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COURT OF APPEALS

APR 11 2011 10:51
STATE OF WASHINGTON
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No. 40447-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Bradford,

Appellant.

Pierce County Superior Court Cause No. 09-1-01944-6

The Honorable Judge Stephanie Arend

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Bradford's UPF convictions infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.
2. The trial court violated Mr. Bradford's right to a unanimous jury under Wash. Const. Article I, Section 21.
3. Mr. Bradford's state constitutional right to a unanimous jury was violated when the state failed to elect a single act as the basis for each charge and the judge failed to give a unanimity instruction.
4. Mr. Bradford's convictions violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.
5. Mr. Bradford's convictions violated his state constitutional right to notice of the charges against him, under Wash. Const. Article I, Sections 3 and 22.
6. The Second Amended Information was deficient because it failed to allege specific facts describing Mr. Bradford's alleged conduct.
7. Mr. Bradford was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
8. Defense counsel was ineffective for failing to either seek severance from the Williams case, or to request instructions limiting the jury's consideration of evidence that was only admissible against Williams.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Conviction for Unlawful Possession of a Firearm requires proof that the accused person actually or constructively possessed a firearm. The state did not introduce evidence that Mr. Bradford possessed a firearm. Did Mr. Bradford's convictions violate his Fourteenth Amendment right to due process because they were based on insufficient evidence?

2. When evidence of multiple criminal acts is introduced to support a single conviction, either the state must elect one act or the court must give the jury a unanimity instruction. Here, the state introduced evidence that Mr. Bradford was found in proximity to four firearms, but did not elect a single firearm to support each charged crime, and the trial judge failed to give a unanimity instruction. Did the trial court's failure to give a unanimity instruction violate Mr. Bradford's state constitutional right to a unanimous verdict in light of the prosecutor's failure to make the required election?
3. An accused person is constitutionally entitled to be informed of the charges against him. The Second Amended Information in this case did not allege specific facts describing Mr. Bradford's alleged conduct. Was Mr. Bradford denied his constitutional right to adequate notice of the charge?
4. An accused person has a constitutional right to the effective assistance of counsel. Mr. Bradford's attorney failed either to seek severance from the Williams prosecution, or to request instructions restricting the jury's consideration of evidence that was only admissible against Williams. Was Mr. Bradford denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Efrem Peoples wanted to do two things on April 8, 2009: sell some marijuana and sell a P85 Ruger handgun. RP 237, 258. To sell the marijuana, he arranged a meeting with James Briggs so they could smoke a blunt¹ together and then Briggs could make the purchase. RP 235-237. After the meeting place and time changed several times, Peoples met Briggs at a '76 gas station. RP 235-238. It was after dark, but Briggs said he wanted to do the deal in a nearby apartment parking lot. So Briggs and Larell Harttlet got into Peoples's vehicle and they drove over. RP 236, 239. Once Peoples arrived, Briggs said he needed to go to the bathroom and got out. RP 247.

Marces Sanders opened Peoples's door and pointed a .40 caliber semiautomatic at him. Larell Harttlet held a chrome revolver on him. RP 248-250. They took Peoples's cell phone, a gold chain from around his neck, cash, and his Ruger.² RP 249-251, 259. Then they told him to get out and lay on the ground, but Peoples got out and walked, then ran, away.

¹ Peoples explained that a blunt is marijuana inside the husk of a cigar. RP 387.

² He did not reveal that his Ruger had been stolen until just before trial, when he acknowledged that one of the guns placed into evidence belonged to him. RP 259.

RP 252-253. He went to the '76 station and asked the clerk to call 911.

RP 252, 256.

Police officers came and took his statement, and then put the information out to other law enforcement.³ RP 257, 155-157. Peoples did not tell them about the planned marijuana sale or about the Ruger, since he is not allowed to possess firearms. RP 258-259. He did tell them that he had a speaker system in his vehicle and was concerned it would not still be there when he got the vehicle back. RP 270-276.

Based on People's description of the suspects, more than one police officer concluded Marces Sanders had been involved in the robbery, so they went to his mother's house. RP 196-198, 406. Not long after, a van pulled up. All of the van's occupants were taken out at gunpoint and put onto the ground. RP 198-199, 207, 410.

James Bradford was seated behind the driver. RP 729.

Police brought Peoples to view the five people pulled from the van. RP 162. Peoples identified Sanders, Briggs and Harttlet as involved in the robbery. RP 162-164, 260. He did not identify James Bradford. RP 180-182, 261-262. He'd seen a brown van parked near where he parked at the

³ When the officer took Peoples back to his vehicle, it was not there. RP 167-168. The next day, the officer located the vehicle less than a mile away, and Peoples came to get it. RP 169.

apartments, and he said it was the same van. RP 263-264. Seth Williams owned the van, and had been in the driver's seat. RP 810.

Peoples's stereo components were found in the van, as well as some DVDs, Xbox games and documents. RP 272-290, 678-692. One of the three men also had \$200 in cash-- the same amount taken from Peoples. RP 164.

An officer looked into the van and saw three guns. RP 469, 492. After obtaining a search warrant, officers found a total of four guns in the van. RP 516-518, 540-549, 669. A .40 caliber Glock Model 23 semi-automatic pistol was found in a cabinet behind the rear seat area of the van, a Young American .32 caliber chrome revolver lay behind the driver's seat among other items on the floor, Peoples's Ruger 9mm semi-automatic lay on the passenger-side seat next to the back side doors, and a second .40 caliber Glock Model 23 semi-automatic lay on the floorboard. RP 259, 543-9, 559.

The state charged Marces Sanders, James Briggs, Larell Harttlet and Seth Williams with Robbery in the First Degree. Sanders, Briggs and Harttlet all pled guilty. RP 3. The state charged Mr. Bradford with two counts of Unlawful Possession of a Firearm in the First Degree. The operative language of the Second Amended Information read as follows:

...[that Mr. Bradford] did unlawfully, feloniously and knowingly own, have in his possession, or under his control a firearm, to wit: a revolver, he having been previously convicted in the State of Washington or elsewhere of a serious offense, as defined in RCW 9.41.010(12), contrary to RCW 9.41.040(1), and against the peace and dignity of the State of Washington.

...[that Mr. Bradford] did unlawfully, feloniously and knowingly own, have in his possession, or under his control a firearm, to wit: a semi-automatic handgun, he having been previously convicted in the State of Washington or elsewhere of a serious offense, as defined in RCW 9.41.010(12), contrary to RCW 9.41.040(1), and against the peace and dignity of the State of Washington. ...

CP 236-237.

Peoples did not plan to follow up on prosecuting the robbery, but he was arrested on his own Robbery in the First Degree charge, and so he made a deal to give testimony. RP 292-296. His agreement included a reduction of his charge to Attempted Robbery in the Second Degree, and the state's promise not to charge him with the possession or planned sale of marijuana, or with the unlawful firearm possession. RP 296-302, 333. He said that his agreement reduced a 15-year sentence to between 11 and 15 months. RP 402.

The charges against Seth Williams and Mr. Bradford were tried to a jury together. Mr. Bradford's attorney did not file a motion to sever. Evidence regarding the robbery, including a surveillance tape that was played multiple times, was admitted at the trial. RP 153-190, 233-421, 440-465, 500-522, 622-637, 667-714, 804-907.

Mr. Bradford stipulated that he had been convicted of a serious offense. RP 63-34, 712. He testified that he had no knowledge of any robbery, and did not know of or possess the contents of Mr. Williams's van. RP 727-803.

The prosecutor did not elect which of the four guns the jury should consider in deciding Mr. Bradford's two UPF charges, and the court did not give a unanimity instruction. CP 256-285. The court gave only one "to convict" instruction regarding Mr. Bradford, which listed the following elements:

- (1) That on or about the 8th day of April, 2009 the defendant, James Curray Bradford, Jr., knowingly had a firearm in his possession or control;
- (2) That the defendant, James Curray Bradford, Jr., had previously been convicted of a serious offense; and
- (3) That the acts occurred in the State of Washington.
CP 272.

The jury completed two different verdict forms regarding Mr. Bradford, one entitled "Verdict Form BIII (revolver)", and the other entitled "Verdict Form BIV (semi-automatic pistol)." CP 286-287. Mr. Bradford was convicted of two counts of Unlawful Possession of a Firearm in the First Degree. RP 286-287. After sentencing, Mr. Bradford timely appealed. CP 291-302, 288.

ARGUMENT

I. MR. BRADFORD'S UPF CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS BEYOND A REASONABLE DOUBT.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, ___ Wash. 2d ___, ___, ___ P.3d ___ (2010). A conviction based on insufficient evidence raises a manifest error affecting a constitutional right, which may be argued for the first time on review. RAP 2.5(a)(3); *State v. Fleming*, 155 Wash. App. 489, 506, 228 P.3d 804 (2010).

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

B. The prosecution failed to prove beyond a reasonable doubt that Mr. Bradford possessed a firearm.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v.*

Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt*, *supra*.

A conviction for Unlawful Possession of a Firearm requires proof that the accused person knowingly possessed a firearm. RCW 9A.04.040; *State v. Anderson*, 141 Wash.2d 357, 5 P.3d 1247 (2000) . Where a person is not in actual possession, guilt may be premised on constructive possession; however, mere proximity is insufficient to prove constructive possession.⁴ *State v. George*, 146 Wash. App. 906, 920, 193 P.3d 693 (2008).

Here, the evidence was insufficient to show that Mr. Bradford possessed any of the four handguns. First, he did not have actual possession, because no gun was found on his person. RP 468-471. Second, there was no evidence that he had dominion and control over any of the guns; thus the state failed to prove constructive possession.⁵ *See* Instructions Nos. 13, 21, and 22, CP 272, 280-281; *George*, at 920. Third, five men were found in the van, but only four guns were discovered, and one of those guns had been stolen from Peoples. RP 198-199, 207, 410, 516-518, 540-549, 669.

⁴ This is so even where the accused person handles contraband, because evidence of momentary handling is insufficient to establish constructive possession. *George*, at 920.

⁵ At most, the state established his proximity to the guns—without even proof of momentary handling. *Cf. George*, at 920-924 (collecting cases).

This evidence is insufficient to establish that Mr. Bradford possessed any of the guns. *George*, at 920. Because the evidence was insufficient, Mr. Bradford's convictions must be reversed and the case dismissed with prejudice. *Smalis*, *supra*.

II. THE ABSENCE OF A UNANIMITY INSTRUCTION DENIED MR. BRADFORD HIS RIGHT TO A UNANIMOUS JURY UNDER WASH. CONST. ARTICLE I, SECTION 21.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler*, at ____.

The erroneous failure to provide a unanimity instruction requires reversal, unless the error is harmless beyond a reasonable doubt. *State v.*

Coleman, 159 Wash.2d 509, 512, 150 P.3d 1126 (2007). The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id.*

B. Where the prosecution presents evidence of multiple acts, the court must provide a unanimity instruction.

An accused person has a state constitutional right to a unanimous jury verdict.⁶ Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wash.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a criminal defendant

⁶ The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *Coleman*, at 511. If the prosecution presents evidence of multiple acts to support a particular charge, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act to convict the accused person of that particular charge. *State v. York*, 152 Wash.App. 92, 216 P.3d 436 (2009); *Coleman*, at 511. Jurors have a constitutional “responsibility to connect the evidence to the respective counts.” *State v. Vander Houwen*, 163 Wash.2d 25, 39, 177 P.3d 93 (2008).

In the absence of an election by the prosecution, failure to provide a unanimity instruction in a “multiple acts” case is presumed to be prejudicial.⁷ *Coleman*, at 512; *see also Vander Houwen*, at 38. Without the election or an appropriate unanimity instruction, each juror’s guilty vote might be based on facts that her or his fellow jurors did not believe were established beyond a reasonable doubt. *Coleman*, at 512.

The obligation to provide a unanimity instruction applies in cases involving multiple acts of possession. *See, e.g., State v. King*, 75 Wash. App. 899, 878 P.2d 466 (1994) (instruction required when evidence shows

⁷ Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); *State v. Greathouse*, 113 Wash.App. 889, 916, 56 P.3d 569 (2002).

actual possession of cocaine in a fanny pack and constructive possession of cocaine found in vehicle).

C. The absence of a unanimity instruction prejudiced Mr. Bradford and requires reversal.

In this case, the prosecution introduced evidence that Mr. Bradford was seated in a van containing four firearms. Specifically, the police found a .32 caliber Young American chrome revolver on a pile of DVDs, a Ruger P85 9 mm semiautomatic pistol under a seat, and two Glock Model 23 semiautomatic pistols, one in a storage drawer and the other under a DVD case. RP 543-545, 546, 548, 686. The prosecutor did not make an election as to which handgun(s) Mr. Bradford allegedly possessed. CP 236-237, 256-285, 286, 287; RP (generally).

Despite this, the trial court failed to provide a unanimity instruction. CP 256-285. This created a manifest error affecting Mr. Bradford's constitutional right to juror unanimity, and thus can be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009).

In the absence of a unanimity instruction, there is no guarantee that all twelve jurors agreed on the particular acts that made Mr. Bradford guilty of each count of UPF. The error is presumed prejudicial, and requires reversal unless the state can establish that no rational juror could

have a reasonable doubt that Mr. Bradford was guilty. *Coleman*, at 512. The prosecutor cannot make this showing: the evidence established that Mr. Bradford was near all four firearms, but nothing (beyond mere proximity) connected him to any particular firearm.

Given the evidence, a rational juror could have had a reasonable doubt that Mr. Bradford knowingly possessed any of the four firearms. Under these circumstances, it is impossible to say that the jury unanimously agreed that Mr. Bradford was guilty of possessing any particular firearm discovered in the van. *Coleman*. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

III. THE SECOND AMENDED INFORMATION VIOLATED MR. BRADFORD'S RIGHT TO NOTICE UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND UNDER WASH. CONST. ARTICLE I, SECTIONS 3 AND 22.

A. Standard of Review.

A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.*, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required.

State v. Courneya, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006);

State v. McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. Mr. Bradford was constitutionally entitled to notice that was both legally and factually adequate.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the federal constitution, as well as Article I, Section 3 and Article I, Section 22 of the Washington State Constitution. The right to a constitutionally sufficient Information is one that must be “zealously guarded.” *State v. Royse*, 66 Wash.2d 552, 557, 403 P.2d 838 (1965).

A constitutionally sufficient charging document must notify the accused person of the essential elements of the offense and of the underlying facts alleged. The rule

requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged. This is not the same as a requirement to ‘state every *statutory element* of’ the crime charged.

State v. Leach, 113 Wash.2d 679, 689, 782 P.2d 552 (1989) (emphasis in original). The *Leach* court addressed the rationale for requiring a statement of the essential facts when a defendant is charged by Information:

Complaints must be more detailed since they are issued by a prosecutor who was not present at the scene of the crime. Defining the crime with more specificity in a complaint assists a defendant in determining the particular incident to which the complaint refers... [Where a citation is issued at the scene, the defendant] presumably know[s] the *facts* underlying [the] charges.

Id., at 699.

Following *Leach*, the Supreme Court elaborated on this aspect of the essential elements rule:

The primary purpose is to give notice to an accused so a defense can be prepared. There are two aspects of this notice function involved in a charging document: (1) the description (*elements*) of the crime charged; and (2) a description of the specific *conduct* of the defendant which allegedly constituted that crime. As we recently made clear in *Kjorsvik*, the “core holding of *Leach* requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime.” *Leach* noted that often charging documents are written by alleging specific facts which support each element of the crime charged.

Auburn v. Brooke, 119 Wash.2d 623, 629-630, 836 P.2d 212 (1992)

(footnotes omitted, emphasis in original).

C. The Second Amended Information was factually deficient because it did not include specific facts supporting the allegation that Mr. Bradford had previously been convicted of a serious offense.

A conviction for Unlawful Possession of a Firearm in the First Degree requires proof that the accused person has a prior conviction for a serious offense. RCW 9.41.040. In this case, the Second Amended Information alleged only that Mr. Bradford had been “previously

convicted in the State of Washington or elsewhere of a serious offense...” CP 236-237. The Information did not provide any facts enabling Mr. Bradford to identify the alleged prior conviction. CP 236-237. It did not specify the charge, the court, the date of conviction, or the cause number. CP 236-237.

The existence of a prior felony conviction made Mr. Bradford’s alleged firearm possession criminal; the classification of that felony as a serious offense elevated the crime from a Class C felony to a Class B felony. RCW 9.41.040. In the absence of any details identifying the prior qualifying conviction, the Information was factually deficient, because it did not provide “a description of the specific *conduct* of the defendant which allegedly constituted that crime.” *Brooke*, 629-630 (emphasis in original).

Nor can the underlying facts—the specific identity of the prior qualifying conviction—be inferred from the language used in the Second Amended Information. CP 236-237. Accordingly, Mr. Bradford need not demonstrate prejudice. *Kjorsvik, supra*. His conviction must be reversed, and the case dismissed without prejudice. *Id.*

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

A. Standard of Review

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

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

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

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *see also State v. Pittman*, 134 Wash. App. 376, 383, 166 P.3d 720 (2006).

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

C. Defense counsel should have either moved to sever Mr. Bradford's case from the Williams trial or requested instructions limiting the

jury's consideration of evidence that was only admissible against Williams.

1. Defense counsel should have moved for severance.

An ineffective assistance claim can be based on defense counsel's failure to move for severance from a codefendant's case.⁸ *See, e.g., Trass v. Maggio*, 731 F.2d 288, 293-94 (5th Cir. 1984); *Hernandez v. Cowan*, 200 F.3d 995, 999-1000 (7th Cir. 2000). Severance is required whenever a joint trial creates a risk of unfair prejudice.

Under CrR 4.4, severance should be granted whenever "it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant," or when the evidence is insufficient to support joinder and failure to sever would cause prejudice.⁹ CrR 4.4(c) and (d). Addressing severance under the federal rules of criminal procedure, the Supreme Court has said that severance is appropriate

if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider

⁸ Typically, such claims are successful when one codefendant accuses another of committing the crime; however, nothing prohibits a successful ineffective assistance claim in other contexts where severance is appropriate.

⁹ Defendants are properly joined for trial if the charged offenses were "(i) part of a common scheme or plan; or (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others." CrR 4.3; CrR 4.3.1.

against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened... Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice.

Zafiro v. United States, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993) (citations omitted).

In this case, defense counsel should have moved for severance.

The problems identified in *Zafiro* are present here: (1) evidence of wrongdoing by Williams may have erroneously suggested to jurors that Mr. Bradford was guilty, (2) the two young men had “markedly different degrees of culpability,” and (3) evidence admissible only against Williams increased the risk of conviction for Mr. Bradford. Accordingly, severance was appropriate to promote a fair determination of Mr. Bradford’s guilt or innocence. CrR 4.4(c).

Furthermore, the evidence produced at trial was insufficient to support joinder: there is no indication that Mr. Bradford’s firearm charges were related to the robbery as part of a common scheme or plan; nor would it have been difficult to separate proof of the robbery from proof of Mr. Bradford’s purported possession of firearms. CrR 4.3. Finally, the joint trial prejudiced Mr. Bradford because it resulted in the introduction

of evidence of the robbery—which would otherwise have been excluded—and painted Mr. Bradford in a bad light because of his association with violent armed criminals. *Zafiro*; CrR 4.4(d).

2. Defense counsel should have sought instructions limiting the jury’s consideration of that evidence because the case against Williams involved a large amount of prejudicial evidence that was not admissible in Mr. Bradford’s case.

To be reasonably competent, defense counsel must be familiar with the relevant legal standards and instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). Failure to request appropriate instructions may require reversal. *Id.*

In the absence of a limiting instruction, “evidence admitted as relevant for one purpose is deemed relevant for others.” *State v. Myers*, 133 Wash. 2d 26, 36, 941 P.2d 1102 (1997). Accordingly, a trial court must provide appropriate limiting instructions when evidence is admitted for a limited purpose. *State v. Russell*, 154 Wash.App. 775, 225 P.3d 478 (2010) (where evidence is admitted under ER 404(b), a limiting instruction must be given). The need for limiting instructions is especially acute when jurors are required by the court’s instructions to consider “all of the evidence” relating to a proposition, “in order to decide whether [that] proposition has been proved...” Instruction No. 1, CP 257-259; *See*

also *Russell*, at 786. Furthermore, the Supreme Court has noted that limiting instructions “often will suffice to cure any risk of prejudice” caused by joinder of defendants. *Zafiro*, at 539.

In this case, much of the evidence admitted against Mr. Williams was irrelevant¹⁰ to Mr. Bradford’s charges, and therefore inadmissible under ER 402, ER 403,¹¹ and ER 404(b).¹² Defense counsel should therefore have objected to its admission for use against Mr. Bradford, and requested instructions directing the jury to consider it only as it related to Williams. There was no strategic reason to allow the jury to consider facts relating to the robbery as substantive evidence. The robbery evidence

¹⁰ ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Irrelevant evidence is inadmissible. ER 402.

¹¹ Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

¹² ER 404(b) requires exclusion of an accused person’s uncharged misconduct, when offered as propensity evidence to show action in conformity with the person’s character. Before evidence of prior acts may be admitted, the trial court is required to analyze the evidence and must ““(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.”” *State v. Asaeli*, 150 Wash.App. 543, 576, 208 P.3d 1136 (2009) (quoting *State v. Pirile*, 127 Wash.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record; however, if the record shows that the trial court adopted a party’s express arguments addressing each factor, then the trial court’s failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wash.App. 727, 733, 25 P.3d 445 (2001).

suggested either that Mr. Bradford was an accomplice to armed robbery (and had a propensity to commit crimes),¹³ or that he maintained friendships with others who were involved in such crimes. Furthermore, the court's instructions actually *required* the jury to consider the robbery evidence as proof of Mr. Bradford's guilt. Instruction No. 1, CP 257-259; *Russell*, at 786.

A proper request would have required the trial judge to give appropriate limiting instructions. *Russell*, *supra*. Counsel's failure to request limiting instructions constituted deficient performance and prejudiced Mr. Bradford. Had proper objections been made, the outcome of trial would have differed: if the jury had been told to disregard the robbery evidence (and the presence of stolen property in the van), at least some jurors would have voted to acquit Mr. Bradford.

Counsel's failure to propose proper limiting instructions deprived Mr. Bradford of the effective assistance of counsel. *Tilton*, *supra*; *Russell*, *supra*. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Id.*

¹³ The use of propensity evidence to establish guilt violates ER 404(b); it may also violate the Fourteenth Amendment's due process clause. U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).

CONCLUSION

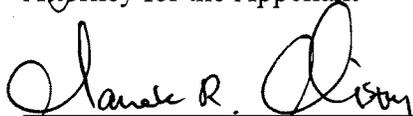
For the foregoing reasons, the convictions must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded to the superior court for a new trial.

Respectfully submitted on August 30, 2010.

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