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No. 62864-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN LEE,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 29 PM 4:53

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Steven Lee's trial on charges of premeditated murder and first degree felony murder, the trial court admitted hearsay evidence of a statement made by Mr. Lee's non-testifying co-defendant that implicated Mr. Lee in the shooting of the victim, violating his Sixth Amendment and Article 1, § 22 confrontation rights pursuant to Crawford v. Washington¹ and Bruton v. United States.²

2. The violation of Mr. Lee's confrontation rights constituted manifest constitutional error under RAP 2.5(a)(3).

3. The violation of Mr. Lee's confrontation rights was not harmless beyond a reasonable doubt.

4. Trial counsel provided ineffective assistance in failing to object to the hearsay evidence.

5. The trial court erred at sentencing when it merged Mr. Lee's premeditated murder conviction into his felony murder conviction, but failed to vacate the merged offense.

¹See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004).

²See Bruton v. United States, 391 U.S. 123, 126, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Lee was prosecuted in a joint trial with co-defendant Tsegazeab Zerahaimanot on two counts of murder arising out of the shooting death of Forrest Starrett, apparently caused by two separate shooters. A State's witness, Leroy Holt, testified about a telephone conversation that he had with Mr. Zerahaimanot in which Holt told or reminded Zerahaimanot that Lee had specifically been responsible for shooting Starrett in the head. The deputy prosecutor then purposefully elicited from the witness that Zerahaimanot had not "taken issue" with Holt's statement that Lee shot Starrett.

(a) Was Zerahaimanot a declarant uttering an out-of-court statement for purposes of the definition of hearsay at ER 801?

(b) Did Holt's hearsay testimony violate Mr. Lee's Sixth Amendment and Article 1, § 22 confrontation rights, pursuant to Crawford v. Washington and Bruton v. United States?

(c) Did the admission of Holt's hearsay testimony constitute "manifest constitutional error" under RAP 2.5(a)(3) for purposes of preservation of the error for appeal, where there was no objection by trial counsel?

(d) Was the constitutional error harmless beyond a reasonable doubt?

2. Was Mr. Lee's trial counsel deficient in failing to object to this hearsay evidence, where nothing in the rules defining non-hearsay or any exception to the hearsay bar applied to render Zerhaimanot's statement admissible, including ER 801(d)(2)(v) (statement by co-conspirator in furtherance of conspiracy)?

3. The State's case against Mr. Lee was predicated on the vague, contradictory, thoroughly impeached, and frequently incomprehensible testimony of one witness, Michelle Walker, a long-term user of crack cocaine who was heavily intoxicated by the drug at the time of the incident, and the similarly impeached testimony of another witness, Leroy Holt, who was observed fleeing the scene and tried to change his appearance to avoid apprehension, and was himself a viable other suspect in the shooting. Mr. Zerhaimanot's assertion that Mr. Lee shot Mr. Starrett was inculpatory on its face, but it also carried the additional, powerfully incriminating unfair prejudice that is inherent in one defendant's implication of the other, as recognized in Bruton. There was no conceivable tactical justification for counsel's failure to object to the single most significant, though inadmissible, piece of evidence against his client. Was counsel's deficient performance in failing to object to the hearsay evidence sufficient to undermine this Court's confidence in the outcome of trial?

4. Did the trial court err in denying the parties' agreed request that the court vacate the conviction that the court had merged at sentencing?

C. STATEMENT OF THE CASE

1. Procedural history. Steven Lee and co-defendant Tsegazeab Zerhaimanot were two individuals among a large group of persons present at the duplex apartment home of Michelle Walker, in Everett, Washington, during the night of August 20, and the early morning hours of August 21, 2007. CP 146; 11/20/08RP at 471. The majority of the persons who had assembled at Walker's home were there to use, sell, and/or purchase "crack" cocaine, and most were long-term users of the drug. CP 146-48; 11/21/08RP at 614-18.

At some point during the early morning hours of the 21st, Forrest Starrett, one of the drug users who had gathered at the home, was shot to death near the cab of his pick-up truck in the apartment complex's parking lot. 11/19/08RP at 245-50, 11/20/08RP at 441. It was later determined that Starrett was shot once in the head and twice in his lower body. 12/1/08RP at 1377. Numerous persons rapidly left the area when the shooting occurred, including Leroy "Packy" Holt, Mr. Zerhaimanot, and Mr. Lee. CP 147; 11/19/08RP at 320, 11/20/08RP at 496, 11/24/08RP at 825, 829-32. Mr. Holt, who

tried to change his appearance by taking his shirt off, was seen fleeing the scene. 11/24/08RP at 831.

Mr. Lee and Mr. Zerhaimanot were singled out as the shooters, were subsequently arrested, and were charged with premeditated murder and first degree felony murder (based on kidnaping) pursuant to RCW 9A.32.030(1)(a) and (c). CP 147-48.

At the defendants' joint trial, Michelle Walker said she saw two persons guide Mr. Starrett out of the house to his truck, just prior to hearing the gunshots, and at times in her testimony, she indicated she believed the two men were the defendants. 11/20/08RP at 492, 496-98. Leroy Holt denied involvement in the shooting, and claimed to have heard the first gunshot or gunshots, and then to have observed Lee shoot Starrett. 11/24/08RP at 816, 825-29. The testimony of both of these witnesses was subject to a considerable impeachment, based on their record of felony crimes of dishonesty, prior inconsistent statements, internal contradictions in their trial testimony itself, drug use and long-term addiction, and, specifically as to Holt, a favorable deal that the State struck with him that allowed him to avoid a prosecution and sex offender registration arising out of a charge of Rape of a Child. 11/13/08RP at 103, 11/20/08RP at 471, 11/21/08RP at 574-75, 588-89, 614. The remainder of the State's evidence at trial consisted of testimony regarding contemporaneous but mostly

irrelevant, collateral events from a parade of witnesses whose perceptive abilities on the night in question were addled by cocaine. In total, the evidence that Mr. Lee shot Mr. Starrett was simply scant.

However, during examination of Mr. Holt, the deputy prosecuting attorney elicited evidence of an out-of-court statement made to Holt by Mr. Zerahaimanot, in which Zerahaimanot appeared to admit to being one of the persons who shot Mr. Starrett, and also directly implicated Mr. Lee as the other shooter. 11/25/08RP at 1035. This latter statement was hearsay, and unfortunately, but for obvious reasons, Mr. Lee was unable to cross-examine or confront the declarant, who was his co-defendant.

The jurors deliberated for three days, but ultimately returned verdicts of guilty as to both defendants on charges of premeditated first degree murder and first degree felony murder based on kidnaping. 12/10/08RP at 2173-74; CP 242-45.

Mr. Lee waived his jury trial rights on a third count charging second degree unlawful possession of a firearm (VUFA) pursuant to RCW 9.41.040(2). CP 222, 227; 12/10/08RP at 2177-79. The trial court found him guilty on that count based on his prior felony conviction for Taking a Motor Vehicle Without Permission. CP 33-34.

At sentencing, the trial court merged Mr. Lee's premeditated murder conviction into his felony murder conviction, but denied an

agreed request by the parties to vacate the merged offense. Mr. Lee was then sentenced to a term of 407 months incarceration, which included sentences on a firearm enhancement, and on the conviction for VUFA. 12/16/08RP at 2197-98.

Mr. Lee appeals. CP 6.

2. Pertinent facts. On August 21, 2007, at approximately 4:42 a.m., the police responded to several 911 calls reporting a shooting in the parking lot outside an apartment building at 8717 Holly Drive in Everett. Officers discovered Forrest Starrett's body on the ground alongside his pickup truck. 11/19/08RP at 235, 12/1/08RP at 1377. Witnesses at the scene indicated that, before he was shot, Starrett had been inside apartment #3, a duplex residence leased by Michelle Walker. 11/19/08RP at 336

Mr. Starrett had arrived at Walker's apartment sometime the night before, for a visit. 11/19/08RP at 276. Walker and Starrett both used crack cocaine; Walker, who was "freebasing," had been ingesting the stuff since she woke up on the morning of the 20th. 11/19/08RP at 275-78, 11/21/08RP at 574-75. A number of other people came and went from the apartment during the evening; virtually all were there for drug use. 11/19/08RP at 277-79.

Starrett was socializing and using crack cocaine in a den area in the upstairs part of the apartment. 12/1/08RP at 219. At some point in the early morning hours, a group of males gradually gathered in the downstairs area of the apartment, including Leroy Holt, known as "Packy," and Aaron Hill, known as "Capone." 11/19//08RP at 310-12. Later, Steven Lee, and Tsegazeab Zerhaimanot, who was also known as "Keylo," arrived at the apartment together. 11/20/08RP at 476-77. While Lee, Zerhaimanot, Holt, and Hill congregated downstairs, Michelle Walker became annoyed with the noise they were making, and miffed that she was not the beneficiary of any of their drugs, so she tried to get them to leave. 11/20/08RP at 483-88. The men would not leave, however, so at one point, from upstairs, Walker borrowed Forrest Starrett's cell phone and used it to call Leroy Holt in an attempt to get the men out of her home. 11/20/08RP at 288.

Forrest Starrett then went downstairs with Michelle Walker and Tesha Mitchell. 11/20/08RP at 492. The trio was nervous about getting Forrest out of the home, partly because he was the only Caucasian person there, and Zerhaimanot did not know him and was suspicious of people he did not know. 11/20/08RP at 488-90, 11/24/08RP at 810-12.

Michelle Walker claimed that Zerhaimanot demanded to know what Starrett was doing at the apartment, and asked him if he was a "cop." 11/20/08RP at 814-16. Zerhaimanot was heard yelling at Starrett. The kitchen began to fill with more people, and at this point the only people who were not in the kitchen were James Howell and Michelle Pillatos, both of whom were upstairs. 11/20/08RP at 485. Forrest Starrett sat in a kitchen chair with Zerhaimanot and Lee in front of him. According to Michelle Walker, the two became increasingly aggressive toward Starrett, and she said that Lee and Zerhaimanot pointed handguns at Starrett. 11/20/08RP at 491-92, 11/24/08RP at 814-16. Somehow the contents of Starrett's pockets were emptied onto a kitchen table. 11/20/08RP at 490.

Walker's subsequent testimony revealed that there were in fact many guns present and brandished in the kitchen at this time. When asked who among the persons present had guns, she said that Tesha Mitchell had a gun, Capone had a gun, and Keylo and his friend had guns. 11/20/08RP at 492. Walker admitted she saw Capone pull a gun in the kitchen before the shooting. 11/21/08RP at 578-79. In cross-examination by Mr. Lee's counsel, Walker added that there were two additional males present in the kitchen, one with the nickname "Security," and another male called Xavier, and they also had guns. 11/21/08RP at 635-36.

Walker became concerned about the situation, so she began screaming, and ran upstairs. In hysterics, she said, she yelled downstairs that she was calling 911, and also yelled that the police were outside. Then she heard "two gunshots." 11/20/08RP at 493-94. After she heard the shots, Ms. Walker looked out the window to see if the police were there yet. 11/20/08RP at 494-95. Then she apparently hid in the closet, talked to Michelle Pillatos (it was not explained how or why Michelle was in the closet), and then she looked out the window (apparently having stopped hiding in the closet). 11/20/08RP at 495. Ms. Walker testified that when she looked out the window toward the parking lot, she saw a vehicle that exited the lot and "went to the left." 11/20/08RP at 496. The car was "like a Ford or, not hatchback, but like a little wagon," and it was "dark-colored," and had "tinted windows." 11/20/08RP at 496. It was "lowered to the ground." 11/20/08RP at 496.

When asked what, if anything, she claimed to have seen when she went upstairs before the gunshots, Walker said she saw two people carrying Mr. Starrett out of the kitchen by his arms. 11/20/08RP at 497. She did not say who these persons were, but testified, "I could only see caps." 11/20/08RP at 498. Asked if "it was Packy," (Mr. Holt), Walker testified, "No, I didn't know exactly who it was." 11/20/08RP at 498.

Leroy Holt was the other accuser of Mr. Lee and Mr. Zerahaimanot. Holt claimed that when Mr. Lee arrived at Walker's home, he was wearing a cap. 11/24/08RP at 804. According to Holt, during the arguments and shouting in the kitchen of Ms. Walker's apartment, Zerahaimanot and Lee forcibly escorted Starrett from the kitchen, through the front door of the apartment, and out to the parking lot. 11/24/08RP at 816. Holt admitted that "Capone," one of the several other persons identified as having pulled a gun, also went out the door. 11/24/08RP at 817-18. Holt then heard a gunshot. 11/24/08RP at 824. He exited the apartment door and saw Forrest Starrett sitting in his truck with Zerahaimanot and Lee "right there on him." 11/24/08RP at 824-25. In addition, "Capone" was "bobbing and weaving." 11/24/08RP at 825. Holt claimed that he saw a flash from the gun that Mr. Zerahaimanot was holding, and Mr. Starrett jerked. 11/24/08RP at 825-27. Then, Holt claimed, he saw Steven Lee shoot Mr. Starrett. 11/24/08RP at 828-29. Holt stated that Lee fled the area. 11/24/08RP at 829.

Holt admitted that he had told an investigator, in April of 2008, that he "couldn't say whether a gun was pointed at Forrest [Starrett] at all" on that night. 11/25/08RP at 1000-01. Holt also admitted he changed his appearance, apparently including by taking his shirt off, as he fled the apartment parking lot. 11/25/08RP at 830-31. He did

not want the police to see him. 11/25/08RP at 831. Holt denied that he shot Mr. Starrett. 11/25/08RP at 1033.

Holt, it turned out, had negotiated a deal for his testimony. In return for his testimony, the prosecuting attorney had agreed not to prosecute him for Failure to Register as a sex offender, arising out of a conviction for Rape of a Child in the Third Degree, which was not prosecuted. 6/5/08RP at 103, 11/25/08 at 940.

D. ARGUMENT

- 1. CO-DEFENDANT ZERAHAIMANOT'S OUT-OF-COURT HEARSAY STATEMENT IMPLICATING MR. LEE WAS MANIFEST CONSTITUTIONAL ERROR THAT VIOLATED LEE'S RIGHT TO CONFRONTATION.**

During the State's re-direct examination of its witness Leroy Holt, the deputy prosecutor elicited a series of answers from Holt regarding statements that had been made during a telephone conversation Holt had with Mr. Zerachaimanot about the shooting, some weeks subsequent to the incident. 11/25/08RP at 1034-35. Zerachaimanot's initial recollection of the incident was imprecise, and, Holt testified, he told Zerachaimanot that Steven Lee had shot Forrest Starrett in the head. 11/25/08RP at 1035. The prosecutor then questioned Holt in a manner that pointedly drew the jury's attention to

the fact that Zerahaimanot, by keeping silent, had fully agreed with that statement. 11/25/08RP at 1035; see Part D.1.b, infra.

All of this had the result of placing before the jury an assertion of fact -- uttered by the co-defendant, Mr. Zerahaimanot -- stating that Mr. Lee was the person who, in addition to himself, also shot the victim. This admission by Zerahaimanot named him as guilty, first, and because Zerahaimanot's assertion came from outside the courtroom in the form of hearsay evidence testified to by Leroy Holt, the State was also able, for the several moments that Zerahaimanot effectively served as the State's own witness against Mr. Lee, to insulate him from any cross-examination by the party he had also just inculpated.

The State therefore succeeded in preventing Steven Lee from exercising his right to "face to face" confrontation of, and cross-examining, a person who, for all practical purposes, gave inculpatory testimony against him. Wash. Const., Article 1, § 22; U.S. Const., Amend. 6. Up to that point, the trial had been populated by witnesses whose perception, memory, consistency, and character for dishonesty represented an absolute nadir of credibility. Mr. Zerahaimanot's statement to Mr. Holt in fact became the best evidence the prosecutor adduced in seeking to secure the conviction of both defendants.

a. Confrontation violations are manifest constitutional error that may be challenged on appeal under authority of RAP

2.5(a)(3). Admission of Mr. Holt's testimony was manifest constitutional error under RAP 2.5(a)(3). Of course, this violation of the Sixth Amendment and Article 1, § 22 was constitutional error. Crawford, 124 S.Ct. at 1354, 1359 (Sixth Amendment's guarantee of confrontation is a "bedrock" principle of constitutional due process). An error is "manifest" under RAP 2.5(a)(3) if the defendant demonstrates that it had practical and identifiable consequences in the trial. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Denial of the right of confrontation in this case was a "manifest" error for purposes of appealability because the statements admitted were directly implicatory of Mr. Lee, and therefore carried identifiable prejudice. See RAP 2.5(a)(3); see also State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007) (confrontation clause challenges may be raised for the first time on appeal); State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999) (same). Here, the effect of the introduction of Mr. Holt's testimony was in fact substantial material prejudice, because Zerhaimanot's accusation was by far the most competent evidence of guilt the State was able to elicit from any witness. This

Court should conclude that the confrontation error may be raised on appeal, despite defense counsel's failure to object below.

b. Crawford v. Washington disallows what occurred here - the admission of testimonial hearsay implicating the accused.

Pursuant to the United State's Supreme Court's decision in Crawford v. Washington, 124 S.Ct. at 1374, the admission into evidence of a non-testifying declarant's out-of-court statement implicating the defendant violates the defendant's constitutional right to confront and cross-examine that person, who becomes in all practical respects, by virtue of his accusatory utterance, one of the State's "witnesses against him." U.S. Const., amend. 6;³ Wash. Const., Article 1, § 22;⁴ see Crawford v. Washington, 124 S.Ct. at 1364, 1369.

An out-of-court accusatory statement is incompetent as evidence under the rules defining, and barring hearsay. See ER 801, ER 802; State v. Young, 160 Wn.2d 799, 822-23 and n. 1, 161 P.3d 967 (2007). For constitutional purposes, it is the admission of "hearsay" statements – where they are also "testimonial," and where the defendant has had no prior opportunity to cross-examine the

³The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

⁴Article I, § 22 of the Washington State Constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face."

declarant – that implicates the defendant’s confrontation rights.

Crawford v. Washington, 124 S.Ct. at 1364.

In this case, on initial direct examination of Leroy Holt, the State asked generally about his presence at Michelle Walker’s apartment on the night before and the morning of the shooting, and Holt’s claims to have seen Mr. Zerahaimanot and Mr. Lee shoot the victim. 11/24/08RP at 825-28.

On cross-examination, Mr. Zerahaimanot’s attorney asked Holt about a telephone conversation that he had with Mr. Zerahaimanot in which the topic of the incident was raised. 11/24/08RP at 896. No other details of the conversation were elicited. See 1/24/08RP at 897-98. The subsequent cross-examination of Holt by Mr. Lee’s counsel focused primarily on Holt’s extensive, generous “deal” with the prosecuting attorney in exchange for his testimony. 11/25/08RP at 939-48. Lee’s counsel also did not elicit any details regarding the content of Holt’s telephone conversation with Zerahaimanot.

However, on re-direct examination by the deputy prosecutor, the State delved into particular details of the telephone conversation. Zerahaimanot told Holt “some of the things that he had done” that night. 11/25/08RP at 1034. Zerahaimanot was “foggy” about the exact details of what happened during the shooting, and who shot who where. 11/25/08RP at 1034. He also wondered aloud why Mr.

Starrett had grabbed the gun or struggled for it. 11/25/08RP at 1034 (“he asked why did – why did Forrest go for the gun”).

Holt also testified that Mr. Zerachaimanot “said something about him being the one that – him [sic] might have been the one that shot him [Starrett] in the head.” 11/25/08RP at 1034. The prosecutor inquired further, eliciting Holt’s testimony about this same statement by Zerachaimanot a second time. 11/25/08RP at 1035. Then, the prosecutor posed a leading question, asking Holt if he had said to Zerachaimanot that he, Holt, had seen Mr. Lee shoot Mr. Starrett in the head. 11/25/08RP at 1035.

When Holt answered this question in the affirmative, the State specifically elicited from Holt that Mr. Zerachaimanot did not dispute this factual assertion. 11/25/08RP at 1035. Specifically, the colloquy proceeded as follows:

Q: And then Keylo [Mr. Zerachaimanot] made the statement to you that he believed he was the one that shot Forrest in the head.

A: Yes.

Q: And then it was after that that you said, No, I saw Stevie shoot him in the head.

A: Yes.

Q: Did he take any issue with that?

A: No.

Q: Okay.

MS. PAUL: All right. Thank you.
That’s all I have.

11/25/08RP at 1035.

The State's questioning accomplished at least several prosecution objectives. First, the jury learned that Mr. Zerhaimanot was admitting to involvement in the shooting. If this was true, he therefore had the best possible opportunity to know what happened at the cab of Mr. Starrett's truck that night. But foremost, Zerhaimanot was in fact asserting that Steven Lee shot Forrest Starrett - proof enough of at least the intentional killing element of premeditated murder, and the felony murder requirement of causing Starrett's death. Zerhaimanot provided the privileged insider knowledge of the crime and its participants that only a co-defendant could possess. In terms of inculpatory value, this testimony was critical to the prosecution case against Mr. Lee. Nothing even remotely as probative had been, nor during the remainder of trial would be, elicited from any other witness.

However, Mr. Zerhaimanot's "silent" assent – his indication of agreement with Holt's assertion that Steven Lee shot Forrest Starrett – was a "statement" by Zerhaimanot for purposes of the ER 801 definition of "hearsay." In addition, Zerhaimanot's hearsay statement – given the manner in which the prosecutor employed it to inculpate Mr. Lee – was also "testimonial" for purposes of the confrontation clause jurisprudence of Crawford v. Washington.

- (i). *Zerahaimanot uttered a “statement” under the ER 801(c) definition of hearsay, by his assent to Holt’s factual assertion.*

Although Mr. Zerahaimanot did not himself utter the specific words that Mr. Lee was the other shooter of Forrest Starrett, but instead assented to Leroy Holt’s statement to that effect, the evidence rules defining “hearsay” provide for this circumstance, by equating nonverbal assertive conduct with the express oral or written statements that are more commonly the form taken by inadmissible hearsay.

"Hearsay" is defined an out-of-court "statement" offered to prove the truth of the matter asserted. ER 801(c). Where there is no “statement,” there is no hearsay; but where there is a statement, it is always hearsay if it was made out of court, was testified to by a trial witness, and is offered by a party to prove the truth of the matter asserted by its declarant. ER 801; State v. Sua, 115 Wn. App. 29, 41 and n. 30, 60 P.3d 1234 (2003).

Evidence Rule 801 provides, inter alia, the following operative definitions, including the definition of “statement:”

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A “declarant” is a person who makes a statement.

(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(Emphasis added.) ER 801(a)-(c). The essence of a “statement” for purposes of the hearsay rule is that it intentionally puts forth an affirmative assertion of fact. State v. Collins, 76 Wn. App. 496, 498, 886 P.2d 243 (1995); 5B Karl Teglund, Washington Practice: Evidence Law and Practice § 801.3 (5th ed. 2007).

The term “assertion” is not defined in the state or federal evidence rules, and its meaning is subject to debate on the margins; however, pronouncements regarding past events or occurrences are universally considered to be assertions, and therefore statements, and they are inadmissible if the other criteria of the hearsay definition are met. 5B Karl Teglund, Washington Practice, Evidence Law and Practice § 801.3 (“Definition of statement and assertion”) (6th ed. 2009) (stating that although hearsay rules do not define “assertion,” term unquestionably includes “statements describing something that occurred in the past”) (citing 2 Kenneth S. Broun, McCormick on Evidence § 246 (6th ed. 2006)).

In addition, under Washington’s ER 801(a) and every other jurisdictions’ iteration of the hearsay rule, the underlying factual

assertion that makes an utterance a "statement" may be either an explicit oral or written assertion, or may also be other "nonverbal conduct" where such conduct is intended by the declarant as an assertion. (Emphasis added.) ER 801(a)(2); see 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 378, at 55-56 (2d ed. 1994).

It is also well-accepted that under the nonverbal conduct component of the hearsay definition, a "statement" may include an assertion of fact that takes the form of silence in response to the factual statement of another. 4 Mueller & Kirkpatrick, Federal Evidence § 379, at 56 (silence can be a "statement" under the federal evidence rules so long as it was intended by the person as an assertion); see, e.g., Blackson v. United States, 979 A.2d 1, 10 and n. 7 (D.C., 2009) (recognizing silence as nonverbal conduct under Fed. R. Evid. 801(a)(2) but finding principle inapplicable to case's particular facts); People v. Zamudio, 43 Cal.4th 327, 350, 181 P.3d 105, 125 (2008) (stating that " 'nonverbal conduct' - such as a person's silence - constitutes a 'statement' under the hearsay rule" if it was " 'intended by [the person] as a substitute for oral or written verbal expression' ") (quoting Cal.Evid.Code § 225 (definition of statement as, inter alia, "nonverbal conduct of a person intended by him as a substitute for oral or written expression")); People v. Meza, 188 Cal.App.3d 1631,

1646, 234 Cal.Rptr. 235, 243 (1987) (defining silence as a form of "passive nonverbal behavior" which falls within the § 225 hearsay definition of a " 'statement' if it is intended so to be"); People v. Hackett, 596 NW2d 107, 112 (Mich. 1999) (silence in the face of an assertion is admissible as a tacit admission if circumstances indicate person manifested his belief in its truth)⁵

Court decisions in which silence has been deemed assertive nonverbal conduct amounting to a "statement" for purposes of the hearsay definition include cases with similar facts to the present case. For example, evidence of a person's silence was properly deemed inadmissible hearsay, in the form of an out-of-court "statement" by a declarant, in United States v. Kenyon, 481 F.3d 1054 (8th Cir. 2007). There, the wife of a defendant charged with sexual abuse of a minor testified that she asked two other children whether they noticed

⁵Evidence Rule 801(d)(2)(ii), which provides that "adoptive admissions" by a party are "not hearsay," is a separate rule from ER 801(a)(2)'s provision that nonverbal conduct of a person, including his or her silence, may constitute a statement. Under ER 801(d)(2)(ii), a party may manifest adoption of the statement of another and thereby make it the party's own, in which case the statement, when admitted against that party, is defined as "not hearsay" and thus not inadmissible by virtue of ER 802. See State v. Cotten, 75 Wn. App. 669, 689, 879 P.2d 971 (1994). However, the two rules rely on similar reasoning – the question of intent, in the former instance either to tacitly adopt another's statement, or in the latter, to make an assertion by silence – is at the core of both determinations. Because of the close similarity in the analyses, court decisions regarding adoptive admissions are therefore instructive with regard to the question of when silence is a "statement" under ER 801(a)(2). See K. Kemper, Admissibility of statement under Rule 801(d)(2)(B) of Federal Rules of Evidence, providing that statement is not hearsay if party-opponent has manifested adoption or belief in its truth, 156 A.L.R. Fed. 217 (1999, 2009).

anything that would support the minor's allegation of abuse. Kenyon, 481 F.3d at 1060, 1064. Kenyon's counsel then asked the wife if these children "had provided her 'with any information suggesting anything happened.'" The wife answered "no," but the trial court sustained the government's objection to this question and answer on grounds of hearsay. Kenyon, 481 F.3d at 1064.

The federal appellate court rejected Kenyon's argument that this question did not seek to elicit an out-of-court "statement," and thus did not attempt to proffer "hearsay." The court held that testimony by Kenyon's wife that the children were silent in response to her inquiry about sexual abuse of the complainant would be evidence of a "nonverbal assertion" amounting to a "statement" by the children, and therefore inadmissible hearsay under Fed. R. Evid. 801. Kenyon, 481 F.3d at 1065. The court invoked the specific language of Fed. R. Evid. 801(a)(2) (which is identical to Washington's ER 801(a)(2)⁶), and relied on prior case law providing that a "statement" may come in the form of silence in the face of the utterance of another, where the

⁶Where a rule of evidence under the Federal Rules or the rules of evidence of other state jurisdictions is identical or not materially dissimilar to the Washington evidence rule at issue, decisions from those jurisdictions may be persuasive authority in discerning the meaning and proper application of the Washington rule. State v. Land, 121 Wn.2d 494, 497-99, 851 P.2d 678 (1993); State v. Terrovona, 105 Wn.2d 632, 639-41, 716 P.2d 295 (1986); see Robert H. Aronson, The Law of Evidence in Washington, Rule 401 cmt., at 404-1 (3d ed.1998).

natural response to such utterance "would be to deny it if untrue"). Kenyon, at 1065 (citing Rahn v. Hawkins, 464 F.3d 813, 821 (8th Cir. 2006)). The court therefore ruled that the defendant's "question called for hearsay, and [the wife's] response was properly stricken" as such. Kenyon, at 1065.

The Eighth Circuit's analysis in Kenyon indicates that Mr. Zerachaimanot's silence constituted a hearsay statement, which is a predicate to his confrontation clause assignments of error, and to his alternative argument of ineffective assistance based on counsel's failure to object to simple evidentiary hearsay. See Part D.2, infra. As in Kenyon, this silence in the face of Leroy Holt's factual assertion was an out-of-court "statement" alleging that Lee was a shooter, and it was, therefore, "hearsay." See Kenyon, at 1065.

Rahn v. Hawkins, supra, 464 F.3d at 821, which involved "adoptive admissions," is also instructive. In that case, a police officer "said nothing" and "remained silent" in response to statements by the police department describing the officer's and the defendant's actions during a bank robbery. Rahn v. Hawkins, 464 F.3d at 821. This silence by the officer was deemed by the federal court to be a "statement" under the hearsay definition of Fed. R. Evid. 801, that could be used to impeach the officer's divergent trial testimony. Rahn, 464 F.3d at 822 (42 U.S.C. § 183 civil rights action).

Mr. Zerhaimanot's silence, in the face of Mr. Holt's assertion that Mr. Lee shot Foster Starrett, constituted a "statement" by Zerhaimanot under ER 801(a)(2), and this is, of course, just how the prosecutor desired that silence to be understood by the jury. The State's line of questioning could theoretically have terminated after Mr. Holt testified that he told Mr. Zerhaimanot that he saw Mr. Lee shoot Mr. Starrett, perhaps allowing the jury to deduce for itself that there was 'no response' or 'no answer' by Zerhaimanot, and letting the jurors realize the meaning of that absence of a response on their own. Instead, the prosecutor endeavored to guarantee that Zerhaimanot's silence would be taken by the jury as the State wished it to be taken, by explicitly eliciting that Zerhaimanot did not disagree or in any way "take issue" with this allegation.

This entire question and answer colloquy was crafted to place Mr. Zerhaimanot's assertion that Mr. Lee shot Mr. Starrett in front of the jury. See also Brooks v. Price, 121 Fed. Appx. 961, 967-68 (3rd Cir. 2005) (silence of police review board in response to presentation of facts claiming to prove officer misconduct was "statement" asserting conclusion of no misconduct, in the form of "non-verbal conduct of a person . . . intended as an assertion," and was thus inadmissible absent showing of some exception to hearsay bar) (citing

United States v. Praetorius, 622 F.2d 1054, 1056 (2d Cir.1979)). Mr. Zerhaimanot told Mr. Holt – and thus, effectively, testified for the jury – that the co-defendant Steven Lee shot the victim.

(ii). *Zerhaimanot's hearsay accusation was "testimonial," triggering the application of Crawford v. Washington and resulting in confrontation error.*

Pursuant to Crawford, the confrontation clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford v. Washington, 124 S.Ct. at 1354. Mr. Zerhaimanot's statement that Mr. Lee shot Mr. Starrett was "testimonial" under the circumstances, including by virtue of the State's purposeful elicitation of this evidence with the design of proffering it as an accusation, in order to inculcate Mr. Lee in front of the body that held his fate in its hands.

Any reasonable person would consider a statement of this sort to be exactly the type of assertion the government would utilize in a criminal trial, or in an investigation of the shooting. Crawford's definition of "testimonial," based on how a reasonable person "would anticipate" his statements could be used, is adequate to bring Mr. Zerhaimanot's statement within its ambit. See State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), affirmed, 165 Wn.2d

474 (2009) (citing State v. Shafer, 156 Wn.2d 381, 388-89, 128 P.3d 87, cert. denied, 549 U.S. 1019, 127 S.Ct. 553, 166 L.Ed.2d 409 (2006) (a statement is testimonial if a reasonable person in the declarant's position would anticipate that his statement would be used against the accused in investigating or prosecuting a crime)).

The Supreme Court did state in Crawford that statements “taken by police officers in the course of interrogations are . . . testimonial even under a narrow standard.” Crawford, 124 S.Ct. at 1364. However, the Court further explained that it was using the term “interrogation” in its colloquial sense. Crawford, 124 S. Ct. at 1365 n. 4 (comparing colloquial definitions of interrogation with technical definition applicable for purposes of Miranda). The fact that Mr. Zerachaimanot was not being questioned by a law enforcement officer when he alleged that Mr. Lee shot Mr. Starrett does not disqualify his hearsay from being deemed testimonial. Certainly, his accusation against Mr. Lee is on the opposite end of the spectrum from statements seeking emergency assistance, such as in a 911 call.

Because Mr. Lee was unable to cross-examine Mr. Zerachaimanot, his Sixth Amendment right to confrontation was violated. The Crawford Court held that the confrontation clause “commands, not that evidence be reliable [under hearsay principles],

but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” (Emphasis added.) Crawford, 124 S.Ct at 1370. Mr. Zerahaimanot’s allegation that his co-defendant shot Mr. Starrett – a relatively short, but extraordinarily consequential portion of the evidence at trial – was never tested by the adversarial process, a defect at trial that inured to the prosecution. Crawford, 124 S.Ct at 1354, 1359.

c. Holt’s testimony also offended the confrontation clause as its protections were applied in *Bruton v. United States*. Even though the present case does not strictly involve a violation of the required “redaction or severance” decision required to be made where a co-defendant’s implicatory confession is proffered by the State in a joint trial of co-defendants, any remaining reliability of the verdict in Mr. Lee’s case is erased in the presence of the unfair prejudice inherently caused by the alleged co-perpetrator’s naming of him as a shooter.

It is an unfortunate aspect of the present appeal, with regard to co-defendant Zerahaimanot, that certain of his statements were properly admissible at trial against him, through Mr. Holt, given that he essentially admitted to shooting Forrest Starrett. 11/25/08RP at 1033-

35; see ER 801(d)(2)(i) (statement by party-opponent).⁷ But if a quantum of State's evidence supported a conclusion by the jury that Mr. Zerahaimanot was guilty of shooting the victim, the jury would naturally also conclude not only that he was a perpetrator of the shooting, but that he possessed the best possible knowledge of the incident, with regard to who the other shooter was on the early morning of August 21. Thus it is completely understandable that the deputy prosecutor would seek to elicit Zerahaimanot's accusation naming Steven Lee, emphatically making sure the jury knew that Zerahaimanot did not "take issue" with Holt's claim that Lee shot Starrett. At the same time, the State also insulated Zerahaimanot from the fundamental procedural protections of confrontation and cross-examination.

As the jury passed its several days of deliberations attempting to sort out the muddle of vague, confusing testimony in this case, the co-defendant Zerahaimanot's act of specifically naming Mr. Lee as a shooter unquestionably would have carried great persuasive weight with jurors seeking to find a comprehensible explanation for Forrest

⁷An out-of-court statement is not barred by ER 802 and is technically "not hearsay," where it falls within the definition of an "Admission by Party-Opponent" under ER 801(d)(2)(i), which applies where the "statement is offered against a party and is . . . the party's own statement[.]" See, e.g., State v. Larry, 108 Wn. App. 894, 896, 34 P.3d 241, review denied, 146 Wn.2d 1022 (2001).

Starrett's death. In Bruton, the Supreme Court recognized that a non-testifying co-defendant's admission of guilt that also implicates the defendant is such convincing evidence for a jury, and thus so unfairly damaging because of its legal inadmissibility, that even instructing the jury to use the admission only against the uttering co-defendant is insufficient to cure the danger of an outcome unconstitutionally obtained. Bruton v. United States, 391 U.S. at 126.

As the Bruton Court stated:

[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

391 U.S. at 135-36. Crawford v. Washington demonstrates that Mr. Lee's right of confrontation was violated by the introduction of an inculpatory, out-of-court allegation against him. Bruton's reasoning shows that the prejudice resulting from that violation is so specific and substantial in a joint trial that it should answer not only the question of what remedy should be granted Mr. Lee for this constitutional error, but also that this very same kind and degree of prejudice is presented, and the same remedy of reversal is required, when Mr.

Zerahaimanot's implication of Mr. Lee is considered in the context of his argument of ineffective assistance of counsel, and the standard of reversal where the error "undermines confidence in the outcome." of trial., See Part D.2.c, infra.

d. Confrontation violations are constitutional error and require reversal unless the State proves that the verdict can be independently sustained by "overwhelming untainted evidence."

Violations of the confrontation clause by admission of hearsay contrary to the Sixth Amendment, Article 1, § 22, and Crawford, will require reversal of the defendant's conviction unless the error can be deemed harmless "beyond a reasonable doubt." State v. Davis, 154 Wn.2d 291, 304-05, 111 P.3d 844 (2005) (citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)); see also State v. Smith, 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002) (same); State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990) (same).

To determine whether a constitutional error is harmless, the Washington courts utilize "the 'overwhelming untainted evidence' test." Smith, 148 Wn.2d at 139. Under that test, the subject error is harmless only where the State proves the remaining, untainted evidence is so overwhelming as to necessarily lead to a finding of

guilt. Davis, at 304 (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)). As indicated, it is the State in this case that must prove to the Court of Appeals that the confrontation error was harmless under this standard. Davis, at 304; State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

This constitutional error standard came into play in State v. Hopkins, 137 Wn. App. 441, 154 P.3d 250 (2007), a case in which the trial court failed to conduct a mandatory competency hearing regarding the child complainant before admitting her hearsay allegations of sexual abuse under RCW 9A.44.120 and State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). On appeal, Division Two of this Court reversed the defendant's conviction, because of the absence of any physical evidence connecting him to a sexual assault of the child. State v. Hopkins, 137 Wn. App. 441, 451-52. The Court concluded that it could not say beyond a reasonable doubt that, without the complainant's materially persuasive, but wrongfully admitted hearsay accusations, a reasonable jury would nonetheless have convicted the defendant of the crime charged. State v. Hopkins, 137 Wn. App. at 457.

Hopkins, at a minimum, stands for the proposition that the hearsay statements of a witness with knowledge, which the jury would

understandably conclude reflects specific, highly probative information of the crime charged, very much carries the weight of the State's proof in a prosecution where little or marginal other evidence against the accused is adduced. In Hopkins, once the child's hearsay statements were deemed incompetent evidence, the remaining State's proof was inadequate to support the defendant's conviction beyond a reasonable doubt.

There can also be no real disagreement in this appeal that the State's other, admissible evidence inculcating Mr. Lee as having shot Forrest Starrett, which was elicited from Holt and Walker, was only marginally adequate to convict, and only then because witness credibility is not assessed in evaluating a sufficiency challenge on appeal, so long as the verbatim report of proceedings indicates that some witness managed to utter words indicating a claim to have seen the charged conduct occur. The State's case here was based on fractured, inconsistent claims made by third-party witnesses of inherently little credibility. Their testimony, on its face, was so muddled, and so contradictory both in comparison to their prior statements, and during trial itself, that the proceeding did not significantly advance anyone's understanding of what actually occurred on August 21, 2007, much less establish either

“overwhelming” evidence, or enough evidence to affirm under even a lesser standard of harmless error.

In the context of the State’s remaining evidence, the damning insider claims of an alleged co-participant in the crime -- Mr. Lee’s co-defendant, Zerhaimanot – which were also accompanied by his own admission of guilt – were surely what the jury in this case primarily, if not solely, relied on to reach the decision that Mr. Lee was guilty. Take that evidence away, and there is simply not enough left to affirm Mr. Lee’s murder conviction and sentence of 407 months.

2. IN THE ALTERNATIVE, DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO LEROY HOLT’S HEARSAY TESTIMONY.

Should this Court conclude that Mr. Holt’s testimony repeating Mr. Zerhaimanot’s assertion that Steven Lee shot Mr. Starrett did not violate Mr. Lee’s rights of confrontation under Article 1, § 22 or the Sixth Amendment, Mr. Lee argues in the alternative that defense counsel’s representation was deficient for failing to object to Mr. Holt’s testimony on hearsay grounds, and that his attorney’s performance prejudiced the outcome of the trial.

a. Mr. Lee was entitled to non-deficient attorney performance. Steven Lee had a right to the effective assistance of

counsel at his trial, protected by both the Sixth Amendment and the Washington Constitution. See U.S. Const., Amends. 6 and 14; Wash. Const., Article 1, § 22; Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 685, 104 S.Ct. 2052 (1984); see also United States v. Cronic, 466 U.S. 648, 653-54, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984).

To prevail on a claim of ineffective assistance of counsel, a defendant must show, first, that his counsel's performance was deficient. To establish this first prong of ineffective assistance, Mr. Lee must show that his "counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). If defense counsel's complained-of conduct at trial may be deemed legitimate trial strategy or tactics, it will not be considered deficient. Thomas, 109 Wn.2d at 229-30.

The appellate courts review claims of ineffective assistance of counsel de novo. State v. Meckelson, 133 Wn. App. 431, 435, 135 P.3d 991 (2006).

b. Mr. Lee's trial counsel failed to properly object to obvious hearsay. To show deficient performance, a defendant must show that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment.” State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. at 687). This is, admittedly, a heavy burden. Howland, 66 Wn. App. at 594.

However, where the legal issue is uncomplicated, and attorney error is obvious and not dismissible as tactical choice, the appellate court’s issue of focus is in fact merely whether material prejudice was the result of counsel’s plain deficiency. Cf. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986) (appellate court need not address both prongs of Strickland analysis if defendant makes an insufficient showing on one prong).

Deficient attorney performance may come in the form of sins of commission, and omission. Thus, for example, if defense counsel waived a viable legal issue by failing to speak up at trial, and the waiver was the result of ineffectiveness of counsel, review is not precluded. See State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995). This theory applies specifically to a failure to object to inadmissible hearsay testimony, which can amount to ineffective assistance of counsel. State v. Hendrickson, 138 Wn. App. 827, 831, 158 P.3d 1257 (2007), affirmed, 165 Wn.2d 474 (2009); see also Bolander v. Iowa, 978 F.2d 1079 (8th Cir. 1992) (counsel’s failure to

object to the introduction of hearsay evidence constitutes ineffective assistance of counsel).

In this case, counsel's failure to object cannot be explained.

ER 801 and ER 802 indicate that Holt's testimony was inadmissible.

Hearsay is defined as follows:

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c). Hearsay is generally inadmissible pursuant to ER 802.⁸

An out-of-court accusatory statement of the sort elicited from the non-testifying co-defendant Zerahaimanot, through Leroy Holt's trial testimony, was of course incompetent as evidence under the rules defining, and barring hearsay, which are grounded in part on the non-proffering party's inability to cross-examine the out-of court declarant. See ER 801, ER 802; State v. Young, 160 Wn.2d at 822-23 and n. 1, supra; 6 John Henry Wigmore, Evidence in Trials at Common Law § 1747, at 195 (Chadbourn rev. ed.1976).

Importantly, Zerahaimanot's statement was plainly not admissible under ER 801(d)(2)(v) (statements made by a co-conspirator in furtherance of the conspiracy are "not hearsay"). First, the existence of a conspiracy is a predicate finding required for

⁸ER 802 provides that "[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute."

admission of out-of-court statements under this rule. State v. St. Pierre, 111 Wn.2d 105, 118-19, 759 P.2d 383 (1988); State v. Guloy, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985). No such finding was made here. A conspiracy of course need not involve express words of agreement to act in concert, but the proponent of the evidence must at least show "concert of action, [with] all the parties working together understandingly with a single design for the accomplishment of a common purpose." State v. Barnes, 85 Wn. App. 638, 664, 932 P.2d 669 (1997). Here, there was no evidence suggesting that the charged defendants allegedly shot Mr. Starrett in pursuit of any common plan, expressly or implicitly agreed upon. Absent such evidence, the case merely involves joint shootings occurring during the briefest passage of time, as opposed to any even implicit plan to act. If there was a basis to contend otherwise, surely the State would have argued such a theory and gained in limine authorization for eliciting Mr. Holt's pivotal testimony.

More significantly, in general, statements made after the conspiracy has ended are not within this exemption from the hearsay definition. St. Pierre, 111 Wn.2d at 119. Zerahaimanot's admission to Mr. Holt that he and Lee were allegedly the persons who shot the complainant had no purpose or effect of furthering any identified goal

of committing the crime, including its concealment. The opposite is true. Revealing criminal conduct works against successful commission and “getting away with” the offense.

Certainly, a confession of the crime to police or other authorities -- without more - will never be deemed an act "in furtherance" of the conspiracy. United States v. Fielding, 645 F.2d 719, 726-27 (9th Cir. 1981); Hoover v. Beto, 439 F.2d 913, 924 n. 6 (5th Cir. 1971) (stating that "even the most strained construction of the hearsay exception [for co-conspirator statements] cannot bring a conspirator's confession under the penumbra of 'in furtherance of' or 'during the pendency of' the conspiracy"). This principle was addressed, but found inapplicable in State v. Sanchez-Guillen, 135 Wn. App. 636, 145 P.3d 406 (2006). There, a member of a conspiracy "spoke to Mr. Hernandez Refugio in furtherance of the plan to keep her son from being arrested." State v. Sanchez-Guillen, 135 Wn. App. at 644. Here, nothing in the evidence indicates that Mr. Zerhaimanot spoke to Mr. Holt for purposes of evasion of arrest, or concealment of the crime. Although the statement was made to a third party who was not law enforcement, it was nonetheless a revealing of the criminal act, which could only (and in fact did) frustrate, rather than further, “getting away with” the crime. Without

more, Mr. Zerhaimanot's admission of the crime to a third party does not become a statement in furtherance of the conspiracy simply because Mr. Holt was not a law enforcement officer.

Although the decision of when or whether to object is a classic example of trial strategy, State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989), in the present case, in light of the entire record and the State's case being fundamentally dependent on its securement of more sound and credible evidence implicating Mr. Lee than that provided by its scheduled witnesses, no legitimate strategic or tactical reasons support Mr. Lee's counsel's failure to object to the State's elicitation of evidence that was outright barred by ER 801 and ER 802's hearsay proscriptions.

c. Mr. Lee was prejudiced by his attorney's deficient performance. The second prong of the ineffective assistance of counsel analysis requires a showing of prejudice – i.e., that there is a reasonable probability that the deficient performance of counsel influenced the outcome of the case. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226; see also State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Importantly, the Washington courts have rejected a purely mathematical expression of the question of prejudice – rather than

requiring a showing that it is “more likely than not” that the attorney’s error materially affected the jury’s verdict, our courts have repeatedly stated that a “reasonable probability” that the outcome was influenced is established where counsel’s deficient performance was sufficient to undermine the reviewing court’s confidence in the verdict. Thomas, 109 Wn.2d at 226.

Thus, for example, in Hendrickson, the Court of Appeals agreed that defense counsel rendered prejudicial ineffective assistance where counsel failed to object to testimony that “was crucial to the State’s case because it was the only evidence” of the defendant’s guilt. Hendrickson, 138 Wn. App. at 833.

The State’s case here was based completely on testimonial claims and assertions by denizens of the Holly Drive “crack house,” describing what they believed they heard and saw at different junctures during the evening, most of which testimony was unhelpful. What little inculpatory testimony that was offered at trial was either from Walker, in the form of descriptions of what she believed or claimed she saw that early morning, which changed from moment to moment while she was on the stand, and at times bordered on the incomprehensible, or from Holt, as to whom the evidence of his possible involvement in the death of Mr. Starrett was so significant that

the trial court allowed Mr. Lee to argue in closing that Holt was the “cause of this tragedy.” 12/2/08RP at 2034-35.⁹

There was no useful forensic evidence proffered. The concept of physical evidence, linking Mr. Lee to Mr. Starrett’s shooting, has no relationship to Mr. Lee’s trial except perhaps in the blank stares of the forensic and crime scene scientists at trial who were called to the stand and yet had very little science to report, and whose testimony instead merely offered a lengthy lesson for the jury on the State’s well-worn theory that the absence of physical evidence does not prove that criminal defendants are innocent. Although it cannot be said that Mr. Zerhaimanot’s allegation that Mr. Lee shot Mr. Starrett was the “only” evidence implicating Mr. Lee, the paucity of probative evidence presented below, particularly in comparison to the improper hearsay evidence which should not have been admitted but which undoubtedly was the best evidence the prosecutor could produce, should leave this Court with no confidence that the outcome of trial would have been

⁹Leroy Holt was a recognized “other suspect” in the shooting of Forrest Starrett. Prior to trial, following argument on a motion in limine, the court ruled that Mr. Lee would be permitted, under the “other suspects” doctrine, to elicit evidence tending to implicate Holt, who fled the scene of the shooting and altered his appearance, as the perpetrator of Mr. Starrett’s death. 11/13/08RP at 23, 26; see In re Pers. Restraint of Lord, 123 Wn.2d 296, 316, 868 P.2d 835, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994) (“other suspects” evidence may be offered at trial, if it tends “clearly to point to someone other than the defendant as the guilty party”).

the same if the hearsay evidence had properly been objected to and excluded.

Ms. Walker's testimony regarding what she saw, or what she thought she saw, careered back and forth literally from question to question and even within her individual answers. When her testimony did not contradict either itself, or her prior statements, it was borderline incomprehensible. Walker's testimony made little chronological sense where she claimed to have seen the victim being escorted out of the house before he was apparently shot. Walker testified that she heard "two gunshots." 11/20/08RP at 493-94. After she heard these gunshots, she looked out the window to see if the police were there yet. 11/20/08RP at 494-95. Her testimony continued:

Then I heard two gunshots and then I hid in my closet. When I had the 911 call on the call I didn't say nothing because I didn't know. I heard some guns go off. I didn't know if anybody was going to come upstairs or not. So I just kind of hid. I told Michelle, she asleep, she asleep. Then I told her, something's going on. I don't know.

11/20/08RP at 495. There is very little of substance that can be gleaned from this testimony.

The State in this case orchestrated a criminal trial in which the prosecutor managed to get one co-defendant to effectively testify against the other. By introducing hearsay evidence of Mr.

Zerahaimanot's out-of-court accusation of Steven Lee as one of the shooters of the victim, the State successfully insulated the individual who unwittingly became its star witness, protecting him from cross-examination and confrontation by Lee, and preventing Lee from defending himself against the co-defendant's murder allegation by use of those tools which would certainly seem to be necessary components of a fair proceeding.

The prejudice to Mr. Lee caused by Mr. Zerahaimanot's unfronted hearsay accusations would have been tremendous in the jury's eyes. The sound reasoning that drove the confrontation clause rule of Bruton was the Supreme Court's recognition that an alleged co-perpetrator's admission that implicates the other co-defendant is so damaging that even a limiting instruction to the jury to use the confession only against the uttering co-defendant is simply insufficient to cure the resulting prejudice. Bruton, 391 U.S. at 127; see also State v. McIntyre, 3 Wn. App. 799, 803, 478 P.2d 265 (1970) (effect of admitting the co-perpetrator's implication of the accused is "highly prejudicial"). Given that juries are presumed to follow the court's instructions, see State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008), including limiting instructions directing how a certain piece of evidence may and may not be used, Bruton's conclusion that

the words of a co-perpetrator must be kept from the accused's jury, because they are so incapable of being disregarded, attests to the thundering prejudice resulting when one defendant admits the offense and also inculcates the other as his partner in crime. The fact of Mr. Lee being named as an accomplice by Mr. Zerahaimanot – a person the jury would have concluded to be in possession of particular knowledge of the crime committed -- was assuredly taken by Mr. Lee's jury as adequate proof against him in itself – such is the inherent nature of this type of "powerfully incriminating" evidence. In re Hegney, 138 Wn. App. 511, 546, 158 P.3d 1193 (2007) (citing Bruton, 391 U.S. at 135-36); State v. Dent, 123 Wn.2d 467, 486-87, 869 P.2d 392 (1994) (same).

3. THE TRIAL COURT ERRED IN REFUSING TO VACATE MR. LEE'S MERGED MURDER CONVICTION.

The jury issued verdicts finding Mr. Lee guilty on count 1, first degree felony murder pursuant to RCW 9A.32.030(1)(c), and count 2, first degree premeditated murder pursuant to RCW 9A.32.030(1)(a). CP 242, 244; 12/10/08RP at 2173. At the defendants' sentencing hearing held December 16, 2008, the deputy prosecutor asked the court to "dismiss Count II so there is no double jeopardy issue on appeal." 12/16/08RP at 2184. Both defendants indicated no objection

to this procedure. 12/16/08RP at 2184. The parties also referred to the ruling sought as merger of count 2 into count 1. 12/16/08RP at 2184-86.

The trial court agreed that count 2 should properly merge into count 1, but that both convictions should stand because the “jury has found beyond a reasonable doubt that each defendant has committed the homicide by each means.” 12/16/08RP at 2184. The court stated:

And while I certainly could understand and do understand why the counts might merge. so that the defendants would be sentenced under both theories, I don't really see why the Court would dismiss one or the other.

12/16/08RP at 2184. The court therefore ordered that, for each defendant, count 2 would merge into count 1, and the judgment and sentence would so indicate, but would also include convictions on both counts as identified by their statutory references. 12/16/08RP at 2186-87. See CP 20 (judgment and sentence).

This was error. The Double Jeopardy Clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. Amend. 5; Wash. Const. Article 1, § 9. This Court has held that two crimes in the homicide chapter of the criminal

code constitute the same offenses for double jeopardy purposes, as both are directed at punishing the same behavior that causes the same harm. State v. Schwab, 98 Wn. App. 179, 189-90, 988 P.2d 1045 (1999).

It is a firmly entrenched principle of constitutional law that multiple convictions for the same acts are punitive, regardless whether any sentence imposed, because multiple convictions carry societal stigma, increase future punishment under recidivist statutes, and may be used for impeachment. State v. Read, 100 Wn. App. 776, 792-93, 998 P.2d 897 (2000), affirmed, 147 Wn.2d 238, 53 P.3d 26 (2002).

Likewise, in State v. Johnson, the Supreme Court held,

Conviction in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect and the presence of multiple convictions is apt to affect the minimum sentence set by the parole board.

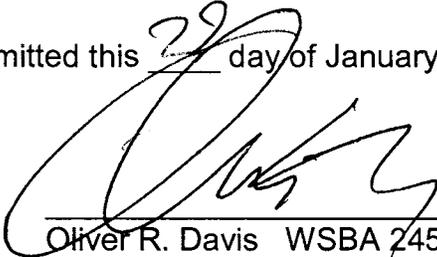
State v. Johnson, 92 Wn.2d 671, 679, 600 P.2d 1249 (1979). Thus in State v. Womac, the Supreme Court held that when a trial court finds that multiple convictions violate double jeopardy, the proper remedy is to vacate the redundant count. State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). As the court explained: "That Womac received only one sentence is of no matter as he still suffers the punitive consequences of his [twin] convictions." State v. Womac, 160 Wn.2d

at 656. Accordingly, this Court should strike Mr. Lee's merged murder conviction.

E. CONCLUSION

Based on the foregoing, Mr. Lee respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 29 day of January, 2010.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
)
 Respondent,)
)
)
 STEVEN LEE,)
)
 Appellant.)

NO. 62864-0-I

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