

- 1 4. Has petitioner failed to show that the redaction of his non-testifying co-
2 defendant's statement was insufficient when it used neutral pronouns in lieu
3 of petitioner's name?
- 4 5. Has petitioner failed to show any sentencing error to his detriment?
- 5 6. Despite the fact that defendant received a correct total sentence of
6 confinement of 561 months, should this matter be remanded for entry of a
7 corrected judgment and sentence when the judgment failed to reference the
8 count of unlawful possession of a firearm to which petitioner pleaded
9 guilty, and when the length of sentence imposed on Count II improperly
10 includes 60 months for a firearm enhancement which has been properly
11 imposed in another portion of judgment?
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14 B. STATUS OF PETITIONER:

15 Petitioner, MICHAEL LOUIS RHEM, is restrained pursuant to a Judgment and
16 Sentence entered in Pierce County Cause No. 99-1-04722-4. Appendix A. Petitioner was
17 charged with eight crimes under this cause number, including drive-by shooting, two
18 counts of unlawful possession of a firearm, and multiple counts of assault in the first
19 degree. Appendix B (opinion in first appeal). Petitioner entered a plea of guilty to one
20 count of unlawful possession of a firearm and went to trial on the remaining counts. Id.
21 The jury found him guilty of two counts of assault in the first degree, and of unlawful
22 possession of a firearm in the first degree. Appendices B and C. The convictions obtained
23 at trial were reversed on appeal. Appendix B. Petitioner was retried and again a jury
24 convicted him of two counts of assault in the first degree, and unlawful possession of a
25

1 firearm. An appeal followed. The convictions were affirmed in an unpublished decision
2 on March 1, 2005. Appendix D. The mandate issued on February 3, 2006. Id.

3 On July 21, 2006, petitioner filed a timely personal restraint petition alleging that
4 his convictions should be reversed because: 1) there were violations of the court's orders in
5 limine, 2) the courtroom was closed to spectators during jury selection, and 3) the
6 admission of the redacted statement of his codefendant in a joint trial violated Bruton.

7 Within the time to file a timely personal restraint petition, petitioner successfully moved to
8 amend his petition to include several challenges to the sentence imposed.
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10 The State has no information to dispute petitioner's claim of indigency.

11 C. ARGUMENT:

- 12 1. THE PETITION SHOULD BE DISMISSED BECAUSE
13 PETITIONER HAS NOT SHOWN EITHER PREJUDICIAL
14 CONSTITUTIONAL ERROR OR A FUNDAMENTAL DEFECT
15 RESULTING IN A COMPLETE MISCARRIAGE OF JUSTICE
16 THAT IS NECESSARY TO OBTAIN RELIEF BY
17 COLLATERAL ATTACK.

18 Personal restraint procedure has its origins in the State's habeas corpus remedy,
19 guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of
20 habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A
21 personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for
22 an appeal. In re Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral relief
23 undermines the principles of finality of litigation, degrades the prominence of the trial, and
24 sometimes costs society the right to punish admitted offenders. These are significant costs,
25 and they require that collateral relief be limited in state as well as federal courts. Hagler,
Id.

1 In this collateral action, the petitioner has the duty of showing constitutional error
2 and that such error was actually prejudicial. The rule that constitutional errors must be
3 shown to be harmless beyond a reasonable doubt has no application in the context of
4 personal restraint petitions. In re Mercer, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987);
5 Hagler, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to
6 demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of
7 the judgment and sentence and not against it. In re Hagler, 97 Wn.2d at 825-26. To obtain
8 collateral relief from an alleged nonconstitutional error, a petitioner must show "a
9 fundamental defect which inherently results in a complete miscarriage of justice." In re
10 Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the
11 constitutional standard of actual prejudice. Id. at 810.

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13 Reviewing courts have three options in evaluating personal restraint petitions:

- 14 1. If a petitioner fails to meet the threshold burden of showing actual
15 prejudice arising from constitutional error or a fundamental defect
16 resulting in a miscarriage of justice, the petition must be
dismissed;
- 17 2. If a petitioner makes at least a prima facie showing of actual
18 prejudice, but the merits of the contentions cannot be determined
19 solely on the record, the court should remand the petition for a full
hearing on the merits or for a reference hearing pursuant to RAP
20 16.11(a) and RAP 16.12;
- 21 3. If the court is convinced a petitioner has proven actual prejudicial
error, the court should grant the personal restraint petition without
remanding the cause for further hearing.

22 In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

23 In a personal restraint petition, "naked castings into the constitutional sea are not
24 sufficient to command judicial consideration and discussion." In re Williams, 111 Wn.2d
25 353, 365, 759 P.2d 436 (1988) (citing In re Rozier, 105 Wn.2d 606, 616, 717 P.2d 1353

1 (1986), which quoted United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970)). That
2 phrase means “more is required than that the petitioner merely claim in broad general
3 terms that the prior convictions were unconstitutional.” Williams, 111 Wn.2d at 364. The
4 petition must also include the facts and “the evidence reasonably available to support the
5 factual allegations.” Id.

6 The evidence that is presented to an appellate court to support a claim in a personal
7 restraint petition must also be in proper form. On this subject, the Washington Supreme
8 Court has stated:

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10 It is beyond question that all parties appearing before the courts of this
11 State are required to follow the statutes and rules relating to authentication
of documents. This court will in future cases accept no less.

12 In re Connick, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). That rule applies to pro se
13 defendants as well:

14 Although functioning pro se through most of these proceedings, Petitioner
15 – not a member of the bar – is nevertheless held to the same responsibility
as a lawyer and is required to follow applicable statutes and rules.

16 Connick, 144 Wn.2d at 455. The petition must include a statement of the facts upon which
17 the claim of unlawful restraint is based, and the evidence available to support the factual
18 allegations. RAP 16.7(a)(2); Petition of Williams, 111 Wn.2d 353, 365, 759 P.2d 436
19 (1988). Personal restraint petition claims must be supported by affidavits stating particular
20 facts, certified documents, certified transcripts, and the like. Williams, 111 Wn.2d at 364.
21 If the petitioner fails to provide sufficient evidence to support his challenge, the petition
22 must be dismissed. Williams at 364.

23 As will be discussed below, petitioner has failed to provide evidentiary support for
24 many of his claims and fails to meet the higher standard that must be shown to obtain relief
25 by way of personal restraint petition. His petition must be dismissed.

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2. PETITIONER HAS FAILED TO SHOW THAT THE PLAIN LANGUAGE OF THE TRIAL COURT'S RULING CONSTITUTED A CLOSURE OF THE COURTROOM OR PROVIDE EVIDENCE THAT THE COURTROOM WAS ACTUALLY CLOSED, OR THAT ANY CONSTITUTIONAL VIOLATION RESULTED IN ACTUAL PREJUDICE.

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

Closure of a criminal trial courtroom may constitutionally occur under limited circumstances. The strict standards for closure were first enunciated by the Supreme Court, with varying formulations, in cases considering the First Amendment access rights of the press and the public. See Press-Enterprise I, 464 U.S. at 510 ("the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 581, 100 S. Ct. 2814, 65 L.Ed.2d 973 (1980)(closure was permitted only upon a showing of an "overriding interest articulated in findings"); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07, 102 S. Ct. 2613, 73 L.Ed.2d 248 (1982)(closure to "inhibit the disclosure of sensitive

1 information" required a showing that denial of public access "is necessitated by a
2 compelling governmental interest, and is narrowly tailored to serve that interest").

3 In Waller v. Georgia, supra, the United States Supreme Court extended the
4 procedures announced in the First Amendment cases to cover an accused's right to a public
5 trial under the Sixth Amendment as well. Waller reformulated the standards for courtroom
6 closure into a four-factor test:

- 7 (1) The party seeking to close the hearing must advance an overriding
8 interest that is likely to be prejudiced,
- 9 (2) The closure must be no broader than necessary to protect that interest,
- 10 (3) The trial court must consider reasonable alternatives to closing the
11 proceeding, and
- 12 (4) It must make findings adequate to support the closure.

13 Waller, 467 U.S. at 48. The Washington Supreme Court, following Waller, created
14 standards that a trial court must apply before closing a courtroom to the public. State v.
15 Bone-Club, 128 Wn.2d at 257. The Court adopted the same standards originally
16 articulated in cases considering a public's right to access under article I, section 10 of the
17 Washington State Constitution, and extended the standards to cover an accused's right to
18 public trial under article I, section 22. The closure test involves an analysis of five criteria:

- 19 (1) The proponent of closure or sealing must make some showing [of a
20 compelling interest], and where that need is based on a right other than an
21 accused's right to a fair trial, the proponent must show a "serious and
22 imminent threat" to that right.
- 23 (2) Anyone present when the closure motion is made must be given an
24 opportunity to object to the closure.
- 25 (3) The proposed method for curtailing open access must be the least
restrictive means available for protecting the threatened interests.
- (4) The court must weigh the competing interests of the proponent of
closure and the public.

1 (5) The order must be no broader in its application or duration than
2 necessary to serve its purpose.

3 Bone-Club, 128 Wn.2d at 258-59.

4 A violation of one's right to a public trial is structural error. Waller, 467 U.S. at
5 49. Structural error is not subject to harmless error analysis in a direct appeal. Arizona v.
6 Fulminante, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). Therefore, once
7 a defendant demonstrates a violation of his Sixth Amendment right to a public trial in a
8 direct appeal, he need not show that the violation prejudiced him in any way. Judd v.
9 Haley, 250 F.3d 1308, 1314-15 (11th Cir. 2001). The Washington Supreme Court has not
10 held that a violation of the right to a public trial, which is per se prejudicial on direct
11 review, will also be presumed on prejudicial for the purposes of a personal restraint
12 petition. Orange, 152 Wn.2d at 804, 814. The Court has granted relief on the basis of an
13 ineffective assistance of counsel claim when the petitioner alleged that his appellate
14 counsel was deficient for not raising the issue in the direct appeal. Orange, 152 Wn.2d at
15 814.

16 Some closures are too trivial to implicate the Sixth Amendment right to a public
17 trial. United States v. Ivester, 316 F.3d 955, 959-60 (9th Cir. 2003); State v. Brightman,
18 155 Wn.2d 506, 517, 122 P.3d 150 (2005). Some courts have concluded that limited
19 seating by itself is not enough to violate a defendant's public trial right, requiring some
20 affirmative act from the trial judge. See, e.g., United States v. Shryock, 342 F.3d 948, 974
21 (9th Cir. 2003); Morales v. United States, 294 F. Supp. 2d 174, 177-179 (2003).

22 In order to determine whether a particular error implicates the Sixth Amendment, a
23 court "must look not only to the right violated, but also at the particular nature, context,
24 and significance of the violation." Brown v. Kuhlmann, 142 F.3d 529, 540 (2nd Cir.
25 1998)(quoting Yarborough v. Keane, 101 F.3d 894, 897 (2nd Cir. 1996)) "The remedy

1 should be appropriate to the violation.” Waller, 467 U.S. at 49. By this logic, a court must
2 first determine if a closure occurred -- and, if so, the nature of the closure -- before
3 deciding whether the Sixth amendment has been violated. See United States v. Shryock,
4 342 F.3d 948, 974 (9th Cir. 2003)(citing United States v. Al-Smadi, 15 F.3d 153, 155 (10th
5 Cir. 1994)(a defendant’s Sixth Amendment right to a public trial “requires some
6 affirmative act by the trial court meant to exclude persons from the courtroom”).

7 The Washington Supreme Court has held that the reviewing court determines the
8 nature of the closure by the presumptive effect of the plain language of the court’s ruling,
9 not by the ruling’s actual effect. In re PRP of Orange, 152 Wn.2d at 807-08. In Orange,
10 the parties discussed access for family members during the voir dire process. After a short
11 colloquy, the judge stated:

12 ... I am ruling no family members, no spectators will be permitted in this
13 courtroom during the selection of the jury because of the limitation of
14 space, security, etcetera [sic]. *That's my ruling.*

15 Orange, 152 Wn.2d at 801 (emphasis in original). The court made no written findings on
16 the issue of courtroom space. The Supreme Court ultimately decided, based solely on the
17 transcript of the trial court’s oral ruling, that the closure in Orange was a permanent,
18 full closure. Id. at 808. The trial court therefore should have engaged in the five-step
19 analysis mandated by Bone-Club.

20 Similarly, in Brightman, the court found that the following ruling by the trial court
21 constituted a permanent full closure:

22 In terms of observers and witnesses, we can't have any observers while we
23 are selecting the jury, so if you would tell the friends, relatives, and
24 acquaintances of the victim and defendant that the first two or three days
25 for selecting the jury the courtroom is packed with jurors, they can't
observe that. It causes a problem in terms of security.

When we move to the principal trial, anybody can come in here that wants
to. It is an open courtroom.

1 Any other problem?

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3 State v. Brightman, 155 Wn.2d at 511 (2005).

4 Petitioner contends that the trial court violated his right to a public trial by two
5 different rulings. The first occurred after the State made a motion to exclude anyone under
6 18 from the courtroom during trial. The record indicates that young children related to
7 petitioner had been present in the court during the pretrial hearings. RP 73-74. The court
8 denied the motion stating:

9 COURT: All right. It's not the Court's job to determine what's
10 appropriate for people and what's not. That's the parent's job or the
11 family member's job. And as long as the children aren't disruptive and
12 aren't being somehow used as a trial tactic, which I haven't perceived any
13 of that so far, the family members are welcome.

14 Now I will say this: When we begin jury selection, it is just too crowded
15 in here, and we have already been advised at a previous time that we need
16 to keep the doors free, so family members are going to have to wait
17 outside until we can at least get some of the jurors out of here. I anticipate
18 we will get some of the jurors out, because a lot of people will be
19 dismissed because they won't be able to accommodate a trial this long,
20 and that will shrink out pool and we can get the family members back in.
21 *But when we get the whole 50 up here, we need to have the doors clear
22 and the courtroom available only for the jurors. But after that, anybody is
23 welcome.*

24 RP 75 (emphasis added). Petitioner also contends that the following statement by the court
25 indicates that the courtroom was closed to the public:

26 COURT : Hang on just a second. I thought we had the door posted that
27 people aren't to be coming in, except at a normal break. Now, everybody
28 that just came in can go back out again, because you are not to be in here,
29 except at a break. That's why the door is so posted. Thank you very
30 much. You're welcome at the break.

31 RP 391. Petitioner presents no other evidence to support his claim of courtroom closure
32 other than these two citations to the verbatim report of proceedings.

1 Neither of these rulings are comparable to the complete closures condemned in
2 Orange or Brightman. The latter statement by the court, quoted above, does not even
3 indicate a courtroom closure, but only a restriction on the timing of when the public could
4 come into the courtroom. This comment reflects that the courtroom was, in fact, open to
5 the public during trial. Such a restriction on ingress, and, presumably egress, is a
6 reasonable control of the courtroom aimed at minimizing disruptions that might distract the
7 jury.

8 The first ruling seems initially to be more problematic, but still does not reach the
9 level of the closures in Orange or Brightman. It is clear that the plain language of the
10 ruling is instructing the spectators that they will have to clear the courtroom when the fifty
11 member venire panel is brought up to the court. It also appears from the court's comments
12 that the court expected the venire to occupy most of the spectator gallery in its courtroom.
13 However, the ruling also indicates that family members could come in when space became
14 available as jurors were excused for cause. The italicized portion of this ruling indicates
15 that if the fifty member venire panel did not take up all of the available room, family
16 members would be able to come in and be seated. Thus, the plain language of the court
17 ruling indicates that family members would have to give up their seats for the venire, but
18 after the venire was seated, could come back in as space allowed. The presumptive effect
19 of the plain language of the court's ruling was not to close the courtroom to spectators
20 during jury selection, but only to give seating priority to the venire panel. This does not
21 represent a full or permanent closure of the courtroom.

22 The case of Morales v. United States presents a nearly identical factual situation as
23 this. Morales, 294 F. Supp. 2d 174, 177-179 (2003). In that case, the trial court made the
24 following statement:

25 Because at this point I don't know how many jurors we'll have left in the
pool, I'm going to guess it's going to be somewhere around 50 or so, give

1 or take. All of the rows in the spectator section of the courtroom are going
2 to be used for the jurors to be seated. I'm not going to permit any
3 spectators to be seated among the prospective jurors so that I want counsel
4 to be on notice that on Friday there will be no room for any spectators. All
of those seats are going to be taken by prospective jurors. So everyone
should be aware of that.

5 294 F. Supp. at 178. Morales files a habeas corpus petition alleging, among other things,
6 that this constituted an improper violation of his right to a public trial. The court rejected
7 this claim finding that the trial court's action did not amount to a closure. Id. at 178-179.

8 Petitioner presents no evidence to show that all spectators were, in fact, excluded
9 by a lack of room when the venire was seated, much less that any such space limitations
10 continued for a significant period of time such that his Sixth Amendment rights would be
11 implicated. The State disputes that the court room was closed. The record¹ in this case
12 indicates that the venire members did observe contact between the petitioner and his family
13 members, including his child, in the courtroom because at least two potential jurors talked
14 about it in voir dire. RP 150-158. While it is not entirely clear from the record all that did
15 happen, the record indicates that Juror 49 and Juror 50 made comments in voir dire about
16 the family members. RP 157-158. The numbering of these jurors is significant as these
17 two would have been the last two jurors of a fifty member venire and, thus, seated closest
18 to any additional space for spectators at the back of the courtroom. The record also
19 suggests that there was contact between family members and potential jurors. RP 153,
20 158. Whatever occurred prompted the prosecutor to renew his motion to have children
21 excluded from the courtroom. RP 156. The court denied the motion stating that "I'm
22 absolutely committed to an open courtroom" and that it "was not inclined to bar children
23 from the courtroom." RP 157. The court's summary of the jurors' concerns indicates that
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¹ Voir dire proceedings were not transcribed for the direct appeal.

1 family members were in the courtroom. RP 157-159. After denying the motion to exclude
2 children, the court went on to say:

3 COURT: So I am going to be extra vigilant about this in the future. And
4 if I get the sense that stuff is going on on purpose in my courtroom, people
5 are going to jail. That's all there is to it. I won't tolerate it, not for a
6 second. If ... there's purposeful contact to gain a strategic advantage or to
7 disrupt the trial or to intimidate anybody or to make a display for the jury
8 and it happens in court where my contempt powers reach, they are going
9 to jail as quick as I can put them there.

10 RP 159. Neither the plain language of the court's ruling nor the court's constant
11 statements that it was committed to an open courtroom, support petitioner's claims that the
12 trial court closed the courtroom. Moreover, the subsequent discussions of the jurors'
13 concerns about the petitioner's family members, in conjunction with the court's ultimatum
14 about future courtroom behavior, support a conclusion that family members were in court
15 during the jury selection process. Petitioner has presented no other evidence to support his
16 claim and the record does not prove that the court room was closed, or that there was no
17 room for spectators for any significant length of time. This claim should be dismissed.

18 This court should also note that petitioner did not raise a claim of ineffective
19 assistance of appellate counsel. By not doing so, petitioner has failed to show that he was
20 actually prejudiced by any courtroom closure. Therefore, he is not entitled to any relief
21 under In re PRP of Orange. In Orange, the court specifically noted that it was granting
22 relief on the ineffective assistance of appellate counsel claim because petitioner could
23 demonstrate actual prejudice under this claim. Orange, at 814. The Supreme Court
24 reiterated that errors that are presumed prejudicial on direct appeal are not entitled to the
25 same presumption of prejudice in personal restraint petitions. Id. at 804, citing In re Pers.
Restraint of St. Pierre, 118 Wn. 2d 321, 328, 823 P.2d 492 (1992). Although the State
contends that the courtroom was not improperly closed during the jury selection, petitioner

1 is not entitled to relief even upon such a showing because he has failed to establish any
2 actual prejudice stemming from this constitutional error.

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4 3. PETITIONER HAS FAILED TO ESTABLISH ANY
5 VIOLATIONS OF THE COURT'S ORDERS IN LIMINE.

6 Petitioner contends that there were several violations of two orders in limine,
7 thereby depriving him of a fair trial. These claims are without merit.

8 He asserts that the court ruled that the prosecutor was not to mention that he carried
9 a handgun. Petitioner fails to identify where in the record the court made such a ruling.
10 The court allowed the State to introduce evidence that petitioner possessed a .45 caliber
11 gun around the time of the charged assaults, and that Wynn possessed a .9 mm. 1/10/03
12 RP 36-38; RP 207-209. A challenge to these rulings was rejected on direct appeal.

13 Appendix D. Petitioner has failed to establish that an order in limine existed, and therefore
14 cannot show that it was violated.

15 Petitioner also alleges that the court ordered that there be no references to the fact
16 of the first trial. That is not an accurate summary of the court's ruling. The court
17 prohibited either side from saying what were the results of the prior trial. 1/10/03 RP 45.
18 The court then inquired as to how the parties would refer to testimony given at the prior
19 trial, and the parties agreed to use the phrase "previous testimony." 1/10/03 RP 46. There
20 was a discussion that witnesses should be instructed to use this phrase, but the court noted
21 that this was the type of thing that "people blurt out ...even though two seconds before
22 they were told not to." 1/10/03 RP 46. Thus, the record indicates that the only ruling of
23 exclusion was a reference to the results of the prior trial followed by an agreement as to
24 how the prior trial should be referenced. Petitioner provides citations to the record where
25 he claims the court's ruling was violated. See petition at p. 8. None of these cites to the
record reveal a violation of the court's ruling excluding mention of the results of the first

1 trial. Some of the alleged violations reflect use of the word "trial," but it is not clear from
2 the context precisely which "trial" is being referenced. See, RP 519, 586-90, 618, 620.
3 From the State's review, two of these cites involve references to the current (second) trial.
4 RP 618, 620. Another of petitioner's claimed violations pertain to Randall Henderson
5 discussing his own trial not petitioner's first trial. RP 600. Randall Henderson also
6 clarified that "proceeding" meant "trial" when he was being cross-examined as to when he
7 had made an earlier statement. RP 633-37. The remaining two claimed violations are
8 where petitioner's own attorney uses the term "trial" in referencing previous testimony.
9 RP 500, 609. Defendant has failed to establish any violation of the court's order excluding
10 reference to the results of the first trial. The court did not forbid all use of the word "trial",
11 and petitioner makes no showing that use of this word involves an error of constitutional
12 magnitude or a fundamental defect resulting in a complete miscarriage of justice.

13 This claim should be dismissed as meritless.

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15 4. THE REDACTION OF PETITIONER'S CO-DEFENDANT'S
16 STATEMENT SATISFIED BRUTON AND ITS PROGENY;
17 PETITIONER HAS FAILED TO DEMONSTRATE ERROR OF
18 CONSTITUTIONAL MAGNITUDE OR RESULTING PREJUDICE.

18 In Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968),
19 "the United States Supreme Court held that the defendant was deprived of his
20 confrontation rights under the Sixth Amendment when he was incriminated by a pretrial
21 statement of a codefendant who did not take the stand at trial." State v. Hoffman, 116
22 Wn.2d 51, 75, 804 P.2d 577 (1991). However, this rule was modified in Richardson v.
23 Marsh, 481 U.S. 200, 107 S. Ct. 1702, 95 L.Ed.2d 176 (1987), the United States Supreme
24 Court held that a confession redacted to omit all reference to the codefendant fell outside
25 Bruton's prohibition because the statement was not "incriminating on its face", and became

1 incriminating "only when linked with evidence introduced later at trial (the defendant's
2 own testimony)." Richardson, 481 U.S. at 208.

3 In Gray v. Maryland, 523 U.S. 185, 118 S. Ct. 1151, 140 L.Ed.2d 294 (1998), the
4 Supreme Court further defined the contours of the Bruton rule; the prosecution in that case
5 had redacted the non-testifying codefendant's confession by replacing the defendant's name
6 with a blank space or the word "deleted." Gray, 523 U.S. at 188. The court found that
7 such a redaction was ineffective:

8 Redactions that simply replace a name with an obvious blank space or a
9 word such as "deleted" or a symbol or other similarly obvious indications
10 of alteration, however, leave statements that, considered as a class, so
11 closely resemble Bruton's unredacted statements that, in our view, the
12 law must require the same result.

13 Gray, 523 U.S. at 192. The Court went on to say that such statements "*obviously refer*
14 *directly to someone, often obviously the defendant*, and . . . involve inferences that a jury
15 ordinarily could make immediately [T]he accusation that the redacted confession
16 makes "is more vivid than inferential incrimination, and hence more difficult to thrust out
17 of mind." Gray, 523 U.S. at 196 (emphasis added) (quoting Richardson, 481 U.S. at 208).
18 Importantly, the Court indicated that it would have reached a contrary result had the
19 confession been tailored to read "[m]e and a few other guys" committed the crime, instead
20 of --"[m]e, deleted, deleted, and a few other guys." Gray, 523 U.S. at 196-97.

21 Since Gray, several federal Courts of Appeal have found use of neutral pronouns
22 proper in complying with Bruton: United States v. Logan, 210 F.3d 820 (8th Cir. 2000)
23 (use of "another individual" did not violate confrontation clause); United States v.
24 Verduzco-Martinez, 186 F.3d 1208, 1213-14 (10th Cir. 1999) (use of "another person" did
25 not violate confrontation clause); and United States v. Akinkoye, 185 F.3d 192, 198 (4th
Cir. 1999), cert. denied, 528 U.S. 1177, 120 S. Ct. 1209, 145 L.Ed.2d 1111, (2000) (use of
"another person" and "another individual" did not violate confrontation clause).

1 Washington courts have also approved the used of redacted statements which are:
2 “(1) facially neutral, i.e., not identify the nontestifying defendant by name (Bruton); (2)
3 free of obvious deletions such as "blanks" or "X" (Gray); and (3) accompanied by a
4 limiting instruction (Richardson).” State v. Larry, 108 Wn. App. 894, 905, 34 P.3d 241
5 (2001); State v. Medina, 112 Wn. App. 40, 48 P.3d 1005 (2002).

6 Petitioner claims that the redaction of the statement of his non-testifying co-
7 defendant, Wynn, was improper because it indicated that Wynn was with “another guy” or
8 “someone” before, during, and after the assaults that were the subject of the trial. See,
9 Petition at p. 13. However, as stated above, the use of neutral pronouns has been approved
10 as satisfying Bruton. Petitioner fails to establish any constitutional error.

11 5. PETITIONER HAS FAILED TO SHOW THAT HE IS ENTITLED TO
12 ANY SUBSTANTIVE RELIEF FROM THE IMPOSITION OF A 561
13 MONTH SENTENCE OF TOTAL CONFINEMENT; HOWEVER, THE
14 MATTER SHOULD BE REMANDED FOR ENTRY OF A
CORRECTED JUDGMENT TO CORRECT SOME CLERICAL
ERRORS.

15 Petitioner makes numerous challenges to the 561 month sentence imposed below.
16 As will be argued below, none of petitioner’s legal challenges have merit. However, in
17 examining the judgment entered in this case, it contains errors and omissions which should
18 be corrected by entry of a corrected judgment. The first correction needs to be the
19 inclusion of petitioner’s conviction for unlawful possession of a firearm that was obtained
20 by entry of his plea. This conviction was properly listed in the original judgment and
21 sentence. Appendix C. The conviction was affirmed in the first direct appeal. Appendix
22 B. However, when the case was remanded there was no corrected judgment entered
23 reflecting just the one conviction affirmed on appeal, and this conviction was not included
24 among the counts listed in the judgment entered after the retrial. Thus, there is no facially
25 valid judgment which contains a sentence for this conviction.

1 Secondly, two errors were made in the second judgment. The errors, in effect,
2 cancelled each other out, but they render the judgment susceptible to a facial invalidity
3 challenge and should be corrected. The first error is found in the sentence imposed on
4 Count II. The judgment properly articulates the standard range as being 93-123 months,
5 plus an additional 60 months for the firearm enhancement, making the total range 153-183
6 months. Appendix A at p.2. When the court imposed a sentence on Count II, it imposed
7 183 months as the base sentence, which would include time for the enhancement.
8 Appendix A at p. 4. The court also imposed 60 months in the section of the judgment
9 specifically designed to reflect time imposed for enhancements, making it appear that
10 petitioner has received a total of 120 months for the firearm enhancement on Count II. Id.
11 The court should have imposed a sentence of 123 months on Count II. However, the
12 actual number of months of total confinement accurately sets petitioner's sentence at 561
13 months. Appendix A at p. 5. This sentence is comprised of a high end standard range
14 sentence of 318 months for Count I, a high end standard range sentence of 123 months on
15 Count II - which would run consecutive to the sentences on Count I, and 120 months for
16 the two consecutive firearm enhancements - which would also run consecutive to the
17 sentences imposed on Count I and Count II (318+123+120 = 561). The total confinement
18 time would have come out to be 621 months if the court had actually imposed the sentence
19 as written in the judgment.

20 Despite petitioner receiving a correct total sentence of 561 months, the matter
21 should be remanded for entry of a corrected judgment and sentence.

- 22 a. Petitioner correctly received consecutive
23 sentences on the two convictions for assaults in
24 the first degree and for the two firearm
25 enhancements.

Petitioner was convicted of two counts of first degree assault, each with a separate
victim. Appendix C. Assault in the first degree is a "serious violent offense" under RCW

1 9.94A.030(40). The statutory provision that deals with consecutive and concurrent
2 sentences provides that when a person is sentenced for two or more serious violent
3 offenses arising from separate and distinct criminal conduct, the sentences "shall be served
4 consecutively to each other." RCW 9.94A.589(1)(b). Crimes against separate victims
5 constitute separate and distinct criminal conduct. State v. Salamanca, 69 Wn. App. 817,
6 828, 851 P.2d 1242 (1993). Thus, the trial court properly ran the sentences on the two
7 assaults in the first degree consecutively to one another.

8 The trial court was also required to impose consecutive five year firearm
9 enhancements. RCW 9.94A.510 provides that five years shall be added to the standard
10 sentence range for felony crimes "[i]f the offender or an accomplice was armed with a
11 firearm." RCW 9.94A.510(3)(a). The statute also mandates that "[n]otwithstanding any
12 other provision of law, all firearm enhancements under this section are mandatory, shall be
13 served in total confinement, and shall run consecutively to all other sentencing provisions,
14 including other firearm or deadly weapon enhancements, for all offenses sentenced under
15 this chapter." RCW 9.94A.510(3)(e).

16 Petitioner's claim that his sentences on the two assaults should run concurrently is
17 without merit.

18 b. The consecutive sentences on the two assault do not
19 constitute an exceptional sentence.

20 In State v. Cubias, 155 Wn.2d 549, 552, 120 P.3d 929 (2005), the Washington
21 Supreme Court held that "the trial court's imposition of consecutive sentences under RCW
22 9.94A.589(1)(b) does not increase the penalty for any single underlying offense beyond the
23 statutory maximum provided for that offense and, therefore, does not run afoul of the
24 decisions of the United States Supreme Court in Apprendi and Blakely." Cubias, 155
25 Wn.2d at 556; accord State v. Louis, 155 Wn.2d at 572 (recognizing that Apprendi and
Blakely have "no application to consecutive sentencing decisions so long as each

1 individual sentence remains within the statutory maximum for that particular offense").
2 The Cubias court further noted that even if the jury was required to make factual findings
3 supporting consecutive sentences, where the jury finds the defendant guilty of more than
4 one charge against separate victims, "it is merely a legal conclusion from these factual
5 determinations that the criminal conduct charged in each count was separate and distinct
6 criminal conduct." Cubias, 155 Wn.2d at 556 n.4.

7 Petitioner's claim that his consecutive sentences constituted an exceptional
8 sentence is without merit.

9 c. Petitioner's criminal history did not include any
10 juvenile convictions committed before his 15th
11 birthday.

12 Petitioner asserts that the State improperly included juvenile conviction committed
13 before the age of 15 in his criminal history. The judgment indicates that petitioner was
14 born on 9/13/1975. Appendix A. Petitioner turned 15 on September 13, 1990. All of the
15 criminal history listed in the judgment reflect a crime date occurring after September 13 ,
16 1990. Appendix A. There is no merit to petitioner's claims.

17 d. Juvenile convictions may be properly included in
18 criminal history without violating Apprendi or
19 Blakely.

20 In both Apprendi and Blakely, the United States Supreme Court held that "[o]ther
21 than the fact of a prior conviction, any fact that increases the penalty for a crime beyond
22 the prescribed statutory maximum must be submitted to a jury, and proved beyond a
23 reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S. Ct. 2348, 147
24 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159
25 L.Ed.2d 403 (2004). This is largely because recidivism "is a traditional, if not the most
traditional, basis for a sentencing court's increasing of an offender's sentence."

1 Almendarez-Torres v. United States, 523 U.S. 224, 243, 118 S. Ct. 1219, 140 L.Ed.2d 350
2 (1998). Therefore, facts related to prior convictions are "potentially distinguishable for
3 constitutional purposes from other facts that might extend the range of possible
4 sentencing." Jones v. United States, 526 U.S. 227, 249, 119 S. Ct. 1215, 143 L.Ed.2d 311
5 (1999).

6 Based on this exception, prior convictions do not need to be proved to a jury
7 beyond a reasonable doubt in order to enhance a defendant's sentence. Washington courts
8 have held that juvenile adjudications fall within the prior convictions exception. State v.
9 Mounts, 130 Wn. App. 219, 122 P.3d 745 (2005)(Division II); State v. Weber, 127 Wn.
10 App. 879, 892-93, 112 P.3d 1287 (2005)(Division I); State v. Kuhlman, 135 Wn. App.
11 527, 144 P.3d 1214 (2006)(Division III).

12 Petitioner claim that inclusion of his juvenile convictions in his criminal history
13 violated Apprendi and Blakely should be dismissed.

- 14 e. Imposition of punishment for firearm enhancements
15 in addition to the punishment for the crime of assault
16 does not violate double jeopardy.

17 Petitioner also contends that the firearm enhancements for the two first-degree
18 assault convictions violate double jeopardy. He argues that he is being punished twice for
19 using a firearm in violation of double jeopardy-once for first-degree assault with a
20 "firearm", and again for being armed with a "firearm" while committing the same assault.
21 Double jeopardy prohibits multiple punishments for the same offense. U.S. Const. amend.
22 V; Wash. Const. art. 1, § 9; State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).
23 Whether double jeopardy is violated is a question of law reviewed de novo. State v.
24 Zumwalt, 119 Wn. App. 126, 129, 82 P.3d 672 (2003), aff'd, 153 Wn.2d 765, 108 P.3d 753
25 (2005).

1 Washington courts have repeatedly rejected double jeopardy challenges to deadly
2 weapon enhancements where the use of a deadly weapon is an element of the underlying
3 crime. See e.g., State v. Husted, 118 Wn. App. 92, 95-96, 74 P.3d 672 (2003) rev.
4 denied, 151 Wn.2d 1014, 89 P.3d 712 (2004); State v. Caldwell, 47 Wn. App. 317, 319-20,
5 734 P.2d 542 (1987); State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605 (1986). In
6 Husted, this court reiterated the well recognized conclusion that:

7 The Legislature has clearly expressed its intent in RCW 9.94A.310² that a
8 person who commits certain crimes while armed with a deadly weapon will
9 receive an enhanced sentence, notwithstanding the fact that being armed
with a deadly weapon was an element of the offense.

10 State v. Husted, 118 Wn. App. 92, 95-96, 74 P.3d 672 (2003) (quoting State v. Caldwell,
11 47 Wn. App. 317, 320, 734 P.2d 542 (1987)). Petitioner offers no reason why this long
12 standing rule should be re-examined. His claim should be dismissed

13 f. The court was entitled to rely on petitioner's
14 stipulation that his prior convictions did not
15 constitute the same criminal conduct.

16 Two crimes constitute the "same criminal conduct" if they (1) require the same
17 criminal intent, (2) are committed at the same time and place, and (3) involve the same
18 victim. RCW 9.94A.589(1)(a); State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000).
19 The absence of any one of these elements prevents a finding of "same criminal conduct."
20 State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); State v. Lessley, 118 Wn.2d 773,
21 778, 827 P.2d 996 (1992). An appellate court reviews a trial court's determination of
22 whether two crimes involve the "same criminal conduct" for abuse of discretion or
23 misapplication of the law. Price, 103 Wn. App. at 855.

24
25

² Recodified at RCW 9.94A.510 (2003), recodified at RCW 9.94A.533 (2005).

1 The Supreme Court has made it clear a defendant must raise the issue of whether
2 two current offenses should be treated as the same criminal conduct in the trial court or it is
3 waived. In re PRP of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002) (waiver can be
4 found where the alleged error involves an agreement to facts, later disputed, or where the
5 alleged error involves a matter of trial court discretion). The court approved of the analysis
6 in State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030
7 (2000), where the defendant argued for the first time on appeal that the two crimes he was
8 convicted of constituted the same criminal conduct, and therefore neither could not be
9 counted as part of his offender score for sentencing for the other crime. Nitsch had agreed
10 in his own presentence memorandum that his offender score had been properly calculated.
11 The Court of Appeals noted that application of the same criminal conduct statute involves
12 both factual determinations and the exercise of discretion and held that the defendant's
13 "failure to identify a factual dispute for the court's resolution and . . . failure to request an
14 exercise of the court's discretion" waived the challenge to his offender score. Id. at 520,
15 523.

16 Petitioner argues that some of his convictions should have been treated as the same
17 criminal conduct. Petitioner makes no showing that he raised such a challenge in the trial
18 court. The stipulation on offender score attached to the State's response shows that
19 petitioner stipulated to an offender score of 9 as to Counts I and III. Appendix E. Under
20 Goodwin, petitioner is precluded from raising this claim now.

1
2 D. CONCLUSION:

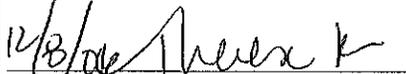
3 The State respectfully requests that this court dismiss the defendant's personal
4 restraint petition.

5 DATED: December 8, 2006.

6
7 GERALD A. HORNE
8 Pierce County Prosecuting Attorney

9 
10 _____
11 KATHLEEN PROCTOR
12 Deputy Prosecuting Attorney
13 WSB # 14811

12 Certificate of Service:
13 The undersigned certifies that on this day she delivered by U.S. mail
14 to the petitioner a true and correct copy of the document to which this
15 certificate is attached. This statement is certified to be true and correct
16 under penalty of perjury of the laws of the State of Washington. Signed
17 at Tacoma, Washington, on the date below.

18 
19 _____
20 Date Signature

21
22
23
24
25
FILED
COURT APPEALS
06 DEC - 8 PM 4:33
STATE OF WASHINGTON
BY _____
DEPUTY

APPENDIX “A”

Judgment and Sentence (99-1-04722-4)



99-1-04722-4 18445409 JDSWCD 02-13-03

CERTIFIED COPY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 99-1-04722-4.

vs.

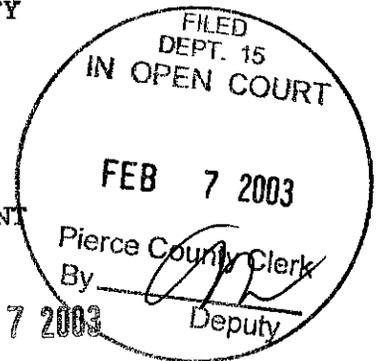
MICHAEL LOUIS RHEM,

Defendant.

WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

FEB 07 2003



THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 2-7-03

By direction of the Honorable

[Signature]

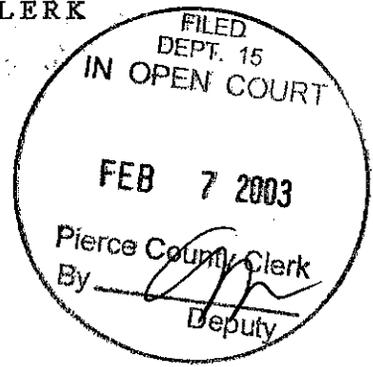
JUDGE THOMAS J. FELNAGLE
KEVIN STOCK

By: *[Signature]*

DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date FEB 07 2003 *[Signature]* Deputy



STATE OF WASHINGTON, County of Pierce
ss: I, Kevin Stock, Clerk of
the above entitled Court, do hereby certify
that this foregoing instrument is a true and
correct copy of the original now on file
in my office.

IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of Said Court this
_____ day of _____, _____

KEVIN STOCK, Clerk
By: _____ Deputy

kyr

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY



STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 99-1-04722-4

vs.

JUDGMENT AND SENTENCE (JS)

MICHAEL LOUIS RHEM
Defendant.

- Prison
 Jail One Year or Less
 First-Time Offender
 SOSA
 DOSA
 Breaking The Cycle (BTC)

FEB 07 2003

SID: WA14981478
DOB: 09/13/75

Defendant.

I. HEARING

1.1 A sentencing hearing was held on February 7, 2003, and the defendant, the defendant's lawyer, Michael A. Stewart, and the deputy prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 **CURRENT OFFENSE(S):** The defendant was found guilty on 01/30/2003 by [] plea [X] jury-verdict [] bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME	INCIDENT NO.
I	ASSAULT IN THE FIRST DEGREE W/FASE CHARGE CODE: E23	9A.36.011(1)(a)	08/21/99	99-233-1355
II	ASSAULT IN THE FIRST DEGREE W/FASE CHARGE CODE: E23	9A.36.011(1)(a)	08/21/99	99-233-1355
III	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE CHARGE CODE: GGG66	9.41.040(1)(a)	08/21/99	99-233-1355

as found guilty by a jury.

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- A special verdict/finding for use of firearm was returned on Counts I and II. RCW 9.94A.602, .510.
 Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
 Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	THEFT 2	12/17/90	Pierce Co WA	10/31/90	JUV	NV
2	THEFT 2	11/15/91	Pierce Co WA	10/2/91	JUV	NV
3	UPCS	4/1/93	Pierce Co WA	12/11/92	JUV	NV
4	TMVWOP	8/26/93	Pierce Co WA	8/2/93	JUV	NV
5	PSP1	6/28/94	Pierce Co WA	6/1/94	ADULT	NV
6	ATT ELUDE	6/28/94	Pierce Co WA	6/1/94	ADULT	NV
7	REND CRIM ASSIST	8/28/96	Pierce Co WA	8/28/96	ADULT	NV
8	ASSAULT 2	7/14/00	Pierce Co WA	7/23/99	ADULT	V
9	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE	5/10/00	Pierce Co WA	10/20/99	ADULT	NV

- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9	XII	240-318 MOS	*60 MOS (F)	300 - 378 MOS	LIFE
II	0	XII	93-123 MOS	*60 MOS (F)	153-183 MOS	LIFE
III	9	VII	87-116 MOS	N/A	87-116 MOS	10 YRS

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

2.4 **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence above below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

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2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows: Disposition was by jury trial, therefore, there are no plea agreements.

State recommended same sentence as imposed -

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 The court DISMISSES Counts _____ The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTM/RJN \$ _____ Restitution to: _____
\$ _____ Restitution to: _____
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV \$ 500.00 Victim assessment RCW 7.68.035

BLD \$ 100.00 Biological Sample Fee ~~RCW~~

CRC \$ 110.00 Court costs, including RCW 9.94A.030, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$ 110.00 FRC

Witness costs \$ _____ WFR

Sheriff service fees \$ _____ SFR/SFS/SFW/WRF

Jury demand fee \$ _____ JFR

Other _____ \$ _____

PUB \$ _____ Fees for court appointed Attorney RCW 9.94A.030

\$ _____ Other costs for : _____
\$ 710.00 TOTAL RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for _____

RESTITUTION. Order Attached

The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.

All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____ . RCW 9.94A.760.

In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.760.

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[] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

[X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant shall not have contact with MICHAEL ROLLINS DOB: 5/4/78 and KIMBERLY MATTHEWS DOB: 2/7/80 including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 1.5 years (not to exceed the maximum statutory sentence).

[] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.4 OTHER:

Empty rectangular box for additional notes or conditions.

4.4(a) BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

318 months on Count I 183 months on Count II
116 months on Count III
_____ months on Count _____ months on Count

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 months on Count No I 60 months on Count No II
_____ months on Count No _____ months on Count No
_____ months on Count No _____ months on Count No

Sentence enhancements in Counts I and II shall run

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[] concurrent [x] consecutive to each other.
Sentence enhancements in Counts I and II shall be served
[x] flat time [] subject to earned good time credit

Actual number of months of total confinement ordered is: 561 months

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

The sentence herein shall run consecutively to all felony sentences in other cause numbers prior to the commission of the crime(s) being sentenced.

Confinement shall commence immediately unless otherwise set forth here:

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 1,206 days

4.6 **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

Count I for 24 months,

Count II for 24 months,

Count _____ for _____ months,

COMMUNITY CUSTODY is ordered as follows:

Count _____ for a range from: _____ to _____ Months,

Count _____ for a range from: _____ to _____ Months,

Count _____ for a range from: _____ to _____ Months,

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placemet offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to

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monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with: Michael Rollins or Kimberly Matthews.

Defendant shall remain within outside of a specified geographical boundary, to wit: Per CCO

The defendant shall participate in the following crime-related treatment or counseling services: _____

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse

mental health anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: _____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

4.7 **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is

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completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.

5.4 **RESTITUTION HEARING.**

[] Defendant waives any right to be present at any restitution hearing (defendants initials): _____

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.

5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. N/A

5.8 **OTHER:** Def. shall have no contact w/ Digno Dejesus or Randall Henderson or any known gang members.

DONE in Open Court and in the presence of the defendant this date: 2-7-03

JUDGE [Signature]
Print name THOMAS J. FELNAGLE

[Signature]
Deputy Prosecuting Attorney
Print name: GREGORY L. GELER
WSB # 22936

[Signature]
Attorney for Defendant
Print name: Michael Stewart
WSB # 25981

[Signature]
Defendant
Print name: _____



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CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 99-1-04722-4

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

99-1-04722-4

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year term of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed;

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC;

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

- (I) The offender shall remain within, or outside of, a specified geographical boundary: Per CCO
- (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: Michael Rollins, Kimberly Matthews
- (III) The offender shall participate in crime-related treatment or counseling services;
- (IV) The offender shall not consume alcohol;
- (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or
- (VI) The offender shall comply with any crime-related prohibitions.
- (VII) Other: _____

99-1-04722-4

IDENTIFICATION OF DEFENDANT



SID No WA14981478
(If no SID take fingerprint card for State Patrol)

Date of Birth 09/13/75

FBI No 781355VA7

Local ID No UNKNOWN

PCN No UNKNOWN

Other

Alias name, SSN, DOB:

Race:

Asian/Pacific Islander Black/African-American

Caucasian

Ethnicity:

Hispanic

Sex:

Male

Native American

Other:

Non-Hispanic

Female

FINGERPRINTS

Left four fingers taken simultaneously



Left Thumb



Right Thumb



Right four fingers taken simultaneously



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, [Signature] Dated: 2-6-03

DEFENDANT'S SIGNATURE: [Signature: Michael Kheim]

APPENDIX “B”

Opinion (Consolidated numbers 26220-7 and 26295-9)

4 of 5 DOCUMENTS

**STATE OF WASHINGTON, Respondent, v. MICHAEL LOUIS RHEM, Appellant.
STATE OF WASHINGTON, Respondent, v. KIMOTHY MAURICE WYNN, Appellant.**

No. 26220-7-II, No. 26295-9-II (consolidated)

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2002 Wash. App. LEXIS 1525

July 2, 2002, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

PRIOR HISTORY: Appeal from Superior Court of Pierce County. Docket No: 99-1-04723-2. Date filed: 07/14/2000. Judge signing: Hon. Stephanie A. Arend. State v. Rhem, 112 Wn. App. 1034, 2002 Wash. App. LEXIS 2362 (2002)

DISPOSITION: Reversed and remanded.

COUNSEL: For Appellant(s): Linda J. King, Attorney At Law, Steilacoom, WA, Patricia A. Pethick, Attorney At Law, Tacoma, WA.

For Respondent(s): Barbara L. Corey-Boulet, Pierce Co. Deputy Pros. Atty., Tacoma, WA.

JUDGES: Authored by Karen G. Seinfeld. Concurring: J. Dean Morgan, Carroll C. Bridgewater.

OPINION BY: Karen G. Seinfeld

OPINION:

SEINFELD, J. -- Michael Rhem and Kimothy Wynn each appeal convictions for two counts of first degree assault and one count of the unlawful possession of a firearm. Because the accomplice liability instructions were defective and this error was not harmless, we reverse the assault convictions. And because the unlawful firearm possession "to convict" instructions also were defective and, as again this error was not harmless, we reverse the unlawful possession jury convictions. But as the evidence was sufficient to convict, we remand for a new trial.

FACTS

The assault convictions challenged here [*2] arose out of an alleged gang-related shooting that occurred in an alley behind Ash Street in Tacoma on the night of August 21, 1999. Michael Rollins and Kimberly Matthews, the assault victims, were working on Rollins's car when multiple shots were fired in their direction. Rollins saw two men, including Rhem, running away from the scene. Based on this incidence, the State charged Rhem and Wynn each with two counts of first degree assault (counts IV and V) and one count of drive-by shooting (count VI) under an accomplice liability theory.

In the same information, the State charged Rhem with two counts (counts VII and VIII) and Wynn with one count (count IX) of illegally possessing a firearm. And based on events that preceded the nighttime shooting, the State charged Rhem with three other counts of first degree assault (counts I, II, and III).

The State's theory of the case was that the shootings were in retaliation for Rollins's failure to come to the aid of Rhem and another young man, both associated with the Hilltop Crips, when they fought with two Blood gang members, Rodney Hebert and Chris Meza. This was on July 21, 1999, and following the fight, Rhem made it known that he was [*3] angry with Rollins, who also was a Hilltop Crip. n1

n1 Following an ER 404(b) hearing, the trial court held that evidence of this fight was admissible as proof of motive but only against Rhem. The court gave a limiting instruction directing the jury not to consider this evidence against Wynn.

On the afternoon of August 21, Hebert, Rollins, and Hebert's young daughter were driving near 23rd and

Wilkeson Streets in Tacoma when, according to Rollins, Rhem shot at Hebert's car. Rhem later told two other Hilltop Crips, Randall Henderson and Digno DeJesus, about the shooting.

After the shooting, Hebert was angry and went looking for Rhem, taking his .40 caliber semi-automatic handgun with him. At about 9:30 p.m., Hebert fired into a crowd attending a barbecue at Wynn's aunt's house. Wynn told a friend that he thought Rollins and Hebert were the shooters and he said that he had shot back.

The shooting in the alley occurred later that same night. Rollins saw three people, one of whom was Rhem, walking toward his [*4] car. Rollins thought the men were going to steal his car but instead they turned around and left in a blue Caprice. Several minutes later, Rollins and Matthews heard shots and Rollins saw two men, including Rhem, running from the scene.

Rhem again told Henderson and DeJesus about this shooting. Wynn, who was present, not only did not contradict Rhem but on occasion, he would fill in the blanks or finish Rhem's statements.

Police recovered nine .40 caliber and six 9 mm casings from the area of Wynn's aunt's house. They also recovered a number of .45 caliber and 9 mm casings from the Ash Street scene. Forensic reports indicated that one of the 9 mm casings from Wynn's aunt's house and several of the 9 mm casings from the Ash Street shooting were fired from the same gun.

Rhem pleaded guilty to count VIII, a first degree unlawful possession of a firearm charge, and the State tried the remaining eight counts against Rhem and Wynn in a consolidated proceeding. The jury acquitted Rhem on counts I, II, and III, which arose out of the shooting at Hebert's vehicle on the afternoon of August 21. It also acquitted both Rhem and Wynn of count VI, the drive-by-shooting charge.

The jury convicted [*5] both men of counts IV and V, the first degree assaults of Rollins and Matthews in the alley behind Ash Street. It also convicted Rhem and Wynn of the two unlawful firearm charges, counts VII and IX. The trial court sentenced Wynn and Rhem to standard range sentences of 459 months and 561 months respectively.

DISCUSSION

I. JOINT ISSUES

A. ACCOMPLICE LIABILITY INSTRUCTIONS

The State concedes that the accomplice liability instructions, n2 which supported the assault convictions, were defective because they did not require the jury to

find that the defendants aided another in planning or committing the specific crime charged. See RCW 9A.08.020; n3 *State v. Roberts*, 142 Wn. 2d 471, 511, 513, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn. 2d 568, 579, 14 P.3d 752 (2000). It contends, however, that the error was harmless because it neither argued nor introduced evidence that the defendants knowingly participated in any crime other than the charged crime of assault.

n2 Instruction 18 provided:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of a crime, he either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing a crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Clerk's Papers (Rhem) (CP) at 181. Instruction 24 further provided: "If you are convinced that both defendants participated in a crime or crimes and that a crime or crimes have been proved beyond a reasonable doubt, you need not determine which defendant was an accomplice and which was a principal." CP (Rhem) at 187.

[*6]

n3 The accomplice liability statute provides, in part:

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

RCW 9A.08.020.

It is reversible error to instruct the jury in a way that relieves the State of its burden of proving beyond a reasonable doubt that the defendant knew he facilitated the charged crime. *See Cronin*, 142 Wn. 2d at 580. *But see State v. Stein*, 144 Wn. 2d 236, 245-48, 27 P.3d 184 (2001) (employing harmless error analysis to instructional error involving accomplice liability and *Pinkerton* doctrine); *State v. Swenson*, 104 Wn. App. 744, 762, 9 P.3d 933 (2000) [*7] (applying harmless error analysis to alleged accomplice liability instructional error). But a constitutional error may be harmless if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

In *Cronin*, a consolidated case, the court found in one case that the accomplice liability instructional error was not harmless because the State specifically argued that the jury could convict the defendant if it found he facilitated the commission of *any* crime. 142 Wn. 2d at 572-73, 580-81. The *Cronin* court also reversed the other case, concluding that the error allowed the jury to convict the defendant of first degree premeditated murder if it found he had facilitated the commission of "a crime." 142 Wn. 2d 577, 582.

Here, the trial court instructed the jury as follows:

To convict defendant Rhem of the crime of Assault in the First Degree as charged in Count IV, each of the following elements [*8] of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 21st day of August, 1999, defendant Rhem or an accomplice intentionally assaulted Michael Rollins;

(2) That the assault was committed with a firearm;

(3) That defendant Rhem or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP (Rhem) at 183. The court gave a similar instruction on the assault charges against Wynn.

In describing Rollins's testimony in closing argument, the State said that Rollins saw Rhem and two other people whom he thought were going to steal his car. The State repeated this fact a short time later in describing Rhem's and Wynn's statements that "[t]hey went to steal Casper's [Rollins's] car." 7 Report of Proceedings (RP) at 930. [*9] *See also* 7 RP at 931 ("Michael Rhem sees [sic] they're going to steal the car, but they don't get to do it."). The State also argued:

You have an instruction in your packet about accomplice liability. I'm not going to spend a lot of time with that, but in a nutshell the Legislature said we do not want people getting together and committing crimes. Don't do it. *If you participate at all, you participate to the full extent.*

Three guns. Latron Swearington, Kimothy Wynn, Michael Rhem. There was another person maybe there named Johnny Bopp. Maybe Johnny Bopp is one of the triggers; maybe he's not. *But they're all there together. They're all participating. It's as if each one of them pulled the trigger 15 times instead of the different times that they actually did it.*

7 RP at 933 (emphasis added).

The testimony of Rollins and Matthews that Rollins thought the three men were trying to steal his car, and the State's multiple references to that testimony in closing, allowed the jury under the court's erroneous accomplice liability instructions to find that the defendants promoted or facilitated car theft to support the jury's convictions for assault. [*10] But the law requires that the jury base accomplice liability on involvement with the specific crime charged. *Roberts*, 142 Wn. 2d at 510-11, 513. Thus, we cannot say beyond a reasonable doubt that the erroneous instructions did not contribute to the verdict and, consequently, we must reverse Rhem's and Wynn's assault convictions. *See Chapman*, 386 U.S. at 24.

B. UNLAWFUL POSSESSION OF A FIREARM -- "KNOWLEDGE" ELEMENT

Both Rhem and Wynn challenge their convictions for the unlawful possession of a firearm, asserting that

the second amended information and the "to convict" instructions were defective because they failed to allege the essential element of knowledge. Rhem also challenges his guilty plea to count VIII on the same basis.

In August 2000, the Washington Supreme Court held that knowledge is an essential element of the crime of unlawful possession of a firearm, thereby reversing a court of appeals decision that had reached the opposite conclusion. *State v. Anderson*, 141 Wn. 2d 357, 359, 5 P.3d 1247 (2000); *State v. Krajieski*, 104 Wn. App. 377, 384, 16 P.3d 69, review denied, 144 Wn. 2d 1002 (2001). [*11]

1. Charging Document

When a defendant alleges for the first time on appeal that a charging document fails to include all the essential elements of the charged crime, we liberally construe the document in favor of its validity. *State v. Davis*, 119 Wn. 2d 657, 661, 835 P.2d 1039 (1992); *State v. Kjorsvik*, 117 Wn. 2d 93, 102, 812 P.2d 86 (1991). We employ a two-prong test, asking first whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document" and, if so, whether "the defendant [can] show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *Kjorsvik*, 117 Wn. 2d at 105-06.

The charging document must include all essential elements of a crime to fulfill its purpose of supplying "the accused with notice of the charge that he or she must be prepared to meet." *Kjorsvik*, 117 Wn. 2d at 101. See also *State v. Vangerpen*, 125 Wn. 2d 782, 787, 888 P.2d 1177 (1995). But the charging document need not use the exact statutory language if it employs words "conveying the same meaning and [*12] import[.]" *Kjorsvik*, 117 Wn. 2d at 108; *State v. Leach*, 113 Wn. 2d 679, 686, 782 P.2d 552 (1989).

Here, the information charging Rhem and Wynn with first degree unlawful firearm possession does not use the term "knowledge:"

That MICHAEL LOUIS RHEM, in Pierce County, on or about on or about the 21st day of August, 1999, did *unlawfully and feloniously* own, have in his possession, or under his control a firearm, he having been previously convicted in the State of Washington or elsewhere of a serious offense, to wit: Burglary in the Second Degree, contrary to RCW 9.41.040(1)(a), and against the peace and dignity of the State of Washington.

....

That KIMOTHY MAURICE WYNN, in Pierce County, on or about on or about the 21st day of August, 1999, did *unlawfully and feloniously* own, have in his

possession, or under his control a firearm, he having been previously convicted in the State of Washington or elsewhere of a serious offense, to wit: Assault in the Second Degree, contrary to RCW 9.41.040(1)(a), and against the peace and dignity of the State of Washington.

CP (Rhem) [*13] at 93-94 (counts VII and IX) (emphasis added). The State similarly charged Rhem with a second count of unlawful firearm possession, count VIII, to which he pleaded guilty.

But as we recently held, a liberal construction of the phrase "unlawfully and feloniously" adequately apprises a defendant of the knowledge element of unlawful firearm possession. *Krajieski*, 104 Wn. App. at 384-86; see also *State v. Cuble*, 109 Wn. App. 362, 367-68, 35 P.3d 404 (2001) (upholding use of "unlawfully and feloniously" language in first degree unlawful firearm possession charge). The *Krajieski* court's reasoning is in accord with other Washington cases similarly holding that "unlawfully and feloniously" is equivalent to alleging knowledge. See e.g., *State v. Nieblas-Duarte*, 55 Wn. App. 376, 380-81, 777 P.2d 583 (1989) (involving unlawful delivery of a controlled substance charges).

As to the second prong of the *Kjorsvik* test, Rhem does not allege any prejudice resulting from the information's allegedly inartful language. See 117 Wn. 2d at 106. And Wynn asserts only that the information failed to describe or identify the [*14] particular firearm he allegedly possessed. But that allegation does not relate to a lack of notice as to the knowledge element. Thus, the inadequacy of the charging document does not mandate reversal.

2. "To Convict" Instruction

Although Rhem and Wynn did not challenge the "to convict" instructions below, the omission of an element is a manifest constitutional error that we will review. RAP 2.5(a)(3); *State v. Aumick*, 126 Wn. 2d 422, 429-30, 894 P.2d 1325 (1995); *State v. Scott*, 110 Wn. 2d 682, 688 n.5, 757 P.2d 492 (1988).

The State concedes that the "to convict" instructions for the unlawful possession of a firearm charges erroneously omitted the "knowledge" element but again argues that the error was harmless.

The "to convict" instructions stated:

To convict defendant Wynn [defendant Rhem] of the crime of Unlawful Possession of a Firearm in the First Degree as charged in Count IX [Count VII], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 21st day of August, 1999, defendant Wynn [defendant Rhem] had a firearm in his possession or control;

(2) That defendant Wynn [*15] [defendant Rhem] had previously been convicted of a serious offense [had previously been adjudicated guilty of a serious offense as a juvenile]; and

(3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP (Wynn) at 235; CP (Rhem) at 207.

The failure to include an element in a "to convict" instruction may be subject to harmless error analysis under United States Supreme Court jurisprudence. See *Neder*, 527 U.S. at 15. But under current Washington case law, "when a trial court fails to include an essential element in a 'to convict' instruction, it is a manifest constitutional error that requires automatic reversal." *State v. Summers*, 107 Wn. App. 373, 381-82, 28 P.3d 780, 43 P.3d 526 (2001) (court ultimately found defendant invited error by proposing identical "to convict" [*16] instruction). A "to convict" instruction is intended to be a complete statement of the relevant law that the jury is entitled to rely on; we can only assume that it did so in this case. See *State v. Smith*, 131 Wn. 2d 258, 263, 265, 930 P.2d 917 (1997). As the jury is not expected "to search the other instructions to make sense of the erroneous 'to convict' instruction, and we cannot assume that the jury attempted to compensate for the court's error by doing so," such an error cannot be harmless. *Smith*, 131 Wn. 2d at 265 ("to convict" instruction that omitted essential element of crime not subject to harmless error analysis). n4

n4 As we stated in *State v. Jennings*, Washington decisions seem to nominally adhere to prior case law but then conduct a harmless error analysis. For example, in *State v. Cronin*, 142 Wn. 2d 568, 580, 14 P.3d 752 (2000), our Supreme Court held that "[i]t is reversible error to instruct the jury in a manner that would relieve the State of this burden," (quoting *State v. Jackson*, 137 Wn. 2d 712, 727, 976 P.2d 1229 (1999) (quoting *Byrd*, 125 Wn. 2d 707 at 713-14, 887 P.2d 396)). But later in the same paragraph, the

Court "turn[ed] to the question of whether the instructional error in these cases can be labeled harmless." *Cronin*, 142 Wn. 2d at 580, 14 P.3d 752. In *State v. Stein*, 144 Wn. 2d 236, 246, 27 P.3d 184 (2001), the Court held that "[i]nstructional error is presumed to be prejudicial unless i[t] affirmatively appears to be harmless," (citing *State v. Wanrow*, 88 Wn. 2d 221, 237, 559 P.2d 548 (1977)).

111 Wn. App. 54, 44 P.3d 1, 5 n.7 (2002). But *Jennings* involved an erroneous definitional instruction not a "to convict" instruction. 44 P.3d at 4-5.

[*17]

Here, the "to convict" instructions omitted the element of knowledge. Notwithstanding the State's contention that the evidence of unlawful firearm possession was overwhelming, this defect necessitates reversal of the possession of a firearm jury convictions, counts VII (Rhem) and IX (Wynn). But this holding does not require the reversal of Rhem's conviction that resulted from his guilty plea, count VIII, as the plea was not tainted by the erroneous jury instruction.

C. EVIDENCE OF HABIT -- ER 404(B) AND ER 406

Rhem and Wynn also argue that the trial court erred in admitting evidence that they were known to carry guns. They contend that this was ER 404(b) evidence and was highly prejudicial.

We review the trial court's evidentiary decisions for an abuse of discretion. *State v. Wade*, 138 Wn. 2d 460, 463-64, 979 P.2d 850 (1999). An abuse occurs when the court's decision is manifestly unreasonable or based on untenable grounds. *Wade*, 138 Wn. 2d at 464.

Wynn and Rhem moved in limine to exclude "patterned testimony from [the State's] witnesses to the effect that defendant always carries a gun." CP (Wynn) at 86. See also CP (Rhem) [*18] at 105 ("Evidence that Mr. Rhem was known to possess a gun on other occasions and that he was known to generally possess a gun should be suppressed under ER 402, ER 403 and ER 404 as being irrelevant to the crimes with which he is charged, and even if relevant unduly prejudicial and as prior bad acts."). Wynn argued that the evidence did not satisfy the ER 406 requirements for the admission of habit or routine practice evidence and that its prejudicial impact outweighed its probative value under ER 403.

The trial court entered a written order admitting De-Jesus's and Henderson's testimony that they saw the defendants "with a gun on a regular basis." CP (Wynn) at

176. The court cited ER 406, ER 404(b), and *State v. Platz*, 33 Wn. App. 345, 655 P.2d 710 (1982). After admitting this testimony, the trial court instructed the jury at Wynn's request that: "Testimony that either defendant generally was in possession of a firearm cannot be considered as proof that either defendant possessed a firearm specifically on or about the 21st day of August, 1999, for the purposes of the unlawful possession of a firearm in the first degree charges." CP (Wynn) at 196.

Evidence of other [*19] crimes or bad acts is not admissible to prove a person's character and that the person acted in conformity with that character. ER 404(b); *State v. Saltarelli*, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). But such evidence may be admissible for other purposes if (1) the acts can be proven by a preponderance of the evidence; (2) the evidence is logically relevant to a material issue; and (3) the evidence's probative value outweighs its potential for unfair prejudice. *State v. Pirtle*, 127 Wn. 2d 628, 648-49, 904 P.2d 245 (1995); *Saltarelli*, 98 Wn. 2d at 362. Relevant evidence is of consequence to the action's outcome and makes the existence of a material identified fact more or less probable. *Saltarelli*, 98 Wn. 2d at 362-63.

ER 406 governs habit evidence:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Unlike ER 404(b), "Rule 406 makes it clear that evidence [*20] of a person's habit is relevant to prove the person acted in conformity with that habit on a particular occasion." KARL B. TEGLAND, 5A WASH. PRACTICE § 406.2, at 23 (4th ed. 1999). We agree with Tegland's distinction between character traits, such as stealing, lying, or forgetfulness, which are inadmissible under ER 404, and habits, such as driving without using a seat belt, patronizing a certain pub after each day's work or always signaling before changing lanes, which are admissible under ER 406. TEGLAND, 5A WASH. PRACTICE § 406.2, at 23.

In *Platz*, a first degree murder case involving a stabbing death, the trial court admitted evidence that the defendant never left his house without his knife. 33 Wn. App. at 346-47, 351. The *Platz* court upheld the admission of the evidence, holding that "[t]he evidence did not go to show Platz' character which [ER 404(b)] proscribes." 33 Wn. App. at 351. Additionally, the *Platz* court found the evidence admissible under ER 406, which explicitly recognizes evidence of habit is admissible. The testimony about Platz' propensity to carry a

knife is within McCormick's definition [*21] of habit. "A habit . . . is the person's regular practice of meeting a particular kind of situation with a specific type of conduct. . . ." 5 K. Tegland, Wash. Prac., *Evidence* § 128, at 318 (2d ed. 1982).

33 Wn. App. at 351.

Here, as in *Platz*, the court could properly characterize evidence that Rhem and Wynn routinely carried a weapon as ER 406 habit evidence. But because of Rhem's and Wynn's prior convictions, this evidence also proved prior illegal acts and, thus, is subject to the additional analysis of ER 404(b), including the satisfaction of ER 403's balancing test. See *Saltarelli*, 98 Wn. 2d at 361 (admissibility of ER 404(b) evidence must also be considered under ER 402 and ER 403).

Although the trial court apparently relied on, in part, ER 404(b) in admitting this evidence, it failed to balance the probative value and prejudice of the evidence on the record. See *State v. Jackson*, 102 Wn. 2d 689, 693, 689 P.2d 76 (1984) (balancing of probative value versus prejudice should be done on the record). This error is harmless, however, if we can determine from the record that the trial court would have admitted [*22] the evidence or if the trial's outcome would have been the same absent the evidence. *State v. Carleton*, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996).

In engaging in the balancing test, we are mindful that this evidence clearly had a high potential to be prejudicial, e.g., misused as evidence of the firearm possession charges. See *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (linchpin of ER 403 balancing test is determination of "unfair" prejudice). And it seems unlikely that the trial court's limiting instruction was effective. But see *State v. Southerland*, 109 Wn. 2d 389, 391, 745 P.2d 33 (1987) (generally courts presume that the jury follows its instructions). Given the obvious connection of this evidence to both the assault with a gun and the possession of a gun charges, it was unrealistic to expect the jury to be able to comply with the limiting instruction and to consider

the possession charges in a vacuum. n5 See *State v. Miles*, 73 Wn. 2d 67, 71, 436 P.2d 198 (1968) (error may be prejudicial even where court has instructed the jury to limit the use of evidence).

n5 We do note that the jury apparently considered each charge separately, as it acquitted Rhem and Wynn of some of the charges but convicted them of others. But some confusion was unavoidable in this eight-count trial as exempli-

fied by the note the jury sent to the judge during deliberations:

Re: Rhem + Wynn

Are Counts VII and IX individual? Are they contingent on Counts I, II, III, IV and V, i.e. if we believe both defendants are "not guilty" on Counts I-V, can they be found "guilty" on Counts VII and IX?

CP (Wynn) at 245. The court responded: "Each of the counts are separate and independent, as you have been instructed in Instruction No. 9. Please reread this and all instructions, and remember to consider the instructions as a whole." CP (Rhem) at 215.

[*23]

As it seems unlikely that the jury was able to comply with the trial court's limiting instruction, we are unable to say that there is no reasonable probability that the trial's outcome would have differed absent the error. *Jackson*, 102 Wn. 2d at 695. That the jury also convicted Wynn and Rhem of the assault charges arising from the Ash Street shooting does not make the error harmless, despite the State's contrary assertion. Because the State charged Wynn and Rhem as accomplices in the assaults, the jury did not need to find that they were both armed during the shooting. Consequently, the error was not harmless and requires reversal of Wynn's and Rhem's firearm possession jury convictions (counts VII and IX).

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Wynn claims ineffective assistance based on his counsel's failure to object to the erroneous accomplice liability instructions and the erroneous "to convict" instruction on the unlawful firearm possession charge. Rhem limits his ineffective assistance claim to his counsel's failure to object to the "to convict" instruction.

To sustain an ineffective assistance claim, a defendant must establish that his counsel's performance [*24] was objectively unreasonable and that there is a reasonable probability that the result of the proceeding would have been different absent the unprofessional errors. *State v. McFarland*, 127 Wn. 2d 322, 334-35, 899 P.2d 1251 (1995). See also *State v. Hendrickson*, 129 Wn. 2d 61, 78, 917 P.2d 563 (1996) (claim fails if either prong is not met). We employ a strong presumption that counsel provided effective representation; using legitimate trial tactics is not deficient performance. *McFarland*, 127 Wn. 2d at 335; *State v. Garrett*, 124 Wn. 2d 504, 520, 881 P.2d 185 (1994).

Rhem and Wynn have not established deficient performance in their counsel's failure to object to the challenged instructions. Here, at the time the trial court heard exceptions to the proposed jury instructions, the Washington Supreme Court had not yet issued its *Roberts*, *Cronin* and *Anderson* decisions.

Thus, when the trial court heard objections to the proposed jury instructions, the existing case law gave defense counsel no basis for an objection. See *State v. Anderson*, 94 Wn. App. 151, 153, 971 P.2d 585 (1999) (knowledge [*25] is not an essential element of second degree unlawful possession of a firearm), *rev'd*, 141 Wn. 2d 357 (2000). Rhem and Wynn have not established deficient performance and their ineffective assistance claims therefore fail. See *Hendrickson*, 129 Wn. 2d at 78.

E. SUFFICIENCY OF THE EVIDENCE

In a sufficiency challenge, we take the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn. 2d 333, 338, 851 P.2d 654 (1993). Circumstantial and direct evidence are equally reliable and credibility determinations rest solely with the trier of fact. *State v. Camarillo*, 115 Wn. 2d 60, 71, 794 P.2d 850 (1990); *State v. Delmarter*, 94 Wn. 2d 634, 638, 618 P.2d 99 (1980).

The evidence here clearly was sufficient to support both of Rhem's assault convictions and his unlawful firearm possession jury conviction. Rollins recognized Rhem when Rollins first went outside his aunt's house and again when he saw Rhem running from the scene after the shots were fired. [*26] DeJesus and Henderson testified that Rhem admitted to shooting at Rollins and Matthews. The State recovered .45 caliber casings from the scene and DeJesus and Henderson testified that they knew Rhem carried a .45 caliber gun. And there was evidence of a motive as Rhem was angry with Rollins over the fight in July.

Rhem attacks this evidence, arguing that Rollins did not see Rhem shoot at him or see Rhem carrying a gun and Matthews had nothing to add to Rollins's testimony. But there is reasonable circumstantial evidence that Rhem was the shooter.

Rhem also attacks the credibility of DeJesus and Henderson. But we will not review the jury's credibility determinations. *Camarillo*, 115 Wn. 2d at 71.

Wynn also challenges DeJesus's and Henderson's credibility, arguing that the only evidence supporting a finding of guilt is their testimony about Wynn's admissions

related to the shooting. Wynn discounts the forensic evidence that 9 mm casings from the shooting at Wynn's aunt's house matched 9 mm casings recovered from the scene of the charged shooting, arguing that there was no evidence linking Wynn to this "unknown" 9 mm gun. Appellant Wynn's Br. at 49.

Taking [*27] the evidence in the light most favorable to the State, the following evidence supports Wynn's convictions. First, although Rollins did not see Wynn, he testified that "[t]hese guys [Rhem and Wynn] were together every time" and that he saw one tall person and one short person run off after the shooting. 4 RP at 359. There was evidence that Rhem was 6'3" and Wynn was 5'7". n6

n6 There also was testimony that Latron Swearington was present at the shooting and that he was about 5'7" as well.

Second, Wynn admitted to DeJesus and Henderson that he was involved in the shooting.

Third, a 9 mm casing that the police recovered from Wynn's aunt's house and the 9 mm casings from the shooting at Rollins's aunt's house were fired from the same gun. Wynn told DeJesus that he had fired back at the shooters at his aunt's house. And DeJesus and Henderson testified that Wynn was known to carry a 9 mm gun and Wynn sold his 9 mm to DeJesus after the charged shooting.

Fourth, [*28] Wynn had a motive for the shooting as he told DeJesus that he thought Hebert and Rollins were the shooters at Wynn's aunt's house. This evidence is sufficient to support the convictions.

II. WYNN'S MOTION TO SEVER

Finally, Wynn asserts that the trial court erred in denying his motion to sever his trial from Rhem's. The State first asks this court to find that Wynn waived his severance motion by failing to renew it at the appropriate time. Alternatively, the State contends that the trial court properly denied the motion because Wynn could not show specific prejudice.

Wynn relies on CrR 4.4(c)(2), which provides:

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed ap-

propriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

To preserve an objection to the [*29] denial of a severance motion, the defendant must renew the motion before or at the close of all evidence. CrR 4.4(a)(2).

As to the State's waiver argument, Wynn first made his severance motion on March 24, 2000, before a pre-trial motion judge, who denied his motion. When Rhem made a severance motion on March 27, Wynn noted that he would "renew my motion, as the Court rule requires me to do so, to preserve it." RP (3/27/00) at 101.

In April, Wynn notified the trial judge that he was "going to be renewing that [motion] because the rules require me to renew that at the time of trial, otherwise it is waived[.]" 2 RP at 111. Later that same day, in response to an inquiry from the trial court, Wynn asked the court when it would like him to renew his severance motion. The court indicated that it wanted to conclude all pretrial motions that day so that jury selection could begin on Monday morning. Wynn thus renewed his motion, which the trial court again denied. n7 Based on this record, the State's waiver argument is not compelling.

n7 There is some ambiguity in the record about whether Wynn needed to renew his motion yet again. The trial court noted that it "may spend some time over the course of the next couple of days taking a further look at this," but at that point, it was denying the motion. 2 RP at 210. Wynn then noted that he "may have to renew it again at some point." 2 RP at 210. Wynn apparently did not raise the issue again until his motion for a new trial.

[*30]

We review a trial court's decision on a severance motion for a manifest abuse of discretion. *State v. Hoffman*, 116 Wn. 2d 51, 74, 804 P.2d 577 (1991). This state does not favor separate trials and, thus, the party seeking severance has "the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy."

Hoffman, 116 Wn. 2d at 74. See also *State v. Dent*, 123 Wn. 2d 467, 484, 869 P.2d 392 (1994). The defendant must point to specific prejudice to support his motion. *State v. Canedo-Astorga*,

79 Wn. App. 518, 527, 903 P.2d 500 (1995).

This demonstration may show

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

Canedo-Astorga, 79 Wn. App. at 528 [*31] (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276

(7th Cir. 1985)) . But mutually antagonistic defenses alone are insufficient to support separate trials. *Hoffman*, 116 Wn. 2d at 74. Rather, the moving party must demonstrate "that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this

conflict alone demonstrates that both are guilty." *Hoffman*, 116 Wn. 2d at 74.

Wynn's entire assertion of prejudice was that "there was a gross disparity of prejudicial evidence against Rhem, which would not have been admissible against Wynn in a separate trial." Appellant Wynn's Br. at 45. But "[t]he mere fact that evidence may be admissible against one defendant and not against another is not in and of itself proof that the two defendants cannot have a fair trial if tried together." *State v. Courville*, 63 Wn. 2d 498, 501, 387 P.2d 938 (1963). See also *State v. Philips*, 108 Wn. 2d 627, 640, 741 P.2d 24 (1987) ("The mere fact that evidence admissible against one defendant would not be admissible against a [*32] codefendant if the latter were tried alone does not necessitate severance[.]").

Additionally, the courts have recognized that a limiting instruction may cure any prejudice. *Courville*, 63 Wn. 2d at 501. Here, the court instructed the jury that "[e]vidence of an incident that took place on July 21, 1999, involving a fight may not be used for any purpose or consideration as it relates to defendant Kimothy Wynn." CP (Wynn) at 195. The trial court also gave the following standard instruction:

A separate crime is charged against one or both of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant or each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

CP (Wynn) at 199.

Thus, as Wynn's only argument in support of his severance motion is that there was a "gross disparity" of evidence admissible against Rhem but not against Wynn and the trial court gave an appropriate limiting instruction, Wynn has failed to show specific prejudice.

We reverse [*33] counts IV, V, VII, and IX, the jury convictions for assault and possession of a firearm, and remand for a new trial on those counts. But we affirm Rhem's conviction on count VIII, the guilty plea to the possession of a firearm charge.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Seinfeld, J.

We concur:

Morgan, P.J.

Bridgewater, J.

APPENDIX "C"

Judgment and Sentence (99-1-04722-4)

FILED
DEPT. 12
IN OPEN COURT
JUL 14 2000
Pierce County Clerk
By [Signature] DEPUTY

CERTIFIED COPY

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

MICHAEL LOUIS RHEM,

Defendant.

CAUSE NO. 99-1-04722-4
WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other - Custody

JUL 14 2000

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

- [] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).
- 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: July 14, 2000

By direction of the Honorable

Stephanie A. Rut
J U D G E

TED RUTT

C L E R K

By:

Karen Ladensung

D E P U T Y C L E R K

CERTIFIED COPY DELIVERED TO SHERIFF

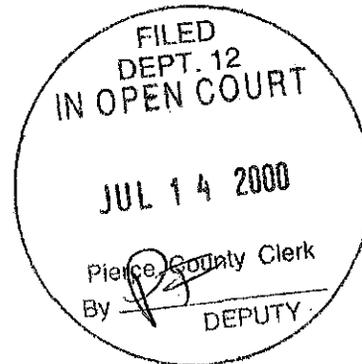
Date JUL 14 2000 By Karen Ladensung Deputy

STATE OF WASHINGTON, County of Pierce
ss: I, Ted Rutt, Clerk of the above
entitled Court, do hereby certify that
this foregoing instrument is a true and
correct copy of the original now on file
in my office.

IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of Said Court this
_____ day of _____, 19____.

TED RUTT, Clerk

By: _____ Deputy



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff,
vs.
MICHAEL LOUIS RHEM,
Defendant.
DOB: 09/13/75
SID NO.: WA14981478
LOCAL ID:

CAUSE NO. 99-1-04722-4
JUDGMENT AND SENTENCE
(FELONY/OVER ONE YEAR)

FILED
DEPT. 12
IN OPEN COURT
JUL 14 2000 JUL 14 2000
Pierce County Clerk
EV DEPUTY

I. HEARING

1.1 A sentencing hearing in this case was held on July 14, 2000.
1.2 The defendant, the defendant's lawyer, MICHAEL STEWART, and the
deputy prosecuting attorney, JOHN M. NEEB, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court
FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on May 10,
2000, by

plea VIII jury-verdict COUNTS IV, V, VII [] bench trial of:

Count No.: IV 4
Crime: ASSAULT IN THE FIRST DEGREE WITH FIREARM SENTENCE
ENHANCEMENT, Charge Code: (E23/FASE)
RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310,
9.94A.370
Date of Crime: August 21, 1999
Incident No.: 99-233-1355

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 1

ENTERED
JUDGMENT # _____

00-9-08223-2

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Count No.: V 5
Crime: ASSAULT IN THE FIRST DEGREE WITH FIREARM SENTENCE ENHANCEMENT, Charge Code: (E23/FASE)
RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, 9.94A.370
Date of Crime: August 21, 1999
Incident No.: 99-233-1355

Count No.: VII 7
Crime: UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, Charge Code: (GGG66)
RCW: 9.41.010(1)(a)
Date of Crime: August 21, 1999
Incident No.: 99-233-1355

Count No.: VIII 8
Crime: UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, Charge Code: (GGG66)
RCW: 9.41.010(1)(a)
Date of Crime: ~~OCTOBER 20~~, 1999
Incident No.: 99-233-1355

- Additional current offenses are attached in Appendix 2.1.
- A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s).
- A special verdict for use of a firearm was returned on Counts IV and V.
- A special verdict/finding of sexual motivation was returned on Count(s)_____.
- A special verdict/finding of a RCW 69.50.401(a) violation in a school bus, public transit vehicle, public park, public transit shelter or within 1000 feet of a school bus route stop or the perimeter of a school grounds (RCW 69.50.435).
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

ASSAULT 2 99-1-03898-5

- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)): NONE

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 2

.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Date of Crime	Crime Type
ATT BURGLARY 2	06/25/90	JUVENILE 14	04/19/90	NV 1/2
BURGLARY 2	08/16/90	JUVENILE 14	07/08/90	NV 1/2
THEFT 2	12/17/90	JUVENILE 15	10/31/90	NV 1/2
THEFT 2	11/15/91	JUVENILE 16	10/02/91	NV 1/2
UPCS	04/01/93	JUVENILE 17	12/11/92	NV 1/2
TMVOP	08/26/93	JUVENILE 17	08/02/93	NV 1/2
PSP 1	06/28/94	ADULT	06/01/94	NV 1
ELUDING	06/28/94	ADULT	06/01/94	NV 1
REND CRIM				
ASST 1	08/28/96	ADULT	08/28/96	NV 1
ASSAULT 2	CURRENT	ADULT	07/23/99	V 2/1
ASSAULT 1	CURRENT	ADULT	08/21/99	SV 0/1
ASSAULT 1	CURRENT	ADULT	08/21/99	SV 0/1
UPOF 1	CURRENT	ADULT	08/21/99	NV 0/1
UPOF 1	CURRENT	ADULT	10/20/99	NV 0/1

- [] Additional criminal history is attached in Appendix 2.2.
- [] Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(5)(a)): NONE

2.3 SENTENCING DATA:

	Offender Score	Serious Level	Standard Range(SR)	Enhancement	Maximum Term
Count IV:	10	XII	240 - 318	60 mos.	Life / 50,000
Count V:	0	XII	93 - 123	60 mos.	Life / 50,000
Count VII:	10	VII	87 - 116		10 yrs/20,000
Count VIII:	10	VII	87 - 116		10 yrs/20,000

- [] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE:

- [] Substantial and compelling reasons exist which justify an exceptional sentence
- [] above [] within [] below the standard range for Count(s) _____ . Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [] did [] did not recommend a similar sentence.

JUDGMENT AND SENTENCE
 FELONY / OVER ONE YEAR - 3

if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [] The court DISMISSES.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

\$ _____, Restitution to: UNDER ORDER

\$ 110.00, Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);

\$ 500.00, Victim assessment;

\$ _____, Fine; [] VUCSA additional fine waived due to indigency (RCW 69.50.430);

\$ _____, Fees for court appointed attorney;

\$ _____, Washington State Patrol Crime Lab costs;

\$ _____, Drug enforcement fund of _____;

\$ _____, Other costs for: _____;

\$ 610.00, TOTAL legal financial obligations [] including restitution ~~and~~ not including restitution.

[] Minimum payments shall be not less than \$ _____ per month. Payments shall commence on _____.

The Department of Corrections shall set a payment schedule.

Restitution ordered above shall be paid jointly and severally with:

<u>Name</u>	<u>Cause Number</u>
<u>Kimothy Wynn</u>	<u>99-1-04723-2</u>

The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement to assure payment of the above monetary obligations.

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

Defendant must contact ~~the~~ Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release or by _____.

Bond is hereby exonerated.

4.2 CONFINEMENT OVER ONE YEAR: The defendant is sentenced as follows:

(a) CONFINEMENT: (Standard Range) RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

<u>318</u>	months on Count No. IV (4)	<input type="checkbox"/>	concurrent	<input type="checkbox"/>	consecutive
<u>123</u>	months on Count No. V (5)	<input checked="" type="checkbox"/>	CONSECUTIVE to Count IV(4)		
<u>116</u>	months on Count No. VII (7)	<input checked="" type="checkbox"/>	concurrent with Count IV(4)		
<u>116</u>	months on Count No. VIII(8)	<input checked="" type="checkbox"/>	concurrent with Count IV + VII		

(4) (8)

(b) CONFINEMENT (Sentence Enhancement): A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 (sixty) MONTHS ON COUNT IV
 60 (sixty) MONTHS ON COUNT V 120

TOTAL MONTHS CONFINEMENT ORDERED: 561

Sentence enhancements in Counts IV and V shall run consecutive to each other and consecutive to the underlying sentences ordered in Counts IV and V.
 Sentence enhancements in Counts IV and V shall be served as flat time.

Standard range sentence shall be concurrent consecutive with the sentence imposed in Cause No. 99-1-03898-5

Credit is given for 258 days served;

4.3 COMMUNITY PLACEMENT (RCW 9.94A.120). The defendant is sentenced to community placement for one year two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

COMMUNITY CUSTODY (RCW 9.94A.120(1)). Because this was a sex offense that occurred after June 6, 1996, the defendant is sentenced to community custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

While on community placement or community custody, the defendant shall: 1) report to and be available for contact with the assigned community corrections officer as directed; 2) work at Department of Corrections-approved education, employment and/or community service; 3) not consume controlled substances except

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 7

pursuant to lawfully issued prescriptions; 4) not unlawfully possess controlled substances while in community custody; 5) pay supervision fees as determined by the Department of Corrections; 6) residence location and living arrangements are subject to the approval of the department of corrections during the period of community placement.

- (a) [] The offender shall not consume any alcohol;
- (b) The offender shall have no contact with: MICHAEL FOLINS, KINGSWAY MATTHEWS, ANY MEMBER OF THEIR FAMILIES, ANY GANG MEMBER
- (c) [] The offender shall remain [] within or [] outside of a specified geographical boundary, to-wit: _____
- (d) [] The offender shall participate in the following crime related treatment or counseling services: _____
- (e) [] The defendant shall comply with the following crime-related prohibitions: _____
- (f) OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS: SEE APPENDIX "F"
- (g) [] HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. (RCW 70.24.340)
- (h) DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The Department of Corrections shall be responsible for obtaining the sample prior to the defendant's release from confinement. (RCW 43.43.754) SEPARATE ORDER

[] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND DEPORTATION BY THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SUBJECT TO ARREST AND REINCARCERATION IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO THE EXPIRATION OF THE SENTENCE.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9.94A.200(2)).

FIREARMS: PURSUANT TO RCW 9.41.040, YOU MAY NOT OWN, USE OR POSSESS ANY FIREARM UNLESS YOUR RIGHT TO DO SO IS RESTORED BY A COURT OF RECORD.

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 8

ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 24 HOURS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130.

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT'S RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE CONVICTION OR THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: July 14, 2000

Stephanie Alford
JUDGE

Presented by:

Approved as to form:

Joan M. Need
JOAN M. NEED
Deputy Prosecuting Attorney
WSB # 21372

Michael Stewart
MICHAEL STEWART
Lawyer for Defendant
WSB # 2338

jmn

FILED
DEPT. 12
IN OPEN COURT

JUL 14 2000

Pierce County Clerk
By [Signature]
DEPUTY

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 9

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense *ASSAULT 1' (2 counts)*
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year term of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

- (I) The offender shall remain within, or outside of, a specified geographical boundary:

- (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: *MICHAEL ROLLINS, Kimberly Matthews, any member of their families, any GANG MEMBER, RAINY WAGBET, DIGNO DE JESUS, RANDALL WENDERSON, any member of their families*
- (III) The offender shall participate in crime-related treatment or counseling services;
- (IV) The offender shall not consume alcohol;
- (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or
- (VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: *Conditions 1 thru 7 on page 7 of presentence investigation report*

FINGERPRINTS

Right Hand

Fingerprint(s) of: MICHAEL LOUIS RHEM, Cause #99-1-04722-4

Attested by: Ted Rutt, CLERK.

By: DEPUTY CLERK

Barbara J. Frank

Date:

7/14/00

CERTIFICATE

OFFENDER IDENTIFICATION

I, _____
Clerk of this Court, certify that
the above is a true copy of the
Judgment and Sentence in this
action on record in my office.

State I.D. #WA14981478

Date of Birth 09/13/75

Sex MALE

Race BLACK

Dated: _____

ORI _____

CLERK

OCA _____

By: _____

DEPUTY CLERK

OIN _____

DOA _____



FINGERPRINTS

APPENDIX “D”

Mandate and Opinion



99-1-04723-2 24909492 MND 02-10-08

CERTIFIED COPY

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FILED
A.M. FEB - 9 2006 P.M.
PIERCE COUNTY WASHINGTON
U.S.A.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KIMOTHY MAURICE WYNN AND
MICHAEL RHEN,

Appellant.

No. 29958-5-II

MANDATE

Pierce County Cause No.
99-1-04723-2

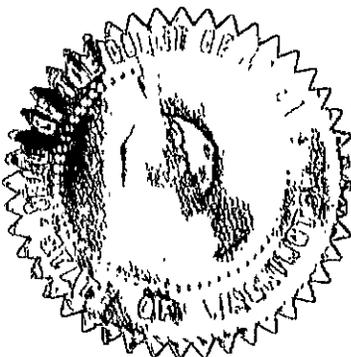
The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on ~~March 1, 2005~~ became the decision terminating review of this court of the above entitled case on **January 10, 2006**. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs have been awarded in the following amount:

- Judgment Creditor: State of Washington, \$16.94
- Judgment Creditor: Appellate Indigent Defense Counsel, \$14,521.69 (consolidated)
- Judgment Debtor(s): Kimothy Maurice Wynn, \$6,731.82
- Michael Rhem, \$7, 806.82

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 3rd day of February 2006.

D. A. [Signature]
Clerk of the Court of Appeals,
State of Washington, Div. II



Page 2, CASE #: 29958-5-II

State of Washington, Respondent v. Kimothy Maurice Wynn, Michael Rhem, Appellants

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Indeterminate Sentence Review Board

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

KIMOTHY MAURICE WYNN,
Appellant.

No. 29958-5-II

Consolidated with

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL LOUIS RHEM,
Appellant.

No. 30039-7-II

UNPUBLISHED OPINION

Hunt, J. — In this consolidated case, Kimothy Wynn and Michael Rhem appeal convictions for two counts of first degree assault while armed with a deadly weapon and one count each of unlawful possession of a firearm. They argue (1) abuse of discretion by the trial court in admitting ER 404(b) evidence; (2) prosecutorial misconduct; (3) improper denial of their motions for severance and for mistrial; (4) defective chain of ballistics custody; and (5) ineffective assistance of counsel. Finding no reversible error, we affirm.

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FACTS

I. THE SHOOTING

In the presence of his girlfriend, Kimberly Matthews, Michael Rollins was working on his car in the alley behind his aunt's house. Rollins noticed a blue Chevrolet Caprice in the alley, which he thought belonged to Maurice Wynn.¹ He saw two men, Michael Rhem and a shorter black man, walking toward his car; a third person remained in the Caprice. The two men returned to the Caprice and drove off down the alley with the lights off. Rollins returned to working on his car.

While repairing wiring in the trunk of his car, Rollins heard about fifteen gunshots in rapid succession and dove to the ground. When the firing stopped, he got up and saw a person in a blue jersey running away from a bush. Rollins did not see the man's face, but he believed it was Rhem because earlier he had seen Rhem wearing the same type of blue jersey. Rollins did not see a firearm in Rhem's hand nor did he see who had fired the shots. Matthews also heard the shots, but she did not see anything or notice a car or any people in the alley.

After the alley shooting, Rhem and Wynn went to "Shawn's" house, where Rhem told Randall Henderson that he had shot at Rollins, and Wynn told Henderson that he had shot at Matthews. The next day, Rhem told Digno DeJesus that he and Wynn had shot at Rollins and Matthews.

According to Henderson and DeJesus, both Wynn and Rhem possessed 9 mm and .45 caliber handguns before and after the date of the alley shooting at Rollins and Matthews. Police

¹ Wynn drove a light blue two-door Caprice. The car in the alley was actually Latron Swearington's nearly identical, four-door Caprice.

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found five .45 caliber casings and ten 9 mm casings at the scene of the alley shooting. Terry Franklin, a ballistics expert from the Washington State Patrol Crime Lab, later concluded that the casings were from rounds fired from three different guns, two 9 mm and one .45 caliber. Casings from one of these 9 mm handguns and the .45 matched casings found at other shootings in which Rhem and Wynn were also allegedly involved.²

When police arrested Rhem and Wynn, they denied involvement in the alley shooting and other uncharged shootings.

II. PROCEDURE

The State charged both Rhem and Wynn with two counts of first degree assault (separate counts for victims Matthews and Rollins) and one count of first degree unlawful possession of a firearm (UPF).

A. First Trial and Reversal on Appeal

A jury convicted both Rhem and Wynn on all counts. On appeal, we reversed their assault convictions based on instructional error and erroneously admitted habit evidence that Rhem and Wynn were known to carry guns. We reversed the UPF convictions because of prejudicial firearm evidence.

² One shooting occurred at a barbecue that Rhem and Wynn were attending on August 21, 1999, before the charged alley shooting. Rodney Hebert fired at the barbecue in a retaliatory, gang-related drive-by shooting. There was conflicting witness testimony about whether Wynn returned fire at Hebert. Wynn admitted to DeJesus that he had returned fire, but a witness at the barbecue testified that Wynn did not have a gun and did not return fire.

The other shooting occurred approximately a month after the charged alley shooting: Rhem fired a .45 and Wynn fired a 10 mm at "Lump's" house.

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B. Remand and Retrial

On remand, the State again charged both Rhem and Wynn with two counts of first degree assault with firearm enhancements and one count of UPF. The trial court denied Rhem and Wynn's motion to sever their trials. Rhem and Wynn stipulated that they each had a prior conviction for a serious offense, a necessary element of UPF.

In a pre-trial hearing, the State informed the court that the parties had agreed to adhere to the orders from the previous trial, with one exception: The State would move under ER 404(b) to introduce evidence of other uncharged incidents, different from the evidence it had offered at the first trial. The trial court granted the State's request to admit a number of retaliatory incidents, both before and after the alley shooting, as "*res gestae*" evidence and to prove the defendants' identities and motive for the charged crimes.

The State also moved to introduce gang evidence, alleging that Rollins and Rhem were Crips, and Rollins had stood by without intervening while Hebert, a Blood, beat another Crip, DeJesus. The State's theory of the case was that (1) the alley shooting was one incident in a series of retaliatory events arising out of the AM/PM gang fight in which Rollins failed to show loyalty to his gang; and (2) Rollins' lack of gang loyalty motivated Rhem and Wynn to shoot at him. Both Rhem and Wynn objected, but the trial court admitted the gang evidence as "not incidental, but . . . central to what was going on." Report of Proceedings (RP) at 233.

To comply with our earlier decision reversing Rhem's and Wynn's original convictions, the State said it would not introduce habit evidence that Rhem and Wynn were known generally to carry guns. Over the defendants' objections that the State was attempting to admit habit evidence through the "back door," the trial court allowed into evidence observations and

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admissions that Rhem and Wynn had possessed 9 mm and .45 caliber handguns on specific occasions before and after the charged August 21, 1999 alley shooting at Matthews and Rollins.

Rhem objected during the State's closing argument that the prosecutor had improperly vouched for the credibility of State witnesses with whom the State had made deals in exchange for their trial testimonies. The trial court held a sidebar and directed the State either to discontinue or to sum up its vouching line of argument.³

After closing arguments and the noon recess, Rhem and Wynn moved for a mistrial, arguing that a curative instruction about the vouching would be ineffective at that point. The trial court denied the motion, ruling that (1) defense counsel had waived the objection by requesting a sidebar during the State's closing argument,⁴ thus precluding the effectiveness of a timely curative instruction; and (2) even if defendants had not waived the issue, the State's argument was proper.

The jury convicted Rhem and Wynn on all counts, with special firearm enhancement verdicts applicable to the assaults. Rhem and Wynn appeal.

³ The record on appeal does not show whether Rhem and Wynn requested a curative instruction at the sidebar.

⁴ The trial court had previously informed counsel that (1) it wanted to hear only the bases for objections, without additional argument; (2) any sidebar discussions would not be on the record; and (3) it was counsel's responsibility to request a hearing outside the jury's presence if counsel wanted such discussions on the record.

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ANALYSIS

I. MOTION TO SEVER

Rhem and Wynn first argue that the trial court erred in denying their motion to sever under CrR 4.4(c)(2).⁵ The trial court denied their severance motion for reasons of judicial economy, the need to present the whole picture to the jury rather than “bits and pieces,” and the lack of prejudice to the defendants flowing from a joint trial.

We review a trial court’s denial of severance for manifest abuse of discretion. *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). Our state does not favor separate trials. Thus, the party seeking severance has “the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy.” *Hoffman*, 116 Wn.2d at 74. See also *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994).

Defendants must point to specific prejudice to support their severance motion. *State v. Canedo-Astorga*, 79 Wn. App. 518, 527, 903 P.2d 500 (1995), *review denied*, 128 Wn.2d 1025 (1996). This demonstration may show:

- (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive;
- (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant’s innocence or guilt;
- (3) a co-defendant’s statement

⁵ CrR 4.4(c)(2) provides:

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

- (i) if before trial, it is deemed necessary to protect a defendant’s rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
- (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

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inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

Canedo-Astorga, 79 Wn. App. at 528 (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985)).

Mutually antagonistic defenses alone, however, are insufficient to warrant separate trials. *Hoffman*, 116 Wn.2d at 74. Rather, the moving party must demonstrate “that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.” *Hoffman*, 116 Wn.2d at 74. Wynn and Rhem have failed to demonstrate such prejudice here.

We previously addressed defendants’ motion to sever in their first appeal, where we held that they failed to show specific prejudice arising from a gross disparity of evidence admissible against Rhem but not against Wynn. *State v. Rhem and Wynn*, 2002 WL 1481272, at 11 (Wash. Ct. App.). We see no substantial change in the evidence adduced at the second trial that would indicate a gross disparity of evidence warranting severance of their trials. Accordingly, we apply the “law of the case”⁶ and adhere to our previous ruling upholding denial of severance on that ground.

⁶ *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988):

Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal.

It is also the rule that questions determined on appeal . . . will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.

(Citations omitted.) “Reconsideration of an identical legal issue in a subsequent appeal of the same case will be granted where the holding of the prior appeal is clearly erroneous and the application of the doctrine would result in manifest injustice.” *Folsom*, 111 Wn.2d at 264. The doctrine promotes judicial efficiency by not disturbing settled issues. *State v. Harrison*, 148

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Thus, we address only the remaining severance argument—that Wynn’s and Rhem’s defenses are antagonistic.⁷ Rhem and Wynn assert that Wynn’s alibi defense is so antagonistic to Rhem’s general denial that their two defenses are irreconcilable. But as the State argues, “Wynn fails to explain how a defense of ‘I was somewhere else’ is antagonistic with another’s . . . claim that ‘the prosecution has not proved its case.’” *Br. of Respondent* at 18. We agree with the State that it is reasonably possible for a jury to accept one of these defenses and to reject the other.⁸

Rhem and Wynn have failed to demonstrate “the conflict is so prejudicial that defenses are irreconcilable, and the jury [would] unjustifiably infer that this conflict alone demonstrate[d] that both are guilty.” *Hoffman*, 116 Wn.2d at 74. Accordingly, we hold that the trial court did not abuse its discretion in denying their motion to sever their trials.

II. ER 404(b) EVIDENCE

Rhem and Wynn next argue that the trial court abused its discretion in admitting (1) unduly prejudicial evidence of uncharged crimes and other misconduct as *res gestae* evidence,

Wn.2d 550, 562, 61 P.3d 1104 (2003). Here, we find both no substantial change in the evidence below and no clear error in our previous decision.

⁷ Rhem and Wynn also assert that there was a massive and complex quantity of evidence, making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant’s innocence or guilt. In support, they cite to “identical verdicts of guilt for identical counts, despite a gross disparity of evidence against Rhem, which demonstrates that the jury was unable to compartmentalize the evidence.” *Br. of Appellant Wynn* at 47. This circular argument is little more than the reiteration the fourth factor of the *Canedo-Astorga* test that this court resolved in the first appeal of this case. 79 Wn. App. 518.

⁸ Thus, Rhem’s and Wynn’s defenses are not sufficiently antagonistic. Moreover, as we noted earlier, both Rhem and Wynn admitted to having fired shots in the charged alley shooting. Wynn’s defense, therefore, is “antagonistic” to his own admitted complicity in the crime.

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(2) evidence that they were known to carry firearms, and (3) highly inflammatory gang evidence.

We disagree.

A. Standard of Review

Admission of evidence is within the trial court's sound discretion; we will not disturb its decision on review absent a showing of abuse. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), reversed on other grounds, 99 Wn.2d 538 (1983).

Erroneously admitted evidence is not grounds for reversal unless it unfairly prejudices the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Evidentiary error is not prejudicial "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Bourgeois*, 133 Wn.2d at 403 (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). We find no abuse of discretion or erroneously admitted evidence here.

B. Other Misconduct

1. ER 404(B)

ER 404(b) provides:

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.

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This list of purposes is not exclusive. *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), *overruled by State v. Louch*, 125 Wn.2d 847, 889 P.2d 487 (1995).

Before admitting evidence of other crimes or wrongs under ER 404(b), the trial court must (1) establish by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. *State v. Hernandez*, 99 Wn. App. 312, 321-22, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000).

The State has the burden of establishing that evidence of other offenses is not only relevant but “necessary to prove an essential ingredient of the crime charged.” *Goebel*, 40 Wn.2d at 21. Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more or less probable. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); ER 401.

A trial court’s failure to articulate the balance between the probative value and prejudice of ER 404(b) evidence, however, does not necessarily require reversal. *State v. Carleton*, 82 Wn. App. 680, 686, 919 P.2d 128 (1996). Such error is harmless when (1) the record is sufficient for the reviewing court to determine that, if the trial court had balanced probative value and prejudice, it would have admitted the evidence; and (2) upon consideration of the untainted evidence, the reviewing court concludes that the result would have been the same had the trial court never admitted the evidence. *Carleton*, 82 Wn. App. at 686-87.

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2. Specific incidents of firearm possession and shooting

Wynn and Rehm argue that the trial court erred in allowing the following instances of other shootings and gun possession before and after the charged incident. They contend this evidence was essentially improper gun-carrying habit evidence, which we held to be reversible error in their previous appeal:

GANG EVIDENCE/MISCONDUCT	GROUND FOR ADMISSION
7/27/99 — AM/PM fight.	ER 404(b) — motive; limiting instruction for Wynn
8/21/99, afternoon — street shooting	ER 404(b) — <i>res gestae</i> (Rhem acquitted of this incident in first trial)
8/21/99, 9:25 P.M. — barbecue shooting	ER 404(b) — <i>res gestae</i> , identity (Wynn); no request for limiting instruction; 9 mm casings ballistics match charged alley shooting
8/21/99, 11:15 P.M. — CHARGED ALLEY SHOOTING AT ROLLINS AND MATTHEWS	TWO COUNTS OF ASSAULT AND ONE COUNT UPF CHARGED AGAINST BOTH WYNN AND RHEM
8/22/99, 1:52 A.M. — AM/PM shooting at Rhem and Wynn	ER 404(b) <i>res gestae</i> retaliation incident
9/28/99 — shooting at Lump's house	ER 404(b) <i>res gestae</i> , identity (Wynn and Rhem); .45 caliber casings matched casings found in alley where charged shooting occurred

a. Other firearm possession

In defendants' first appeal, we held that, under the circumstances, it was unlikely the jury would have been able to comply with a limiting instruction,⁹ even had one been requested and

⁹ The first trial court instructed the jury: "Testimony that either defendant *generally* was in possession of a firearm cannot be considered as proof that either defendant possessed a firearm specifically on or about the 21st day of August, 1999, for the purposes of the unlawful

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given. We determined, therefore, that there was a reasonable probability that the trial outcome on the UPF charges would have differed if the error had not occurred. *Rhem and Wynn*, 2002 WL 1481272 at 8. See also *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). We further held (1) the error was not harmless, even though the jury found Rhem and Wynn, charged as accomplices, guilty of assault in the alley shooting; because (2) the jury did not need to find that both men were armed.

In the second trial, Rhem and Wynn both stipulated that they were convicted felons prohibited from possessing firearms. They repeatedly objected to testimony that they were known to possess .45 caliber and 9 mm handguns at unspecified times; they argued the State was attempting to admit inadmissible habit evidence, which we had previously held to be reversible error in their earlier appeal from their UPF convictions. The retrial court overruled these objections, distinguishing the newly proffered evidence as referencing *specific guns*, rather than the general habit of carrying unnamed types of guns.¹⁰

We hold that (1) the trial court did not commit reversible error in admitting evidence of specific other close-in-time instances when Rhem and Wynn possessed firearms of the same caliber used in the charged alley shooting; (2) there is sufficient evidence to support the convictions; and (3) in light of defendants' admissions to others about having shot at Matthews and Rollins in the alley, any error in admitting evidence of other times when defendants

possession of a firearm in the first degree charges." Wynn's Clerk's Papers at 32 (emphasis added).

¹⁰ Because of this critical distinction, we hold that the "law of the case" doctrine neither applies here nor precludes the trial court's admitting this non-habit evidence.

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possessed the same caliber guns would not have materially affected the trial outcome. *Bourgeois*, 133 Wn.2d at 403.

b. Gang affiliation

Rhem and Wynn next argue the trial court (1) abused its discretion in admitting highly inflammatory gang evidence, which lacked a sufficient nexus with the charged crimes; and (2) erred in admitting multiple incidents of uncharged crimes and other misconduct as *res gestae* evidence. In addition to the non-alley shooting incidents listed in the chart above, the State adduced evidence of gang affiliation and gang names of the defendants, witnesses, and other people referenced in testimony. The so-called "*res gestae*" exception to ER 404(b) allows evidence of other bad acts "[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *affirmed*, 96 Wn.2d 591 (1981) (quoting Cleary, Edward, W., MCCORMICK ON EVIDENCE § 190, 451-52 (2d ed. 1972)). Like other ER 404(b) evidence, such evidence must be relevant for a purpose other than showing propensity, and it must not be unduly prejudicial. *State v. Lane*, 125 Wn.2d 825, 834, 889 P.2d 929 (1995). It is an abuse of discretion for the trial court to fail to conduct the required balancing of probative value versus prejudicial effect before admitting evidence of other bad acts. *State v. Trickler*, 106 Wn. App. 727, 732, 25 P.3d 445 (2001).

The record shows that the trial court heard argument and balanced the necessary factors before admitting the gang evidence challenged here. The State's theory was that (1) Rollins' want of gang loyalty motivated Rhem and Wynn to shoot at him; and (2) evidence of other fights

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and retaliatory gang shootings surrounding the charged August 21, 1999 alley shooting showed motive, intent, and identity of the defendants.

The one potentially questionable incident, because of its remoteness in time, was the shooting at "Lump's" house, a month after the charged alley shooting.¹¹ But this shooting was probative of the defendants' identities: It linked ballistics evidence from "Lump's" house to the charged shooting in the alley because .45 caliber casings recovered from Lump's house matched .45 caliber casings recovered from the alley shooting scene. Because witnesses identified Wynn and Rhem as the shooters at Lump's, the matching .45 casings tending to prove that Wynn and Rhem were also the shooters in the charged alley shooting.

We hold that the trial court did not abuse its discretion in admitting this evidence of specific other shootings and gun possession involving the same type of weapons used in the charged alley shooting.¹²

III. PROSECUTORIAL MISCONDUCT

A. Standard of Review

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). The defendant bears the burden of

¹¹ Although Wynn and Rhem were the targeted victims of the August 22, 2 A.M. shooting at the AM/PM, any error in admitting this incident was harmless because it was not evidence of a prior bad act by either defendant.

¹² Even assuming, without deciding, that the trial court erred in admitting this evidence, any error was harmless. The defendants' independent admissions, elicited through Hendersons and DeJesus's testimonies, sufficiently support the assault convictions; thus, it is unlikely that any error in admitting this evidence materially affected the trial's outcome. *Bourgeois*, 133 Wn.2d at 403.

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showing both prongs of prosecutorial misconduct. *Hughes*, 118 Wn. App. at 727. If a defendant does not object or request a curative instruction, he waives the error unless the remark is "so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Binkin*, 79 Wn. App. 284, 294, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996) (quoting *Hoffman*, 116 Wn.2d at 93).

It is improper for a prosecutor to introduce evidence of a witness's experiences that are not probative of truthfulness or expertise in an attempt to bolster the witness's credibility by appealing to a jury's passions or prejudices. *State v. Smith*, 67 Wn. App. 838, 842-44, 841 P.2d 76 (1992). "Opinion testimony" is based on one's belief or idea rather than on direct knowledge of facts at issue. *State v. Demery*, 144 Wn.2d 753, 757-60, 30 P.3d 1278 (2001). Because no witness may give an opinion about another witness's credibility, it is improper to adduce such evidence. *State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996).

We review allegedly improper prosecutorial 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. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999). A prosecutor's remarks are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel's statements. *State v. Russel*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Moreover, in closing argument, a prosecutor may comment on a witness's veracity as long as he does not express it as a personal opinion and does not argue facts beyond the record. *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983).

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B. Improper Questioning

Rhem and Wynn argue that the prosecutor questioned Henderson and DeJesus in a manner that improperly bolstered their credibility. We disagree.

On direct examination of Henderson, the State asked without objection, "Let me just ask you straight out. Truthful testimony is what the agreement required, correct?" RP at 588-89. The prosecutor then asked, "And if you gave testimony that, for instance, hurt the State in the sense of, 'These guys said they were not there,' would you be complying with the agreement if that was truthful?" RP at 589. The trial court sustained an objection to the form of the question. The prosecutor rephrased the question as follows: "The agreement, itself, required that, no matter what your testimony was, that it must be truthful, correct?" RP at 589. The court then sustained an objection that the question had been asked and answered.

The defense cross-examined DeJesus about what he had to lose if he testified differently at the retrial compared to his previous testimony at the first trial.¹³ In response, on re-direct the State asked DeJesus several questions about the truthfulness of his testimony, whether he had complied with his agreement to testify truthfully, whether he understood that perjury meant he

¹³ Defense counsel and DeJesus had the following exchange:

Q: And in this instance, today, your testimony means that you won't lose all the things that you have, your family, your house, your job; isn't that correct?

A: Well, I feel that, you know, if I -- if I said anything different than what I said before, which was, you know, I gave a true, like, testimony, that I would be perjuring myself, and therefore, I'd be losing everything that I worked so hard to get, to have right at this moment, that I have.

RP at 720-21.

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was not telling the truth under oath, and whether he believed that if he said something different in his current testimony, he would be committing perjury and could be charged with a crime.

We find no impropriety in the prosecutor's questions to either Henderson or DeJesus. First, the prosecutor merely questioned the witnesses about whether they were being truthful in the present and whether they had testified truthfully in the past. At most, each witness was testifying about his own veracity, which the jury could evaluate. Neither witness was testifying about another witness's veracity. Nor was the prosecutor attempting to bolster the witnesses' credibility by appealing to the jury's passions or prejudices.

Second, the prosecutor's questions were appropriate in light of the defense cross-examination, which suggested that Henderson and DeJesus conspired to give the same story in order to obtain favorable plea agreements from the State. The defense specifically questioned DeJesus about what he had to lose if he changed his story. Thus, defendants cannot foreclose the State's attempt to rehabilitate the witness concerning the truthfulness of his current and prior testimonies.

We find no prosecutorial misconduct based on improper questioning.

C. Vouching

Rhem and Wynn next argue that the prosecutor improperly vouched for State witness credibility in closing argument by rebutting defendants' position—that the State acted as a witness credibility evaluator when it offered plea bargains in exchange for witnesses' testimonies. Specifically, defendants challenge the propriety of the following portion of the State's closing argument:

Of course, the State, the Prosecutor's Office, those entities have the authority to enter into deals with criminal defendants. They have a job to do, and part of

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doing the job, they have to deal, at times, to get information. The nature of the game.

Now, in the process, there has to be a process of determining, before you are going to give somebody a deal, obviously, whether what they are saying is credible. You are not just going to give a deal to somebody who says, "Hey, I have some information here. Here it is. Give me -- I saw so-and-so get murdered. I was an eyewitness." "Okay, here's your deal." You're going to verify. You are going to cross-check. You are going to look at all the other evidence you have. You are going to match it all together. Of course, logic says, after that is all done, you make a calculated decision. You risk that you are going to put a witness on who very easily and will be attacked because of the deal you are giving them. You know that going into it.

RP at 1554-55.

Defendants objected to this State argument at side bar; later they put their objection on the record and moved for a mistrial outside the jury's presence. The trial court denied the motion, ruling that (1) defendants had waived the objection by requesting a sidebar during closing argument and failing to request a timely curative instruction, and (2) even if defendants had not waived the issue, the State did not overstep the bounds of propriety. The trial court noted that any unfairness was balanced "because what the defense does is attempt to intimate to the jury that the agreement that was made between the State and the witness was one where the State would totally decide who was telling the truth and who wasn't." RP at 1583.

We agree with the trial court. The prosecutor presented a legitimate response to the defense implication that the State was the judge of who would testify truthfully.¹⁴ A prosecutor's

¹⁴ During the cross examination of Henderson the defense started this exchange:

- Q: And is the judge of who was going to decide if you were credible in your testimony is the State; is that correct?"
- A: Excuse me? I don't understand what you asked?
- Q: You testified earlier today that part of the deal was you had to testify truthfully.
- A: Correct.
- Q: And the judge of who decided whether you testified truthfully was the State; is that correct?

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remarks are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel's statements. *Russel*, 125 Wn.2d at 86. Nor did the prosecutor render a personal opinion as to veracity or comment on facts outside the record. *Papadopoulos*, 34 Wn. App. at 400.

We find no prosecutorial misconduct arising from allegedly improper argument vouching for witness credibility.

D. Violations of Prior Rulings *In Limine*.

Rhem and Wynn next argue that the prosecutor committed misconduct by violating the following orders *in limine*: (1) exclusion of Wynn's custodial statement to the police, and (2) limiting inquiry into the circumstances of Wynn's arrest in Oregon. Although a prosecutor's violation of a ruling *in limine* may constitute misconduct warranting a mistrial, *State v. Clemons*, 56 Wn. App. 57, 62, 782 P.2d 219 (1989), *review denied*, 114 Wn.2d 1005 (1990), such is not the case here.

The parties generally agreed to honor the first trial court's order *in limine*. That order provided in pertinent part:

IT IS HEREBY ORDERED that defendant Wynn's motion to exclude the following portion of his statements to police is granted: "WYNN then asked what we wanted, what it would take for him to go home. We told WYNN all we wanted was the truth and *that he had only been partially truthful*. WYNN said that if we dropped the charges he would tell us everything."

Wynn's Clerk's Papers at 268 (emphasis added).

A: Well, I would guess the jury or the judge would.
 Q: Who's the one that recommended time served?
 A: The prosecution.

RP at 615-16.

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1. Wynn's custodial statement

At an evidentiary hearing before the retrial, the prosecutor brought to the court and defense counsel's attention the first trial court's order redacting Wynn's statement. Attached to the order was a redacted version of the police reports, indicating necessary changes and omissions to Wynn's custodial statements. This version included the above statement, but with the following phrase redacted (as noted by italics above): "and that he had only been partially truthful." Wynn's Clerk's Papers at 280. The defense reviewed the redacted statement, the trial court inquired whether counsel had any concerns about the proposed redaction, and defense counsel responded, "Assuming that this is the same that's in the court file and we can check later before it's presented, then I think it's correct." RP (1/10/03) at 52. The prosecutor later confirmed that his copy of the redacted statement matched the one in the court file.

During Detective Davidson's testimony, the parties and the court discussed Wynn's redacted statement outside the jury's presence. The State notified defense counsel and the trial court that it wanted to offer the following statement by Detective Davidson, which it had redacted: "Wynn then asked what we wanted, what it would take for him to go home. We told Wynn all we wanted was the truth. Wynn said, if we dropped the charges, he would tell us everything." RP at 1142-43. Defendants did not object to admission of the proposed redacted statement. Finding the redactions reasonable, the trial allowed the statement. Detective Davidson then testified about Wynn's custodial statement in its redacted form.

"ER 103 requires all objections to be timely and specific. Failure to raise an objection in the trial court precludes a party from raising it on appeal." *Dehaven v. Gant*, 42 Wn. App. 666, 669, 713 P.2d 149 (1986), *review denied*, 105 Wn.2d 1015 (1986). Although the statement had

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been the subject of the first trial court's order *in limine*, at the retrial, the State gave the defense ample opportunity to review and to object to the statement before adducing Detective Davidson's testimony.

But even assuming that defendants did not waive their objection below, we find no prejudice from the trial court's admission of Wynn's redacted statement, especially in the context of the entire record and circumstances at the retrial. *Hughes*, 118 Wn. App. at 727. Defendants argue that the statement created a damaging implication that Wynn was not allowed to return home because he did not tell the truth to the police. We disagree. On the contrary, a reasonable inference from this statement is that the police simply did not drop the charges, not that Wynn was lying to the police as defendants contend. Such inference would not have been prejudicial because Wynn was on trial before a jury with no illusions that the police had dropped the charges. *Hughes*, 118 Wn. App. at 727.

2. Wynn's Oregon arrest

Wynn and Rhem also argue that the prosecutor engaged in misconduct (1) by eliciting, in violation of an order *in limine*, extensive testimony about Wynn's arrest in Portland, Oregon; and (2) in referring to Wynn's having been in custody since his arrest. Again, we disagree.

During cross examination of defense witness Alisha Rorie, the State asked:

Q: Do you know that, on that date, he was arrested and charged with shooting at Michael Rollins and Kimberly Matthews?

A: I don't know nothing about that. I know we both were arrested in Portland, if that's what you are talking about, but I don't know nothing about no shooting.

Q: You know that, on this case, he's in custody pending a determination, a trial, of whether, in fact, he shot at Mr. Rollins and Ms. Matthews, right?

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A: Only thing I know is, when we were in Portland, we both got pulled over and we both went to jail. And I thought that's what he was going to jail for. I don't know nothing about what you are talking about.

RP at 1356-58.

To some extent, Rorie volunteered information about Wynn's arrest in Oregon. The State did not specifically question Rorie about the location and circumstances of Wynn's arrest. Rather, the State alluded to Wynn's custodial status with such questions as: (1) "[H]e's been charged and he's sitting here and this jury is listening to evidence"; (2) "[H]e's been in custody waiting on trial"; (3) "You know that he's in custody for a period of time"; (4) "You know that, on this case, he's in custody pending a determination, a trial, of whether, in fact, he shot at [Rollins and Matthews]"; and (5) "[H]e's been in custody since [they were pulled over in Portland and went to jail]." RP at 1356-58. Wynn objected repeatedly to this line of questioning, and the trial court denied his request for an immediate hearing.

After the State completed its questioning, the trial court held a hearing outside the jury's presence. The State made clear that it had questioned Rorie about Wynn's custodial status only to establish that she had never contacted the police even though she had information relevant to Wynn's alibi. The prosecutor conceded his questioning was inartful because he was unable to organize his thoughts while being interrupted repeatedly by defense objections.

The trial court found that, although the State's line of questioning was not improper, the State had gone too far in referencing Wynn's continual custody. The trial court further noted, however, that (1) the transgression was not entirely the State's fault because the witness's evasive responses were partly to blame; and (2) because the jury already knew that Wynn and Rhem had been in custody, there was no prejudice. The trial court denied the defendants' motion

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for a mistrial and offered to give a curative instruction at either defendant's request. Neither defendant requested a curative instruction, so none was given.

Rhem and Wynn having failed to show prejudice, *Hughes*, 118 Wn. App. at 727, we hold they have failed to show prosecutorial misconduct based on violations of orders *in limine* or improper questioning.

E. Mistrial

Rhem and Wynn further argue that the trial court abused its discretion in denying their motions for a mistrial based on (1) improper State argument vouching for the credibility of witnesses; and (2) violations of orders *in limine* and improper questioning about Wynn's custodial status.

A court should grant a mistrial only when "nothing the trial court could have said or done would have remedied the harm done to the defendant." *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) quoting *State v. Swenson*, 62 Wash.2d 259, 382 P.2d 614 (1963). The trial court is in the best position to evaluate the prejudicial effect the error has on the jury. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). The grant or denial of a motion for new trial is within the trial court's sound discretion, and we will reverse it only for abuse of that discretion. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Defendants having failed to prove prosecutorial misconduct, we hold that the trial court did not abuse its discretion in denying their motions for mistrial based on alleged prosecutorial misconduct. Nor does the record reveal multiple incidents of prosecutorial misconduct creating a

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cumulative prejudicial effect warranting a new trial. *State v. Henderson*, 100 Wn. App. 794, 804-05, 998 P.2d 907 (2000).

IV. BALLISTICS EVIDENCE AND CHAIN OF CUSTODY

Wynn next argues that the prosecution failed to establish the proper chain of custody for the shell casings recovered at the barbecue shooting. Statement of Additional Grounds for Review (SAG) at 1; *see n. 2 supra* and the chart showing other shooting incidents on page 11, *supra*. Wynn contends Officer Wales' police report and property sheet show that Wales turned in six 9 mm F.C. brand shells, whereas at trial, the State admitted five F.C. brand shells and one Spier brand shell. Defense counsel extensively cross-examined Officer Wales and elicited his admission that one of the casings in the evidence envelope was not one of the casings picked up at the scene of the barbecue shooting. Rhem and Wynn both objected to this discrepancy during Officer Wales' testimony. Wynn argues that this discrepancy undermines the State's theory that Wynn returned a single shot at the barbecue shooting, which shot was forensically matched to the shots fired at the charged alley shooting. We disagree.

First, the State never charged Wynn with any crime for the barbecue shooting. Rather, the State used evidence that Wynn returned one shot at the barbecue to establish his identity as one of the shooters in the charged alley shooting because the ballistics evidence matched.

Second, even if there were error in admitting Officer Wales' testimony and the related ballistics evidence, it was harmless. Erroneous admission of evidence is not grounds for reversal unless it prejudices the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Evidentiary error is not prejudicial unless, within reasonable probabilities, the trial outcome would have been materially affected had the error not occurred. *Bourgeois*, 133 Wn.2d

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at 403. As we have previously noted, the defendants' admissions of their complicity in the alley shooting independently support their assault firearm convictions. Thus, we cannot say that this challenged ballistics evidence materially affected the trial outcome. *Bourgeois*, 133 Wn.2d at 403.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Rhem and Wynn next argue that if we hold that counsel's failure to raise certain issues below precludes raising them on appeal, they received ineffective assistance of trial counsel. Because we have not refused to address any appellate issues for failure to preserve error below, we need not consider this contingent, ineffective assistance of counsel argument.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

Hunt, J.

We concur:

Morgan, A.C.J.
 Morgan, A.C.J.

Armstrong, J.
 Armstrong, J.

APPENDIX "E"

Stipulation on Prior Record and Offender Score



99-1-04722-4 18445403 STPPR 02-13-03

CERTIFIED COPY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

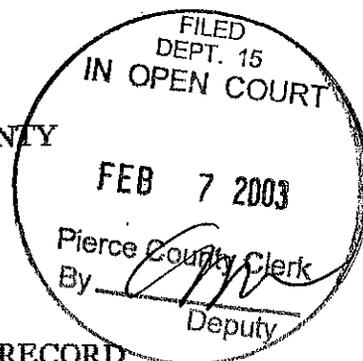
Plaintiff,

CAUSE NO. 99-1-04722-4

vs.

MICHAEL LOUIS RHEM,

Defendant.

STIPULATION ON PRIOR RECORD
AND OFFENDER SCORE
(Plea of Guilty)

FEB 07 2003

Upon the entry of a finding of guilt in the above cause number, charges of; ASSAULT IN THE FIRST DEGREE; ASSAULT IN THE FIRST DEGREE; UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE; UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, the defendant MICHAEL LOUIS RHEM, hereby stipulates that the following prior convictions are his complete criminal history, are correct and that he is the person named in the convictions:

WASHINGTON STATE CONVICTIONS

Crime	Date of Sentence	Jurisdiction	Date of Crime	Adult/Juvenile	Crime Type	Class	Score	Felony or Misdemeanor
THEFT 2	12/17/90	Pierce Co WA	10/31/90	JUV	NV	C	5	FELONY
THEFT 2	11/15/91	Pierce Co WA	10/2/91	JUV	NV	C	5	FELONY
UPCS	4/1/93	Pierce Co WA	12/11/92	JUV	NV	C	5	FELONY
TMV WOP	8/26/93	Pierce Co WA	8/2/93	JUV	NV	C	5	FELONY
PSPI	6/28/94	Pierce Co WA	6/1/94	ADULT	NV	B	1	FELONY
ATT ELUDE	6/28/94	Pierce Co WA	6/1/94	ADULT	NV	C	1	FELONY
REND CRIM ASSIST	8/28/96	Pierce Co WA	8/28/96	ADULT	NV	C	1	FELONY
ASSAULT 2	7/14/00	Pierce Co WA	7/23/99	ADULT	V	B	2	FELONY

Concurrent conviction scoring: N/A

STIPULATION ON PRIOR
RECORD -1
jsprior.dotOffice of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

99-1-04722-4

CONVICTIONS FROM OTHER JURISDICTIONS: NONE KNOWN OR CLAIMED.

The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9	XII	240-318 MOS	60 MOS	300 - 378 MOS	LIFE
II	0	XII	93-123 MOS	60 MOS	153-183 MOS	LIFE
III	9	VII	87-116 MOS	N/A	87-116 MOS	10 YRS

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

The defendant further stipulates:

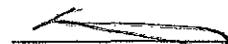
- 1) That if any additional criminal history is discovered, the State of Washington may resentence the defendant using the corrected offender score without affecting the validity of the plea of guilty;
- 2) That if the defendant pled guilty to an information which was amended as a result of plea negotiation, and if the plea of guilty is set aside due to the motion of the defendant, the State of Washington is permitted to refile and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution;
- 3) That none of the above criminal history convictions have "washed out" under RCW 9.94A.360(2) unless specifically so indicated.

If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation.

Stipulated to this on the 7 day of February, 2003.


GREGORY L. GREER
Deputy Prosecuting Attorney
WSB # 22936


MICHAEL LOUIS RHEM


MICHAEL A. STEWART
WSB # 23981

kyr