree as well. Since they did not, it shows that the evidence was not so massive or complex that the jury could not separate defendants. Each defendant was identified at some point during testimony as being present at the bar that night and playing a role in the fight.

Further, the jurors were specifically instructed that certain pieces of evidence only apply to one defendant. FCP 490-552, MCP 256-308, NCP 931-993, SCP 1179-1241, Instruction #5. As noted above, if courts are to assume that jurors violate their oath at a moment's notice then the concept of trial by jury becomes a farce. The jury is presumed to follow the court's instructions. The evidence was not so massive or complex that it was impossible to separate out each defendant's role.

Further, there was not a gross disparity in evidence such that separate trials were required. Each defendant was identified and each had a different part in the incident. The fact that different defendants played different roles does not equate with a gross disparity. Rather it shows that each defendant had a different role and that they were not all grouped in as guilty simply because they were a member of the group. This is not a case where defendant McCreven or defendant Ford were not identified as being at the Bull's Eye on the night of incident and were named as defendants

just because they ride with the other two. All four defendants were identified as being at the Bull's Eye on the night of the incident and all identified as playing some part in the fight that lead to the victim's murder. The jury was instructed that each defendant was charged separately and they were to consider the evidence against each defendant separately. FCP 490-552, MCP 256-308, NCP 931-993, SCP 1179-1241, Instruction #7. The jury is presumed to follow that instruction.

Finally, the defenses of defendant McCreven and defendant Ford were not mutually antagonistic. In order to believe one, the jury was not required to disbelieve the other. Defendant McCreven cites several pages in the trial transcript which he believes show that defendant's Ford's defense was inconsistent with the defense of defendant McCreven. Brief of McCreven, page 78.¹⁴ However, none of those pages bear that out. The fact that defendant Ford clarified with some witnesses as to the fact that three people in the incident were identified as wearing bikers jackets with red and yellow patches does not make the defenses mutually antagonistic. RP 257, 333, 1410-11. There is nothing in the record to suggest that anyone presented any defense that was antagonistic. Any inconsistencies in the defenses were not so much as to make them irreconcilable. The defenses were not such that believing one defense required the jury to

¹⁴ RP 157 is the State's opening and has nothing to do with what defendant Ford argued.

disbelieve another. Defendants have not met their burden in showing that the trial court abused its discretion in denying their motion to sever.

6. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577

(1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, *citing Gentry*, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) *citing State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). “Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Russell*, 125 Wn.2d at 86, *citing State v. Dennison*, 72 Wn. 2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

In the instant case, each defendant makes numerous arguments as to prosecutorial misconduct.

- a. The State did not willfully violate the motions in limine and any violations did not prejudice defendants. (Pertains to Ford's issue #4 [no assignment of error]¹⁵, and McCreven's assignment of error #2, issue #2)

Defendants Ford and McCreven argue that the State committed misconduct by violating motions in limine.¹⁶ Both defendants argue that the State violated the motions in limine and committed prosecutorial misconduct when three different witnesses early on in the trial used the word victim a total of five times. Brief of Ford, page 72, Brief of McCreven, page 57. The State told the court that she was sorry about the using the word herself once and it was because she had never had such a ruling before. RP 352. The State indicated she would watch herself and inform all of her witnesses. RP 352. The instances that defendants point to occurred on April 21, 22, and 23 which were in the first three days of trial. There were no other instances past that date on the part of the

¹⁵ The State is addressing this issue since defendant McCreven assigned error to it.

¹⁶ Defendant Ford argues that the State violated the motions in limine regarding association evidence by admitting photos of defendants. However, that issue has already been addressed in Issue #2 above concerning the admission of evidence. As the trial court deemed the photos admissible, there was no violation of a motion in limine or evidence of prosecutorial misconduct.

State.¹⁷ The use of the word by the State and the State's witnesses was not intentional and was also very limited in terms of the amount of evidence and length of the trial. The State did not intentionally violate the court's order and obviously worked hard to fix the problem since the instances were limited and contained to early in trial. Defendant cannot show they were prejudiced by the use of the word victim. Mr. Beaudine was clearly the victim of a homicide. Using the term did not mean prove that defendants had killed him. It also did not show that the homicide was not justified. Simply put, Mr. Beaudine was the victim of a homicide. Using that term did not make defendants any more or less guilty. Such an isolated use of the word and the fact that the word was not prejudicial means that defendants cannot meet their burden of proving misconduct.

Defendants Ford and McCreven also argue that the State committed misconduct when Ms. Dobiash used the word gang. RP 1457. However, the State's question was not designed to elicit such a response.

State: And when that search warrant was read to you, do you remember being told that one of the things that they were looking for were items of clothing that had the Hidalgos insignia?

Ms. Dobiash: No, they did not say that to me.

State: You don't remember them saying that?

Ms. Dobiash: No, I read it. They didn't read it, I read it. It was any kind of weapons, gang —

¹⁷ The only other incident happened when counsel for defendant McCreven asked a question during cross-examination and the witness used the word victim in his answer. RP 1751.

Ms. High: Objection, Your Honor,

The Court: Objection sustained.

RP 1457. The State did not intend to elicit that evidence at all. The word was isolated and did not indicate that there was any gang evidence at Ms. Dobiash's house. Similarly, the State did not intend to elicit the mention of the word weapons and again, there was no evidence that any were found at Ms. Dobiash's house.¹⁸ The violation of the motion was not intentional and was dealt with quickly and without drawing undue attention to the remark. Defendant cannot show prejudice or misconduct.

- b. The State did not coach witnesses and the trial court did not abuse its discretion in finding that the inadvertent annotations did not influence the witnesses. (Pertains to McCreven's assignment of error #2, issue #2 and Ford's assignment of error #8, adopted by McCreven, Nolan and Smith)¹⁹

This issue is also discussed below in issue #11 of this brief. There is no evidence that the State coached the witnesses with police reports. When it was brought to their attention that four exhibits used to refresh

¹⁸ Defendant Ford also argues that the State violated the motion in limine with regards to knives when Detective Donlin testified. However, the State addresses that issue below in issue #9. Further, the State did advise Detective Donlin and he made a mistake. RP 1596. There was no prosecutorial misconduct.

¹⁹ Defendant Ford assigns error to this issue but does not argue it in his brief. Since it is raised in passing the State would not normally address it but since defendant McCreven properly assigned error and argued the issue, the State will address it.

four witnesses recollection had writing on them, the State was surprised. In fact, the State originally thought the attorney for defendant Smith had made the annotations. RP 857. However, upon further investigation, it became clear that co-counsel for the State had handed up her copies of the reports that had writing on them. RP 747, 854-55, 857. It appeared to be a miscommunication between the two attorneys. The State indicated that they did not know the reports had been handed up with annotations and that it was completely inadvertent. RP 856. They also promised that they would look at all future exhibits carefully and that it would not happen again. RP 857. There is no evidence that the State used these reports to elicit answers from the witnesses.

Further, the trial court made a through review of the exhibits, their annotations and how they affected each witness who used them. Given the limited annotations, the content of the annotations and the way the exhibits were used for each person, the trial court found that defendants had failed to meet their burden both in showing arbitrary conduct on the part of the State as well as any actual prejudice. RP 861. The trial court's ruling was based on a thorough analysis of the evidence and the actual annotations. The State did not intentionally use the exhibits and there is no evidence that the exhibits influenced the witnesses answers in any way. Nor was there any evidence that the State purposely used the statements to coach the witnesses. There is nothing that shows that the

trial court's ruling was an abuse of discretion. There was no prejudicial misconduct.

In addition, while the State seemed to have potentially violated CrR 4.7 by allowing Mr. Howden to take home a copy of his transcript, defendant cannot show prejudice from this. The exhibit the witness reviewed was a copy of the transcript of his own interview. RP 853-54, Exhibit 193. There has been no argument that the witness was not allowed to view the exhibit prior to testifying only that it was supposed to remain in control of the State. Whether he reviewed the exhibit in the office of the State or at home, he was allowed to review his own transcript. So while the State committed a technical violation of the rules, defendant cannot show prejudice and there is no basis for reversal.

- c. The State's questions were not improper and did not prejudice defendant. The State did not mislead the court. (Pertains to McCreven's assignment of error #2, issue #2; Ford's assignment of error #9, issue #4 and Smith's assignment of error #7, issue #2)

A prosecutor's allegedly improper questioning is reviewed in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including

inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, __ U.S. __, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).

Defendant McCreven argues that the State bolstered Ms. Abbott's credibility by twice asking if she remembered seeing something or was making it up. RP 513, 514. However, there were no objections to either of these questions. As the questions were in redirect after defense counsel had spent a good amount of time cross-examining her on what she remembered and what she had told officers, these questions were in response to the questions of defense counsel. They were not a personal opinion on credibility. There was no misconduct.

Defendant Smith argues that the State tried to mislead the jury about the victim's character with its questions of Detective Laliberte. RP 1745-46. However, the questions were in redirect and in response to questions asked by defendant McCreven's attorney during cross-examination. In addition, the two questions that the State asked about the unusual behavior of the victim were sustained by the court. RP 1746-47. There was no prejudice here as any objections to improper questions were

sustained by the trial and the testimony that came from the properly asked questions was that the detective had no information about any confrontation in the bar. There is no misconduct and no prejudice.

Finally, as to Ms. Dobiash, defendant McCreven objected when the State asked, “Ms. Dobiash, other than your testimony that these are the chaps that he wore that night, Mr. McCreven wore that night, there is no way to know for sure, is there?” RP 1921. The witness testified that she was under oath. RP 1921. This did not implicate defendant’s right to silence or shift the burden. Ms. Dobiash had already testified that her son had also worn the chaps so there were others who could have testified. Again, the State asked the question after the trial court ruled that they could. The State did not commit misconduct.

The State also did not mislead the court in terms of the court order on Ms. Dobiash. This issue is also addressed in issue #11 below. There was no evidence of misconduct by the State since the State truly thought the court had ordered Ms. Dobiash to cooperate. RP 2182. The trial court did give a limiting instruction as instruction #10. FCP 490-552. There was no evidence of misconduct or prejudice to defendant.

Evidence that a defendant threatened a witness is admissible to imply guilt. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997), citing *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945).

However, if no connection is made between the fear and the defendant, then the evidence should be considered only to evaluate the witness's credibility. *Id.*

In the case of questioning of Ms. Blair, the State started to ask a question related to what Ms. Blair had told police and defendant McCreven objected. RP 721. Extensive argument was held outside the presence of the jury. RP 721-730. The trial court ruled that since the State was not going to elicit any testimony about an alleged death threat or retaliation and was only going to address that the witness didn't want to confront anyone, there was no prejudice to defendants. RP 730.

The witness then testified that even if she was put somewhere where no one could see her, she could still not identify any of the defendants. RP 733. She also indicated that even if she told the officers that she didn't want to confront these people she was wasted on the night of the murder and does not remember what she said. RP 734, 736. The witness then testified twice that she was not concerned about confronting defendants. RP 734, 735. The State's questions were in line with the court's ruling which makes it difficult to see how they are misconduct. In addition, the witnesses answer showed more indifference than fear and she was clear that she was not concerned about confronting defendants in this case. Defendant has not shown prejudicial misconduct.

- d. The State did not argue from facts not in evidence. (Pertains to Ford's assignment of error #7, issue #4, adopted by Nolan)

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).

The court instructed the jury:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

FCP 490-552, NCP 931-993, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02.

In the instant case, defendant Ford alleges that the State argued many facts not in evidence during closing argument. Brief of Ford, pages 65-66. However, none of the statements that defendant points to were objected to by defendant. As such, defendant had to prove that the statements are flagrant and ill-intentioned. Defendant cannot meet this burden. All of the statements that defendant cites were logical inferences from the evidence. Defendant may not agree with the State's inference but

that does not mean that the State argued facts that were not in evidence. The State is entitled to make logical inferences from the evidence presented. The State did not call defendant names or engage in any inappropriate behavior as distinguished from the case that defendant relies on, *State v. Rose*, 62 Wn.2d 309, 382 P.2d 513 (1963). Further, if any of the statements were not supported by the evidence adduced at trial then the jury is presumed to disregard that statement. Defendant has not met his burden of proving prosecutorial misconduct.

- e. The prosecutor did not vouch for the credibility of the State. (Pertains to Ford's issue 4 (no assignment of error))²⁰

As noted above, the State is entitled to respond to the defense arguments. In rebuttal closing the State argued:

Mr. Schwartz: Mr. Schwartz said things weren't tested, and other attorneys have said it as well, and that's true. Counsel said, didn't the prosecutor, didn't the police want to know who was involved? Ladies and gentlemen, is this a "who done it" case? Do you really have a reasonable doubt as to whether or not the State got the right four guys? Do you believe that there are other four Hidalgos members out there running around in Washington that the State has not apprehended?

²⁰ Where no assignment of error has been made, the court will generally not consider a claimed error. See *Painting and Decorating Contractors of America v. Ellensburg School District*, 96 Wn.2d 806, 814-815, 638 P.2d 1220 (1992) (applying RAP 10.3(g)). The State only briefly addresses this issue since it was not properly raised.

RP 2932. No defendant objected to this statement. The State was clearly responding to the arguments made by defense counsel. The statement is not improper but even if it was, it was in response to defense counsel and was not flagrant or ill-intentioned. Defendant cannot show misconduct.

- f. The State's comments about defense counsel did not prejudice defendant and do not warrant reversal. (Pertains to Ford's issue #4 (no assignment of error)²¹, Nolan's assignment of error #5, issue #5, adopted by McCreven and Smith)

Generally, an attack by the prosecutor on defense counsel is not sufficiently prejudicial to warrant reversal of a conviction. *State v. Van Luven*, 24 Wn.2d 241, 163 P.2d 600 (1945). The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant's arguments. See *Russell*, 125 Wn.2d at 85-86.

A prosecutor does not shift the burden of proof when they argue that a defendant's version of events is not corroborated by the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). "The State is entitled to comment upon quality and quantity of evidence presented by the defense. An argument about the amount or quality of evidence

²¹ Again, the State is addressing this as defendant Nolan assigned error to the issue.

presented by defense does not necessarily suggest that the burden of proof rests with the defense.” *Id.*

Defendant Nolan argues that the State disparaged defense counsel in rebuttal closing:

State: Ms. High and Mr. Fricke, they want it both ways. Wasn't involved. But if you believe that he was involved, then it was self-defense. Or defense of another. Well, which is it? Was he involved, or was he not involved? Was he involved in assaulting Dana, and was that assault justified, justified because he was defending himself or defending another? Or did he just stand aside, as Mr. Berneburg would have you believe Mr. Ford did during the whole incident, stood by, and watched while other four men dressed in leathers, dressed in a Hidalgos jacket, dressed in yellow and gold, beat Dana, jumped on a motorcycle, and fled the scene. You can't have it both ways. It doesn't work that way.

Why do I say that? Because the law says that you have to determine if you have an abiding belief in the truth of the charge. You have to do that. The truth, and what happened that night, truth in what each of these defendants did that night against Dana Beaudine.

And that word truth, it's not uttered because it sounds --

Ms. High: I am going to object, Your Honor. This is not the law. The law is beyond a reasonable doubt, and only then if you have an abiding belief. I would object to her stating the law and shifting the burden.

The Court: My ruling is the jury has been instructed on the law of this case.

State: That word truth, it's in the instructions. The law that you have been given, and truth doesn't involve game play, or loopholes or trickery. It's the law.

RP 2925-26. Defendant Nolan did not object to this statement. As such, defendant Nolan has to show that the remark was so flagrant and ill-intentioned as to prejudice defendant. The State was not disparaging defense counsel. The State was responding to arguments in closing and the fact that defense counsel wanted to argue that their clients were not involved but if they were it was self-defense. The State is entitled to point out the evidentiary deficiencies in the defense case. The State's comments referred to the jury instructions so it is difficult to see how they could be flagrant or ill-intentioned. The State's comments were not disparaging to defense counsel and were in response to defendants' arguments in closing. The trial court reminded the jury that they were instructed on the law and the jury is presumed to follow the court's instructions. Defendant cannot show prejudicial misconduct.

The State concedes that the remark about defendant Smith's counsel was uncalled for and unnecessary. RP 2945-46. However, the fact that the remark was not necessary and inartful does not mean that it prejudiced defendant. There was nothing in the State's remarks that indicated that defendant Smith's attorney was deceiving the jury or tricking the jury. This was not an attack on defendant's right to counsel. It was an isolated remark that in the context of the entire argument, issues in the case, evidence addressed in the argument and jury instructions

cannot be said to have prejudiced defendant. *See State v. Warren*, 134 Wn. App. 44, 69, 138 P.3d 1081 (2006).

Defendant Ford also argues that the State disparaged defendant Ford's attorney during rebuttal closing. RP 2929. However, as argued above, the State is entitled to make arguments in response to defense counsel's argument. The State's argument was in response to argument by defense counsel and was not a personal attack. There is no evidence of prejudicial misconduct.

- g. The State did not comment on defendants' right to remain silent or interfere with defendant's right to present a defense.
(Pertains to McCreven's assignment of error #2, issue #2 and Smith's assignment of error #5, issue #1, adopted by Nolan and McCreven and assignment of error #1, issue #1)

It is proper for the State to comment on its own evidence. *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986), *overruled in part by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991) (clarifying that *Traweek* was overbroad in ruling that State may never comment on the defendant's failure to call witnesses or produce evidence.). The State may say that "certain testimony is undenied as long as he or she does not refer to the person who could have denied it." *State v. Fiallo-Lopez*, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995), *citing State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). A statement about undenied

testimony only becomes a violation of the defendant's right to remain silent if the statement is "of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify.'" *Id.* at 728-729, citing *Ramirez*, 49 Wn. App. at 336, quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978), review denied, 91 Wn.2d 1013 (1979).

When the court gives an instruction to the jury that the defendant does not have to testify and the jury cannot infer any prejudice or guilt against defendant, the jury is presumed to follow the instruction. *See State v. Kroll*, 87 Wn.2d 829, 837, 558 P.2d 173(1976), citing *State v. Ingle*, 64 Wn.2d 491, 392 P.2d 442 (1964). Comments about undisputed evidence do not have a prejudicial effect on the defendant if the trial court instructs the jury that "Every defendant in a criminal case has the absolute right not to testify. You must not draw any inference of guilt against the defendant because he did not testify." *State v. Ashby*, 77 Wn.2d 33, 38, 459 P.2d 403 (1969).

In the instant case, the jury was properly instructed as per the above case law. MCP 256-308, NCP 931-993, SCP 1179-1241, instruction #4.

The State's argument did not comment on defendant's right to remain silent. The State's argument must be looked at in context and as a whole. The State was not arguing that defendants should have testified but rather was telling the jury that by arguing self-defense that meant

defendants had admitted they participated in the act. RP 2933. So now the question was not whether or not defendants were involved but whether they acted in self-defense. RP 2933. There is nothing improper about this argument. The State was not arguing that defendants should have gotten on the stand and admitted they were there, by arguing self-defense, the issue became what actions had defendants engaged in to meet their burden on self-defense and what did the State then have to disprove. The State's comments were not error.

In addition, the State's arguments asking how they were supposed to disprove that the victim was going to commit a felony or inflict death or serious injury were not comments on defendants' right to remain silent. RP 2936. These statements were not objected to so defendants have to prove that they were flagrant and ill-intentioned. The State is permitted to show the holes in the defense theory of the case and to comment on the State's own evidence. Not a single person testified that the victim drew a knife or came after defendants. The testimony from several people was that the victim was jumped and then held down while he was beaten. There simply was no evidence that the victim was endangering defendants. Further, even the argument that was objected to indicting that defendants wanted the jury to assume facts not in evidence was not a comment on defendants' right to remain silent. RP 2937. It was true that no one testified that the victim made any threatening movement and no one testified as to seeing the knife be introduced into the fight. There were

many witnesses to the fight and so evidence of the victim engaging in behavior that would have supported the defense argument could have come from them, it did not have to come from defendants. It could have come from anyone who was there. The fact is no one who was there that night testified that the victim was trying to inflict death or serious injury on defendants. It was not a fact that was in evidence and to ask the jury to assume that the victim was trying to do so was proper for the State to point out. The State did not comment on defendants' right to remain silent. There was no misconduct.

Further, the State did not interfere with defendant Smith's right to present a defense. As discussed above in issue #2, defendant Smith's self-serving hearsay was not admissible. The State's arguments do not in anyway implicate Smith's own statements. This case is not at all similar to *State v. Kassahun*, 78 Wn. App. 938, 900 P.2d 1109 (1995) where the prosecutor specifically referred to evidence in closing that it had successfully moved to exclude. In the instant case, the State referred to the evidence the jury had and did not implicate any specific piece of evidence that was excluded. The prosecutor did not commit misconduct.

- h. The State did not shift the burden, misstate the law, misstate the evidence, mislead the jury or violate the separation of powers.
(Pertains to Ford's assignment of error #10, issue #4, adopted by McCreven, Nolan, and Smith; McCreven's assignment of error #2, issue #2; Nolan's assignment of error #4, issue #4, Smith's assignment of error #7, issue 2 and assignment of error #5, issue 1, adopted by McCreven and Nolan)

A jury is presumed to follow the court's instructions regarding the proper burden of proof. *State v. Gregory*, 158 Wn.2d 759, 861-2, 147 P.3d 1201 (2006). A jury is presumed to follow the trial court's instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

The jury was properly instructed on both justifiable homicide and self-defense. FCP 490-552, MCP 256-308, NCP 931-993, SCP 1179-1241, Instructions #s 24 & 31.

Defendants argue that the State misstated the law and misled the jury when in initial closing argument they stated, "the Defendants if they want you to believe that they were defending themselves, or defending others, they want to put forth that statutory defense to the murder of Dana Beaudine, have to prove to you by a preponderance of the evidence that it's more likely than not that that particular defendant did not aid in the..." RP 2816-17. While this argument does seem to combine the self-defense and justifiable homicide instructions, the argument was not repeated and the jury was properly instructed. It appears that the State misspoke and nothing more and then went on to explain the instructions correctly.

Further, the State correctly stated their burden in rebuttal closing and clarified the difference between the self-defense instructions. RP 2933-35. The State was not seeking to mislead the jury but was actually trying to clarify the varying instructions. The jury was properly instructed. There is no misconduct and no prejudice.

Defendant McCreven also argues that the State only told the jury that it had to prove the elements in the to-convict instruction and did not mention that it had to disprove self-defense. This is untrue since the State talked about self-defense in its initial closing. RP 2816-17. In addition, as noted above, the State stated their burden on self-defense in rebuttal closing. RP 2933-35. Defendant McCreven's argument does not take the entire closing argument into account and cannot show any misconduct.

Defendants also argue that the State violated the separation of powers, told the jury to disregard the court's instructions and shifted the burden. Again, this is an overstatement and not at all what happened in closing. The State told the jury that they had self-defense instructions because for the three defendants raising the defense, the case shifted from a general denial case to a self-defense or defense of others case. RP 2933. In addition, the State went through the instructions with the jury and pointed out certain numbered instructions and part of the instructions. RP 2934-36. There is no evidence to support defendants argument that the State told the jury to disregard the very same instructions they drew their attention to. In addition, the State does not have the power to overrule a

court's decision. While the State's argument, "So if there is no evidence of self-defense, how is it that they even get to argue it?" may have been inartful, it certainly was not a violation of the separation of powers. The State's argument related to the fact that it was difficult for the State to disprove self-defense when the evidence did not support such a claim. This argument did not shift the burden to defendants. The State's arguments were in line with the law and evidence. Any evidence of self-defense was minimal and as the State had to disprove it, the State was required to make arguments disproving its existence. The State did not commit misconduct.

Finally, the State did not misstate the evidence. As argued above, the State is permitted to comment on the State's own evidence and to show the deficiencies in defendants' case. As they are also required to disprove self-defense, they are entitled to go through the evidence and show how it does not support defense of self or others. The evidence of self-defense was thin. The victim was alleged to have made comments toward defendants about their colors and the knife may have belonged to him, but that was it. There was evidence that the victim was jumped and held down and there was no evidence that defendant was the initial aggressor in the fight. The State did not misstate the evidence and did not commit misconduct.

- i. The State did not misstate the role of the jury.
(Pertains to McCreven's assignment of error #2, issue #2; Nolan's assignment of error #5, issue #5, adopted by McCreven and Smith; and Smith's assignment of error #7, issue #2)

In that instant case, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

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

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

FCP 490-552, MCP 256-308, NCP 931-993, SCP 1179-1241, Instruction #3, see also Washington Pattern Jury Instructions Criminal, WPIC 4.01.

The State did not misstate the law and imply that the State had any other burden besides the burden of beyond a reasonable doubt. The State's argument addressed language in the jury instruction about abiding belief. RP 2925-26. The State did not tell the jury to ignore the burden or that their job was to discern the truth. The State said at the end of its closing that the jury needed to find beyond a reasonable doubt the truth of what

happened. RP 2951. This statement was not objected to. That is not a misstatement of the law or an attempt to misstate the jury's role. The reasonable doubt instruction tells the jury they must have an abiding belief in the truth of the charge. FCP 490-552, MCP 256-308, NCP 931-993, SCP 1179-1241, instruction #3. The State correctly referred to a jury instruction in the context of its argument.

Defendant Smith also argues that the State told the jury it would have to find the State's witnesses lied in order to acquit. It is sometimes improper for a prosecutor to tell the jury that their verdict rests on whether they believe one witness or another. *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) (“[I]t is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying.”); *State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991) (concluding that it was misconduct for prosecutor to argue that “in order for you to find the defendant not guilty . . . you have to believe his testimony and completely disbelieve the officers’ testimony”). “It is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.” *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

Statements that guilt or innocence depend on a determination that a witness is lying are inappropriate when it is possible that the testimony of the witness could be “unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being

involved.” *Casteneda-Perez*, 61 Wn. App. at 363; accord *Barrow*, 60 Wn. App. at 871, 875-76 (misconduct for prosecutor to say that the defendant was calling the State’s witnesses liars when the defendant presented a mistaken identity theory). However, where “the parties present the jury with conflicting versions of the facts and the credibility of the witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.” *State v. Wright*, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995).

In the instant case, the State did not tell the jury that in order to acquit defendant that they had to disbelieve the State’s witnesses. The State’s argument was a survey of the inconsistencies between the stories and versions of events and a review of the witnesses and their bias or lack thereof. RP 2806, 2930. No defendant objected to these statements. The comments made by the State were not ill-intentioned and flagrant and were not in violation of case law. The State did not commit prosecutorial misconduct.

7. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GIVING JURY INSTRUCTIONS THAT ACCURATELY STATED THE LAW AND ALLOWED THE PARTIES TO ARGUE THEIR CASES.

A trial court’s jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its

theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, *review granted*, 137 Wn.2d 1032, 980 P.2d 1285 (1999), *citing Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), *citing State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963). The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); *See State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009).

- a. Defendants have not preserved their challenge to the special verdict instruction. (Pertains to Smith's assignment of error #13, issue #5, adopted by McCreven and Nolan)²²

The State agrees that the decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) is the controlling law on the challenged special verdict instruction, number 57, in this case. However, the rule adopted in *Bashaw* is not constitutional. *Bashaw*, 169 Wn.2d at 146 n. 7, *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011).²³ Rather, it is a common law rule. *Bashaw*, 169 Wn.2d at 146 n. 7. As such, this challenge cannot be raised for the first time on appeal. In order to challenge this instruction, it must have been objected to below. In the instant case, no objection to this jury instruction was raised. There is no ruling from the trial court to be considered on appeal. As such, this court should decline to address defendant's challenge to the special verdict instruction as it is not of a constitutional nature and is raised for the first time on appeal.

²² Defendant Ford does not assign error to this issue but does address it in his issue #9. Again, the State is addressing it because defendant Smith properly assigned error to it.

²³ Defendant Nolan provides *State v. Ryan*, __ Wn. App. __, __ P.3d __, 2011 WL 1239796 (April 4, 2011) in a Statement of Additional Authorities. However, the State urges this court to follow the ruling in *Nunez* as it is well reasoned, in line with the Supreme Court decision in *Bashaw* and is a more complete review of the relevant Supreme Court decision in this area.

- b. The trial court did not error in giving Instruction #15. (Pertains to McCreven's assignment of error #9, issue #9, adopted by Nolan)

Defendant McCreven argues that the trial court erred in giving instruction #15 which was the definition of recklessness. Defendant did not object to this instruction below. However, the giving of the instruction was not reversible error. The instruction given in this case mirrored the instruction given in *State v. McKague*, 159 Wn. App. 489, 246 P.3d 558 (2011). In *McKague*, the instruction given to the jury stated, "When recklessness as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly." *Id.* at 509. This instruction was distinguishable from the instruction in *State v. Hayward*, 152 Wn. App. 632, 217 P.3d 354 (2009) which read, "[r]ecklessness also is established if a person acts intentionally." The Court of Appeals found the instruction in *McKague* to be correct and found that it did not create a mandatory presumption. *Id.* at 509-10.

In the instant case, instruction #15 contained very similar language. "When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally as to that result." MCP 256-308, NCP 931-993. Like the instruction in *McKague*, the instruction was based on the Washington

Practice Series pattern instruction (WPIC) 10.03. The trial court gave a correct instruction. There is no error.

- c. Instructions #24 and #34 correctly stated the law. (Pertains to McCreven's assignments of error #7 & 8, issues #7 & 8, adopted by Nolan)

Defendant McCreven argues that the trial court should have given its proposed instructions that combined the to-convict instruction for murder in the second degree as well as the justifiable homicide- defense of self and other instructions. MCP 180. However, the trial court did give the to-convict instruction on murder in the second degree and the justifiable homicide instruction, just as two separate instructions. MCP 256-308, instructions #s 24 and 34. There is nothing wrong with how the court instructed the jury. The two instructions accurately state the law and followed the Washington Pattern Jury Instructions. *See* WPIC 16.02 and 27.04. When read as whole, as contemplated by the above case law, the court's instructions to the jury were correct. The fact that these two instructions do not appear on the same sheet of paper does nothing to diminish their statement of the law. The trial court did not error in giving these two instructions, which are contemplated as two separate instructions, separately.

Defendant McCreven also argues that the trial court erred by not giving his proposed "standing in his shoes at the time of the incident"

language. MCP 180. However, the instruction already makes the standard clear. The instructions third paragraph is specifically designed to take that language into account. *See* Washington Pattern Jury Instructions, 16.02, Comment. “3) the defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the defendant, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident.” MCP 256-308, instruction #24, *see* WPIC 16.02. The additional language was not necessary as the instruction was already an accurate statement of the law. The instruction permitted defendant to argue his case and indeed counsel for defendant McCreven was able to make the standing in his shoes argument in closing. RP 2836. The instruction was an accurate statement of the law and allowed defendant to argue his theory of the case.

- d. Defendants did not preserve their objections to instructions #24, 25 and 26 and the instructions are correct. (Pertains to Smith’s assignment of error #10, issue #4, adopted by McCreven and Nolan and Nolan’s assignment of error #7, issue #6, adopted by McCreven and Smith)

Defendant Smith challenges instructions #24, 25, and 26 as creating an impossibly high standard. No defendant challenged instructions #25 and 26 in the trial court and the challenge to instruction #24 was on a different issue and is addressed above. As such, defendants

have not preserved their objection and defendants cannot raise it for the first time on appeal.²⁴

Even if this court were to consider their argument, the instructions were correct. This court in *State v. Ferguson*, 131 Wn. App. 855, 129 P.3d 856 (2006) addressed the giving of WPIC 16.02 in a second degree felony murder case where second degree assault was the predicate felony. This court found that giving WPIC 16.02 was proper. *Id.* at 862. The trial court's instruction #24 mirrored the language in WPIC 16.02. It was proper for the court to give it. This court in *Ferguson* also stated that the giving of WPIC 17.02 was never appropriate when defendant was charged with felony murder based on assault. "We hold that WPIC 17.02 can never be given in a felony murder case where assault is the predicate felony because it can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm." *Ferguson*, 131 Wn. App. at 862. In the instant case, defendant was charged with second degree felony murder with assault as the predicate crime. The murder was the stabbing of the victim during a fistfight that was initiated by the victim. *See State v. Slaughter*, 143 Wn. App. 936, 186 P.3d 1084 (2008). A deadly weapon was used in the assault. *Ferguson* is on point with this case as the fact

²⁴ Defendant Nolan proposed WPIC 17.02 but did not take exception or object to the court not giving the instruction and so has not preserved the issue for appeal. CP 886-924.

patterns are similar and the trial court correctly instructed the jury accordingly. Further, instruction #25 was based on WPIC 16.07 and #26 was based on WPIC 16.04. These instructions also were accurate statements of the law. Defendants did not preserve their objections on this ground and even if they did, the three instructions were accurate statements of law. The trial court did not error.

- e. The trial court did not error in refusing to give the excusable homicide instruction and defendant did not preserve the issue for appeal. (Pertains to Nolan's assignment of error #8, issue #7, adopted by McCreven and Smith)

Defendant Nolan argues on appeal that the trial court should have given an excusable homicide instruction. However, no defendant objected in the trial court to the failure to give such instruction. As such, the issue has not been preserved for appeal.

Even if the court were to consider this issue on appeal, the evidence in this case does not support the giving of such an instruction. The testimony was that there was a fight with lots of people punching the victim. Sometime during the fight, the victim was stabbed repeatedly and died of those injuries. Defendant cites to the *Slaughter* case as supporting his position that the court should have given an excusable homicide instruction but the court in *Slaughter* distinguished the case in *Ferguson* and said that *Ferguson* was not an excusable homicide case. As the fact

pattern in *Ferguson* is more similar to this case, the trial court did not error in refusing to give an excusable homicide instruction.

- f. The trial court did not error in not giving assault in the second degree instructions as a lesser included of murder in the second degree and this issue was not preserved for appeal. (Pertains to Ford's issue #6, no assignment of error)

Defendant Ford argues that the trial court should have given instructions on assault in the second degree as a lesser included charge of murder in the second degree. However, defendant Ford does not assign error to this. As noted several times in this brief, this court generally will not review an issue without an assignment of error.

Even if this court were to review this issue, defendant Ford's argument fails. First, this was not preserved for appeal as this issue was not raised in the trial court. Second, the facts of this case do not support the exception made in *State v. Lyon*, 96 Wn. App. 447, 979 P.2d 926 (1999). In *Lyon*, defendant appealed the trial court refusing to instruct on second degree assault as a lesser included crime of second degree felony murder with assault in the second degree as a predicate crime. *Id.* at 450. Citing to *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), the court noted:

Under the factual prong of the *Workman* test, the evidence in the case must support an inference that only the lesser crime was committed. Ordinarily, the factual prong of *Workman* would *not be met in a felony murder case.*

But here there was evidence from which a jury could conclude that the death resulted from a later, unrelated assault by another person.

Lyon, 96 Wn. App. at 450 (emphasis added). The court in *Lyon* clearly indicated that under normal circumstances, defendant is not entitled to assault in the second degree as a lesser included charge. In addition, there is no evidence in the instant case to support that the victim died from a separate unrelated assault. Defendant did not preserve this issue and even so, cannot prevail under the law.

8. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE JURORS' DISCUSSION DID NOT PREJUDICE DEFENDANTS.^{25 26}

The party who asserts juror misconduct bears the burden of showing that the alleged misconduct occurred. *State v. Hawkins*, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). The determination of whether misconduct has occurred lies within the discretion of the trial court. *State v. Havens*, 70 Wn. App. 251, 255-56, 852 P.2d 1120, review denied, 122

²⁵ Defendant Nolan adopts defendant McCreven's assignment of error #4 but did not make any motion in the trial court and so did not preserve this issue for appeal.

²⁶ Defendant Ford's assignment of error #11 is that the trial court abused its discretion in failing to dismiss two jurors. This is adopted by the other three co-defendants. However, defendant Ford does not argue this topic in his brief nor do any of the other defendants. An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Further, defendant McCreven was the only defendant who made this motion in the trial court below. RP 817-8. This court should decline to address this issue.

Wn.2d 1023 (1993). Where the possibility of juror misconduct arises, the appropriate course for the trial court is to make an inquiry. See *State v. Elmore*, 155 Wn.2d 758, 773-774, 123 P.3d 72 (2005); *State v. Earl*, 142 Wn. App. 768, 771-772, 177 P.3d 132 (2008). Once the court has conducted the proper inquiry, the court's decision is reviewed only for abuse of discretion. *Elmore*, 155 Wn.2d. at 761. In its inquiry, the court must be careful to respect the principle of jury secrecy. *Earl*, 142 Wn. App. at 775. A new trial is only granted when the juror misconduct prejudiced the defendant. *Id.* at 174.

In the instant case, juror #7 brought to the court's attention that several jurors were talking about the testimony of Ms. Blair. RP 776. The trial court alerted the attorneys and then brought juror #7 into the courtroom individually in order to make inquires. RP 776-780. Juror #7 detailed what he had heard. RP 777-780. He also indicated that this was the first time any jurors had discussed any testimony. RP 779-80. After the trial court had conducted the inquiry of juror #7, the court allowed the attorneys time to research the issue and then called in each juror individually to see if they overheard any comments or had made any comments about the testimony of Ms. Blair. RP 781-82, 784-816. The jurors who indicated that they had either overheard the conversation or had participated in it were also asked if they could put that aside, keep an open mind and follow the court's instructions. RP 784-816. The trial court followed case law and made the proper inquires of the jurors.

The court's inquiry showed that there were three categories of jurors. There were five jurors (#s 1, 2, 6, 8, and 14) who did not hear anything and did not participate in any kind of conversation about Ms. Blair. RP 785, 786, 796, 799, 813. The second category was jurors who had not participated in the situation but had overheard the conversation. This included jurors # 4, 7, 9, 10, and 12, although #9 had not heard anything specific and only remembered seeing some eye rolls. RP 791-96, 802-804, 807. The final category only contained five jurors and contained those that had participated in the conversation.²⁷ Jurors #3, 5, 11, 13, and 15 all indicated they had somehow participated in the conversation, though in #13's case, he had merely laughed at the jokes while reading his book. RP 786-90, 793-96, 804-07, 809-13, 814-16.

Further, some of the jurors' comments gave some insight into their thoughts. Juror # 3 clarified that no one was discussing the content of the testimony or what they believed. RP 790. They were just discussing the way she was behaving. RP 790. Juror #3 indicated that he thought they were not supposed to discuss the content of what happened and he felt the jurors followed that instruction. RP 790. Juror #5 said there was no speculation as to why she couldn't remember. RP 795. Juror #10 said it

²⁷ Defendant McCreven claims 10 jurors discussed the testimony of Ms. Blair. Brief of Defendant McCreven, page 75. However, that is not supported by the record. The five jurors who overheard the conversation or saw eye rolls did not participate and cannot be said to have discussed the testimony.

did not sound like anyone had made up their minds. RP 804. Juror #12 said there had been no other chatter like this after other witnesses. RP 809. Juror #15 indicated that the juror knew they weren't supposed to talk about the case but didn't feel like these comments or jokes were talking about the case. RP 815. The repeated theme was that the jurors were trying to follow the court's instructions.

The trial court did not find that this discussion rose to the level of misconduct that prejudiced defendants. The trial court remarked that every juror who said they had either heard something or had said something indicated that they could put aside what they heard and decide the case based on the evidence, the court's instructions and the law. RP 823. While defendant McCreven alleges that juror #11 was considering a remark that was stricken by the trial court and shows that jurors cannot be presumed to follow the court's instructions, juror #11's answer was not that simple. Defendant McCreven's defense counsel went further than the scope of the inquiry and asked juror #11 if there was any speculation in *either his own mind* or in what others had said as to why the witness may not have appeared cooperative. RP 806. This went beyond the inquiry of what the juror had said or what others had said and was close to asking about something that would inhere in the verdict. Speculation in defendant's own mind was not a proper inquiry. From the juror's response, it's clear that he was trying to give the defense attorney an answer as to why the witness might have been uncooperative. The juror

said, “I think she said she was somewhat afraid to identify people that she may have seen. She said that in her testimony. Did I answer your question?” RP 806. This response does not indicate that he was considering this testimony that was stricken or that others were considering it, he was trying to answer defense counsel’s question which went beyond the scope of the proper inquiry. There is no evidence of prejudice.

In fact, of the four defense attorneys, only the attorney for defendant McCreven made any motion in regards to the jurors. RP 817-818. Defendant McCreven moved to excuse jurors #11 and 13. The trial court denied that motion. RP 823. The trial court ruled that all of the jurors still had open minds and that they were not going to make any decisions until jury deliberations. RP 823. There is nothing that indicates any differently. All of the jurors who heard or said anything clearly indicated as such and many thought they were following the court’s instructions by not discussing the actual content of the testimony or the case. The trial court conducted a proper inquiry and made a decision based on the results of that inquiry. The decision was based on tenable grounds. The trial court did not abuse its discretion.

9. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTIONS FOR MISTRIAL.²⁸

The trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. See *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court's denial of a motion for mistrial will be overturned only when there is a "substantial likelihood" the error prompting the motion affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269-70. A trial court should deny a motion for a mistrial unless "the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *Id.* at 270 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

The trial court is in the best position to determine the prejudice of the statement in context of the entire trial. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). If an objection was made, the appellate court will still give deference to the trial court's ruling when examining the conduct for prejudice because "the trial court is in the best position to most

²⁸ Defendant Smith's assignment of error #15 is that trial court erred in denying the motion for a new trial. While this is adopted by Nolan and Smith, it is not argued anywhere in his brief. As noted previously in this brief, this argument is raised in passing and should not be considered by this court.

effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial. *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

A reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow. See *State v. Crane*, 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991) *superseded on other grounds by statute as stated in In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

- a. The trial court did not abuse its discretion in denying the motion for mistrial where the single isolated statement was not so prejudicial as to deny defendants a fair trial. (Pertains to Ford's assignments of error #13, 17, Issue #11, adopted by McCreven, Nolan and Smith; and Nolan's assignment of error #3, Issue #3, adopted by Ford and McCreven)

During motions in limine, the State stipulated that they would not mention weapons obtained from the homes or vehicle of defendants. 4/9/09 RP 113, 134, NCP 1017-1019. Unfortunately, during the testimony of Detective Donlin, when he was describing serving a search warrant on

defendant Smith's house, Detective Donlin mentioned that knives were found in an outbuilding.

State: Do you recall what, if anything, was found in that large outbuilding or garage?

Donlin: If I recall, there was several knives and vehicle.

RP 1596. Counsel for defendant Smith objected and all defendants joined in motions for either a mistrial or a dismissal. RP 1596-97. The trial court denied the motions. RP 1602.

The trial court did not abuse its discretion in denying defendants' motions. The State had advised the Detective of the motion in limine and the Detective acknowledge that, and apologized. RP 1596, 1597-8. In addition, the State's question was not meant to elicit such testimony. RP 1596. The State indicated that they were not going to bring any attention to the inadvertent comment nor were they going to engage in any follow up in that vein. RP 1598. After hearing argument from all parties and denying the defense motions, the trial court gave a curative instruction that the answer was to be stricken and that the jury was not to consider it for any purpose. RP 1603-4.

Contrary to defendant's assertions, this statement was not so overly prejudicial as to warrant a mistrial and dismissal. It was not a serious irregularity. The single, isolated statement indicates that the Detective saw knives in an outbuilding. There was no further discussion. It is logical that most people have knives in their homes and garages for various

reasons. In addition, there was no evidence presented that this was the knife that was used to stab the victim since that knife was found at the scene of the murder with only the victim's DNA on the handle. The single statement was general enough and brief enough that it did not undermine the defense theory and was a minor occurrence given the length of the trial and volume of testimony. A curative instruction such as the one given was the appropriate remedy in this case.

The instant case is similar to *State v. Slone*, 133 Wn. App. 120, 134 P.3d 1217 (2006). In that case, there was a pre-trial ruling excluding evidence of defendant's refusal to take field sobriety tests. *Id.* at 123. At trial, the officer testified that he asked defendant if he would perform field sobriety tests. *Id.* The officer did not mention whether or not the defendant had performed the tests. *Id.* at 129. The court found no abuse of discretion in the trial court ruling that the testimony was a non-prejudicial harmless error. *Id.* at 129-30. As in *Slone*, the statement made by the officer was not specific in terms of knives. It was a non-prejudicial, harmless error. The trial court did not abuse its discretion in denying the motion for mistrial.

The single, isolated statement, while a violation of the court's ruling, did not prejudice defendant to the extent that a mistrial was warranted. Based on the facts of the instant case, the trial court denied the motion for a mistrial and motion for dismissal. There was no abuse of discretion.

- b. The trial court did not abuse its discretion denying defendant's motion for mistrial for prosecutorial misconduct. (Pertains to Nolan's assignment of error #6, Issue #4, adopted by McCreven and Smith.)

As noted above, both the trial court's rulings on prosecutorial misconduct as well as a denial of a motion for mistrial are reviewed for abuse of discretion. Defendant Nolan claims that the trial court abused its discretion in denying the defendants' motions for mistrial for prosecutorial misconduct during closing argument.

However, the trial court followed the procedure outlined by case law and cannot be said to have based his decision on untenable reasons. After hearing argument from the parties, the trial court took the time to review the transcripts of the closing arguments. RP 2957. The trial court also conducted research after reviewing the arguments. RP 2957. The trial court also considered whether a curative instruction would have been appropriate. RP 2958. The trial court told counsel that he tends to be conservative in terms of being too wordy and possible making a comment on the evidence. RP 2958-59. The trial court did note that it did make comments that the jury had been properly instructed and that the jury would be the one to decide the facts. RP 2958. The trial court also noted that the jury had been instructed at both the beginning and end of the case to disregard any remarks, statements, or argument that is not supported by the evidence, or the court's instructions on the law. RP 2959. After going

through the analysis of the case and the current case law, the court reached a reasoned decision:

However, in this case, based on the entire argument made by all defense counsel, and the prosecutor, I don't find any statements taken out of context by the prosecutor that rise to the level of prosecutorial misconduct. Any statements they made were clearly proper argument, even if there was anything that was improper, it was very attenuated, didn't rise to the level of the court needing to give a curative instruction.

There certainly is nothing in the prosecutor's argument, taken as a whole, that is so flagrant that a curative instruction would — first, I don't think that a curative instruction is necessary, and then the final argument, of course, that Mr. Schwartz made that everybody joined into as well, if you look at everything that the prosecutor said, it's just so flagrant that curative instruction won't even save it, and I disagree with that.

So, the motions for a mistrial are denied.

RP 2950-60. The trial court properly reviewed the entire closing argument, the issue in the case and the instructions given to the jury. This is what case law dictates the court should consider. The trial court is in the best position to determine if misconduct had occurred and if so, if it had prejudiced defendants. The trial court engaged in the proper analysis and determined that any comments were not flagrant, that the jury was properly instructed, no curative instructions was necessary beyond his rulings on the objections and that there was no prosecutorial misconduct. As such, the trial court properly denied the motions for a mistrial. The trial court did not abuse its discretion.

10. DEFENDANTS HAVE FAILED TO
DEMONSTRATE THAT THEY RECEIVED
INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986).

The test is as follows:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also ***State v. Walton***, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); ***State v. Denison***, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995); ***State v. Foster***, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the ***Strickland*** test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing ***Strickland***, 466 U.S. at 689-90.

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S., at 689.

All four defendants raise or adopt ineffective assistance of counsel issues.²⁹ However, a review of the entire record, as is required by case law, shows that counsel for defendants were all zealous advocates for their clients. All defense counsel participated in the motions in limine, in making numerous objections throughout trial, engaging in numerous motions to sever, for mistrial or for dismissal and all clients cross-examined witnesses and made closing arguments. There was also post-trial litigation on behalf of all defendants. In addition, some defense counsel put on witnesses as part of the defense case. The trial was a true example of the adversarial system and exactly what was contemplated by the above case law. Defense counsel put the State's case to the test. A review of the entire record shows that none of defendants had ineffective counsel.

Defendant Ford claims his counsel was ineffective for failing to move for a mistrial based on juror bias and for failing to move for a mistrial based on Ms. Blair's expression of fear. However, as noted above, there was no basis to ask for a mistrial after the court conducted the proper inquiry and each juror indicated that they would be able to put aside any issues, keep an open mind and follow the court's instructions. The

²⁹ It is concerning to the State that counsel for defendant McCreven, who is the same counsel on appeal, adopted two of the ineffective issues raised. Counsel is essentially calling herself ineffective. As Pro Se defendants cannot raise an ineffective assistance of counsel claim on themselves, it is unclear how counsel can do so.

juror issue was an isolated issue and there was no basis for a mistrial after the full inquiry. As to Ms. Blair's expression of fear, as addressed earlier in this brief, it was not directed toward defendants and Ms. Blair indicated that she was not concerned about confronting defendants. There was no basis for a mistrial. Defendant Ford's counsel was a zealous advocate for defendant. He made many motions and objections on defendant's behalf and a review of the record does not show him to be ineffective.

Defendant McCreven joins with defendants Ford and Nolan in saying that counsel was ineffective for failing to move for a mistrial in the above instances. However, since counsel herself did not move for a mistrial in either situation, counsel must necessarily also be calling herself ineffective. Counsel for McCreven did move to exclude two jurors after the court's inquiry and it was denied. Since that was denied there is no basis to assume a motion for mistrial would have been granted. In addition, as noted above, there was no basis for a mistrial based on Ms. Blair's fear as it did not apply to defendants. While it is very concerning that counsel feels she herself was ineffective, there is no evidence of it. A review of the entire record shows her to be an advocate for her client.

Defendant Nolan joins with defendants Ford and McCreven in arguing that his counsel was ineffective for failing to move for a mistrial for the two reasons cited above. As noted, there was no reason to ask for the mistrial. In addition, as case law explicitly says that WPIC 17.02 should not be given in this type of case; there was no reason for counsel to

propose 17.02. Since the facts of this case do not support excusable homicide, there was no reason for counsel to propose WPIC 15.01. Based on a review of the entire record, defendant cannot show that his counsel was ineffective.

Finally, defendant Smith argues that his trial counsel was ineffective for failing to provide the court with briefing as to the admission of his statements, failing to propose correct jury instructions and object to improper ones, and failing specifically to object to the special verdict instruction. Defendant Smith also argues that his counsel at sentencing was ineffective for failing to prepare for sentencing. However, defendant Smith's attorney did provide the court with a memorandum when invited by the court to provide more briefing. RP 2646-47.³⁰ Counsel also did object to jury instructions and as noted above, the instructions that defendant takes issue with were correct statements on the law so no additional instructions were required to be proposed. The *Bashaw* case referred to earlier in this brief was not decided until July 1, 2010, well after defendant's trial date. *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003) was not directly on point in terms of looking at a jury instruction but was instead focused on the court's conduct. Even if counsel should have objected to the special verdict instruction, one error

³⁰ The record indicates that counsel for defendant Smith presented a memorandum to the court but the State was unable to locate it in the court file. In any event, counsel had obviously done research and argued accordingly.

does not make counsel ineffective. The court is required to review the entire record which shows that counsel was an advocate for his client.

In addition, defendant Smith's sentencing attorney was not unprepared for sentencing. As noted above, counsel indicated that he had looked through every judgment and sentence presented by the State and was satisfied that defendant's offender score was a 9+. Counsel also successfully got the State to offer a lesser felon in possession charge based on the fact that reviewing the judgment and sentences showed some that could not be verified. In negotiating the plea deal on the other case, he also successfully negotiated with the State to not ask for an exceptional sentence on this case. Counsel was prepared and an advocate for his client.

Defendants cannot meet their burdens in showing their counsel to be ineffective.

11. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT MCCREVEN'S MOTIONS TO DISMISS.

CrR 8.3(b) allows a judge to dismiss charges against a defendant only where arbitrary actions or governmental misconduct has prejudiced the rights of the defendant.

Before a court may dismiss a charge under CrR 8.3(b), two factors must be met. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). First, a defendant must show that the prosecutor acted arbitrarily

or committed misconduct. *Id.* Prosecutorial mismanagement qualifies as governmental misconduct. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

Second, the defendant must prove that this action prejudiced his or her right to a fair trial. *Michielli*, 132 Wn.2d at 240. Prosecutorial misconduct or mismanagement does not warrant dismissal under this rule if it does not prejudice the defendant. *State v. Teems*, 89 Wn. App. 385, 388, 948 P.2d 1336 (1997). The defendant has a right to a fair trial, but that “right does not include a right to an error free trial.” *State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988). The trial court’s power to deny a motion to dismiss is discretionary and is only reviewable for a manifest abuse of discretion. *Blackwell*, 120 Wn.2d at 830. The trial court’s decision should be reversed only if it was manifestly unreasonable, or based on untenable grounds, or made for untenable reasons. *Id.* A new trial is necessitated only when the defendant “has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.” *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997) (citing *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); see also *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968) (“Something more than a possibility of prejudice must be shown to warrant a new trial.”)). Dismissal is an extraordinary remedy and its appropriateness is fact specific, to be determined on a case by case basis. See *State v.*

Ramos, 83 Wn. App. 622, 637, 922 P.2d 193 (1996), *State v. Coleman*, 54 Wn. App. 742, 749, 775 P.2d 986 (1989).

In the instant case, the trial court did not abuse its discretion in denying defendant McCreven's motions to dismiss. First, defendant moved for dismissal based on the fact that four exhibits were used to refresh witnesses' recollections with annotations on them. RP 824-25, 850, MCP 124-137. The other three defendants joined the motion. RP 825, 829-30. The trial court listened to argument and reviewed the exhibits in question. The State indicated that they did not know the reports had been handed up with annotations and that it was completely inadvertent. RP 856. They also promised that they would look at all future exhibits carefully and that it would not happen again. RP 857. The trial court then went through each exhibit and listed out the annotations and also correlated them with which witness they had been used with. Since Ms. Blair did not identify anyone in the courtroom, it was clear to the court that any annotations had not affected her testimony. RP 859-60. Mr. Howden had only been given exhibit 193 in order to remember the license plate number which was on a different page than the annotations so there was no evidence it affected his testimony. RP 860. The information written on Deputy Simmelink's report was not anything additional than what was written in the report itself so there was no affect on her testimony. RP 860-61. Deputy McCarthy reports had the number of suspects and the word hearsay but none of that affected her testimony

either. RP 861. The trial court found that defendants had failed to meet their burden both in showing arbitrary conduct on the part of the State as well as any actual prejudice. RP 861. The trial court's ruling was based on a thorough analysis of the evidence and the actual annotations. There is nothing that shows that the trial court's reasoning and ruling was an abuse of discretion.

Defendant McCreven also asked for a dismissal along with the other defendants after Detective Donlin testified that knives were found in Defendant Smith's garage. This issue was addressed above in issue #9. Detective Donlin acknowledged that the State had advised him of the motion in limine and apologized. RP 1596. Defendants cannot meet their burden of showing that the State acted arbitrary when it was an honest mistake by the witness after being properly advised. Further, the prejudice to defendants was minimal as discussed above. The statement, was isolated and non-specific. The only weapon discussed as the murder weapon was found at the scene of the crime with defendant's DNA. Defendants cannot show specific prejudice stemming from the single isolated comment. The trial court did not error in denying the motion to dismiss.

Defendant McCreven also brought a motion to dismiss based on the State asking Detective Wood if the follow up interview with Ms. Dobiash occurred before or after the court order requiring her to do so. RP 2148. Defendant McCreven objected and stated in front of the jury that if

there was a court order then no one provided it to her. RP 2148. The court sustained the objection. RP 2148. Defendant McCreven later made a motion to dismiss based on the State misleading the jury. RP 2181. The trial court denied the motion to dismiss noting that it had already sustained the objection. RP 2181-82. There was no abuse of discretion. The trial court had sustained the objection. Further, there was no evidence of arbitrary action by the State since the State truly thought the court had ordered Ms. Dobiash to cooperate. RP 2182. The trial court did give a limiting instruction as instruction #10. MCP 246-308, NCP 931-993, SCP 1179-1241. There was no evidence of arbitrary action on behalf of the State or prejudice to defendants. The trial court did not abuse its discretion.

At the end of the State's rebuttal case, Defendant McCreven moved to dismiss for the same three reasons as above. 6/4/09RP 44-45. The trial court again denied the motion. 6/4/09 RP 53. As the trial court did not abuse its discretion in the above instances its difficult to see how it could abuse its discretion when confronted a second time with the same three arguments.

Finally, Defendant McCreven moved to dismiss based on prosecutorial misconduct in closing. RP 2955. However, as noted above in issue #9, the trial court followed case law and reviewed the transcript of the closings in their entirety and did not see anything that rose to the level of misconduct. Again, the trial court did not abuse its discretion.

Dismissal is an extraordinary remedy and the trial court had great discretion in ruling on these motions. The trial court engaged in reasoned decision based on tenable reasons. The trial court did not abuse its discretion in denying defendants motions.

12. THE TRIAL COURT DID NOT ERROR IN DENYING DEFENDANT FORD'S MOTION TO ARREST THE JUDGMENT WHERE THERE WAS SUFFICIENT EVIDENCE OF DEFENDANT'S GUILT.

Review of a trial court decision denying either a motion for directed verdict or a motion for arrest of judgment requires the appellate court to engage in the same inquiry as the trial court. *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000). At the end of the State's case in chief, a court examines sufficiency based on the evidence admitted at trial so far. *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996). A directed verdict is appropriate if, after viewing the material evidence in the light most favorable to the nonmoving party, the court determines there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Id.*, citing *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

Criminal Rule 7.4 provides a defendant may bring a motion for arrest of judgment for "insufficiency of the proof of a material element of the crime." CrR 7.4(a). At the end of all the evidence admitted at trial or on appeal, a court examines sufficiency based on all the evidence admitted

at trial. *Jackson*, 82 Wn. App. At 608. The evidence presented in a criminal trial is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the state, could find the essential elements of the charged crime beyond a reasonable doubt. *Longshore*, 141 Wn.2d at 420-21, citing *State v. Bourne*, 90 Wn. App. 963, 967-68, 954 P.2d 366 (1998).

Regardless of when a court is asked to examine the sufficiency of the evidence, it will do so using the best factual basis then available. *Jackson*, 82 Wn. App. at 608. Therefore, a challenge to a trial court's denial of a defendant's motion for directed verdict or arrest of judgment is, for all practical purposes, a challenge to the sufficiency of the evidence. See *Jackson*, 82 Wn. App. at 608-09.

As noted above in issue #4, the State presented sufficient evidence for the jury to find that defendant Ford was guilty of murder in the second degree as an accomplice. Defendant Ford was only described by Ms. Hutt at trial as wearing dress clothes. RP 2535. Ms. Diamond identified defendant Ford as one of the men she saw fighting that night. RP 362-64, 356. Mr. Howden identified a man matching defendant Ford's description involved in the fight. RP 208. There was also evidence that Mr. Ford held us his hand to Vincent James to discourage him from getting back in the fight. RP 210. Ms. Hutt also testified a man meeting defendant Ford's description told Mr. Nolan that they needed to leave. RP 2585. There was evidence that Mr. Ford did more than just stand and watch what happened

at the bar that night. Mr. Ford aided the fight by participating in the beating and also by preventing the victim's friend from rejoining the fight to help him. The trial court had heard all the evidence and listened to the arguments made by counsel for defendant Ford. The evidence was sufficient and the trial court did not error.

13. THE TRIAL COURT DID NOT ERROR IN
CALCULATING DEFENDANT MCCREVEN'S
OFFENDER SCORE.

A sentencing court's calculation of an offender score is reviewed de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). It is the State's burden to prove the existence of prior convictions by a preponderance of the evidence. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007) (internal citations omitted). The best evidence to establish a prior conviction of the defendant is a certified copy of the prior judgment and sentence. *Id.*, *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). The State "may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history". *Ford*, 137 Wn.2d at 480.

Defendant McCreven contests two of the charges included in his offender score. Defendant challenges his 1978 juvenile conviction for burglary in the first degree and his 1991 conviction out of California for unlawful possession of a controlled substance of sale.

- a. The trial court properly determined that defendant's juvenile conviction counted in his offender score.

The State is not required to prove that the prior conviction is a constitutionally valid conviction. *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719 (1986). However, a “prior conviction which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face” may not be used. *Id.* at 187 188.

The court in *Ammons* reasoned that a defendant has no right to contest a prior conviction at a subsequent sentencing; moreover, to require the State to prove the constitutional validity of prior convictions would turn each “sentencing proceeding into an appellate review of all prior convictions.” *Id.* at 188. The court held that a defendant seeking to invalidate a prior conviction must use established avenues of challenge provided for post conviction relief in the state or federal court where the judgment was entered and, if he is successful, he can then be resentenced without the unconstitutional conviction being considered. *Id.*

To be constitutionally invalid on its face a conviction must show constitutional infirmities on its face, without further elaboration. *Ammons*, 105 Wn.2d at 188; *State v. Gimarelli*, 105 Wn. App. 370, 20 P.3d 430, 433 (2001). The face of the conviction can include a plea agreement, but does not include items such as jury instructions. *In re Thompson*, 141 Wn.2d 712, 718, 10 P.3d 380 (2000).

RCW 9.94A.525(2)(a) states that “Class A and sex prior felony convictions shall always be included in the offender score.” There are no exceptions. Burglary in the first degree is a class A felony. RCW 9A.52.020. “If the current adult offense occurred on or after June 13, 2002, the prior juvenile adjudication counts.” *State v. Jones*, 121 Wn. App. 859, 870, 88 P.3d 424 (2004). An offender’s criminal history and offender score are determined using the statutory provisions that were in effect on the day the current offense was committed. *Id.* at 868 (citing legislative intent in Laws of 2002, ch. 107 §1).

In the instant case, the State presented a certified judgment and sentence for defendant’s 1978 juvenile offense that showed defendant was guilty of burglary in the first degree. 8/10/09 RP 2-3, Sentencing Exhibit 1. The State also presented a printout of defendant’s prior convictions which included the 1978 burglary in the first degree charge. 8/10/09 RP 3, Sentencing Exhibit 6. While the printout of criminal history may not be certified, it is in combination with the certified judgment and is permitted to be introduced per *Ford*. The State proved by a preponderance of the evidence that defendant had a prior conviction for burglary in the first degree.

The crime also does not wash out. The statute above is clear that Class A felonies shall be counted in the offender score. There is no provision for them to wash out. There are no provisions that state that this rule only applies to crimes that were committed after the Juvenile Justice

Act was enacted. The exceptions that defendant argues should apply to him are not codified in statute nor found in case law. They do not exist. The case law and statutes are clear that there are no exceptions: a Class A felony is to be included in the defendant's offender score. Further, defendant for the first time on appeal alleges that the crime was not comparable and that the court should have been required to do a comparability analysis. Defendant did not raise this issue in the trial court so there was no record of this argument, no chance for the State to respond and no chance for the trial court to make a record. However, even if the court were to consider this argument, the only change in the wording of RCW 9A.52.020 was the word dwelling to building. The rest of the elements, such as the requirement of a deadly weapon or an assault, did not change and are not requirements of residential burglary RCW 9A.52.025. Defendant's argument that the term dwelling being changed to building makes defendant's crime comparable to residential burglary is not supported by the statutes.

Finally, defendant argues that the State had to prove that the prior conviction was constitutionally valid. Again, there is clear case law that says otherwise. The State does not have to prove the prior conviction was constitutionally valid. Having to do so would be unduly burdensome to the State and the court and would grant defendant appellate review of any previous conviction he chose to bring up during a sentencing hearing.

Case law explicitly denounces this practice and makes it clear the State is not required to do so.

The trial court found that the State had proven the existence of defendant's juvenile conviction by a preponderance. "And at the top of Page 2 of this order, the court made an expressed finding that on the date of April 19, 1978, Mr. McCreven did commit the act of first degree burglary as defined by RCW 9A.52.020, so it counts for two." 8/10/09 RP 19. The trial court also found that the conviction did not wash and any collateral attack of the conviction was not subject to direct review. 8/10/09 RP 19. The trial court's findings were in line with current statutes and case law. The trial court did not error.

- b. The trial court did not error in including defendant's California conviction in his offender score.

A defendant's offender score is calculated according to RCW 9.94A.525. Where a defendant has out-of-state criminal history, the court must classify them according to comparable Washington law. RCW 9.94A.525(3); *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005). For the comparability analysis, the court first looks at the elements of the respective crimes. *Id.*, at 255, citing *State v. Morley*, 134 Wn. 2d 588, 605-606, 952 P.2d 167 (1998).

In the instant case, the State presented a certified judgment and sentence showing that defendant had been convicted of possession of

methamphetamine for sale in the State of California. 8/10/09 RP 6, Sentencing Exhibit 2. The State agreed that the court needed to do a comparability analysis based on the documents presented and also advised the court of the analysis done in *State v. Winings*, 126 Wn. App. 75, 107 P.3d 141 (2005). 8/10/09 RP 6-7. This court in *Winings* found that possession of controlled substance for sale is comparable with unlawful possession with intent to deliver. *Id.* at 96.

The trial court made a clear finding that after listening to the arguments and reviewing the documents that the California conviction was comparable with Washington's possession with intent to deliver. 8/10/09 RP 18. This court in *Winings* stated that the statutes did not have to be presented as the court could rely on the documents presented by the State in order to classify the crimes. *Winings*, 126 Wn. App. at 95, fn 11. In addition, there was no requirement for the trial court to conduct a full analysis of the conviction as noted above. Such an analysis as to a factual basis for the crime is not necessary under the case law. Further, the trial court applied the sentencing statutes in effect at the time of offense and found that defendant's conviction was a Class B felony and did not wash out. 8/10/09 RP 18-19. The trial court conducted the proper analysis and followed the proper case law. The trial court did not error.

14. THE TRIAL COURT DID NOT ERROR IN
CALCULATING DEFENDANT SMITH'S
OFFENDER SCORE.

Generally, a defendant cannot waive a challenge to a miscalculated offender score where the claimed sentencing error is a legal one. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). But a defendant may waive a miscalculated offender score if the alleged error involves an agreement to facts, later disputed, or a matter of trial court discretion. *Goodwin*, 146 Wn.2d at 874. The Supreme Court held that where a defendant fails to identify a factual dispute for the court's resolution and fails to request an exercise of the court's discretion, the defendant has waived a challenge to calculation of his offender score. *State v. Shale*, 160 Wn.2d 489, 495, 158 P.3d 588 (2007) (citing *State v. Nitsch*, 100 Wn. App. 512, 520-523, 997 P.2d 1000, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000)). "Under the SRA, acknowledgement allows the judge to rely on unchallenged facts and information introduced for the purposes of sentencing." *In re Connick*, 144 Wn.2d 442, 464, 28 P.3d 729 (2001) (quoting *State v. Ford*, 137 Wn.2d 472, 482-3, 973 P.2d 452 (1999)).

Where a defendant, after trial, challenges the sentencing court's determination of his offender score based on insufficient evidence of the prior convictions, there are three ways for the court to analyze the situation. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007).

“First, if the State alleges the existence of prior convictions at sentencing and the defense fails to ‘specifically object’ before the imposition of sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence. *Id.*, citing *State v. Lopez*, 147 Wn.2d 515, 520, 55 P.3d 609 (2002). Second, if the defense does specifically object at sentencing, but the State does not produce any evidence of the defendant’s prior conviction, then the State is held to the initial record and may not present any new evidence at resentencing. *Bergstrom*, 162 Wn.2d at 93 (internal citations omitted). Finally, if the State alleges the existence of prior convictions at sentencing and the defense does not specifically object and agrees with the State’s depiction of defendant’s criminal history, then the defendant waives his right to challenge the criminal history after his sentence has been imposed. *Id.* at 94.

In the instant case, defendant Smith proceeded to sentencing with new counsel after his trial counsel was allowed to withdraw. 7/23/09 RP 1-8, 8/7/09 RP 2. The State presented numerous exhibits to prove defendant’s criminal history. 12/11/09 RP 35-39, Sentencing Exhibits 1, 3-16. The State clarified with the court that while Exhibit 3 contained a compiled list of defendant’s criminal history, it did include three convictions that the State was not able to verify were defendant’s convictions. 12/11/09 RP 36. The State was clear with the court concerning which three convictions the State could not prove and

informed the court that defendant's offender score was 13 when those three unproven convictions were excluded from the calculation. 12/11/09 RP 36-7. It is clear from the record what convictions the State was relying on and which they were not.

In addition, because defendant's offender score was calculated at a 9+, much of the math concerning the actual number of the offender score was not relevant. The State was clear that defendant's offender score maxed out a 9 and counsel for defendant agreed. 12/11/09 RP 37, 40. While the State had alleged an aggravating factor in the amended information for defendant Smith in that there was prior unscored criminal history that would make the presumptive sentence clearly too lenient, the State chose not to seek an exceptional sentence after an agreed disposition where defendant agreed to plead guilty to a new charge of felon in possession of a firearm in the second degree. 12/11/09 RP 37-8. Counsel for defendant Smith represented to the court that he had looked through all the separate judgment and sentences; had looked at which ones could not be verified; and made an affirmative assertion to the court that there were sufficient prior convictions to make defendant's offender score above 9. 12/11/09 RP 39-40.

The trial court was entitled to rely on defense counsel's affirmative assertion that the offender score was above 9. There was no need for the trial court to conduct a comparability analysis on the out of state convictions or to find that the State had proven defendant's criminal

history when defendant not only did not object to the calculation, but his counsel affirmatively agreed with the State that defendant was over a 9. The trial court did not error in relying on defense counsel's representation and this Court should find that defendant has waived his right to challenge his criminal history and uphold the trial court's sentence.

Should this court find that Exhibit 3 does not accurately state defendant's criminal history, then this court could remand back to fix the scrivener's error. Scrivener's errors are clerical errors that are the result of mistake or inadvertence, especially in writing or copying something on the record. They are not errors of judicial reasoning or determination. *See* BLACK'S LAW DICTIONARY 582, 1375 (8th ed. 1999). CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time of its own initiative or on the motion of any party. The remedy for a scrivener's error is to remand to the trial court for correction of the error. *In re Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). The record from the sentencing hearing is clear that unproven convictions were not part of defendant's offender score and were not relied on. Should this court find that Exhibit 3 is not accurate, this court should remand back to correct the written compilation of defendant's criminal history only.

Assuming, arguendo, that this court finds that defendant did not agree with the State's depiction of his criminal history, it is clear from the record that defendant did not object to the existence of his prior

convictions prior to his sentencing. As such, this court should then remand this case for resentencing, but allow the State to present new evidence as defendant failed to put the court on notice of any apparent defects with his criminal history and offender score calculation.

15. DEFENDANTS HAVE FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478

U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the

strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g. Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against

defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

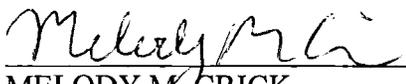
In the instant case, for the reasons set forth above, defendants have failed to establish that their trial was so flawed with prejudicial error as to warrant relief. Defendants have failed to show that there was any prejudicial error much less an accumulation of it. Defendants are not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendants' convictions and sentences.

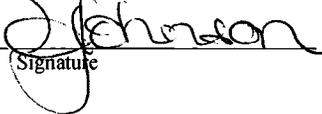
DATED: APRIL 28, 2011

MARK LINDQUIST
Pierce County
Prosecuting Attorney


MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

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

4/28/11 
Date Signature

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