

No. 94853-4

NO. 47826-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

TYREE JEFFERSON

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank Cuthbertson, Judge

BRIEF OF APPELLANT

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B. ASSIGNMENTS OF ERROR

1. Jefferson was denied his right to a fair trial by juror misconduct.
2. Jefferson was denied his right to a fair trial by a violation of the judicial appearance of fairness.
3. Jefferson was denied his right to a fair trial by judicial bias.
4. Under *Batson*, Jefferson was denied equal rights and a right to a fair trial when the court allowed the only African American juror to be stricken from the panel.
5. Jefferson was denied his right to a fair trial by the trial court invading the province of the jury.
6. Jefferson was denied his right to a fair trial by prosecutorial misconduct.
7. Jefferson was denied his right to a fair trial by defense counsel's misconduct.
8. Jefferson was denied his right to a fair trial because counsel was ineffective.
9. Jefferson was denied his right to a fair trial by juror misconduct.

10. Jefferson was denied his right to a fair trial by the admission of impermissible gang evidence.
11. Jefferson was denied his right to a fair trial by the court prohibiting him from presenting his defense theory of the case.
12. Jefferson was denied his right to a fair trial by cumulative error.
13. The trial court erred in denying each defense motion to dismiss due to irreparable denial of due process.

Issues Presented on Appeal

1. Was Jefferson denied his right to a fair trial by juror misconduct where jurors discussed the shooter car following two jurors to the parking lot after court one day?
2. Was Jefferson denied his right to a fair trial by a violation of the judicial appearance of fairness where the judge made multiple *sua sponte* objections?
3. Was Jefferson denied his right to a fair trial by a violation of the judicial appearance of fairness where the judge invited the jury to a party?
4. Was Jefferson denied his right to a fair trial by a violation

of the judicial appearance of fairness when during trial the judge twice informed the defense counsel he was referring her conduct to the WSBA?

5. Was Jefferson denied his right to a fair trial by judicial bias?

6. Was Jefferson denied his right to a fair trial by a judge who was overtly hostile to defense counsel?

7. Was Jefferson denied his right to a fair trial by a judge who was overtly hostile to Jefferson?

8. Under *Batson*, was Jefferson denied equal rights and a right to a fair trial when the court allowed the only African American juror to be stricken from the panel?

9. Was Jefferson denied his right to a fair trial by the trial court invading the province of the jury by questioning the jurors and second guessing jurors who explained that they had heard from a juror that the shooter car followed one of the jurors?

10. Was Jefferson denied his right to a fair trial by prosecutorial misconduct in the form of the prosecutor impermissibly impugning defense counsel?

11. Was Jefferson denied his right to a fair trial by defense counsel's misconduct involving defense counsel talking to a key state witness about her being under improper subpoena by the state?

12. Was Jefferson denied his right to a fair trial because counsel was ineffective by appearing to violate the rules of professional conduct?

13. Was Jefferson denied his right to a fair trial by juror misconduct where a juror discussed with other jurors that she was followed by the shooter car?

14. Was Jefferson denied his right to a fair trial by the trial court suppressing gang evidence but permitting the prosecutor and witnesses to refer to Jefferson and Powell (co-accused) by their street monikers "Shake Man" and "Baby Shake"?

15. Was Jefferson denied his right to a fair trial by the court prohibiting him from presenting his investigator's freeze frames of a state introduced video that would have suggested that Jefferson was not the shooter?

16. Did the trial court err in denying each defense motion to

dismiss?

17. Was Jefferson denied his right to a fair trial by cumulative error?

B. STATEMENT OF THE CASE

a. Summary

The facts of this case pale in comparison to the wholesale denial of justice based on the unprecedented behavior of the judge, defense attorney and prosecutor. The trial judge acted as the prosecutor, making no less than six (6) *sua sponte* objections aimed at defense counsel. RP 300, 342, 346, 1079-99, 1106, 1112, 1132-33, 1147; 2RP 7. The court invited the jury to attend a party that the judge also attended. Jurors reported to each other that they were followed by the shooter car after a day in court. RP 224, 314.

The prosecutor accused defense counsel of witness tampering by informing the state's main witness that she was not under proper subpoena and did not have to return to court. The trial judge told counsel he was referring her conduct to the WSBA on two occasions. In front of Mr. Jefferson and the galley, the prosecutor yelled at defense counsel using the most profane language.

In response, the defendant's father yelled at the prosecutor using similar ugly language. RP 668-72. The prosecutor struck the only African American juror from the jury pool.

b. Substantive Facts

Someone shot Rosendo Robinson after he stole a pair of Versace glasses from Lashonda Goodman at a bar called the Latitude 84. Goodman and her friend Harmony Wortham went to the Latitude to drink. RP 414, 616, 835-36. Wortham was quite intoxicated when the shooting occurred. RP 616-18. Wortham and Goodman saw Dimitri Powell at the Latitude who came with his nephew/cousin, who was not introduced by name but was later identified as Tyree Jefferson. RP 418-19, 838. Neither of the women knew Jefferson or remembered talking to him, but after Wortham viewed surveillance video from Latitude 84, she realized that she must have talked to Jefferson. RP 496, 901, 979.

Robinson did not know Goodman but after asking to look at her glasses he refused to return them. RP 539-40. Robinson pretended to throw the glasses away but did not. RP 852-53, 885. Goodman believed Robinson gave the glasses to his friend who put

them in her purse. RP 853, 886-87. After the security at Latitude 84 did not help, Goodman called the police who also refused to help. RP 422-26, 853.

After Wortham told Powell that Robinson refused to return Goodman's glasses, Powell and his cousin unsuccessfully tried to convince Robinson to return the glasses to Goodman. RP 421-25. To settle the matter, Goodman and the woman with Robinson agreed to fight across the street at the 76 Station. RP 432, 886-87. Wortham drove Goodman in her maroon Altima across the street to the 76 Station and pulled in next to a gas pump. RP 415, 620, 887, 892.

Robinson drove a white Taurus to the 76 Station with a man and the woman accused of putting the glasses in her purse. Robinson parked parallel to Wortham's car. RP 545, 859-60, 862, 892. Wortham and Goodman knew that Powell drove over to the gas station in a black Nissan Altima, but did not know if Jefferson was with him. RP 434, 862, 934. Robinson described another dark car arriving at the gas station. RP 689.

Robinson testified that his cousin Mark was at the gas station in a minivan when Robinson drove up, but no one else saw

a minivan. RP 683-85, 892-93. Robinson also testified that his cousin's car was the only car at that gas station when he arrived, but this was contrary to the other witnesses' testimony. RP 545, 683-85, 859-60, 862, 892-93.

After Robinson arrived at the gas station, Goodman punched him while he was seated in his car and then engaged in fistfights with the female passenger in Robinson's car. RP 547, 621, 692, 860, 893. Wortham and Robinson struggled over Robinson's jacket because Wortham wanted to check the pockets to determine if Goodman's glasses were in a pocket. RP 434-35, 893, 866. Even though Wortham told the police that she saw Jefferson shoot Robinson, Wortham could not remember seeing a shooter or a shooting. RP 439-41, 629, 646.

During her testimony Wortham informed the jury that she lied in this case because of a bad experience working with the Task Force for violent gangs. RP 502-03. Wortham explained that she did not trust the police and had been manipulated by the police before. Wortham decided to just tell the police what they wanted to hear. RP 439-40, 475, 501-03, 610, 612, 635-37, 915. Officer Jeff Martin threatened that Wortham could be charged with a crime if

she did not cooperate with the police. RP 1035-36. Accordingly, Wortham explained when she reviewed the surveillance footage from the gas station she identified Jefferson as the shooter because she just assumed that it was him. RP 611, 650-51.

Goodman saw Jefferson at the 76 Station but did not see him while she was fighting with the other woman. RP 850, 866. Robinson and Powell were fighting when Robinson was shot. Robinson's testimony was inconsistent.

Robinson testified that he did not see the person who shot him, that he was not shot by the person he was fighting with, that he was shot by the person he was fighting with, and that he did not know where the shots came from. RP 548-549, 694-95, 700-01. Robinson also positively identified Powell as the shooter and had a photograph of him on his phone. RP 575, 703-04. There was no forensic evidence linking Jefferson to the shooting. RP 747-827.

c. Gang Evidence

The trial court suppressed all reference to gang evidence because this was not a gang case. RP 4, 1020. The trial court specifically ordered that Jefferson be referred to by his true name and not by his street name "Baby Shake" because moniker's "you

know, normally, “Baby Shake” would suggest there was some affiliation with Powell that was beyond just relatives, or cousins, or whatever “ . RP 41, 44-45.

However, over defense objection, the trial court permitted the prosecution witnesses to refer to Jefferson’s uncle Dimitri Powell as “Shake Man”, claiming that this name did not imply gang affiliation. RP 42- 44. Prosecution witnesses referred to Powell as “Shake Man” 14 times. RP 421-22, 721-22, 838-41, 907, 932. The prosecutor called Powell “Shake Man” on one occasion and once asked his witness to refer to Powell as “Powell”. RP 422, 841. During sentencing while addressing Jefferson, twice, the trial court referred to Powell as “Shake Man”, admonishing Jefferson that Shake Man was not going to protect him in prison. 2RP 28-29 (July 17, 2015).

Before Wortham took the stand the court admonished the witness not to make any references to gang matters because this was not a gang trial. RP 409-411. Wortham nonetheless testified about her experience with Task Force for Violent Gangs. RP 502-03. The defense requested no reference to “home boys” but the trial court did not believe that was a gang reference. Id.

d. Batson Challenge

Juror #10 was the only African American out of 35 potential jurors. RP 238-39. The prosecutor removed Juror #10 from the jury pool in Jefferson's case. RP 238-39. The prosecutor claimed that he did not like juror #10 because juror #10 believed that the extended voir dire was a waste of time after the jurors had sworn to abide by the law in upholding their responsibilities as jurors. RP 242-45. Juror #1 also revealed that the voir dire process seemed like a waste of time but was not removed from the jury venire. RP 245-46. Juror #10 indicated that in a prior case he had discussed a matter in the jury room from outside the case and had learned that this was not appropriate. *Id.*

The prosecutor explained that he struck juror #10 in part because he enthusiastically discussed *Ten Angry Men*. RP 242-47. However, juror #1 discussed the movie enthusiastically as did jurors number #9 and #23, but they were not removed. RP 194-95.

The court denied the *Batson* challenge ruling that striking the only African American juror in a case where the defendant was African American was not a race based strike. RP 246-47.

Jefferson informed the court that “this is not a jury of my peers.”

RP 249.

e. Bias Against Defense And Appearance of Fairness Issues.

i. Invitation to Jury Party

After the jury was seated, the judge invited the jurors to join him in attending a juror appreciation event upstairs in the County City building. RP 224, 305. “I’d love to take all the jurors up there with me. Since it’s a juror’s appreciation proclamation, we can all go.” RP 224. “It might be nice for them to see some real folks, but I’ll leave that to your discretion”. RP 306. After the party, on the record, the court informed the jury that he saw one of the jurors at the party and that juror was treated like a “celebrity.” RP 314.

Early on in the trial, in front of the jury the court admonished Jefferson’s family in the galley not to misbehave and spoke to the sheriff about keeping the galley in line. RP 261-63. Jefferson expressed his distress that the court scolded his family in front of the jury. RP 263. Jefferson was also concerned that when the court discussed the galley with the sheriff in the hall, Jefferson’s family and the Latitude bar manager were also present. RP 263.

ii. Permitting Prosecutor To Treat Witness as Hostile Because She had No Memory of Incident Two and a Half Years Earlier.

Over defense objection, the trial court permitted the prosecutor to treat Wortham as a hostile witness because she could not remember the details of the shooting two and a half years after the incident. RP 428-29. The defense argued that Jefferson's due process rights were violated by the court permitting the prosecutor to lead the witness on direct rather than in an impeachment scenario under ER 611(c). RP 429-30.

iii. Trial Court Ruled Inconsistently Towards Defense and Prosecution.

Over defense objection based on lack of foundation and undue prejudice the trial court permitted the prosecutor to present freeze frames of the surveillance video depicting a blurred image of a man with his arm lifted that no witness could identify. (Exhibits 108-110) RP 477-81. Over defense objection, the trial court permitted the prosecutor to show the jury a video surveillance of the shooting to impeach Wortham after she viewed the video and

testified that it did not refresh her memory. (Exhibit 69) RP 448-49, 474-75, 500.

The defense argued the prosecutor intended to use the exhibit to identify Jefferson as the shooter under the guise that the photograph accurately reflected the scene that night, even though the man was not identified in the photograph. RP 478-81. The trial court ruled that the prejudicial impact did not outweigh the probative value. After the trial court denied suppression, the defense moved for a mistrial under *State v. Derouin*, 116 Wn.App. 38, 64 P.3d 35 (2003) and *State v. Alvarado*, 89 Wn.App. 543, 949 P.2d 831 (1998) RP 479-81.

The court ruled the video and stills admissible when presented by the state on grounds that they were relevant, and although prejudicial, the probative to the state greater than the prejudice to Jefferson. The court also ruled that the images were not cumulative. RP 479-81.

Even though involving the same video, the trial court did not permit the defense to present freeze frames of the same surveillance video because the court determined the evidence was cumulative. The court also ruled the freeze frames inadmissible

because Mr. Pitt, the defense investigator who received the video from the prosecutor could not indicate the camera angle, because he was not present during the incident. The trial court stated the evidence would be confusing to the jury. RP 1044-46, 1051-54.

The defense wanted to introduce still shots from the gas station video surveillance to show Powell walking to the car with his hand in his pocket. These shots demonstrated that Powell could have been the shooter. 2RP 6. The trial court refused the defense request to show these stills even though it permitted the prosecution to present still shots from the same video. RP 1044-46, 1051-59; 2RP 5-6.

When the state introduced the Latitude video, the gas station video and freeze frames images from those videos (Exhibits 108-110) over defense objection, the witness was not asked to identify the camera angle. RP 450, 456, 464, 468-471, 474. Rather, the prosecutor himself, repeatedly testified to the jury that the video represented, "[th]is is a different vantage point." RP 474. Wortham agreed that the photos looked like the gas station. *Id.* The only foundation the prosecutor laid for the exhibits of the photographs

from the gas station video and the video itself was to establish that they were taken at the gas station. RP 474-79.

The trial court denied the defense motion for a mistrial on the basis of undue prejudice. RP 479-81; 2RP 2-6.

iv. Judge Sua Sponte Made Objections.

During cross examination of Robinson, the judge *sua sponte* called for a side bar where he informed counsel that she could not ask questions about Robinson being uncooperative when he was taken to the hospital. RP 300, 342, 344. The court explained that counsel was not entitled to ask this question because on direct, the officer did not explain why he did not go to the hospital. RP 346.

I felt that the questions regarding the -- and I think the specific question that concerned me dealt with whether the victim, Mr. Robinson, was uncooperative until he went to the hospital, or was taken to the hospital because he was uncooperative. Again, confuses the jury. There's no facts in evidence to support that, but --And, third, my ruling was that the question was beyond the scope of direct, or redirect, or cross. It was just totally new territory.

RP 300, 344, 346. The court made another five (5) *sua sponte* objections aimed at defense counsel. RP 1097-99, 1106-07, 1112-18, 1132-33, 1147; 2RP 7.

The court objected *sua sponte* to Kay Sweeny, the defense expert on grounds that his testimony would be confusing to the jury. RP 1097-99. Later the trial court reversed itself and allowed Mr. Sweeny to draw a diagram of the bullet markings. RP 1101. The court called for a second sidebar during Mr. Sweeny's testimony but failed to describe the nature of the second sidebar. RP 1106-07, 1132-33.

Again during direct examination of Mr. Sweeny who was discussing bullet trajectory analysis, the trial court called a third sidebar. RP 1097-1112. Mr. Sweeny testified that he examined photographs of Robinson's T-shirt to attempt to determine bullet entry or exit information from residue left by the bullets. RP 1113-14. (Exhibits 45, 36 ,47). The court denied the defense motion to publish the state's photographs and called yet another sidebar. RP 1115.

The Court explained that if Mr. Sweeny relied on looking at clothing to form an opinion he should have made a report. RP

1118. During later testimony from Mr. Sweeny who was discussing firearm and bullet analysis, the court *sua sponte* objected that the evidence was not relevant under ER 402. RP 1097-1122.

After the prosecution began its closing argument, the court *sua sponte* called for a sidebar after juror #8 directly informed the judge that she felt intimidated by members of the galley who had been identified as Jefferson's family. RP 1185-86, 1188-89.

The Defense explained that when the trial court made multiple objections on behalf of the prosecution, not only was the appearance of fairness and impartiality violated, but Jefferson was denied due process because the defense had no recourse for having an independent tribunal consider the propriety of the court's own objections. 2RP 8-10. The court's constant objections and insinuations that defense counsel was dishonest destroyed Jefferson's confidence in his ability to obtain a fair trial with defense counsel and judge Cuthbertson. 2RP 10-11.

v. Allegations Against
Defense Counsel.

At the end of the Friday May 7, 2015 court session, the prosecutor asked the court to instruct Wortham to appear for court

the following Monday morning. RP 5071. On the record, Ms. Cory informed the court that even though Wortham was not legally served a subpoena, she came to court and would return on Monday. RP 507-08. The prosecutor accused Ms. Corey of interfering with Wortham as a witness and informing her that she did not have to appear in court Monday because she had not been properly served. RP 512-535; 651-55.

Ms. Corey denied witness tampering but admitted that when asked, she informed Wortham that she had not been properly served a subpoena. When Wortham asked Mr. Corey for advice, Ms. Corey informed Wortham that she could not help her but Wortham could look up the relevant statute or talk to a different lawyer. *Id.*

When Ms. Wortham failed to appear Monday morning, the state requested a material witness warrant for Wortham who changed her return flight to LA and did not appear for court Monday morning May 11, 2015. RP 512-13. The prosecutor admitted that

¹ The record of the allegations against defense counsel is voluminous. In the interests of efficiency, the relevant portions of the transcripts are set forth in Appendix A rather than in the main body of the opening brief.

Wortham was not under proper subpoena. Id. The court accused Ms. Corey of “sandbagging”. Id.

The prosecutor again informed the court that Ms. Corey interfered with the court’s order that Wortham return to court Monday morning. RP 518-19. The court accused Ms. Corey of possible misconduct. RP 543.

THE COURT: I'm going to tell you, I'm concerned about that the statute even came up. I'm assuming that we're talking about 10.55.060, witnesses from another state summonsed to testify in this state. Nobody has brought anything to my attention that is improper about the way she was summonsed But at this point, I have to tell you candidly, I don't think it excuses any discussion about 10.55.060 and anything that suggests to her that she maybe didn't have to show today, or there was some technicality for her to get out of it following this Court's order, is a serious problem, in my view, and I'm going to research it further. At this time, I'm ready for Mr. Robinson.

RP 543.

After Ms. Wortham concluded her testimony the prosecutor through Greg Greer accused Ms. Corey of causing the delay and encouraging Wortham not to reappear for court Monday Morning. RP 651-52. Mr. Greer asked the court to consider making Ms. Corey pay for Wortham’s return ticket to L.A. RP 652-53. Ms. Corey

objected to the accusations of misconduct on the record without counsel to represent her. RP 651-55.

The judge permitted Mr. Greer to conduct a voir dire of Wortham on the subject of Ms. Corey's involvement in Wortham's decision not to appear for court on Monday. RP 655-58. Wortham testified that she asked Ms. Corey for assistance with her questions about the validity of her subpoena and that Ms. Corey said she could look up the statute or talk to another lawyer, but she could not herself assist Wortham. RP 655-68.

At a later point in trial, after the prosecutor asked for a restroom break, the prosecutor "ask[ed] that Ms. Corey not instruct the witness on anything." RP 1116. In response the court explained to defense counsel that it believed that she violated the rules of professional conduct. RP 1116.

THE COURT: Ms. Corey, I'm going to raise an issue. And, you know, I got to tell you candidly, at this point, I feel like the Rules of Professional Conduct mean nothing. I'm really concerned about lack of candor to the Tribunal. I'm concerned about fairness to opposing Counsel. I know this has been contentious. Okay? But I got to tell you, candidly, you led me to believe that Mr. Sweeney's coming in here to talk about one thing. Mr. Sweeney has had these photos. I asked you about a report from Mr. Sweeney. Mr. Sweeney did not write a report

because he hasn't reviewed any evidence -- and I'm paraphrasing. Okay? Mr. Sweeney's reviewed evidence in April. Mr. Sweeney could have written a report, and now you're asking him to testify about the photos that he looked at back in April, and there has been nothing. There has been nothing. Mr. Curtis has been complaining all day about sandbagging. I say, no, this isn't sandbagging. I'm letting him talk about a very limited subject matter. And, no, he didn't write a report because I asked for -- I ordered you to provide a report to him. There was no report because he didn't look at anything. Because he didn't consider the evidence. Okay? And I don't want to hear it, okay? But you can explain it to the WSBA when we're done.

MS. COREY: May I say something though? He didn't look at any evidence. He looked at a couple of pictures. We wanted to get the evidence. And I talked to Mr. Curtis. Evidence was introduced in the Powell case. We could not get it out. We couldn't get the bullets out. They're admitted in the Superior Court case under another cause number. Evidence is evidence. Evidence is not pictures. He couldn't look at anything. I was not deceiving the Court in any way. He could not look at a single item.

THE COURT: Well, like I said --

MS. COREY: He couldn't write a report.

THE COURT: You can explain it to the others.

RP 1116-18.

vi. Hostility In the Court Room.

During the *Batson* challenge the Court engaged with Jefferson as follows:

THE DEFENDANT: I'd like to say something for the record, too.

THE COURT: Not now.

THE DEFENDANT: I can speak for myself on the record.

THE COURT: Not now.

THE DEFENDANT: This is not a jury of my peers. I want that on the record. This is not a jury of my peers --lock me up.

THE COURT: Yeah, you already locked up.

THE DEFENDANT: So lock me up. Yeah."

RP 249.

The defense objected to the prosecutor making personal attacks against defense counsel, by calling her names. The Defense moved for a mistrial arguing that Jefferson could not receive a fair trial and effective assistance of counsel in the poisoned court room atmosphere. RP 346-47. On more than one occasion the prosecutor informed the jury that defense counsel was testifying. *Id.* The trial court denied the motion for a mistrial ruling that the comments were not prejudicial. RP 349. The court refused to give the proposed curative instruction under. *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014). RP 350-51.

Mr. Jefferson has the constitutional right to effective assistance of counsel. It is impermissible for a prosecutor to disparage Defense Counsel in any way. You must disregard such statements.

RP 349-50. Instead, the court reinstructed the jury as follows:

lawyers may make objections, and that they are not – such objections should not influence their deliberations, and there should be no presumptions based on the objections. With that, I think we're ready for the jury.

RP 349-50.

Mr. Jefferson requested new counsel believing that he could not receive effective assistance of counsel and a fair trial due to the allegations of misconduct and the court's threat to refer the misconduct matter to the WSBA. RP 350.

A person in the galley called the prosecutor a "punk bitch" because he heard the prosecutor tell defense counsel to "shut the fuck up". RP 667, 669. The sheriff explained to the court that Jefferson's father did not like the prosecutor. RP 668. After the trial court told Jefferson to be quiet, defense counsel informed the court that Jefferson was too upset to proceed with counsel. RP 672-73. The trial court informed counsel that Jefferson was not upset even

though counsel reminded the court that the sheriff had a gun trained on her client. RP 673.

Ms. Corey explained that Jefferson's father heard Mr. Curtis tell Ms. Corey shut the fuck up". RP 668-69.

MS. COREY: but he approached -- he came up to me and asked me if Mr. Curtis had, yesterday, told me to -- and this is verbatim, you know, "shut the fuck up," and he had. And so I just affirmed that, and that was offensive to Mr. Jefferson and, you know, it was just one of those things that gets said in trial by -- was said by Opposing Counsel, and I think that he thought that was out of line and was chastising Counsel for that. He was told that that was rude and inappropriate, and that if he continued with that type of reaction, he couldn't stay, and then he stopped. And I think that -- you know, he realized that his response to what he perceived as poor etiquette was also poor etiquette, and I think he's under control. And so I think --

THE COURT: "He" who? Mr. Jefferson?

MS. COREY: Yes.

MS. COREY: I think that -- that is Mr. Jefferson (father) I don't think there will be a problem.

THE COURT: Well, there won't be a problem. I know. I guarantee there will not be a problem because, Mr. Jefferson, I told you before, if you disrupt this proceeding, you're out of here. Period. The end. Okay? And if this is your son, okay --

SR. MR. JEFFERSON: Thank you, Your Honor.

THE COURT: So you need to sit down, if you're gonna be in here, and be quiet. And if I have to say anything again -- because you were out of control yesterday, you know, shouting stuff out -- I'm going to hold you in contempt. You've been warned, and you'll go upstairs.

SR. MR. JEFFERSON: Okay. You're Honor. I apologize. Respect your court, Your Honor. I respect you.

THE COURT: And don't disrespect your son, either, or Counsel.

SR. MR. JEFFERSON: (Inaudible) he disrespect my son, he disrespect my son, he disrespect my son (inaudible) to you and him respecting son.

THE COURT: Yeah. Okay. I'm going to hold him in contempt. You gotta go.

SR. MR. JEFFERSON: Don't worry about them, man.
MS. COREY: I think he's entitled to a hearing, Your Honor, and Counsel, and I'd ask the Court to appoint counsel for him.

THE DEPUTY: Your Honor, you want him to go to jail, or you want him just out of the courtroom?

THE COURT: I want him out of the courtroom. Get your stuff, man.

THE DEPUTY: Okay.

THE COURT: See ya. Go home and check the mirror.

MR. CURTIS: Your Honor --

THE DEFENDANT: It should go both ways.

THE COURT: Mr. Curtis, yes.

MR. CURTIS: Your Honor, I did not use the words fuck when I addressed Ms. Corey, and that Your Honor, I just want to make a record --

THE DEFENDANT: You said shut the fuck up and get the fuck outta my face.

MR. CURTIS: I did not -- I did not --

THE DEFENDANT: That's exactly what he said, man.
(Counsel and Defendant speaking at the same time)

THE COURT: Mr. Jefferson, excuse me.

THE DEFENDANT: That's the problem. Somebody says --

THE COURT: Is it your turn to talk?

THE DEFENDANT: I'm just saying --

THE COURT: Would you be quiet?

THE DEFENDANT: Can I ever talk?

THE COURT: You been talking a little too much.

THE DEFENDANT: When? When? I'm calm.
(Pause)

.....

THE COURT: Oh, okay. So, Ms. Corey, your witness (Robinson).

MS. COREY: Your Honor, my client is extremely upset. May I have a couple of minutes with him?

THE COURT: No. Let's go.

MS. COREY: All right. We can do that. I'm trying to effectively represent my client and speak to him, but if I can't do that, I can't do that. And I'm making a record that I can't talk to my client because he's too upset to talk to.

THE COURT: Thank you for making the record. Now you can talk to the witness and ask the questions. And let me make a record. I'm looking at Mr. Jefferson's affect, and I don't think he's that upset.

MS. COREY: I mean, when a sheriff gets a gun on me --[sic][defendant speaking].

THE COURT: He doesn't know how to control himself, but he's not that upset. That's my record.

THE DEFENDANT: How can you tell if I'm upset or not?

RP 668-72. The judge told Jefferson Sr. "See ya. Go home and check the mirror". RP 671. Jefferson suggested that "it should go both ways." RP 671.

The next court date, the prosecutor again raised the issue of Ms. Corey's involvement in Wortham's failure to voluntarily return to court. RP. 956.

MR. CURTIS: Your Honor, can we get a projection -- I'm not trying to tell the Court how to use its courtroom, but I want to be honest, Your Honor, with the Court. Ms. Corey sat here and told a witness, after

the Court instructed her -- while the Court was going to instruct her to be here 9:00 on Monday, she went and said that she didn't have to be here.

MS. COREY: I did not.

MR. CURTIS: Listen, Your Honor, it's on the transcript. She said she doesn't have to be here. She will be here, but she doesn't have to.

THE COURT: I know that.

MR. CURTIS: And I'm saying that because she knew if that witness would have got on that plane and taken off, it would have been a mistrial, and that's why she didn't tell the Court -- and she's supposed to be candid to the Court. She didn't tell the Court, when we're scrambling around, wondering what was happening with Harmony, she knew, because she knew Harmony had reservations, and she knew that

RP 956. Ms. Corey objected:

I also take significant umbrage with Counsel's statement that I ever told her she could leave.

THE COURT: I --

MS. COREY: No. I want to put this on the record because he puts it on the record all the time. I never told her that. The context in which I said that was when the Court was talking bout --

THE COURT: Ms. Corey, I'm not re-litigating it now. We went through it yesterday, ad nauseam, with you, Mr. Curtis, Mr. Greer. That's off the table.

MS. COREY: Right. They bring it up continuously. I did not tell them that, and I want that to be perfectly

clear.

RP 957-58.

After the trial court told Jefferson to be quiet and after the prosecutor called defense counsel names, defense counsel informed the court that Jefferson was too upset to proceed with counsel. RP 672-73.

Jefferson again moved for new counsel after listening to the prosecutor and trial court attack defense counsel's conduct, Jefferson informed the court that he did not believe he could get a fair trial with Ms. Corey because the court blamed counsel for the delays and problems with the trial. RP 1133-34.

He believes that the Court's comments to me have been derogatory, prejudicial, and unfounded, and he believes that we were unable to put on our defense with this witness. And he does not believe that we can go forward with fairness and that our position has been appropriately heard. He knows from our case preparation that we only had eight hours with Mr. Sweeney, and he just is devastated and doesn't want me to represent him anymore. So I have nothing to add to that particular sidebar, but my client does have a motion. It's not the first time he's made it. And that's what he would say to the Court, is that he is not at all comfortable with what has occurred in the courtroom this afternoon, with respect between the Court and this Counsel, and he does not want me to speak for him, which puts me in the position of not being able to make argument.

RP 1133. The court denied the motion but informed Jefferson that his attorney delayed the progress of the case. RP 1134.

THE COURT: So I'm going to deny the motion, and I'm going to be clear again. I admonished Counsel outside of the hearing of the jury because I rely on the lawyers, as officers of the Court, to be candid with this Court. And that hasn't happened in this case, and it's been an issue a couple of times. I believe there's been undue delay in this case, um, and so -- and I believe it's been disruptive, I believe it's been unfair to the Court, to the proceeding, and so I have candidly tried to hold my tongue for three weeks as this has repeatedly gone on. And, Mr. Jefferson, I'm going to deny your motion.

RP 1134. The court refused to explain to Ms. Corey how she delayed proceedings. RP 1134.

Defense counsel moved for a mistrial based on the lack of due process during the entire proceedings, which the court denied.

I'm going to deny the motion. And I don't want to get into the specifics because I don't think it would be appropriate at this time." I would tell Mr. Jefferson that this Court did everything that it could to guarantee that he had a fair trial. In this case, I think the issue is trial by surprise is not what we do here, and trial by surprise doesn't result in a fair trial. And so, to the extent that that's the issue, and I actually think it is, I don't think there's any basis for the motion.

2RP 20-21.

f. Jury Misconduct and Judge
Invaded Province of Jury

After the prosecution began its closing argument, the court *sua sponte* called for a sidebar after juror #8 directly informed the judge that she felt intimidated by members of the galley who had been identified as Jefferson's family. RP 1185-86, 1188-89. The judge referred the juror to the bailiff to continue communicating her concerns. *Id.* The court conducted a *Bone Club* analysis to voir dire jurors individually, and without objection closed the court room. RP 1186-87.

Juror #8, a female, informed the bailiff that she felt threatened, scared, and intimidated by galley members who followed her and juror #9 to the parking garage and watched as they got into their cars. RP 1191-92. According to juror #8, juror # 9 said if the members of the galley came up to the garage she was going to stay with security and not go to her car. RP 1191-92. Juror # 8 described the experience as "unnerving". RP 1191-92.

The next morning juror #8 discussed her concerns with most of the other jurors in the jury room. RP 1193. The other jurors told

juror #8 that she needed to bring her concerns to the court's attention. When asked about her ability to proceed, juror #8 indicated that she was uncomfortable in part because the members of the galley were people of color. RP 1169. Juror #8 was removed for cause. RP 1258.

During questioning of juror #9, she conceded that she became concerned with being watched after juror #8 brought it to her attention. RP 1200. Juror #9 informed the court that juror #8 discussed with other jurors, her fears about being followed and watched. RP 1203-04. The defense moved for a mistrial which the court deferred, choosing instead to voir dire each juror individually. RP 1206-1207-14. Juror #8 thought it was "creepy" to be watched. RP 1129.

Juror's #5 and #11 both heard juror #8 discuss being watched by galley members in a black Nissan Altima, the alleged shooter car. RP 1219, 1232, 1239-40, 1252, 1256-57. The court recalled jurors #5 and #11 to ask if they were mistaken and perhaps heard "black male" rather than "black Nissan Altima". Both jurors insisted that juror #8 said she was watched by people in a black Nissan Altima. Id. When asked, juror #8 denied mentioning

the black Nissan Altima. RP 1262. Jefferson offered that the person in the car was his brother. RP 1242-1245.

The defense moved for a mistrial based on juror misconduct and because the trial court intimidated jurors #5 and #11 by challenging their memories about the black Nissan Altima. RP 1219, 1232, 1239-41, 1247, 1252, 1256-58, 1266. Even though the court was concerned about the vehicle, it denied the motion for a mistrial because the other jurors indicated that they could be fair and unbiased. RP 1247, 1258, 1264.

The defense made a record that there was no curative instruction that could have removed the taint from this incident and that Jefferson's right to a fair trial had been denied. RP 1265-66. After denying the motion for a mistrial, and after admonishing the jurors not to discuss their individual questioning with each other, the trial court addressed the jurors together:

So, we spent most of the afternoon going through individual voir dire with jurors, and it was important that we do that. And it was my decision because I want to make sure everybody's on the same page and that on bias or prejudice develops in the court if the trial because of anything anybody might have heard or said, or anything like that.

RP 1269.

g. Prosecutorial Misconduct

The prosecutor repeatedly made speaking objections in front of the jury which disparaged the defense counsel. RP 443-44. The first speaking objection consisted of the prosecutor asking the court to play an interview of Wortham after she could not remember her testimony implying that the prosecutor had contrary information. RP 443-53.

The prosecutor in front of the jury repeatedly informed the court that defense counsel was testifying rather than asking questions beyond the scope of direct. RP 340, 346-47. Citing to *Lindsay*, the defense objected that the characterization was a personal attack on counsel which implicated Jefferson's right to counsel. *Id.*

The prosecutor informed the jury that defense counsel was misstating the facts. After the defense objected, the court informed the jurors could decide the facts. RP 821. Counsel moved for a mistrial which the trial court denied after acknowledging that twice, the prosecutor accused counsel of testifying when she was not. RP 347-49.

During a particularly aggressive examination of Wortham, the prosecutor referred to Ms. Corey, as “Barbara”. RP 644. After a sidebar, the prosecutor apologized. *Id.* The prosecutor in front of the jury, asked the court to instruct Jefferson’s father who was in the galley to be quiet. RP 647, 1007-08. In front of the galley, the prosecutor told defense counsel to “shut the fuck up”. RP 667, 669. The prosecutor denied using the word “fuck” but Jefferson informed the court that Mr. Curtis said “You said shut the fuck up and get the fuck outta my face.” RP 671.

The defense objected to the prosecutor attempting to elicit sympathy from the jury by having Robinson lift his shirt to reveal scars on his torso rather than using an image. RP 553-54, 580-81. The defense objected and the court sustained the prosecutor telling Goodman that he was “a little bit confused” and “I need you to clarify some things for me”. RP 906. Over objection the prosecutor tried to impeach Goodman himself rather than using evidence. RP 909. During closing the prosecutor repeatedly informed the jury that counsel “agreed” with him. The court sustained the objections. RP 1312-13.

h. Procedural Facts.

Jefferson was charged and convicted of attempted murder in the first degree and unlawful possession of a firearm in the first degree. CP 40-42, 181-84. The honorable Frank Cuthbertson presided over the jury trial. CP 141-97. This timely appeal follows. CP 422-36.

C. ARGUMENTS

1. JEFFERSON WAS DENIED EQUAL PROTECTION BY THE TRIAL COURT'S DENIAL OF HIS *BATSON* MOTION.

During jury selection, the deputy prosecutor exercised peremptory challenges excusing 2 racial-minority jurors which included Juror#10 the only African American juror and another juror whose first language was not English. RP 219-20; 238-39. Mr. Jefferson is African- American. CP 403-16.

A prosecutor's use of a peremptory challenge solely on the basis of race violates a defendant's right to equal protection. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

a. Standard of Review

Batson challenges are reviewed for clear error. *State v. Saintcalle*, 178 Wn.2d 34, 41, 309 P.3d 326 (2013). "Clear error

exists when the court is left with a definite and firm conviction that a mistake has been committed.” Id.

b. Peremptory Challenges May Not Be Utilized In a Discriminatory Manner and The Trial Court Must Utilize a Three- Part Test.

The Equal Protection Clause prohibits the use of peremptory challenges to exclude otherwise qualified and unbiased jurors based upon their race. U.S. Const. amend. 14; *Batson v. Kentucky*, 76 U.S. 79, 98, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). *Batson* and subsequent cases set out a three-part test for whether the Equal Protection Clause has been violated by a peremptory challenge.

First, the person challenging the peremptory must “make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” *Batson*, 476 U.S. at 93-94. Second, “the burden shifts to the State to come forward with a [race-]neutral explanation” for the challenge. *Batson*, 476 U.S. at 97. Third, “the

trial court then [has] the duty to determine if the defendant has established purposeful discrimination.” *Batson*, 476 U.S. at 98.

The trial court must then consider the defense argument of discrimination along with the State's proffer of an explanation and determine if all the circumstances show the challenge was race-based. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). If the trial court finds purposeful discrimination, the trial court must prohibit the peremptory strike. *Saintcalle*, 178 Wn.2d at 42. The trial court is afforded deference in determining purposeful discrimination. *Saintcalle*, 178 Wn.2d at 55-56.

c. Comparative Juror Analysis

The courts use a comparative juror analysis to determine if the prosecutor used purposeful discrimination in removing a juror based on race. *Saintcalle*, 178 Wn.2d at 43. Comparative juror analysis examines “whether the proffered race-neutral explanation could apply just as well to a nonminority juror who was allowed to serve.” *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). A reason for challenging a juror may be deemed pretextual and thus not race neutral if other jurors made

similar assertions. *Cook*, 175 Wn.App. at 41 (citations omitted).

“*Batson* requires the judge to determine whether a race-neutral reason offered for a challenge is honest”. *United States v. Roberts*, 163 F.3d 998, 1000 (7th Cir. 1998). See also, *Snyder v. Louisiana*, 552 U.S. 472, 485, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (court examines reasons to make sure they are not pretextual). The State’s explanation of its reasons “must be viewed in the totality of the prosecutor’s comments.” *State v. Cook*, 175 Wn.App. 39, 43, 312 P.3d 653 (2013).

A court’s finding of discrimination against one juror is evidence of discrimination against other jurors. *Snyder v. Louisiana*, 552 U.S. 472, 485, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); See *Purkett*, 514 U.S. at 768. “[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.” *Id.* See also, *Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) (stating that courts are not bound to accept neutral reasons that are either unsupported by the record or refuted by it).

The fact that one or more of a prosecutor's justifications do not hold up under judicial scrutiny militates against the sufficiency

of a valid reason. See *United States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989) (stating that, although reasons given by prosecutor “would normally be adequately ‘neutral’ explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency”).

d. Jefferson Made a "Prima Facie" Case of Race Based Discrimination.

Justice Alexander in his dissent in *Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010) recognized that the Court had previously held that “a trial court is ‘not *required* to find a prima facie case [of discriminatory purpose] based on the dismissal of the only venire person from a constitutionally cognizable group, but they *may*, in their discretion, recognize a prima facie case in such instances.’ ” *Rhone*, 168 Wn.2d at 661 (citing, *State v. Tomas*, 166 Wn.2d 380, 397, 208 P.3d 1107 (2009) (quoting *State v. Hicks*, 163 Wn.2d 477, 490, 181 P.3d 831 , *cert. denied*, 129 S.Ct. 278, (2008).

Justice Alexander supported the bright line rule proposed by *Rhone* and amicus American Civil Liberties Union (ACLU) “that a

prima facie case of discrimination is always established whenever a prosecutor peremptorily challenges a venire member who is a member of a racially cognizable group”. *Rhone*, 168 Wn2d at 661-52.

Notwithstanding that the ACLU standard is not in effect, the trial court erred in denying the defense challenge because when considering the totality of the circumstances, the challenge was race-based when the prosecutor accepted juror #1 who was equally outspoken about the prosecutor wasting his time as was juror #10, but was not removed. Jurors #1, #9, #11, and #23 were also as enthusiastic about *Ten Angry Men*, as #10, but they too were not removed. See, *Cook*, 175 Wn.App. at 41 (citing, *Reed v. Quarterman*, 555 F.3d 364, 372-74 (5th Cir. 2000) (citing *Miller-El*, 545 U.S. at 241)).

In *Cook*, the Court of Appeals reversed the trial court’s denial of a *Batson* challenge where the prosecutor removed only 50% of the African American jurors because the juror was “too enthusiastic”. *Cook*, 175 Wn.App. at 43-44. The Court held “that the removal of Juror No. 34 because of his enthusiasm was a proxy reason for striking him on account of his race.” *Id.*

In *McClain*, the Ninth Circuit reversed the District Court's denial of a *Batson* challenge, where the prosecutor struck the only two jurors for nonsensical, pretextual reasons, such as one of the jurors stated that she did not trust the system; the juror did not have experience as a juror and because the prosecutor believed that the juror lied about working for an airline. *McClain*, 217 F.3d at 1221-24. Citing to *Batson*, the 9th Circuit held that McClain was denied the right to a fair trial in violation of the Equal Protection Clause and noted "the fact that all blacks in the venire pool were struck raises an inference of discrimination." See *Batson*, 476 U.S. at 97.

Here, Jefferson made a prima facie case of race based juror removal when the prosecutor removed juror #10 the only African American in the 35 member jury venire, who like juror #1, #9, #11, and #23, was outspoken and enthusiastic about the movie *Ten Angry Men*. RP 238-39, 245-46.

Also, according to the prosecution, Juror #10 said in voir dire that he believed that the extended voir dire was a waste of time after the jurors had sworn to abide by the law in upholding their responsibilities as jurors. RP 242-45. Juror #1 held the same belief. RP 245. Juror #10 also revealed that in a prior case he had

discussed a matter in the jury room from outside the case and had learned from his fellow jurors that his was not appropriate. RP 245-47.

The prosecutor did not like that juror #10 had seen *Ten Angry Men*, and discussed it enthusiastically, but ignored this fact regarding juror #1 number, juror #9, #11, and #23 who also enthusiastically discussed this movie. These other jurors were not African American and they were not removed. RP 242-47.

The prosecutor's race-neutral explanations for moving to strike juror #10, were inadequate and pre-textual, similar to the prosecutions pre-textual excuse in *Cook*, that the juror was "too enthusiastic". *Cook*, 175 Wn.App.at 43-44. RP 242-45.

Here, the trial court should have ruled that the prosecutor's reasons for striking juror #10 were not race-neutral because other juror's answered questions about *Ten Angry Men* and were not removed. And similarly, juror # 1 also believed that voir dire was a waste of time but she also was not removed.

Examining this case objectively, the prosecution's reasons For removing juror #10 were pretextual and implausible. Juror # 10 never indicated that he could not be fair and impartial, but his

skin color clearly concerned the prosecutor. The record indicates that the prosecutor struck juror #10 because of his race and for no legitimate reasons. *Snyder*, 552 U.S. at 485; *McClain*, 217 F.3d at 1221; *Roberts*, 163 F.3d at 1000; *Cook*, 175 Wn.App.at 43-44.

e. The Remedy is Reversal.

When the trial court erroneously denies a *Batson* challenge, the error is *per se* reversible. *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987); *Cook*, 175 Wn.App. at 44. Here, the Court must vacate the convictions and remand for a new trial because Jefferson was denied due process when the prosecutor struck Juror #10 based on his race.

2. JEFFERSON WAS DENIED HIS DUE PROCESS RIGHT TO AN IMPARTIAL AND UNBIASED FACT FINDER AND TO THE APPEARANCE OF FAIRNESS.

The trial court invited the jury to attend a party with him after the jury panel was sworn in. RP 224, 306, 314. The trial court admitted the state's video and freeze frames from the gas station video but suppressed the defense freeze frames from the same

video. RP 450, 456, 464, 468-471, 474, 1044-46, 1051-54. Many times, *sua sponte*, the court acted as the prosecutor and objected to defense counsel. RP 300, 342, 346, 1079-99, 1147.

After the court denied the *Batson* challenge, the court unprofessionally responded to Jefferson with a comment “you already locked up”. RP 249. After an outburst between Jefferson’s father and the judge, the judge told Jefferson’s father “[s]ee ya. Go home and check the mirror”. RP 671. When Jefferson needed a moment to calm himself, the court denied a brief recess and told Jefferson that he was not upset, notwithstanding the fact that the court room deputy had a gun trained on Jefferson. RP 673.

The court informed counsel that her communications with Wortham were “improper” . RP 534. Without counsel for Ms. Corey, the court permitted prosecutor Greg Greer, a different deputy than the trial deputy, to examine Wortham regarding the alleged misconduct by Ms. Corey. RP 655-68. The court on its own informed Ms. Corey that: (1) he did not believe that she was abiding by the rules of professional conduct; (2) she was not being candid with the court; (3) she was sandbagging; (4) he was referring his concerns to the WSBA. RP 1116-18.

After learning that the prosecutor told Ms. Corey to “shut the fuck up” and to “get the fuck outta my face”, and after Jefferson’s father’s responded to the prosecutor with this information by calling him a “punk bitch”, the court threw Jefferson Sr. out of the court room and told him to “check the mirror”. RP 668-72.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties obtained a fair, impartial, and neutral hearing. *State v. Witherspoon*, 172 Wn.2d 271, 287, 286 P.3d 996 (2012); *State v. Gamble*, 168 Wn.2d 1611, 187, 225 P.3d 973 (2010). “ ‘The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.’ ” *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) quoting *State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972)).

“The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts.’ ” *State ex. Rel. McFerran v. Justice Court of Evangeline Starr*, 32 Wn.2d 544, 549, 202 P.2d 927 (1949) (quoting, *State ex rel. Barnard v. Bd. Of Educ.*, 19 Wash 8, 17, 52 P. 317 (1898)). This means that “[i]t is incumbent upon members of the judiciary to avoid even a cause for

suspicion of irregularity in the discharge of their duties.” *Diimmel v. Campbell*, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966).

Canon 3 of the Code of Judicial Conduct (“CJC”) mandates that judges perform the duties of their offices impartially. *Sherman*, 128 Wn.2d at 204-05, quoting, CJC Canon 3(A)(4) (1994) (emphasis added). “The CJC recognizes where a trial judge’s decisions are tainted by even a mere suspicion of partiality, the effect on the public’s confidence in our judicial system can be debilitating.” *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995).

The test for determining whether the judge’s impartiality might reasonably be questioned is an objective one. *State v. Leon*, 133 Wn. App. 810, 812, 138 P.3d 159 (2006), *review denied*, 159 Wn.2d 1022 (2007).

In *State v. Ra*, 144 Wn.App. 688, 175 P.3d 609, *review denied*, 164 Wn.2d 1016, 195 P.3d 88 (2008), this court determined that the trial court made inappropriate comments both during trial and at sentencing regarding the defendant and the victim. *State v. Ra*, 144 Wn.App. at 705. The court reprimanded Ra for shaking his head: “ ‘Don’t shake your head up and down at me as if you are

agreeing with me' “. Id. The judge also argued with Ra's attorney about the victim's service in the Iraq war, stating, “ '[T]o say that this young man, who was very impressive to the Court and was fighting for our country was over there maybe just to kill people, I find offensive....’” *Ra*, 144 Wn.App. at 696, 699.

Again during trial, the court also proposed theories for the State to use to get certain evidence admitted. *Ra*, 144 Wn.App. at 705. This Court held the judge's comments to be improper but reversed Ra's conviction on other grounds and did not reach the question of whether the court's actions demonstrated sufficient partiality to warrant reversal. *Ra*, 144 Wn.App. at 705.

The appearance of unfairness in *Ra*, pales in comparison to the judge's behavior in Jefferson's case. First, here the judge invited the jury to jury appreciation party the judge attended. RP 224. Second, the judge later informed the jury that one of the jurors who attended the party was treated like a celebrity. RP 314. Third, the judge repeatedly informed counsel that he was seriously concerned with counsel's conduct during trial regarding: (1) Wortham; (2) a witness the judge believed counsel had sandbagged the prosecutor with by not providing a report; and (3)

multiple threats to refer defense counsel's conduct to the WSBA. RP 534, RP 1058-59, 1116-18. Fourth, the court made many *sua sponte* objections against defense counsel, thus acting as a prosecutor and eliminating the defense ability to request denial of the objections – because there was no impartial fact finder to consider the motions.

Fifth, as in *Ra*, the court repeatedly reprimanded Jefferson and his father. The court would not allow Jefferson to make any record during the *Batson* motion but when Jefferson stated that the jury venire was not his peer group and the court might as well just lock him up , the court responded with “Yeah, you already locked up. “. RP 249.

Sixth, when counsel informed the court that Jefferson needed a short break because he was upset, the trial court told Jefferson that he was not upset even though the sheriff had a gun pointed on Jefferson, and Jefferson said he was upset. RP 672-73.

Seventh, the trial court ruled in favor of the prosecution on identical issues that it ruled against the defense regarding the admissibility of freeze frames of the gas station video. RP 474-91, 591, 1044-48, 1051-54. Eight, the court accused Ms. Corey of

repeatedly being unprepared during trial. RP 1048-49.

Ninth, *sua sponte*, the court objected to the defense expert, believing the jury would be confused by Ms. Sweeny's testimony about marks on bullets because those tests were not performed and the court felt that Ms. Corey was not being candid with the court. RP 1097-1101, 1116-17.

In *Ra* the judge interfered by proposing theories for the state. Here the judge did more than make suggestions, he actually made repeated *sua sponte* objections for the state. RP 300, 342, 346, 1079-99, 1147. And the court repeatedly informed Ms. Corey that he believed she committed misconduct. In this aggressive and hostile court room not only did the court behave in a biased manner, but he also appeared biased.

As challenging as this case appeared, the trial court was unable to maintain his role as the neutral, and impartial judiciary. The court acted as a prosecutor by objecting on behalf of the state and in so doing demonstrated his actual bias. The appearance of fairness was destroyed by the open hostility and distrust of defense counsel. The remedy is to vacate the convictions and remand for a new trial. *Ra*, 144 Wn.App. at 705.

3. JEFFERSON WAS DENIED HIS ARTICLE 1, SECTION 22 AND SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

a. A Defendant is Constitutionally Entitled To An Unbiased Jury.

The accused in a criminal trial has a constitutional right to have a fair and impartial jury. U.S. Const. amends. VI, XIV § 1; Wash. Const. art. I, §§ 3, 21, 22; *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). Where a juror's views would "prevent or substantially impair the performance of his duties" as a juror, the juror must be excused for cause. *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). If a biased juror is permitted to deliberate, the accused is denied his constitutional right to trial by an impartial jury, requiring reversal. *State v. Gonzales*, 111 Wn.2d 276, 282, 45 P.3d 205 (2002); *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (1969). Moreover, due process requires that a person accused of a crime be tried only by a jury willing to decide the case solely on the evidence presented. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1981).

“[I]t is error to submit evidence to the jury that has not been admitted at trial.” *In re Pers. Restraint of Glassman*, 175 Wn.2d 695, 705, 286 P.3d 673 (2012); *State v. Pete*, 152 Wn.2d 546, 552-53, 98 P.3d 803 (2004).

i. Motion for Mistrial.

CrR 7.5(a)(2) permits a trial court to grant a new trial on the grounds that the jury committed misconduct. In a criminal proceeding, a new trial is necessary when the “defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the defendant will be treated fairly.” *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997); *State v. Chanthabouly*, 164 Wn.App. 104, 140, 262 P.3d 144 (2011), *review denied*, 173 Wn.2d 1018, 272 P.3d 247 (2012).

A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012); *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000) (citing *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). A trial court abuses its discretion when no reasonable person would adopt the trial court's view. *Greiff*, 141 Wn.2d at 921.

The trial court's decision on a motion for mistrial will be overturned if there is a substantial likelihood that the prejudice affected the verdict. *Greiff*, 141 Wn.2d at 921 (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

b. Jury Misconduct Occurs When The Jury Considers Facts Not In Evidence.

It is misconduct for a jury to consider extrinsic evidence. *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986). See also *Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546, 549-50 (1965); *Pete*, 152 Wn.2d at 552-53; WPIC 1.01A. The interjection of extraneous evidence into the jury's deliberations violates this principle as well as an accused's right to due process of law. *Richards v. Overlake Hospital*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990); *Halvorson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 8267 (1973).

Extrinsic evidence is “ ‘information that is outside all the evidence admitted at trial, either orally or by document,’ “ and is improper “because it is not subject to objection, cross examination,

explanation, or rebuttal.” *Pete*, 152 Wn.2d 552-53 (quoting *Overlake*, 59 Wn.App. at 270). The party asserting such misconduct bears the burden of showing it occurred. *State v. Kell*, 101 Wn.App. 619, 621, 5 P.3d 47 (2000).

A strong, affirmative showing is required to impeach a verdict and overcome the policy favoring stable verdicts and the secret and frank discussion of the evidence by the jury. *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). The court is required to make an objective inquiry, asking whether the evidence could have affected the jury’s decision, not whether the evidence did in fact affect the decision; the actual effect of the extrinsic evidence on the jurors’ decision inheres in the verdict. *Overlake*, 59 Wn.App. at 273.

In *Rinkes*, the trial court inadvertently sent a newspaper editorial and cartoon into the jury room. *Rinkes*, 70 Wn.2d at 860. The editorial and cartoon “were most critical of supposedly lenient court decisions in criminal actions, and criticized certain allegedly liberal probation policies of some of the judges of the King County Superior Court.” *Rinkes*, 70 Wn.2d at 860 Our Supreme Court found the extrinsic material inherently prejudicial. *Rinkes*, 70 Wn.2d

at 862-63.

Similarly, in *In Pete*, the trial court inadvertently sent two unadmitted documents into the jury room—a police officer’s written report recounting statements Pete made while being transported to the police station, and Pete’s own written and signed statement. *Pete*, 152 Wn.2d at 550. After Pete was convicted, the court polled the jury and “at least two or three jurors” indicated they had seen and/or read the unadmitted documents before the bailiff retrieved them. *Pete*, 152 Wn.2d at 551 n. 2. The trial court denied the motion, finding the error harmless in part because “the jury was instructed to disregard the documents, and ... the statements contained in the police report and Pete’s written statement were exculpatory in nature.” *Pete*, 152 Wn.2d at 551.

The State Supreme Court determined that the extrinsic evidence prejudiced *Pete*: “The submission of the two documents to the jury seriously undermined [Pete’s general denial defense] and nothing short of a new trial can correct the error.” *Pete*, 152 Wn.2d at 554-55.

In *Mach v. Stewart*, 137 F.3d 630 (9th Cir.1998), the defendant was accused of sexually assaulting a young girl. *Mach*,

137 F.3d at 631. One prospective juror was a social worker with Arizona's Child Protective Service. *Mach*, 137 F.3d at 632. The prospective juror questioned her ability to be impartial, explaining, in front of the jury panel, that in her experience, every claim of sexual assault by a child had later been confirmed. *Id.*

Additionally she stated that she was unaware of a child ever lying about such a situation. *Id.* Later, the juror disclosed that she had taken classes in child psychology, lending an air of expertise to her remarks. *Mach* 137 F.3d at 632-33. The court denied *Mach's* motion for a mistrial based on concerns that the prospective juror had tainted the jury pool, but the court did strike the prospective juror for cause. *Mach* 137 F.3d at 632-33.

The Ninth Circuit Court of Appeals disagreed and reversed the defendant's conviction because the prejudicial comments by the prospective juror so infected the remaining jury panel members that reversal was the only proper remedy. *Mach* 137 F.3d at 633.

c. Jefferson Prejudiced

Jefferson was denied his right to a fair trial by pervasive jury misconduct. Juror #8 believed that members of the galley (Jefferson's family) followed her and juror # 9 to the parking garage

and watched as they approached their cars. RP 1185-1269. Both juror #8 and juror #9 were uncomfortable and juror #8 told the other jurors she was followed and watched by gallery members. Jurors #5 and #11 heard juror #8 inform the other jurors that she was watched by the shooter car, a black Nissan Altima. RP 1185-1169, 1194-1200, 1220-1239, 1252-57.

Similar to *Mach*, juror #8's discussion of her comments and concerns in front of the other jurors tainted the jury pool beyond repair. It was not reasonable to believe that the jurors would be uninfluenced by the fact that the shooter car followed two jurors to the parking lot and watched them as they entered their car.

In *Mach*, under a harmless-error standard, the Court found the error had a "substantial and injurious effect or influence in determining the jury's verdict" since the remarks struck at the heart of *Mach*'s case – whether the jury believed the accused or the accuser. *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). The Court held that the prospective juror's comments "had to have had a tremendous impact on the jury's verdict." *Mach*, 127 F.3d at 633. The Court concluded the juror's comments substantially affected or influenced

the verdict, and reversed Mach's conviction. *Id.*

Here, the taint was as bad if not worse than the more subtle taint in *Rinkes* and more analogous to the taint in *Pete* and *Mach*. In both *Mach* and in this case, the extrinsic evidence presented to the jury went to the heart of Jefferson's case. Jefferson's defense was general denial and the credibility of the witnesses was a significant factor.

Wortham and Goodman both changed their testimony and both testified that they could not remember details. They each described the incident as a violent one where they were both involved in a physical fight, and Powell and Jefferson were also confrontational with Robinson. The witnesses normalized the idea of physical violence in this setting. When juror #9 told the panel that she was afraid because the galley members or shooter car had followed her and watched her go to her car, the jury was tainted beyond repair by the expression of concern and fear of violence.

The message implied that Jefferson and his associates were scary and violent. As in *Mach* and *Pete*, the jury's inevitable associating Jefferson with the jury intimidation, whether intended or not, prejudiced Jefferson because there is at least a "reasonable

ground to believe that the defendant may have been prejudiced.'
Pete, 152 Wn.2d at 554 n. 4.

Similarly, this implication like the implication like the implication that Seattle judges were lenient, influenced the jury to be stricter with Jefferson because he associated with violent, scary types. This information "was very likely indeed to prejudice" Jefferson making it impossible for the jury to act impartially during deliberations. *Rinkes*, 70 Wn.2d at 862-63. Accordingly, this Court must reverse the convictions and remand for a new trial.

4. JEFFERSON WAS DENIED HIS
CONSTITUTIONAL RIGHT TO THE
PRESUMPTION OF INNOCENCE.

The right to a fair trial includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Creditor*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial. *Morrissett v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 96 Led. 288 (1952).

The trial court is charged with the presumption of innocence by being alert to any factor that could "undermine the fairness of

the fact-finding process." *Williams*, 425 U.S. at 503, 96 S.Ct. 1691 (prejudicial for defendant to appear in front of jury in jail garb). Courts must evaluate the likely effects of an alleged violation of this presumption "based on reason, principle, and common human experience." *Williams*, 425 U.S. at 504, 96 S.Ct. 1691.

The presumption of innocence guarantees every criminal defendant all "the physical indicia of innocence," including that of being "brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). If a biased juror is allowed to deliberate, the defendant is denied his constitutional right to trial by an impartial jury, requiring dismissal. *Gonzales*, 111 Wn. App. at 282.

A juror demonstrates actual bias by "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging....". RCW 4.44.170(2). A prospective juror's expression of preference toward police testimony does not, standing alone, conclusively demonstrate bias.

Gonzales, 111 Wn.App.at 281.

This case is analogous to *Gonzales*, where the court reversed and remanded for a new trial because a juror was allowed to deliberate after she had stated that she was more likely to believe police testimony, repeated it several times, and responded that she did not know if she could presume the defendant, *Gonzales*, innocent. *Gonzales*, 111 Wn.App.at 278-79. The Court reversed, because *Gonzales* was denied the presumption of innocence based on the juror's bias. *Gonzales*, 111 Wn.App.at 281.

Similarly, in Jefferson's case the presumption of innocence was destroyed by the jury obtaining information that the shooter car followed jurors. Juror # 8 felt intimidated and was removed from the jury, but the remaining jurors were not removed. Rather they proceeded to deliberation returning guilty verdicts on all counts based not only on the evidence but also on the fact that the shooter car tried to intimidate them. RP 1185-1269.

This information destroyed Jefferson's presumption of innocence because it gave rise to a fear that the same car associated with the shooting was also involved in trying to intimidate

jurors. The effect of juror # 8 discussing her fear, juror # 9's feeling that the whole matter was "creepy" and the knowledge that the car associated with Jefferson and the shooting was following juror's prejudiced the entire jury that deliberated in Jefferson's case. Jefferson demonstrates that the jury pool was actually biased against him by the introduction of extrinsic evidence.

Even though the remaining jurors indicated that they could be fair, they also expressed their concerns about the case which ultimately revealed an unsettling bias that prejudiced Jefferson. Accordingly, the Court must reverse the convictions and remand for a new trial. *Mach*, 137 F.3d at 633; *Gonzales*, 111 Wn. App. at 282.

5. JEFFERSON WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY THE BACKDOOR ADMISSION OF GANG EVIDENCE.

Improperly admitted gang evidence denied Jefferson his right to a fair trial.

a. The Trial Court Erred By Introducing Gang Evidence.

Admission of gang affiliation evidence is measured under the standards of ER 404(b). *State v. Scott*, 151 Wn. App. 520, 526,

213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004, 226 P.3d 780 (2010). Evidence of a defendant's gang membership creates a risk that the jury will improperly infer that the defendant has criminal propensities, acted in accordance with such propensities, and is therefore guilty of the charged offense. *People v. Williams*, 16 Cal.4th 153, 193, 66 Cal.Rptr.2d 123 (Cal. Ct. App. 1997).

Evidence of gang affiliation is considered prejudicial. *Scott*, 151 Wn. App. at 526 (citing *State v. Azalea*, 150 Wn. App. 543, 579, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001, 220 P.3d 207 (2009)). Simple association with gangs is enough to trigger propensity concerns *Ra*, 144 Wn. App. at 701-02.

Under proper circumstances, gang evidence may be admissible to show motive to commit a crime. *State v. Embry*, 171 Wn. App. 714, 732, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005, 300 P.3d 416 (2013). But "there must be a nexus between the crime and the gang before the trial court may find the evidence relevant." *Embry*, 171 Wn. App. at 732. The requisite nexus is what establishes the probative value of such evidence. *Embry*, 171 Wn. App. At 733.

Before the trial court may admit gang evidence under ER 404(b), it must (1) find by a preponderance of the evidence that misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect. *Embry*, 173 Wn.2d at 732 (citing *State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009)).

The court satisfies the first part of this test — that "misconduct" occurred — if the trial court finds that a defendant belonged to a gang. *Embry*, 171 Wn. App. at 733 (State presented evidence of the defendants' gang affiliation, the victim's affiliation with a different gang, and a previous altercation between members of the victim's and defendants' gangs); see also *State v. Saenz*, 156 Wn. App. 866, 874, 234 P.3d 336 (2010) ("The trial court found that the State established by a preponderance of the evidence that Mr. Saenz was a gang member, his street name was Spooky, he associated with other gang members who displayed certain colors and signs of their membership in a gang[.]").

Here there was no evidence that Jefferson was a member of a gang. The prosecutor informed the court that he did not know if Powell and Jefferson's monikers were gang names, but notwithstanding his concern, he asked the court to permit the witnesses to refer to Powell as "Shake Man" and Jefferson as "Baby Shake". RP 39-41.

The court had already agreed that this was not a gang case, no gang evidence was admissible and the use of the monikers implied more than a familial relationship. RP 40, 44-45. [Y]ou know, normally, "Baby Shake" would suggest there was some affiliation with Powell that was beyond just relatives, or cousins, or whatever ", and that this was not a gang case. RP 40, 44-45.

- b. Evidence Must Not Be Admitted To Show Bad Character Or Propensity To Commit Crime, And Even Character Evidence Theoretically Admissible For A Permissible Purpose Should Be Excluded If Prejudice Outweighs Probative Value.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). ER 402 prohibits

admission of irrelevant evidence. ER 403 prohibits admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. ER 404(b) prohibits admission of character evidence to prove the person acted in conformity with that character on a particular occasion.

"ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." *Wade*, 98 Wn. App. At 336. Prior misconduct is inadmissible to show the defendant is a "criminal type" and is likely to have committed a crime for which charged. *State v. Holstein*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). ER 404(b) also prohibits admission of evidence to prove bad character. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

Even relevant evidence is excludable if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403; *State v. Saltarelli*, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). ER 404(b) evidence is presumptively inadmissible. *State v. Gresham*, 173 Wn.2d 405,

421, 269 P.3d 207 (2012). In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the defendant. *Wade*, 98 Wn. App. at 334.

"If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for an abuse of discretion." *State v. Dawkins*, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). Failure to adhere to the requirements of an evidentiary rule is considered an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

c. Reversal Is Required Because Jefferson Was Prejudiced By Admission of Gang Evidence.

Reversal of the conviction is required because there is a reasonable probability that the jury's consideration of gang-related evidence prejudiced the outcome. Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe the defendant deserves to be punished for a series of immoral actions. *State v. Bowen*, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the

forbidden inference; thus, the normal 'presumption of innocence' is stripped away." *Id.*

"This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." *Wade*, 98 Wn. App. at 336.

Gang evidence is prejudicial due to its general "inflammatory nature." *Azalea*, 150 Wn. App. at 579. "It is common knowledge that there is a deep, bitter, and widespread prejudice against street gangs in every large metropolitan area in America." *People v. Rivera*, 145 Ill. App.3d 609, 617-18, 495 N.E.2d 1088 (Ill. Ct. App. 1986) (quoting *People v. Parrott*, 40 Ill.App.3d 328, 331, 352 N.E.2d 299 (Ill Ct. App. 1976)).

In *Scott*, and *Azalea*, gang evidence was admitted even though the defendants were not established gang members. The Courts in *Scott* and *Azalea*, held that evidence of the defendants' gang membership was not harmless. *Scott*, 151 Wn. App. at 529. Without a connection between gangs and the crimes, the only reasonable inference for the jury to draw from the testimony was

that the defendant was a bad person. Id.

Here, the court ruled that the parties could not make any reference to gang association. RP 45. The court also admonished the parties to refer to Jefferson by his true name and not his street name. RP 41. However, over defense objection, the court granted the state's motion to refer to Powell as "Shake Man", even though the court acknowledged that the use of the moniker's "suggest[ed] there was some affiliation with Powell that was beyond just relatives, or cousins, or whatever –" . RP 41, 44-45.

Defense counsel explained that many members of the community were aware of gang names and would recognize "Shake Man" as a reference to gang affiliation. RP 43 Witness references to "boy" and the incident occurring on Hosmer Street also made it likely the jury would understand Jefferson and Powell to be associated with gangs, even if other gang evidence was suppressed.

The court erred by permitting reference to "Shake Man" and "Baby Shake" because these are not innocent street names such as "Sweet pea" or "Beau". "Shake" is a derivative of "Shakedown" and elicits notions of "disturbing", "unsettling", "challenging".

“Shakedown” is “[a]nother word for extortion/blackmail, or the obtaining of a good or service through means of force, threats/intimidation, or abuse of power.” Urban Dictionary: <http://www.urbandictionary.com>.

“Shake” also means “to move sometimes violently back and forth or up and down with short, quick movements” Merriam -Webster: <http://www.merriam-webster.com/dictionary> or “to get into a fist fight,1 on 1” <http://www.urbandictionary.com>. “Baby Shake” next to “Shake Man” elicits the notion of disciple, protégé, or underling involved in violent activity.

Because this incident occurred on Hosmer Street which is known for gang activity, the reference to “Shake Man” was implicit gang evidence erroneously admitted without a nexus between the crime and gang membership. The gang-related references were irrelevant and unduly prejudicial.

As in *Scott*, implicitly associating Jefferson with a gang or gang activity was likewise prejudicial because, in the absence of a proper reason for admitting such evidence, juries naturally associate such groups with criminal activity and improperly convict on the basis of inferences as to the defendant's character.

Here Jefferson was denied his right to a fair trial by the introduction of irrelevant gang evidence. Reversal is required because there is a reasonable probability that the error affected the outcome. Accordingly, Mr. Jefferson should be granted a new trial.

6. PROSECUTORIAL MISCONDUCT DENEID
JEFFERSON HIS RIGHT TO A FAIR TRIAL.

A prosecutor's comments rise to the level of misconduct, if the comments are both improper and prejudicial. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014); *State v. Thorgersen*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Improper comments are prejudicial when there is a substantial likelihood that the prosecutor's comments affected the jury's verdict. *Lindsay*, 180 Wn.2d at 440; *Thorgersen*, 172 Wn.2d at 442-43.

a. Prosecutor Impugned Defense Counsel.

A prosecutor may argue that the evidence does not support the defense theory but the prosecutor may not impugn the integrity of defense counsel. *Lindsay*, 180 Wn.2d at 431-32; *Bruno v. Rushed*, 721 F.2d 1193, 1195 (9th Cir. 1983). In *Lindsay*, State Supreme Court held that the prosecutor impugned defense counsel

with the following comments: “she doesn’t care if the objection is sustained or not,” “ ‘We’re going to have like a sixth grader [argument],’ ” and “ ‘[W]ere into silly.’ ” *Lindsay*, 180 Wn.2d at 432. The prosecutor also made other jibes about counsel needing to be quiet. *Id.* Defense counsel also made jibes about the prosecutor. *Id.* Trial counsel moved for a mistrial which the trial court denied. *Lindsay*, 180 Wn.2d at 441.

The Supreme Court characterized the attorneys’ comments as “self-centered and rude” and a type of “incivility [that] threatens the fairness of the trial, not to mention public respect for the courts.” *Lindsay*, 180 Wn.2d at 432-33. The Court considered the conduct of counsel “an unthinkable disrespect for the trial court and the whole trial process.” *Lindsay*, 180 Wn.2d at 442.

The Court held that reversal was not required for this misconduct standing alone, but when the prosecutor called the defense case a “crook”, the court held that this was reversible error because “crook”, like the impermissible suggestion that defense counsel’s argument was “bogus” in *Thorgersen*, impermissibly impugned defense counsel, influenced the jury’s

verdict, and no instruction could have cured the prejudicial effect.

Lindsay, 180 Wn.2d at 438, 442-44.

Here, the prosecutor and defense exchanges were equally as appalling as in *Lindsay*. The prosecutor in a heated direct examination of a hostile witness called counsel “Barbara”. RP 644. The prosecutor, in front of the jury made speaking objections accusing defense counsel of testifying. RP 246-47, 340, 347-49. The prosecutor made speaking objections in front of the jury against Wortham in an effort to impeach Wortham, who was clearly more aligned with the defense. RP 443-53.

The prosecutor, in front of the jury, asked the court to instruct Jefferson’s father to be quiet. RP 647, 1007-08. In front of the galley, the prosecutor told defense counsel to “shut the fuck up”. RP 667, 669. The prosecutor denied using the word “fuck” but Jefferson informed the court that he heard the prosecutor yell at defense counsel. “You said shut the fuck up and get the fuck outta my face.” RP 671.

During closing, even though the court sustained defense counsel’s objections to the prosecutor repeatedly informing the jury that defense counsel “agreed” with his arguments, these comments

together with the other misconduct impugned defense counsel by: denigrating defense counsel's status ("Barbara") and ability (agreed), implying that she was not doing her job by agreeing with the prosecutor and not challenging the evidence. RP 1312-13.

Like the terms "crook" and bogus" which although more explicit that telling the jury that "Barbara" agreed with his arguments, the prosecutor's treatment of counsel was derogatory and demeaning of her professional status in much the same manner as in *Thorgeson* and *Lindsay*. The prosecutor used impermissible speaking objections to testify against counsel, and the court's refusal to provide a proper curative instruction permitted the prosecutor without limitation to impugn defense counsel to Jefferson's prejudice. The remedy is to reverse the conviction and remand for a new trial. *Lindsay*, 180 Wn.2d at 443-44.

7. APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE BY THE TRIAL COURT'S DENIAL OF HIS MOTION TO PERMIT ITS EXPERT TO PRESENT PHOTOGRAPIC IMAGES OF THE SCENE OF THE INCIDENT.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process and

Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.

State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); Const. art. I, § 22.

a. The State and Federal Constitutions Protect a Defendant’s Right to Present A Defense.

i. Article 1, Section 22.

Under Washington law, it is established that where a defendant is denied his right to present a defense, the error is prejudicial. *State v. Koch*, 157 Wn.App. 20, 33, 237 P.2d 287 (2010). A constitutional error is prejudicial unless the State proves

beyond a reasonable doubt that the error did not affect the outcome of the case. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). The State cannot meet this burden here.

ii. The Sixth Amendment.

“The Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Holmes*, 547 U.S. at 324. An accused person also has the right to compulsory process, a right which stands on equal footing with other Sixth Amendment rights. *Texas*, 388 U.S. at 18; U.S. Const. amends. VI; XIV. “Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 401 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

This Court reviews de novo whether a trial court’s evidentiary ruling violates a defendant’s Sixth Amendment right to present a defense. *Jones*, 168 Wn.2d at 719. Where an accused person seeks to introduce evidence in his defense, the presumption is admissibility, and admissibility is governed simply by relevance. *State v. Darden*, 145 Wn.2d 612, 621-22, 41 P.3d 1189 (2002).

“The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.” *Darden*, 145 Wn.2d at 621. Where evidence proffered by a defendant is relevant, “the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 622.

Further, the State’s interest in exclusion must be balanced against the defense need for the evidence. Only if the State’s interest outweighs the defendant’s need may relevant evidence offered in the accused’s defense be excluded. *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 622.

b. Defense Theory

The state introduced still photographs from the gas station surveillance but the defense was not allowed to do the same using its witness Pitt because the trial court wanted to end the trial soon and did not want to wait for Pitt who had dislocated his shoulder. RP 1044-46, 1051-59; 2RP 5-6.

The State’s theory was that Jefferson got involved in a dispute over a pair of stolen glasses belonging to a person he had just met, but who was a friend of his cousin/uncle, Powell. The

defense theory was that Powell was the shooter, and police investigators, through ineptitude failed to engage in adequate forensic investigation of the bullets, clothing on the victim, trajectory analysis and DNA analysis. Jefferson in the defense case-in-chief tried to present: (1) of “other suspect” defense evidence; and (2) sloppy investigative techniques that would have undermined the State’s theory. The trial court unfairly limited the scope of the testimony of the defense expert and defense investigator.

c. Defense Investigator
Evidence Was Relevant;
Not Cumulative and Not
Confusing To The Jury.

The defense requested permission to present evidence of still frames taken from the gas station security video to show what Powell was doing when the shooting occurred. RP 1044-46. The prosecutor argued that he did not know what the investigator Pitt was going to testify to even though he and Pitt looked at the video and freeze frames together, and the prosecutor gave the videos to Pitt. RP 1043-45. The prosecutor knew that the defense simply wanted to show freeze frames to the jury from the video to permit the jury to decide what it saw. RP 1045-46.

The court admonished counsel that she was not adequately prepared because her investigator did not have his notes indicating the precise sequence of the photographs. RP 1048. Counsel argued the evidence was relevant, there was no surprise to the state and necessary to the defense. RP 1048-52. The court excluded the evidence because the court believed the following:

No. 1, the first set is cumulative.

No. 2, Mr. Pitt can't say for sure what camera is what, or what's being depicted.

No. 3, Mr. Pitt can't lay a foundation. He's not a witness with knowledge that the matter is what it claims to be.

No. 3, (verbatim) it's cumulative. We've seen that first set of pictures before. And, finally, it's confusing to the jury. What is the jury supposed to do? Look at those pictures and try to ascertain what they mean, what they depict, who is who? And nobody can tell them because Mr. Pitt can't testify to it. So, finally, Mr. Pitt has obviously taken snippets of photos from a video, but he can't tell us whether they're in any sequence; whether we took the first two minutes; or who got the ones that I thought would look good from the first couple of minutes and then the last minute. We don't know any of that, and nobody can explain that to the jury. Ms. Corey, you can't because then you'd be a necessary witness. He can't; he doesn't have first-hand knowledge. So I'm going to not have Mr. Pitt testify, and I'm going to exclude this lately -- this evidence that is not

timely, it is confusing, it's cumulative, and that there's no foundation for. And I'll note your objection for the record. He took this one from Minute No. 4, or 5, or 3, or 1; or I

RP 1052-54. The evidence was not cumulative to the defense, but its omission prejudicial because the defense was not permitted to present a defense, whereas the state was permitted to show to the jury other freeze frames from the same video. RP 1046-47.

The court's ruling was erroneous because the evidence was: relevant to show the possibility that Powell was the shooter; necessary for Jefferson to be able to present his defense, and not cumulative or confusing, in much the same manner that the state's video still frames were relevant to the state, not unduly prejudicial to the defense and necessary for the state to present its case. RP 1048. The trial court also erred in ruling that there was no foundation because the same video and still frames from the state were introduced over defense objection. RP 474-92.

Without a valid distinction between the defense freeze frames of the gas station video and the state's freeze frames of the same video based on stills from the same video, the court suppressed the defense images. RP 1044-46, 1051-54. Moreover,

the state's witnesses did not identify anyone in the videos but only established the location to be the gas station. RP 456, 464, 468-471, 474-450, 1044-46, 1051-54.

The court allowed the state to play the video and show still photos which it believed indicated Jefferson as the shooter not Powell, but no witness testified in court that Jefferson was the shooter. *Id.* Rather, the jury was left to decide what was in the video and the state's freeze frames. *Id.*

Wortham testified that she lied when she told the police that Jefferson was the shooter. RP 501-03, 610-11. Robinson on the other hand told the police that Powell was the shooter. RP 1040. The defense still frames of the video supported the defense theory. The trial court ruling suppressing the photos denied the defense the opportunity to argue their theory of the case with relevant evidence. *Darden*, 145 Wn.2d at 621-22.

Under *Darden*, even minimally relevant evidence offered in an accused's defense is admissible, and must be presented to the jury unless the State can demonstrate a compelling need for the evidence's exclusion that outweighs the accused's constitutional right. *Darden*, 145 Wn.2d at 621-22. Photographic evidence that

Powell may have been the shooter was essential to the defense attack on the state's case. The state did not demonstrate a compelling need to exclude the evidence. The state simply wanted the advantage of presenting its version of the facts without a competing defense version. RP 1043-55.

This Court should conclude that trial court's ruling violated Jefferson's state and federal constitutional rights to present his defense theory of the case.

- d. Jefferson Was Denied His Constitutional Right to Present a Defense.

Jefferson was denied his Sixth Amendment rights to compulsory process and to a defense that would have undermined the State's theory. The State, did not demonstrate a compelling reason for suppressing the evidence, and certainly none that outweighed Jefferson's constitutional right to present a defense. *Darden*, 145 Wn.2d at 621-22.

The state complained that it did not know the nature of Pitt's testimony and that Pitt could not lay a foundation for the freeze frames, but this is inaccurate. The prosecutor knew that he and Pitt

viewed the video together, the prosecutor gave Pitt the video to make freeze frames, and the foundation Pitt could have laid was identical to the foundation the state laid for the video: that the video was accurate and the still frames came from the video. RP 473-82.

e. The Constitutional Error Requires Reversal.

The State bears the burden of proving constitutional error harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24; *Jones*, 168 Wn.2d at 724. In *Jones*, the exclusion of evidence material to Jones's defense theory prevented Jones from presenting his version of the events. *Id.* Despite the existence of direct evidence that Jones had committed the charged offense, the Court found that a reasonable jury, presented with the evidence the trial court had excluded, may have reached a different result. *Jones*, 168 Wn.2d at 725. Accordingly, the Court concluded the error was prejudicial and remanded for a new trial. *Id.*

Here, the prosecutor knew the nature of Pitt's testimony because he objected to it on grounds of lack of foundation. The prosecutor however was in possession of the video and laid a foundation with its witness identical to the foundation Pitt offered.

However, unlike the court's ruling for the state, here the court's suppression of this testimony unconstitutionally denied Jefferson his right to present a defense because as in *Jones*, a reasonable jury, presented with the evidence the trial court had excluded, may have reached a different result. *Jones*, 168 Wn.2d at 725. Accordingly, this Court must reverse the convictions and remand for a new trial.

8. JEFFERSON WAS DENIED DUE PROCESS WHERE THE TRIAL COURT FAILED TO DELINEATE IN THE TO CONVICT INSTRUCTION, THE ESSENTIAL ELEMENT OF PREMEDITATION.

The "to convict" jury instruction in Jefferson's case failed to list the essential element of "premeditation". CP 141-179.

The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld." *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Accordingly, "a 'to convict' [jury] instruction must contain all of the elements of the crime because it serves as a ' yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v.*

Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010)², *citing*, *State v. Smith*, 131 Wn. 2d 258, 263, 930 P. 2d 917 (1997), *quoting*, *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953).

The jury must not be required to look to other instructions to supply a missing element from a “to convict” jury instruction. *Smith*, 131 Wn. 2d. at 262-63. “An instruction purporting to list all of the elements of a crime must in fact do so.” *Smith*, 131 Wn.2d at 262-263, *quoting*, *Emmanuel*, 42 Wn. 2d at 819-820.

An accused is denied his right to a constitutional trial when the trial court fails to delineate in the “to convict” instruction all of the essential elements of the crime charged. *Smith*, 131 Wn.2d at 262-263; *Emmanuel*, 42 Wn.at 821.

In *Emmanuel* the defendant admitted the homicide and the court provided a to-convict instruction defining murder in the second degree that omitted the terms “excusable or justifiable”. This was reversible error. *Emmanuel*, 42 Wn.2d at 820-821. In *Smith*, 131 Wn.2d at 262-263, the Supreme Court reversed the Court of Appeals, where the to convict instruction read “crime of

² In *Seibert*, a controlled substance case, the narcotic was not an essential element because it did not increase the maximum sentence. *Sibert*, 168 Wn.2d at 311.

Conspiracy to Commit Murder in the First Degree’ rather than the required, ‘crime of Murder in the First Degree’ since First Degree Murder was the subordinate crime of the alleged conspiracy.” *Smith*, 131 Wn.2d at 262.

The Court in *Smith*, citing to *Emmanuel*, reiterated that “jurors are not required to supply an omitted element by referring to other jury instructions.” *Smith*, 131 Wn2d at 263.

The “to convict” murder instruction in the instant case omitted the essential element of premeditation. The “to convict” instruction number 11, the “yardstick” provided in Jefferson’s case delineated the elements of attempted first degree as follows:

To convict the defendant of Attempted Murder In the First Degree, each of the following elements must be proved beyond a reasonable doubt:

1. That on or about the 15th day of February 2013, the defendant did an act that was a substantial step in the commission of Murder in the First Degree;
 2. That the act was done with intent to commit Murder in the First Degree; and
 3. That the act occurred In the State of Washington;
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CP 141-179 (JI 11). The essential element of premeditation is missing. *Sibert*, 168 Wn.2d at 311.

First degree murder as charged in the instant case under RCW 9A.32.030(1)(a); provided in relevant part as follows:

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

(a) With a **premeditated** intent to cause the death of another person, he or she causes the death of such person or of a third person;

(emphasis added) RCW 9A.32.030(1)(a). Under *Smith*, and *Emmanuel*, this omission was reversible error.

a. Missing Element Not Harmless Error

“[I]t is the duty of the court to define to the jury the elements of the offense with which the accused is charged and such definition must be at least not misleading.” *Id.*

An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless. *Smith*, 131 Wn.2d at 264-265 (citing, *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). “A harmless error is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case.*” (Emphasis in original) *Wanrow*, 88 Wn.2d at 237. Once an error is established to be prejudicial, it is

the State's burden to show that it was harmless. *State v. Burri*, 87 Wn.2d 175, 182, 550 P.2d 507 (1976).

In finding the error prejudicial and reversible error in *Smith*, the Court cited to *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325 (1995), noting that the trial court's failure to instruct the jury that intent was an element of attempted rape was not harmless error. *Smith*, 131 Wn.2d at 264-265, citing, *Aumick*, 126 Wash.2d at 430, 894 P.2d 1325. The Court in *Smith* made clear that even when other instructions supply the missing element, when the "to convict" instruction omits an a element it is not possible to "conclude that the erroneous instruction 'in no way affected the outcome of the case.'", Thus the error can never be harmless. *Smith*, 131 Wn.2d at 264-265. The reviewing Courts "assume that the jury relied upon the "to convict" instruction as a correct statement of the law." *Id.*

In this case, under *Smith* and *Emmanuel*, the error of omitting the premeditation element is not harmless and the conviction must be reversed and the matter remanded for a new trial.

9. JEFFERSON WAS CONVICTED OF
ATTEMPTED MURDER IN THE FIRST
DEGREE BASED ON INSUFFICIENT

EVIDENCE TO ESTABLISH GUILT BEYOND A
REASONABLE DOUBT.

a. Standard of Proof

When determining questions of insufficient evidence to establish a crime, the appellate Court reviews 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 offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Asaeli*, 150 Wn. App. 543, 567, 208 P.3d 1136 (2009); *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). This rule follows from the *Winship* doctrine that due process requires the government prove every element of a crime upon which a defendant is convicted beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed. 2d 368 (1977).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “In determining the sufficiency of the evidence, circumstantial evidence is as reliable as direct evidence.” *State v.*

Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The appellate Court will defer to the trier of fact on any issue that involves “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

b. Attempted First Degree Murder

Jefferson was charged directly and as an accomplice with attempted murder in the first degree by taking a substantial step toward the commission of that crime with premeditated intent to kill Robinson. RCW 9A.32.030(1)(a). To prove Jefferson was an accomplice to Robinson’s murder, the State had to prove beyond a reasonable doubt that Jefferson (1) took a substantial step toward the commission of attempted first degree murder, (2) knew his actions would promote or facilitate the crime of premeditated first degree murder, (3) was present and ready to assist in some manner, and (4) was not merely present at the scene with some knowledge of potential criminal activity. RCW 9A.08.020(3). RCW 9A.32.030(1)(a).

As discussed, *supra*, the to-convict instruction did not require the jury to find the element of “premeditation. Premeditation was

defined in a different instruction from the to-convict instruction as:

thought over beforehand. When a person, after any deliberation forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than just a moment in appoint of time. The law requires some time, however long or a short, in which a design to kill is deliberately formed.

CP 141-179 (JI 8). Attempt under RCW 9A.28.020 provides in relevant part:

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

Id. The court instructed the jury that

A person commits the crime of attempted Murder In the First degree, when, with intent to commit that crime, he does nay act that is a substantial step toward the commission of that crime

CP 141-179 (JI 6).

In this case there was no evidence of premeditation. The evidence revealed that Powell and Jefferson went to the bar together, Jefferson did not know Wortham, Goodman or Robinson. RP 418-19, 496, 838-40, 901, 979. Jefferson and Powell tried to

reason with Robinson to return Goodman's glasses, and that Powell and perhaps Jefferson went to the gas station. RP 421-25,

No witness overheard a conversation between Jefferson and Robinson or identified Jefferson as the shooter. Wortham explained that she lied to police about Jefferson being the shooter because she was treated badly by the police. RP 439-40, 475, 501-03, 610-612, 635-37, 650-51, 915. Goodman, who was drunk, did not see Jefferson at the gas station but knew he was there. RP 866-67. Goodman also lied to the police about Jefferson's involvement after the shooting. RP 822. Goodman was fighting with the woman she believed had her glasses when she heard a shot, but she did not see the shooting. RP 893-898.

These facts do not establish premeditation or that Jefferson was the shooter. *Asaeli*, is instructive. In *Asaeli*, the evidence established that Vaielua went to a bar with his codefendants, that he was present at the park where the shooting took place, that he drove Williams, the person who approached Blaac Fola (the deceased) and asked him to fight, and that Vaielua was aware that some members of the group he was with were trying to locate Fola. Vaielua was standing nearby talking to a friend of Fola's when

Fola was shot. *Asaeli*, 150 Wn.2d at 568-70.

The Court held that this evidence failed to show that *Asaeli* was planning to kill *Blaac* or that *Vaielua* was present at the scene with more than mere knowledge of some potential interaction with *Fola*. *Asaeli* 150 Wn2d at 568.

At best, this evidence is sufficient to suggest that *Vaielua* and the others agreed to meet at the park after the bar closed and that *Vaielua* may have known that someone from his group was trying to locate *Fola*. But the record contains no evidence, direct or indirect, establishing that *Vaielua* was aware of any plan, by *Asaeli*, *Williams*, or anyone else, to assault or shoot *Fola*.

Asaeli, 150 Wn.2d at 568-569.

The Court in *Asaeli* affirmed that the “law is well settled that mere presence is not sufficient to prove complicity in a crime.” *Asaeli*, 150 Wn.2d at 568-570. While this case was charged as an accomplice liability case, the state did not pursue accomplice liability. Nonetheless, *Powell* was involved in the incident and the facts established that *Jefferson* was likely just present.

Jefferson was present at the bar, but did not know any of the other participants. He did try to assist *Powell* in trying to reason with *Robinson* but there was no evidence that shot *Robinson* other than

the witnesses' recanted testimony.

This evidence is insufficient to establish that Jefferson committed attempted murder and insufficient to establish the element of premeditation. Accordingly, this Court must reverse the convictions and dismiss with prejudice.

10. JEFFERSON WAS CONVICTED OF
ILLEGAL POSSESSION FO A FIREARM
BASED ON INSUFFICEINT EVIDENCE
TO ESTABLISH GUILT BEYOND A
REASONABLE DOUBT

There was no evidence that Jefferson possessed a firearm, there was no firearm or forensic evidence connecting Jefferson to the gun. No one saw or described a gun, the gun was never located and Jefferson was not identified as ever handling a gun.

Jefferson's did not make a half time motion to dismiss the firearm charge, but did so for the attempted murder charge. RP 1070.

RCW 9.41.040, possession of a firearm provides in relevant part:

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm

after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

Possession may be either actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession occurs when the contraband is in the personal custody of the person charged. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

No witness saw Jefferson in possessing of a gun. RP 437-441, 628-29, 638-39, 700-01, 893-98. Rather, state's witnesses believed Jefferson was present at the gas station. That is simply insufficient to establish directly or by reasonable inference that Jefferson illegally possessed a gun. Accordingly, this Court must reverse the conviction and remand for dismissal with prejudice.

11. JEFFERSON WAS DENIED
EFFECTIVE ASSISTANCE OF
COUNSEL.

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. *Thomas*, 109 Wn.2d at _____. The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156

Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and Washington Article I, section 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33; citing,

State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004);
State v. Aho, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). “The remedy for lawyer's ineffective assistance is to put defendant in position in which he would have been had counsel been effective.” *State v. Hamilton*, 179 Wn.App. 870, 879, 320 P.3d 142 (2014). In this case, counsel's conduct constituted ineffective assistance of counsel.

Representation of a criminal defendant entails certain basic duties.’ *Strickland*, 466 U.S. at 688. These duties include loyalty,

the avoidance of conflicts of interest, advocacy for the defendant, and the duty 'to consult with the defendant on important decisions,' 'to keep the defendant informed of important developments in the course of the prosecution,' and 'to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.' *Strickland*, 466 U.S. at 688 (citing *Powell v. Alabama*, 287 U.S. 45, 68, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

The question whether an attorney renders ineffective assistance of counsel when counsel violates the Rules of Professional Conduct is one of law. *State v. Garrett*, 124 Wn.2d 124 504, 517, 881 P.2d 185 (1994); *Eriks v. Denver*, 118 Wn.2d 451, 457 , 424 P.2d 1207 (1992) (citations omitted). Here, defense counsel was deficient by conducting herself unprofessionally.

In *State v. Garrett*, 124 Wn.2d 504, 521-23, 881 P.2d 185 (1994), defense counsel was "confrontational", "discourteous and disrespectful" toward the court. "From the entire record it can only be concluded that defense counsel was disrespectful, abusive, antagonistic and insulting in total disregard for the respect due the court." *Garrett*, 124 Wn.2d at 521. In *Garrett*, most of the

misconduct was conducted outside the presence of the jury and counsel was a zealous advocate. *Garrett*, 124 Wn.2d at 521-22. Also significantly different from Jefferson's case, the court therein "was gentle and restrained when dealing with counsel." *Garrett*, 124 Wn.2d at 522. The Supreme Court not the trial court referred counsel's conduct to the WSBA. *Garrett*, 124 Wn.2d at 522.

Here by contrast, not only was counsel brash, but she accused the court and prosecutor of misconduct; the trial court was enraged with her throughout the month long trial; and the trial court referred counsel's conduct to the WSBA in his own. RP 534, 655-68, 1116-18. The trial court repeatedly considered counsel's behavior to violate the rules of professional conduct, and the prosecutor accused counsel of the crime of interfering with a witness. RP 534, 655-68, 1116-18.

This conduct is quite different from the foul and offensive conduct in *Garrett*. The Court held that offensive conduct alone did not deprive Garrett of his right to the effective assistance of counsel, but here, counsel's conduct so provoked the trial judge that he did not behave impartially toward the defense; he yelled at Jefferson, Jefferson's father, repeatedly informed counsel that she

violated the rules of professional conduct, and the court acted as a prosecutor to reign in counsel's conduct. Defense counsel's provocation of the trial court does not excuse the judge's inability to behave impartially, but it was deficient performance that prejudiced Jefferson.

Counsel's behavior here seriously undermined Jefferson's confidence in her ability and he repeatedly asked the court for new counsel, which the trial court repeatedly denied 2RP 10. Here, counsel's performance was deficient and prejudicial because the trial court had determined that counsel committed misconduct and clearly had misgivings about her integrity.

Here, the State's evidence was not very strong. The state's two eyewitnesses denied identifying Jefferson and no one identified Jefferson in the video as the shooter. There was no forensic evidence connecting Jefferson to the shooter gun, there was no trajectory evidence connecting Jefferson to the shooting, the car involved in the shooting was Powell's, not Jefferson's, and Robinson positively identified Powell, not Jefferson as the shooter.

If counsel had not incurred the anger and distrust of the court, the court might not have made so many *sua sponte*

objections to counsel's trial tactics, strategies. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

Counsel's conduct so prejudiced the trial court against Jefferson that counsel was deficient and prejudicial. And without the misconduct, the court likely would have ruled differently on many significant issues that would have, within a reasonable probability, altered the outcome of the trial. Accordingly, this Court must reverse the convictions and remand for a new trial

12. CUMULATIVE ERROR DENIED
JEFFERSON HIS RIGHT TO A FAIR
TRIAL.

Cumulative error can deny a defendant his constitutional right to a fair trial in cases where the state's evidence is not overwhelming. *State v. Cross*, 180 Wn.2d 664, 678, 327 P.3d 660 (2014) (citing, *In re Detention of Coe*, 175 Wn.2d 482, 515,, 286 P.3d 29 (2012); *State v. Coe*, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); *State v. Gallegos*, 286 Kan. 869, 190 P.3d 226 (2008)) Cumulative error occurs when a combination of trial errors deny the defendant a fair trial. *Cross*, 180 Wn.2d at 678.

In *Coe*, the trial court made a number of erroneous rulings

which cumulatively denied Coe his right to a fair trial. The Court erroneously admitted evidence of a petty theft to impeach Coe. *Coe*, 101 Wn.2d at 775. The Court erroneously permitted the state to cross-examine Coe regarding a letter related to an inadmissible conviction. *Coe*, 101 Wn.2d at 776. The Court permitted a witness to describe irrelevant sex with the defendant. *Coe*, 101 Wn.2d at 776-78. The Court permitted evidence that Coe was in the area where a man had made lewd gestures and comments to another woman on a different occasion. *Coe*, 101 Wn.2d at 779.

The Court permitted cross examination of Coe about a book he wrote that had certain types of sex scenes. *Coe*, 101 Wn.2d at 780-81. There were also a number of state discovery violations. *Coe*, 101 Wn.2d at 780-81. The Court held that the cumulative errors prejudiced Coe's right to a fair trial. "While it is possible that some of these errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial. *Coe*, 101 Wn.2d at 789.

Here, the trial court denied each of the defense motions for a mistrial made both during and after the trial. RP 346-47, 349-51,

479, 591, 672-73, 1044-46, 1051-59, 1133; 2RP 3-21. First, the court refused to give a *Lindsay* instruction after the prosecutor accused defense counsel of testifying in front of the jury. RP 346-51.

Second, the court refused to grant a new trial after the prosecutor introduced a blurry image of a man at the gas station that no one could identify but the prosecutor was going to argue was Jefferson. RP 479. Third, the court refused to grant a new trial after the police investigator commented on Jefferson's right to silence. RP 1022-25. Fourth, the court refused to grant a new trial after the jurors' informed the court that they learned that the shooter car followed and watched two jurors walking to the parking lot. RP 1241. Fifth, the court refused to grant a new trial after the prosecutor shifted the burden of proof during closing argument by informing the jury that the defense should have tested the state's evidence. RP 1326.

The trial court also acted as the prosecutor by making *sua sponte* objections against defense counsel, referred her conduct to the WSBA, was hostile towards counsel, Jefferson and his family, was generally failed to maintain a peaceful, impartial decorum in

the court room, and was overly familiar with the jury.

While these errors individually might not have denied Jefferson his right to a fair trial, cumulatively, his trial was a gross farce with misconduct occurring from all corners of the triangle: the bench, the prosecutor and defense counsel. Cumulatively, the errors in this case denied Jefferson his right a fair trial, to the presumption of innocence, to a fair and unbiased judge, to a fair and unbiased jury, to a prosecutor who behaved without misconduct, to a defense attorney who behaved without misconduct, to a jury of his peers and to a jury verdict based on relevant facts, not based on inadmissible, irrelevant inflammable gang evidence.

Here the individual and cumulative errors denied Jefferson his right to a fair trial because there is a substantial likelihood that the prejudice affected the verdict. *Greiff*, 141 Wn.2d at 921. Accordingly, this Court must reverse the convictions and remand for a new trial.

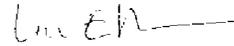
D. CONCLUSION

Tyree Jefferson respectfully requests this Court reverse his convictions and remand for a new trial, with new counsel, a

different prosecutor and in front of a different judge.

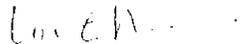
DATED this 31st day of March 2016

Respectfully submitted,



LISE ELLNER
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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor – pcpatcecf@co.pierce.wa.us and the Pierce County Court and Tyree Jefferson DOC# 305122 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362, on March 31, 2016 a true copy of the document to which this is attached. Service was made by depositing in the mails of the United States of America, properly stamped and addressed to Mr. Jefferson and electronically to the prosecutor.



Signature

ELLNER LAW OFFICE

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