

NO. 40984-4-II Consol.

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ANDRE T. PARKER, Appellant

11/27/26 MILLER
STATE OF WASHINGTON
BY _____
COURT, v.

COURT OF APPEALS

Appeal from the Superior Court of Pierce County
The Honorable James Orlando, DEPARTMENT NO. 1
Pierce County Superior Court Cause No. 09-1-01460-6

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR:

1. Defense counsel failed to provide constitutionally effective assistance by failing to request limiting instructions for the admission of gang evidence.

a. Defense counsel was ineffective for failing to propose a limiting instruction regarding the testimony of Curtis Hudson regarding ‘impression’ of events at McCabe’s despite the trial court’s invitation to do so.

b. Defense counsel was ineffective-testimony of Ringer regarding his opinion as to what was occurring in the McCabe’s security video. (RP 1331)

c. Defense counsel was ineffective for failing to object to the prosecutor’s impermissible vouching for the credibility of Det. Ringer where his testimony was the key to the State’s case.

2. Trial court abused its discretion in the admission of gang evidence.

3. The prosecutor committed misconduct when he violated the court’s order limiting the scope of gang evidence.

4. The trial court provided erroneous, confusing instructions to the jury and contradicting jury instructions regarding “substantial step”,

numbers 17 and 27, as well as number 19, which addressed the evaluation of only Mr. Embry's out of court statements.

5. The State failed to prove beyond a reasonable doubt that Mr. Parker committed the crimes of first degree attempted murder with firearm enhancements as well as unlawful possession of a firearm.

6. The defendant entitled to relief under the cumulative error doctrine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. A criminal defendant has the constitutional right to effective assistance of counsel. The criminal defendant is entitled to relief when he establishes both prongs of the *Strickland* standard.

2. Criminal defense counsel has the duty to propose limiting instructions when evidence is admitted for a limited purpose. When defense counsel ignores the trial court's invitation to submit a limiting instruction, defense counsel's actions may not be characterized as legitimate strategic and tactical decisions.

3. Criminal defense counsel has the duty to propose limiting instructions where the State adduces evidence for a limited purpose and the potential misuse of such evidence is prejudicial to the defendant.

4. Criminal defense counsel has the duty to object to the prosecutor's closing argument which impermissibly vouches for the veracity of the State's witnesses.

5. A criminal defendant may be convicted upon competent evidence established beyond a reasonable doubt. Where the trial court erroneously admits, with limitation, so called gang evidence, a criminal defendant is convicted on less than constitutional standards.

6. The trial court must provide to the jury those instructions which correctly set forth the applicable law. When the trial court gives contradictory and incomplete instructions to the jury, the trial court permits the jury to convict the defendant on erroneous law.

7. The State must prove its case beyond a reasonable doubt. When the appellate court finds that the State has insufficient evidence to sustain its convictions, then the defendant is entitled to vacation of those charges.

8. Where a trial is marred by numerous defects, none of which taken alone, is sufficient for reversal/dismissal, the defendant is entitled to relief under the cumulative error doctrine.

C. STATEMENT OF THE CASE:

1. PROCEDURAL FACTS

The State charged Mr. Parker with the crimes of attempted murder in the first degree with a firearm enhancement as well as unlawful possession of a firearm in the first degree. CP 472-473.

The State charged Mr. Parker by information with codefendants Randall Embry and Bryant Morgan. *Supra.*

The State's case was fraught with reversible error. The State was allowed to adduce so-called "gang evidence" over the objection of Mr. Parker, whose counsel then failed to propose a limiting instruction. The State was permitted to adduce evidence of the "impressions" of Det. Ringer and witness Curtis Hudson, again without a limiting instruction.

The State presented no evidence that Mr. Parker took any substantial step toward the commission of the crime of attempted murder in the first degree. The State likewise failed to produce any evidence that Mr. Parker armed with a firearm at that time. The State likewise failed to prove that the firearm enhancement applied to Mr. Parker.

Throughout the State's case, the prosecutor repeated an out of court statement by non-testifying codefendant Morgan that if Det. Ringer watched that security tape from McCabe's, he would be able to put in all together.

The prosecutor impermissibly argued that Morgan's statement was substantive evidence of Mr. Parker's guilt and also impermissibly vouched for the veracity of Det. Ringer.

The trial court's instructions no. 13 and 27 provided conflicting and confusing law to the jury. CP 694-729. Likewise, instruction no. 19 instructed the jury to consider codefendant Embry's out of court testimony in a particular but failed to provide any instruction to the jury regarding the consideration of the out of court statements by Mr. Parker. Instruction No. 19.

(a) The State's motion to admit "gang evidence" and other ER 404(b) evidence.

The State moved to admit ER 404(b)¹ evidence. RP 10. The State argued that there were two instances of admissible ER 404(b) evidence. RP 10.

The incident was alleged to have occurred on February 24, 2009. CP 472-473. The State contended that all three defendants were gang members and that they were involved in a fight in a nightclub parking lot. That fight ended with gunfire. RP 10-11.

¹ ER 404(b) provides . . . (b) Other crimes, Wrongs or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation plan, knowledge, identity, or absence of mistake or accident.

The State's case rested in large part on the "impression" evidence and attenuates and unsupportable links between the defendants. The second incident occurred about two months later at McCabe's bar.

The codefendants and shooting victim all had gang affiliations. Notwithstanding those associations, the State produced no competent evidence that this was a "gang" crime.

There was credible evidence that Mr. Embry shot Clark. There was no evidence of any substantial stop linking Mr. Parker to Clark. Clark had no conversation at all with Parker at McCabe's. RP 642.

The State's version of the case was that Mr. Parker and the three other men walked to the car to get a firearm. Moments later shots were fired. RP 15.

The State's theory of the case was that the four men ran off and jumped in the car. Mr. Parker had rented the car. RP 16. Mr. Parker later called 911 to report that the car had been stolen approximately one hour before the shooting. Police later recovered the car in the Green River where it contained, inter alia, a rental agreement signed by Mr. Parker. RP 16-17.

The State argued that this evidence was admissible to establish that Mr. Parker had "enticed" Embry to do the shooting. RP 18. The State also contended that Mr. Parker recruited Morgan as an accomplice. RP 19.

The State further asserted that Mr. Parker had organized the shooting outing for “retaliation issues.” RP 19.

Police later showed a photo montage to Clark’s girlfriend, who identified Embry to be in the group of shooter(s). RP 16.

Trial counsel² argued that the State had failed to meet the four prong test essential to the admission of such evidence. Trial counsel specifically argued that the State had failed to establish any legitimate purpose for the admission of such evidence, that the evidence was more prejudicial than probative and that the evidence lacked any probative force. RP 23, 28. Trial counsel averred that the State wanted to put on this evidence to support its theory that this case was about “dangerous gangs.” RP 26.

The parties also argued that Tacoma Police Department (TPD) Det. John Ringer did not qualify as an expert witness, RP 34-35. Defense counsel also argued that such testimony violated *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) because it was based on anecdote from unnamed informants.

The State countered Ringer’s testimony was essential to show the jury the link between the defendants. The State also argued that the

² In this appeal, “trial court” refers to Mr. Parker’s attorney Shane Silverthorn.

evidence was necessary to show motive, preparation, plan and association between the parties. RP 38.

The State further asserted that the “gang expert” evidence was necessary for the jury to understand that the “gang affiliation” evidence is “the glue that holds it [relationship between the parties] together.” RP 39.

In reply, Mr. Parker’s attorney noted that the proffered gang evidence was little more than speculation and hearsay statements from unknown confidential informant. RP 47.

The trial court granted the defendants’ motion to exclude gang evidence. The court noted that there was a “very scant showing” that gang evidence was relevant to this case. The court also found that the State did not need this evidence to prove its theory of the case. RP 49-51.

In response to the State’s motion for reconsideration, the defendant noted that he had been incarcerated for the past nine years. RP 54-55. Mr. Parker had been in custody when the photos at issue were placed on Facebook. RP 54. In the State’s photos, Mr. Parker was not throwing any gang signs or engaging in any other conduct that would compel the conclusion that he was in a gang. RP 54-55.

The court ultimately granted the State's motion. The trial court held that the evidence was admissible pursuant to ER 803(a)(3)³, present sense impression. RP 135.

Prior to Ringer's testimony the prosecutor stated that Ringer's testimony would be limited to his credentials as a police officer, including his assignment to a gang task force; the dynamics of gang culture, including the notions of disrespect and retaliation; the associations between the individuals in this case, based on upon his review of photographs as well as the security video from McCabe's. RP 892-894.

The State also contended that this 404(b) evidence was relevant because: "The level of violence that gang members use as compared to other citizens, I guess, is important to convey to the jury, and that it also reflects on these individuals and their actions in this case." RP 19-20.

After the prosecutor's preview of Ringer's testimony, the court ruled that it would permit "a relatively limited foray into the gang world." The court ruled that evidence was admissible to explain "a culture that has demonstrated the propensity to retaliate with greater violence for relatively

³ (a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (3) *Then Existing Mental, Emotional, or Physical Condition*. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

slight insults or acts by either a rival or someone not within their own immediate group of associates.” RP 895. The court attributed Ringer’s expertise to his past investigation of gang cases and also because he “has seen those kinds of behaviors. RP 895.

Det. Ringer’s testimony quickly exceeded scope permitted by the court. RP 1291 *et. seq.* Thus, Det. Ringer was allowed to identify the defendants as members of particular street gangs. RP 1292. Given the sources of this testimony, the defendants could not cross-examine these anonymous sources. RP 1292-1293.

Ringer’s identification was based in part on undated photos from a MySpace account, he identified Mr. Parker and others. RP 1304.

Given the shifting content of Ringer’s testimony, the court invited defense counsel to prepare a limiting instruction that it will be the jury’s responsibility to make factual findings regarding the content of the McCabe’s video. RP 1331.

During direct examination of Nicole Crimmins, the prosecutor also attempted to qualify her as a gang expert. RP 464 *et. seq.* The prosecutor wanted to “prove” that this case was gang-related by having Crimmins testify regarding her knowledge of Hilltop Crips, Young Gangster Crips. RP 464-466. The prosecutor argued that Crimmins’ testimony was somehow relevant to identify Hilltop Crips from YGC (Young Gangster

Crips). RP 466. The prosecutor also wanted to tie Crimmons' knowledge of gang affiliations to the defendant's bloody lip on New Years Day, 2009. RP 466.

The court denied the prosecutor's offer of proof that occurred after Crimmins had been qualified as an individual familiar with different gangs in Tacoma. RP 464. The court explained its ruling:

“Well, I guess my thinking on the offer was that was made was it wasn't this witness that was going to be establishing gang involvement or gang membership but was going to be Detective Ringer. To say, “Are you familiar with Hilltop Crips,” I don't know what that is. It's not like they carry cards that say. “I'm a member of the Elks Club, Lodge Number 2121.”

Mr. Greer: No, but it is even more definitive than that, if you grow up with them and live with them.

The Court: People can come in and can go out and be part and not be part. So, I mean, I guess for purposes of this witness, I think you can ask her to describe who saw there involved in the activities, and perhaps her boyfriend or ex-boyfriend may have been a member of the Hilltop Crips, if she actually knows that.

Beyond that, I'm concerned that she may not have the proper foundation to establish everyone's supposed gang affiliations.

RP 466-467.

The court then modified its ruling to permit the State to ask Crimmins regarding identification of the individuals involved in the fight and to reserve the gang identification for Detective Ringer. RP 471-472.

During direct examination the State's witness Crimmins, who had earlier testified to her employment at the Department of Corrections(DOC), testified that she knew Mr. Parker from work and that she was not certain how long he had reported to her office. RP 493. Mr. Parker's attorney objected to this unfairly prejudicial answer and moved to strike. RP 493, The trial court did not rule either on Mr. Parker's objection or motion to strike. RP 493-494.

However, outside the presence of the jury, the court reminded the State that it previously held inadmissible Crimmins' testimony that she knew Mr. Parker because he had reported to DOC. RP 497. Although the State acknowledged the court's ruling, the prosecutor averred that he had not known how Crimmins would answer his questions. RP 497. The prosecutor clearly had not discussed the court's ruling with Crimmins. *Passim.*

Limiting Instructions

Prior to the testimony of State's witness Curtis Hudson, the court, over the defendant's objection, ruled that the State could ask Hudson about his "impression" of events at McCabe's on February 24, 2009. RP 883-890. The defendant argued that Hudson's testimony was inadmissible because it was based on hearsay. RP 883-884;886-887. The court reasoned that Hudson's "impression" was admissible as state of mind. RP 887.

After the court ruled, the court invited Mr. Parker's attorney to propose a limiting instruction. RP 890. Mr. Park's attorney failed to propose such an instruction. *Passim*.

Closing Argument

The State's theory of the case was that Mr. Parker set the McCabe's shooting in motion after Clark bloodied his lip in the New Years fight at the 54th Street Bar. RP 1565, 1570. According to the State, no other person had a motive to shoot Clark. RP 1574. The State built its theory of the case on codefendant Morgan's statement to Ringer: "It is what it is. You'll be able to put it all together," RP 1566, 1574, 1592, 1613. Morgan made this statement after Ringer showed the security video from McCabe's. RP 1566.

After painting Mr. Parker as the instigator of the shooting, the State characterized the codefendants as accomplices. RP 1570. The State conceded that the shooters were codefendants Morgan and Embry. RP 1570. Embry's jacket matched that worn by the shooter and described by eyewitness Crimmins and later by Clark. RP 1580, 1586, 1586. Clark also viewed a photo montage and identified Embry as the shooter. RP 1593.

The State manipulated Mr. Parker's statements to Ringer to be a confession to the McCabe's shooting. RP 1583: "He admitted he has a

quick temper and there were numerous everyday --- rumors every day about things he had supposedly done.” RP 1583.

During Mr. Parker’s closing argument, he challenged the jury to closely examine the video evidence. RP 1623-1627. The State’s video did not show Mr. Parker in any angry conversation. RP 1624-1625, 1627.

Mr. Parker contended that the State’s theory of the case was he saw what happened and didn’t want to be involved. RP 1652. The State failed to produce even a scintilla of evidence that Mr. Parker did anything other go to McCabe’s the night of the shooting. RP 1657.

Mr. Parker also argued that the State failed to prove any conspiracy, any accomplice liability for him, and no evidence that he directed any shooting or in any other way participated in it. RP 1627-1629. To the contrary, the video established that Mr. Parker walked away from Morgan before the shooting and returned to Morgan very briefly for a short conversation. RP 1636.

In addition, Mr. Parker emphasized Crimmins’ testimony that she knew him and knew that he was not present at the shooting, RP 1642. Clark could not distinguish between Mr. Parker and Deuce. RP 1648.

In rebuttal, the prosecutor urged the jury to convict not upon the facts but instead upon pure fiction: “. . .they’re all sitting in the car, the gun’s in the car.” RP 1786.

Verdict

The jury subsequently convicted Mr. Parker of the crimes of attempted first degree murder; first degree unlawful possession of a firearm; as well as the firearm sentencing enhancement, finding that Mr. Parker was armed with a firearm at the time of the commission of the crime of attempted first degree murder. RP 1806-1808; CP 730, 731, 732.

Sentencing

On July 16, 2010, the court convened a sentencing hearing for Mr. Parker. RP 1811, 1822.

The court sentenced Mr. Parker within the standard range to 372 months, including the enhancement. RP 1827-1828; CP 737-750.

The defendant thereafter timely filed notice of appeal. CP 760-774.

Trial Testimony

Summary of the State's Case

Mr. Parker was present at McCabe's Bar and Grill on a night when codefendant Embry, accompanied by codefendant Morgan, shot Tyrick Clark in the presence of Nicole Crimmins.

The State did not and could not adduce evidence that Mr. Parker was in any way involved in this shooting. By means of "impression" evidence, the State was permitted to elicit testimony from a security video

that supposedly supported its case against Mr. Parker though speculation about his activities when he was not on the video.

The prosecutor used this “impression” evidence , an out of court statement made by non-testifying codefendant Morgan to detectives, as well as impermissible vouching for the veracity of Det. Ringer to convict Mr. Parker.

Based on this inadmissible evidence as well as conflicting and erroneous jury instructions, the jury convicted Mr. Parker.

The State’s theory of the case was that Mr. Parker orchestrated attempted murder of Clark. The State speculated that the shooting was retaliatory for an incident that occurred on January 1, 2009, an a different club. The State argued that on that date Mr. Parker was in a fight with Clark. Mr. Parker sustained an injury to his lip. The State argued that this trivial incident motivated the subsequent events.

Although there were approximately one hundred people milling in the McCabe’s parking lot at the time of the shooting, the State’s case rested on the following discrepant witnesses:

Crimmins Testimony

Crimmins told Thiry that she and Clark were at McCabe’s to get a drink and socialize. RP 373. She stated that as they walked back to their car, they were confronted by the male. RP 373. Once he was within a few

feet of Clark, the shooter began shooting Crimmins. RP 373. Crimmins believed that about six shots were fired. RP 374. Crimmins related that the shooter then walked away toward a car that then left the scene. RP 374. Crimmins gave police a license number and described the car as gray. RP 375. They provided this information to police dispatchers. RP 376. Crimmins stated that the shooter got into the back driver's side before the car drove away. RP 384.

Crimmins and Clark decided to go to McCabe's hours before the shooting. RP 412. En route to McCabe's. Crimmins had a couple of shots of cherry vodka. RP 413. Clark had been insistent on going to McCabe's that night. RP 516.

Crimmins went inside but Clark needed to change his shirt because he "wasn't wearing the right kind of shirt." RP 412, 563. While Clark was gone, Crimmins ordered herself a drink. RP 416. Crimmins consumed several drinks and felt buzzed when she left. RP 418.

After he returned, Clark also consumed four or five drinks. RP 419, 570. Before entering McCabe's, Clark was searched for weapons. RP 568.

None of the police officers asked Crimmins how much she had to drink at McCabe's. RP 379.

As Crimmins and Clark walked away, they were approached by a man wearing a hoodie. RP 425. The man walked toward them with an “aggressive look.” RP 426. The man had hair braids and had on a black and white hoodie with maybe some silver in it. RP 430. The man also had a scratch or scar or “just something there” beneath his right eye. RP 430, 544, 549. Crimmins recalled that the feature below the shooter’s right eye had healed. RP 550. The man walked directly toward Crimmins and Clark, looking into their eyes as he approached. RP 520. Crimmins kept eye contact with the man as he approached and while he shot Clark. RP 520-521.

Crimmins then felt a recoil. RP 426. When Crimmins asked Clark if he had been shot, Clark said, “Yes.” RP 426. Clark denied that he knew the identity of the shooter and instructed Crimmins to get the license plate number. RP 426, 618. Crimmins could not see the license plate number because the lights weren’t on in the car. RP 426. She did see a man at the rear of the car; she saw that the man was doing something. RP 426. That man was wearing the jacket. RP 426.

Crimmins had been taking “a rather heavy dose of Xanax” at the time of McCabe’s incident. RP 516. Crimmins believed that Xanax improved her memory. RP 539.

Ms. Crimmins, who “frantic and hysterical”, told Stanley that she believed that the shooter(s) was in a car that fled southbound on Pacific. RP 266, 293. She further described the car as a white Caprice with the license plate of 698 YNT. RP 266. She also provided a second license plate number. RP 294. She was not sure of the license plate number. RP 296. Moments later she changed the vehicle description to a silver Ford Escort type of car. RP 268. She described the shooter as a black male wearing a white hoodie. RP 268. Despite her hysteria Crimmins noted the license number of the shooter’s car. RP 312. Despite her hysteria she recalled specifically that the shooter wore a white hooded sweatshirt. RP 313.

TPD Officer Thiry responded to Stanley’s call reporting a shooting at McCabe’s. RP 361. When he arrived there were four to six patrol cars already there. RP 363. When Thiry talked to Crimmins she described the shooter to be a black male wearing a white hooded sweatshirt with “fancy silver or grey writing on it.” RP 372. She also described the white hoodie as having birds, birds like rotating birds, like birds in black and white in a pattern. RP 438. Crimmins further described the shooter as approximately 5’7”, weighing 165 pounds and appearing about 24 years old. RP 372-373.

Crimmins also recalled running to the car to get the license plate number even though she needed to get close to the shooter, who was still standing outside the car. RP 443.

Crimmins saw other people in the car. RP 440. When the car pulled away, she could clearly see the license plate number. RP 440.

Crimmins then called 911 and gave them a license plate number although she had been unable to see one. RP 426. Crimmins said she was hysterical and yelling to 911, "I'm getting the license plate, here's what it is." RP 445. When Crimmins gave this information to 911, she was about 5 feet from the shooter. RP 445.

Crimmins later recalled asking Clark if he had seen the shooter before and Clark replied, "Just in the club." RP 436.

Crimmins later identified the shooter to be the man standing at the back of the car. RP 437. She stated that she had not lost sight of the man from the time of shooting until she saw him standing by the car. RP 438.

Crimmins claimed to have told police from McCabe's, "that's the car. The shooter's in there. Follow them." RP 442. She asserted the car pulled away "shortly after" the police pulled up from McCabe's. RP 445. When the police arrived, the shooter was just then getting into the car. RP 448.

Crimmins was unable to identify the shooter from a photo montage. RP 457. Only after police showed her a sweater under various lighting conditions was she able to identify any sweatshirt. RP 458. She could not identify the sweatshirt at trial, noting that the pattern was different – she did not recall a red crown on it – and also less “solid colored” than the shirt she previously saw. RP 439.

Clark’s Testimony

On February 24, 2009, Tyrick Clark was shot in the torso, right shoulder, and buttocks. RP 553, 558. He was shot five or six times by codefendant Embry. RP 553-554.

Clark then spent almost three months in the hospital RP 554.

Clark recalled the shooting although he had remained conscious except for a very brief period throughout. RP 559.

Clark may have told Det. Turner that he and Parker had talked about the prior incident and considered it resolved. RP 634.

Clark identified codefendant Embry as the shooter. RP 607, 615.

Clark “definitely looked” at Embry before Embry shot him. RP 612.

Clark knew that Mr. Parker primarily drove an El Camino and also “a few other cars.” RP 689.

Clark knew that Mr. Parker did not shoot him. RP 702. Clark also knew that Mr. Parker was not anywhere around when he was shot. RP 702. Clark had no altercations with Parker either at McCabe's or the 54th Avenue Sports Bar and Grill. RP 703.

Clark viewed a photo montage and identified Embry as the shooter. RP 622.

Prior Incident At 54th Street Bar And Grill

As "background evidence to show context", the State was allowed to adduce limited testimony from Crimmins regarding an earlier incident on January 1, 2009 at the 54th Street Bar and Grill. RP 486 *et. seq.*

On that previous occasion, Mr. Parker and another male had an altercation. RP 577-578. Clark then entered the fray and swung and hit Drip. RP 578. After Clark hit Drip, he noticed that Drip's mouth was bleeding. RP 579.

Mr. Parker uttered no hostility toward Clark. Likewise, Parker easily could have attacked Clark but did not. RP 639-640.

Telon Walker

Telon, is the cousin of Clark. RP 753. On February 24, 2009, he had plans to meet Clark at McCabe's. RP 753. Clark was with Crimmins. RP 755.

Prior to entering McCabe's Telon was patted down for weapons. RP 754.

Inside McCabe's, Telon saw Clark in a heated conversation. RP 757. That conversation did not occur with Mr. Parker. RP 757. After that conversation, Clark and Embry had a short altercation. RP 759. Embry was with Morgan. RP 759.

After he left McCabe's Telon heard gunshots. RP 762. Telon ran to Clark because he was "pretty sure" that Clark had been shot. RP 765. About the same time that police arrived, Telon saw a big man run to a four door Chevy Impala. RP 767-768. That man work a black hoodie. RP 768. Telon noted that there were several people in the car. RP 768. The man got into the rear passenger side of the car. RP 768. Telon identified the men as Embry and Morgan. RP 772.

When Telon contacted Clark, Clark stated, "Someone shot me" and he had a license plate number. RP 775. Clark was trying to give the number to Crimmins as she talked on the phone. RP 775.

Telon first spoke to a police officer, Det. Ringer, a few weeks after the shooting. RP 776. Det. Ringer wanted to speak to Telon about the incident at McCabe's. RP 777. Ringer showed Telon a photo montage and Telon identified Embry as the individual with whom Clark had an incident inside McCabe's prior to the shooting. RP 779. Telon also selected

Morgan from the photo montage. RP 781. Telon recognized Morgan as the individual whom he had seen with Embry. RP 781.

Telon knew Mr. Parker prior to the incident at McCabe's but he never saw him with either Embry or Morgan. RP 794. Dets. Ringer and Turner repeatedly asked Telon about Mr. Parker. RP 791. They implored Turner not tell them what Parker's role had been, what he had been doing at the 54th Street Bar and Grill on New Year's. RP 791.

Telon never saw Mr. Parker near the car leaving the shooting at McCabe's. RP 796.

Officer Johnson

Officer Johnson interviewed Mr. Parker about the reported stolen vehicle. RP 850-860. Johnson had discovered that the car was a rental from Enterprise Rent-a-Car. RP 863.

While Johnson was at the police station, Det. Ringer provided some information about Mr. Parker. RP 865. Johnson wrote two reports about his contacts with Mr. Parker. RP 866-867. In his first report, Johnson did not include the assertion that he had asked Mr. Parker for the name of his girlfriend. RP 866.

After Det. Ringer told Johnson that Mr. Parker was a Hilltop Crip member, Johnson wrote a second report about Mr. Parker's supposed nervousness. RP 867-870.

After Det. Ringer provided information about Mr. Parker, Johnson viewed him in a different light. RP 870, 871.

Curtis Hudson

Mr. Hudson went to McCabe's on February 24, 2009 with his friend Manny Hernandez. RP 898. Prior to entering McCabe's, the men were frisked for weapons. RP 900. The frisking was not thorough and was more of a quick pat-down. RP 919.

Mr. Hudson belonged to the Hilltop Crips. RP 900. He wore white beads in his hair that night. RP 941.

Inside McCabe's, Hudson recognized several associates, including Mr. Parker. RP 902. Hudson had known Mr. Parker for a year or two. RP 905.

Hudson received the impression that Mr. Parker and T-Loc were having a beer. RP 908. Hudson thought that the two men were trying to work things out. RP 908. Mr. Parker and the codefendants were just standing around. RP 924.

He did not see any physical altercations the entire time he was at McCabe's. RP 910, 928, 958.

Mr. Parker never told Hudson that he was going to do something to T-Loc. RP 928, 956-958.

After Hudson and Hernandez left McCabe's they heard gunshots. RP 910-911. Hudson saw a man wearing a red hoodie running from the area of the gunshots. RP 913. Hudson fled the area because he did not want to be there when the police were around. RP 918.

Hudson did not see Mr. Parker at the time the gunshots were fired. RP 915. He also did not know what type of car Mr. Parker drove that night. RP 915. He had seen Parker drive an El Camino as well as rental cars. RP 927.

Hudson recalled that Morgan wore the red sweater at McCabe's/ RP 933. He related that he observed Morgan, still wearing the same sweater, run down the alley after the shooting. RP 933-934.

In exchange for his testimony, Hudson expected to have most of the "about 20" charges he had pleaded guilty vacated and to plead to a reduced charge of conspiracy to commit second degree robbery. RP 916, He expected to receive a standard range sentence of 16 to 21 months. RP 916. Had he not cooperated with the State, Hudson would have received a life sentence. RP 921.

Hudson worked as an informant for Det. Ringer. RP 920. Ringer contacted Hudson about the McCabe's shooting. RP 922. Hudson gave twelve or thirteen different statements about criminal activities between September 2009 and May 2010. RP 934-935.

Hudson had not provided any information about the McCabe's shooting until April 14, 2010 (less than a month before trial). RP 936.

Manuel Hernandez

Mr. Hernandez testified for the State as part of a plea agreement. RP 964. He had entered guilty pleas to five charges. RP 984. If he testified to the State's satisfaction, then four of his convictions would be vacated, RP 984. Hernandez understood that the prosecutor would move to vacate those pleas. RP 985.

Although Mr. Hernandez went to court with the other defendants, he could not remember whether he talked to any of them. RP 990-991.

He went with Hudson to McCabe's in the hours prior to the shooting. RP 965. They went together in Hernandez's Cadillac or his Buick. RP 965.

When Hernandez and Hudson entered McCabe's, they were patted down. RP 967.

Hernandez saw Mr. Parker inside. RP 967. He did not know Mr. Parker nor did he regularly speak to Mr. Parker. RP 985.

Hernandez left McCabe's maybe ten minutes before Hudson did. RP 973. Hernandez then heard gunshots. RP 973. He did not know exactly where Hudson was then. RP 994. Hudson could have been anywhere in the general area, including in the parking lot. RP 994. After

hearing the shots, Hernandez looked around to see who got shot. RP 974. He also saw a fleeing man who was carrying a gun running toward a car. RP 976, 1009. Hernandez was about 60% certain that Embry was the man who ran toward the car. RP 1017.

Hudson wanted to leave and so the two men left McCabe's. RP 977. Although police were present, neither Hernandez nor Hudson wanted to tell police what they had seen. RP 982. Hernandez wanted to leave because "I felt like it had nothing to do with me." RP 983.

Detective Jeff Turner

TPD Det. Turner was one of several detectives who investigated the McCabe's shooting. RP 1090.

Turner later prepared a bulletin for a vehicle believed to be violated to the shooting. RP 1095. He also collected the security video from McCabe's. RP 1095.

Turner also prepared a search warrant for the stolen car that had been recovered from the Green River in King County. RP 1119. The license plate on that car was 648-YNT. RP 1122. Turner found a rental contract in the car. RP 1122. The renter was listed as Andre Parker. RP 1139.

Police had no other information than the rental car matter to link Mr. Parker to the McCabe's incident. RP 1159.

As a result of this information, Mr. Parker was considered a suspect within the first 24 hours of the investigation. RP 1151

Turner also interviewed both Morgan and Embry. RP 1142. Prior to interviewing these men, a witness had identified them by their clothing. RP 1165.

Detective John Ringer

The State called Ringer as a “gang expert.” Ringer acknowledged that he has never done a statistical or sociological study of Tacoma gangs; has never published a paper, much less a peer reviewed paper, on his gang work; never maintained systematic data regarding gangs in a particular location; has no specialized education/degrees in the field. RP 1414.

Ringer also testified that based on his experience he knew that gang members often traded cars and guns. RP 1444.

Ringer had been called to McCabe’s early in the morning after the shooting. RP 1231. Ringer spoke to Mr. Parker after police had stopped him. RP 1235.

Mr. Parker was taken to the police station where Ringer interviewed him. RP 1235. Prior to the interview, Ringer advised Mr. Parker of his constitutional rights. RP 1237. Mr. Parker waived those rights. P 1237-1238.

Parker stated that he stays at the residences of various women. RP 1238. He sometimes drove the El Camino owned by Ashley Olson. RP 1238.

Mr. Parker averred that on the day of the McCabe's shooting he had driven a rental car. RP 1238. He confirmed that he had filed a motor vehicle theft report. RP 1238. Parker stated that he had left the car running while he ran up to Leilani's apartment. RP 1239. The car then was stolen. RP 1239.

Mr. Parker told Ringer that he had heard about the McCabe's shooting, did not know who had been shot, and was not there when the shooting happened. RP 1241. "I wasn't there when that dude got shot." RP 1243.

When Ringer asked Mr. Parker if he had a quick temper, Mr. Parker replied that he did not unless someone messed with him. RP 1241. He added that people did not like him and that there were rumors every day about him of things he supposedly had done. RP 1241.

Mr. Parker acknowledged that he had been in the Hilltop Crips when he was young. RP 1243.

D. LAW AND ARGUMENT

1. DEFENSE COUNSEL FAILED TO PROVIDE CONSTITUTIONALLY EFFECTIVE ASSISTANCE BY FAILING TO REQUEST A LIMITING INSTRUCTION FOR THE ADMISSION OF GANG EVIDENCE, THE “IMPRESSIONS” OF WITNESSES AS TO EVENTS AT MCCABE’S AS WELL AS THE STATE’S USE OF STATEMENTS MADE BY NON-TESTIFYING CODEFENDANTS AGAINST HIM.

The Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. Strickland, 466 U.S. at 685-86; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In Strickland, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. 466 U.S. 668. Under Strickland, ineffective assistance is a two-pronged inquiry:

“First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘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.” *Thomas*, 109 Wn.2d at 225-26 (alteration in original) (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001) (“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.”).

Under this standard, performance is deficient if it falls “below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” *State v. Kyllö*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *McFarland*, 127 Wn.2d at 335.

“When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Kyllö*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) The appellate court will not find ineffective assistance of counsel if ‘the actions of counsel complained of go to the theory of the case or to trial

tactics.” (quoting *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) .

To satisfy the prejudice prong of the *Strickland* test, the defendant must establish that “there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226; *Garrett*, 124 Wn.2d at 519. In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law” and must “exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification’ and the like.”

Strickland, 466 U.S. at 694-95.

Ineffective assistance of counsel is a fact-based determination that is “generally not amenable to per se rules.” Cienfuegos, 144 Wn.2d at 229; Strickland, 466 U.S. at 696 (“Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles the appellate courts have held applicable this standard does not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.”).

In this case, trial counsel was constitutionally effective for failing to propose limiting instructions even when invited to do so by the trial court.

a. Trial Counsel Was Ineffective For Failing To Propose A Limiting Instruction For Curtis Hudson’s Testimony Regarding His ‘Impression’ Of Events At McCabe’s Despite The Trial Court’s Invitation To Do So .

When evidence is admissible for a limited purpose and an appropriate limiting instruction is requested, the limiting instruction is available as a matter of right. State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003).

In this case, trial counsel should have proposed limiting instructions for the testimony of Curtis Hudson as well as Det. Ringer.

ER 803(a)(3) permits the admission of “state of mind” hearsay under limited circumstances. The rule provides in pertinent part:

“(a) Specific exceptions. The following are not excluded by the hearsay rule, even though the declarant is not available as a witness”

Then Existing Mental, Emotional or Physical Condition

. . . A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, emotion, design, mental feeling, pain, and bodily health) but not including a statement of memory or belief to prove the fact remembers or believed unless it relates to the execution, revocation, identification of terms of the declarant’s will.”

Evidence admitted under this exception is limited to the declarant’s state of mind. If this exception were expanded to statements of memory or belief, the hearsay rule would be virtually eliminated.

In the instant case, the court erred when it admitted evidence of Curtis Hudson’s “impression” testimony. RP 883-890. Hudson, a “snitch” was permitted to testify about his impressions of activities at McCabe’s prior to the shooting. Hudson is a gang member who reportedly was in the know about how gang members at McCabe’s interacted and how even seemingly trivial movements between parties could establish motive, etc.

Hudson's testimony had nothing to do with ER 803(a)(3) and everything to do with his recollection of past events based on his review of a security video. Hudson was permitted to testify regarding the demeanors and apparent conversation between individuals with whom he had no direct contact.

Put simply, his testimony was irrelevant under ER 402 unambiguously states that evidence which is not relevant is not admissible. ER 401 defines "relevant evidence" as "any evidence having any tendency to make the existence of any fact that is of consequence to the determinations of the action more or less probable than it would be without the evidence."

Hudson's testimony regarding memory or belief do not fall within the rule.

The trial court recognized the high potential for misuse of this evidence. To prevent against this danger, the trial court invited Mr. Parker to propose a limiting instruction. Mr. Parker failed to do so. RP 890.

Prior to the testimony of State's witness Curtis Hudson, the court, over the defendant's objection, ruled that the State could ask Hudson about his "impression" of events at McCabe's on February 24, 2009. RP 883-890. The defendant argued that Hudson's testimony was inadmissible because it was based on hearsay. RP 883-884;886-887. The court reasoned

that Hudson's "impression" was admissible as state of mind. RP 887.

After the court ruled, the court invited Mr. Parker's attorney to propose a limiting instruction. RP 890. Mr. Park's attorney failed to propose such an instruction. *Passim*.

Where the trial court recommended the liming instruction, there can be no legitimate strategic or tactical advantage to fail to propose one. Trial counsel's inaction allowed the State to use Hudson's "impression" testimony as substantive evidence without limitation.

Further, as defendant Morgan argues, the Ringer testimony and opinion that Mr. Parker was guilty invaded the province of the jury.

b. Trial Counsel Was Ineffective For Failing To Propose A Limiting Instruction For Det. Ringer's Testimony Regarding His 'Impression' Of Events At McCabe's Where Such Testimony Was Based On The Video And Also Off-Camera Speculation Regarding Activities Of The Parties.

The trial court ruled admissible Ringer's testimony to explain gang culture to the jury. The court determined that evidence that rival gangs sometimes shot at each other along with evidence that the parties in this case were gang rivals was relevant to prove motive for the shooting.

As it did with Hudson's testimony the trial court expanded the scope of Ringer's testimony to permit him to testify to his "impressions" regarding the events shown on the McCabe's security video. Det.

Ringer's astonishingly also was allowed to testify to actions that occurred off the video.

For the reasons argued above re: Hudson's testimony, Det. Ringer's testimony was inadmissible. Further because Det. Ringer's testimony expanded to speculations regarding off-camera activities, Ringer's testimony was unreliable, unfairly prejudicial to Mr. Parker and worse.

Trial counsel should have asked for a limiting instruction as is permitted by ER 105; such an instruction would have neutralized the effect of this evidence.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED THE TESTIMONY OF SO-CALLED GANG EXPERT DETECTIVE JOHN RINGER.

The Washington courts have been increasingly aware of the unfair prejudice that such "gang evidence" poses to a defendant. *e.g.* State v. Scott, 151 Wn.App. 520, 213 P.2d 71 (2009); State v. Asaeli, 150 Wn.App. 543, 208 P.3d 1136 (2009); State v. Ra, 142 Wn.App. 66, 175 P.3d 609 (2008.)

Mr. Parker adopts codefendant Morgan's statement of the law regarding the admission of gang evidence.

Mr. Parker acknowledged that in the past he was a gang member with the Hilltop Crips. However, the State failed to adduce any evidence

that this past association was relevant to the charged crimes. This evidence of previous associations was not admissible to prove motive, intent, plan, and/or any other purpose as defined in ER 403(b).

In this case, the State flatly failed to produce any evidence whatsoever that the shooting in any derived from bad blood related to the New Year's Day incident at the 54th Street Bar and Grill. To make the evidence relevant and admissible, the State strained credulity by alleging the shooting was retaliation for a very minor argument. The State admitted that the evidence was necessary to prove motive. However, the State failed to produce any evidence that Mr. Parker and his associates, on the basis of their possible gang ties, planned to murder Clark on a night when they could not and did not know that Clark would be at McCabe's.

The State required the admission of this evidence because, without it, the State lacked any evidence linking Mr. Parker to the charged crime. Without this evidence, the State at most could prove that Mr. Parker lawfully rented a car and then dissembled about the theft thereof.

3. THE TRIAL COURT'S CONFUSING AND CONFLICTING INSTRUCTIONS DEFINING SUBSTANTIAL STEP ALLOWED THE STATE TO CONVICT MR. PARKER BASED ON MUDDY STATEMENTS OF THE LAW.

Jury instructions are proper if they correctly state the law, do not mislead the jury, and allow each party to argue its theory of the case.

State v. Lee, et. al. 159 Wn.App. 795, 247 P.3d 47 (2011), citing Boeing v. Key, 101 Wn.App. 629, 633, 5. P.3d 16 (2000).

Alleged errors in jury instructions are reviewed do novo. Lee, *supra*, citing State v. Porter, 150 Wn.2d 732, 735, 82 P.3d 234 (2004).

In the instant case, the trial court's instructions incorrectly stated the law and were misleading, this court, upon its de novo review, must reverse Mr. Parker's convictions and remand for new trial.

It is well settled that jury instructions "must be read together and viewed as a whole." State v. Teal, 117 Wn. App. 831, 837, 73 P.3d 402 (2003), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004); this principle of law also is emphasized to the jury. CP 694-729.

In this case, the court provided contradictory instructions on "substantial step" that likely confused and misled the jury.

Instruction 13 defined "substantial step" as "conduct, that strongly indicates a criminal purpose and is more than mere preparation." Instruction 27 defined "substantial step" as "conduct of the defendant, which strongly indicates a criminal purpose."

Read together, these instructions establish patently different and irreconcilable definitions of "substantial step." Viewed together, one is left to guess whether the State had to prove "criminal purpose with more than mere preparation. CP 694-729. In instruction 27, the jury was

instructed that demonstrating conduct that indicates a criminal purpose” without more was sufficient to establish substantial step.

The critical difference between these instructions was whether or not “more than mere preparation” was essential to proving substantial step. Or, put another way, was proof of criminal purpose enough to establish this element.

It is impossible to reconcile these instructions. Where the State’s theory was that Mr. Parker desired retaliation against Clark, the jury could not determine whether Mr. Parker engage in “more than mere preparation” or whether proof of “criminal purpose” was enough.

The second instruction permitted the jury to convict Mr. Parker on a lesser standard than WPIC 100.05.

In addition to the flawed substantial step instruction, the trial court’s instruction no.19 was misleading, and also did not correctly set forth the law in the context of all of the jury instructions.

Instruction no. 19 provided: “You shall give such weight and credibility to any alleged out-of-court statements of the defendant Embry as you see fit, taking into consideration the surrounding circumstances.”

By giving an instruction that focused the jury’s attention only on Embry’s statements, the trial court in fact instructed the jury to consider Mr. Parker’s statements in a different way. Of course, Mr. Parker’s

statements were subject to the same scrutiny as Embry's statements. And yet the trial court de facto instructed the jury that it could not consider the surrounding circumstances when determining what weight and credibility.

Based on the content of instruction no. 19, the jury could only conclude that it could not evaluate the credibility of Mr. Parker's statements to police and had to accept them as true.

When this court examines instruction no. 19 in the context of all the instructions, this court will readily conclude that the instruction is fatally flawed. Therefore this court, upon its do novo review, must reverse Mr. Parker's convictions and remand for new trial.

Thus, the trial court erred by giving substantively different instructions to the jury.

4. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY IMPERMISSIBLY VOUCHING FOR THE TRUTH OF DET. RINGER'S TESTIMONY AND HIS "EXEMPLARY" CONDUCT IN THIS CASE AS WELL AS ADDUCING EVIDENCE THAT CRIMMINS KNEW PARKER BECAUSE OF HER EMPLOYMENT AT THE DEPARTMENT OF CORRECTIONS.

Mr. Parker adopts Morgan's argument about prosecutorial misconduct in closing argument.

A prosecutor must advise its witnesses of the courts pretrial ruling prohibiting certain testimony. Violation of such rulings may constitute

misconduct sufficient to warrant reversal. *E.g.*, *State v. Barker*, 103 Wn.App. 893, 14 P.3d 863 (2000), *review denied*, 143 Wn.2d 1021 (2001)

In this case, the court pretrial prohibited the State from eliciting testimony that Crimmons knew Mr. Parker because he reported to the Department of Corrections when she worked there. The prosecutor failed to convey this ruling to Crimmins, who then testified in violation thereof. The prosecutor's failure to communicate the court's order to Crimmins resulted in prejudice warranting reversal because it informed the jury that Mr. Parker had been on DOC supervision. This testimony was damning because it informed the jury that Mr. Parker had a criminal conviction that could be used for purposes other than the predicate conviction necessary for proof of the unlawful possession of a firearm charge.

Further, the prosecutor is prohibited from vouching for the credibility of its witnesses. To prove prosecutorial misconduct, a defendant must show that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The appellate court reviews a prosecutor's comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). While it is improper for a prosecutor to assert a personal opinion about a witness's veracity, he may

argue an inference of credibility based on the evidence. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). To prove the conduct was prejudicial, the defendant must establish a substantial likelihood the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). If defense counsel fails to object to an improper remark, the appellate court will reverse only if the remark is so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. State v. Jackson, 150 Wn. App. 877, 883, 209 P.3d 553 (2009).

In the instant case, prosecutor argued that Det. Ringer was doing his duty when he sifted through the lies of the defendants and other witnesses with gang ties in his effort to discover the truth. Where the State's case rested largely on the testimony of Det. Ringer, the State's vouching for his credibility and his noble quest for the truth was misconduct. Given Det. Ringer's stature in the State's case, the prosecutor's impermissible so prejudiced the jury's verdict as to warrant relief.

5. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. PARKER COMMITTED THE CRIMES OF ATTEMPTED FIRST DEGREE MURDER WITH A FIREARM ENHANCEMENT AS WELL AS FIRST DEGREE POSSESSION OF A FIREARM.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. The trier of fact is the sole and exclusive judge of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). The reviewing court defers to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In

this case, the State failed to meet its burden and no reasonable fact-finder could have found guilt beyond a reasonable doubt..

This court must vacate Mr. Parker's convictions based on insufficient evidence.. The State's failure to provide sufficient evidence of an element of the charged crime requires remand for dismissal of the conviction. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). ¹³

(a) Attempted First Degree Murder

The court properly instructed the jury that a person is guilty of attempted first degree murder if, with intent to commit first degree murder, the defendant does any act that is a substantial step toward the commission of that crime. *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). CP 694-729. The instructions also explained the meaning of "substantial step" by stating that the conduct must "strongly indicate[] a criminal purpose and [must be] more than mere preparation." Clerk's Papers (CP) Once a substantial step has been taken, and the crime of attempt is complete, the crime cannot be abandoned. *Workman*, 90 Wn.2d at 450.

The trial court further instructed the jury on the meaning of "premeditated." CP at 57. Instruction 11 explained, "Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take a human life, the killing may follow immediately after the

formation of the settled purpose and it will still be premeditated.

Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.” CP at 57.

The State failed to prove beyond a reasonable doubt that Mr. Parker committed the crime of attempted murder in the first degree. Viewing the evidence in the light most favorable to the State, the government established that Mr. Parker went to McCabe’s and was frisked prior to entering; Mr. Parker, either inside the bar or outside, did not give any individual a firearm; Mr. Parker did not have a conversation with anyone regarding the murder of Clark; Mr. Parker had rented a car that may have been used for the shooter’s getaway car; Mr. Parker at some point, apparently after the shooting, learned the rental car had been used in the shooting; Mr. Parker took steps to distance himself from the shooting by falsely contacting the police to report that the car had been stolen from his girlfriend’s apartment complex.

In this case, the State failed to prove that Mr. Parker engaged in any act that constituted a substantial step toward the commission of that crime. There is a fundamental difference between circumstantial evidence and unsubstantiated suspicion. In this case, the State suspected that Mr.

Parker somehow was involved in this crime. However, the State lacked evidence, whether direct or circumstantial.

b. First Degree Unlawful Possession Of A Firearm.

Any person is guilty of first degree unlawful possession of a firearm if the person owns, has in his or her possession, or has in his or her control, any firearm after having previously been convicted of any serious offense as defined by chapter RCW 9.41.040(1)(a). First degree unlawful possession of a firearm is not a strict liability offense and requires knowing possession of the firearm. *State v. Cuble*, 109 Wn. App. 362, 366-69, 35 P.3d 404 (2001); *see also State v. Banks*, 149 Wn.2d 38, 42, 65 P.3d 1198 (2003) (discussing the mens rea requirement of knowledge of the firearm under Washington's unlawful possession of a firearm statute in a case involving first degree unlawful possession of a firearm). Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). To establish constructive possession, the State had to show that Mr. Parker had dominion and control over the firearm. *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010). “Dominion and control” means that the item “may be reduced to actual possession immediately.” *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Control need not be exclusive, but the State must show more than mere proximity to the firearm. *Raleigh*, 157 Wn. App. at 737.

In the instant case, the State failed to prove that Mr. Parker committed this crime. Even assuming for the sake of argument that the State could prove that Mr. Parker was in the vehicle with the shooter, the State nevertheless could not prove either actual or constructive possession. Assuming that the shooter retained possession of the firearm by concealing or steadfastly it in a car that was occupied by several people and that the shooter entered the back seats after the shooting, the State's prove failed. The State argued that Mr. Parker was the driver of the car. Under those facts, Mr. Parker could not have been able to have "actual possession immediately."

Even assuming physical proximity between Mr. Parker and the shooter, the State could not prove either actual or constructive possession.

At most the State may have proven mere proximity to the firearm.

(c) Firearm Enhancement.

A court may add time to a sentence if a defendant was armed with a firearm while committing a crime. RCW 9.94A.533(3). A person is armed while committing a crime if he can easily access and readily use a weapon and if a nexus connects him, the weapon, and the crime. State v. Schelin, 147 Wn.2d 562, 567-568, 55 P.3d 632 (2002) (noting the State had not submitted evidence showing the defendant had a weapon easily

accessible and readily available at any point during the commission of his crime).; State v. Valdobinos, 122 Wn.2d 270, 282,858 P.2d 199 (1993).

This nexus requirement is critical because “[t]he right of the individual citizen to bear arms in defense of himself, or the State, shall not be impaired” WASH. CONST. art. I, § 24. The State may not punish a citizen merely for exercising this right. State v. Rupe, 101 Wn.2d 664, 704, 683 P.2d 571 (1984). The State may punish him for using a weapon in a commission of a crime, though, because a weapon can turn a nonviolent crime into a violent one, increasing the likelihood of death or injury. State v. Gurske, 155 Wn.2d 134, 138-39, 118 P.3d 333 (2005).

When a crime is a continuing crime—like a drug manufacturing operation—a nexus obtains if the weapon was “there to be used,” which requires more than just the weapon's presence at the crime scene. Id. at 138. This potential use may be offensive or defensive and may be to facilitate the crime's commission, to escape the scene, or to protect contraband. Id. at 139. In every case, whether a defendant is armed is a fact specific decision. Id.

In this case, the State failed to prove that Mr. Parker was armed with a firearm while committing the crimes. First, no witness ever saw Mr. Parker in possession of a firearm. No witness ever identified Mr. Parker as either the shooter or being physically present with the shooter

when he fired the shots. Next, even assuming arguendo that Mr. Parker was in the car immediately afterward, the State could not prove that Mr. Parker had access to a firearm such that the weapon was “there to be used” by him. Mere presence of a firearm by another individual in the car vitiates “proof” that the firearm enhancement applied to Mr. Parker. This is so because the State alleged that there were multiple persons in the car -- perhaps from four to six individuals. There is no evidence upon which to establish any nexus between Mr. Parker and the firearm. Presumably the shooter retained possession of the firearm. Absent such evidence, this court must find that the State failed to prove the firearm enhancement.

Moreover, evidence that ballistics evidence later was found in Mr. Parker’s El Camino does not establish proof of the firearm enhancement. This is so because another individual could have left such evidence without Mr. Parker’s knowledge, consent, or nexus .

Mr. Parker therefore is entitled to resentencing without the firearm enhancement.

6. IS THE DEFENDANT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE?

The cumulative error doctrine “is limited to instances when there have been several trial errors that standing alone may not be sufficient to

justify reversal but when combined may deny a defendant a fair trial.”

State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)

In this case, the defendant’s trial was fatally flawed by numerous substantial trial errors. Two witnesses, including the State’s “expert” John Ringer were allowed to testify to their “impressions” of what was occurring at McCabes based on the video and absence of conduct on the video. The trial errors were compounded by constitutionally ineffective trial counsel, a prosecutor who impermissibly vouched for the credibility of witnesses during his closing argument, flawed jury instructions, and a lack of proof beyond a reasonable doubt that Mr. Parker committed the charged crime.

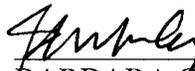
Even assuming that the individual errors argued herein were not sufficient to require relief, the constellation of errors warrants, including, but not limited to dismissal of the charges for which there as insufficient evidence.

Pursuant to RAP 10.1(g)(2), Mr. Parker adopts and incorporates by reference all relevant facts and legal arguments presented in the briefs of codefendants Morgan and Embry.

E. CONCLUSION.

Based on the preceding arguments and law, Mr. Parker respectfully urges this court to reverse his convictions and, if reversing for insufficient evidence, vacate the convictions.

RESPECTFULLY SUBMITTED this ^{26th} 25th of April, 2011.



BARBARA COREY, WSBA#11778
Attorney for Appellant Andre Parker

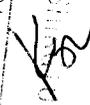
CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws Of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger/U.S. Mail-postage pre-paid, a copy of this Document to: Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946 Tacoma, Washington 98402 and to Andre Parker, Reg: 39064-086, Federal Detention Center, P.O. Box 13900 Seattle, WA 98198-1090.

4-26-11
Date



Signature

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