NO. 42257-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DARCUS ALLEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 10-1-00938-0

Corrected Brief of Respondent/Cross-Appellant

MARK LINDQUIST
Prosecuting Attorney

By
Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State adduced sufficient evidence to prove, beyond a reasonable doubt, all the elements of the crimes charged against the defendant?

2. Whether the prosecuting attorney committed misconduct in closing argument regarding the law of mens rea of accomplice liability?

3. If the prosecuting attorney misstated the law, whether a new trial is warranted where the jury was properly instructed?

4. Whether the trial court properly admitted statements made by the defendant at the time of his arrest?

5. Whether the appellate court should consider issues where no assignment of error has been made?

6. Whether the court's findings regarding the January CrR 3.6 hearing are supported by evidence?

7. Whether the court erred in finding that police entry of the motel room was lawful under exigent circumstances?

8. Whether police had probable cause to arrest the defendant?

9. Whether police could lawfully contact the defendant at the motel room without probable cause to arrest?

10. Whether the defendant was entitled to an instruction that rendering criminal assistance is a lesser-included offense of Murder in the first degree?

11. Whether the court could impose an exceptional sentence, based upon accomplice liability?

12. Whether the trial court abused its discretion in permitting spectators to attend trial wearing shirts commemorating the victims?

B. STATEMENT OF THE CASE.

1. Procedure

On March 2, 2010, the Pierce County Prosecuting Attorney (State) charged the defendant with four counts of Aggravated Murder in the first degree. CP 1-4. The charges included firearm sentencing enhancements and allegations for an exceptional sentence. *Id.* The State later amended the Information to include four counts of felony murder. CP 817-823. (After the State rested and the evidence had been heard, the court dismissed Counts V-VIII for insufficient evidence. 28 RP 3511.)

January 21, 2011, the trial court conducted a hearing under CrR3.6 regarding the defendant's motion to suppress evidence discovered pursuant to a search warrant. 1/21/2011 RP.

Trial began on March 2, 2011, before the Hon. Frederick Fleming. 1 RP 3. Before jury selection, the court held another CrR 3.6 hearing, this time regarding issues under ***Franks v. Delaware***, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978). 3 RP 153 ff. The court also held a hearing under CrR3.5 regarding the admissibility of statements made by the defendant. 2, 3, 4, 5 RP.

After hearing all of the evidence, the jury found the defendant guilty of premeditated first degree murder. CP 2041-2044. The jury did not find the aggravating circumstances as alleged under RCW 10.95.020. CP 2045-2048. The jury did find the firearm sentence enhancements (CP 2053-2056) and the circumstances for an exceptional sentence (CP 2049-2056).

After the trial was over, the defendant filed a motion for a new trial, based upon prosecutorial misconduct and juror misconduct. CP 2071-2084. The court denied the motion. 32 RP 3669.

On June 17, 2011, the trial court imposed exceptional sentences of 1200 months on each count, consecutive to each other. CP 2189; 2181. The defendant filed a timely appeal on the same day. CP 2197.

2. Facts

Shortly after 8:00 a.m. on November 29, 2009, Maurice Clemmons entered the Forza coffee shop on South Steele Street in Parkland, Washington, and shot four Lakewood Police officers: Mark Renninger, Ronald Owens, Tina Griswold, and Greg Richards. 17 RP 2114-2115,

2166-2167, 2706, 21 RP 2746. Clemmons brought two guns with him; a 9mm Glock semi-automatic pistol, and a .38 Smith and Wesson revolver. 18 RP 2286-2287. The 9mm Glock became jammed as Clemmons fired. 18 RP 2286. He fired all six rounds contained in the .38 revolver. 18 RP 2287.

He shot Officers Renninger, Owens, and Griswold each once in the back or side of the head. 18 RP 2374, 2381, 2385, 2387. When Clemmons started shooting, Officer Greg Richards was at the counter, ordering coffee (17 RP 2113); Officer Owens dove under a table for cover. 17 RP 2207. Nevertheless, Clemmons shot Owens below the left ear. 18 RP 2385. Officer Richards struggled with Clemmons and shot him once. 18 RP 2288, 19 RP 2442. Clemmons eventually disarmed Richards and shot him once in the head with Richards' .40 caliber Glock pistol. 18 RP 2288, 19 RP 2442. Clemmons left the area and turned up in Seattle. Clemmons was killed shortly thereafter by Seattle Police Officer Benjamin Kelly. 21 RP 2831, 2833. At the time of his death, Clemmons was still armed with Officer Richards' gun. 18 RP 2296, 21 RP 2833.

Shortly after 8:00 a.m. on November 29, 2009, Darcus Allen drove Maurice Clemmons to the area of the Forza coffee shop on South Steele Street in Parkland, Washington. 23 RP 2973, 2974, 2976; Exhibits 191, 291. Allen was driving Clemmons' white pick-up truck. 23 RP 2948. Allen then drove to a self-service carwash approximately one-quarter mile north on South Steele St. to wait for Clemmons. 22 RP 2877. Allen

remained at the carwash between 4 and 10 minutes. 22 RP 2878, 25 RP 3166. After killing the four officers, Clemmons walked from the Forza coffee shop to the carwash. 17 RP 2121, 2171, 18 RP 2263. As soon as he arrived, they sped off, with Allen at the wheel. 19 RP 2476.

Allen drove the truck to a nearby grocery store. The two left the truck there. 20 RP 2634. Allen took a city bus home. 23 RP 2948, 2967. Clemmons only lived a few blocks away. 20 RP 2643, 2657. Later that morning, only hours after the murders, Allen checked into the New Horizon Motel in Federal Way under the name "Randy Huey". 24 RP 3069. Police arrested him there on December 1, 2009. 22 RP 2925.

PART I

STATE'S RESPONSE TO APPELLANT'S BRIEF

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND ALL THE ELEMENTS OF THE CRIMES CHARGED, BEYOND A REASONABLE DOUBT.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt, viewing the trial evidence in the light most favorable to the State. ***State v. Brockob***, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficiency

claim "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). Direct and circumstantial evidence are equally reliable. ***State v. Thomas***, 150 Wn. 2d 821, 874, 83 P. 3d 970 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. ***Thomas***, at 874-875; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Under RCW 9A.08.020(3), an individual is guilty as an accomplice if he or she "solicits, commands, encourages, or requests" another person to commit a crime or aids in its planning or commission, knowing that his or her act will promote or facilitate the commission of the crime. To prove accomplice liability, the State must prove more than a person's physical presence at the crime scene and assent to establish accomplice liability. ***State v. Everybodytalksabout***, 145 Wn.2d 456, 472–73, 39 P.3d 294 (2002). But an accomplice need not participate in the crime, need not have specific knowledge of every element of the crime, and does not have to share the same mental state as the principal. *See*, ***State v. Berube***, 150 Wn. 2d 498, 511, 79 P. 3d 1144 (2003); ***State v. Hoffman***, 116 Wn.2d 51, 104, 804 P.2d 577 (1991).

Here, it was undisputed that Maurice Clemmons murdered the four police officers. It was undisputed that he did so premeditatedly and while armed with firearms. It was undisputed that the defendant drove

Clemmons to the scene, waited at the nearby carwash, and drove Clemmons away after the murders. The question was: did the defendant act knowingly; did he assist Clemmons by driving him to the Forza, knowing that Clemmons intended to kill the officers and assist in Clemmons' escape afterwards?

Days before the murders, the defendant knew that Clemmons had removed the electronic locating ankle bracelet that Clemmons was required to wear. 23 RP 2959, 2963. The defendant was present, days before the murders, at the Clemmons family Thanksgiving dinner in 2009, where Clemmons stated that he hated the police and threatened to shoot them. 21 RP 2749. At the same dinner, Clemmons displayed a semi-automatic pistol. 21 RP 2750, 23 RP 2962.

On November 29, 2009, Clemmons picked the defendant up at the defendant's home at 7427 So. Asotin Street in Tacoma. 21 RP 2762. Clemmons had the defendant drive in returning south, eventually onto South Steele Street. 23 RP 2973.

The self-service carwash where the defendant later ended up is at the corner of South 112th and Steele. 17 RP 2121. However, the defendant and Clemmons drove past it and continued south on Steele Street. On an opposite corner of the same intersection was a Union 76 gas station. 22 RP 2861. It had a video surveillance system. *Id.* Video analyst Grant Fredericks showed the jury video from that gas station depicting at least two light-colored pick-up trucks that drove south on Steele Street just

before 8:00 a.m. 22 RP 2875. The defendant himself admitted to Det. Kobel that he and Clemmons had driven south on Steele St. past Forza coffee. 23 RP 2973-2974.

At the same time, the four Lakewood Police officers had arrived at Forza. Some of the patrol cars were parked in front, on Steele. 17 RP 2110. Greg Richards parked his car on the south side of the building. 17 RP 2162. Another officer parked his car behind the building. 17 RP 2107. Barista Michelle Chabaya saw Clemmons appear from around the south side of the building. 17 RP 2112. Both baristas, Michelle Chabaya and Sara Kispert, saw Clemmons enter right behind Officer Richards. 17 RP 2112, 2162.

After dropping Clemmons off at Forza, the defendant drove back to the nearby self-service carwash. When the defendant pulled into the self service carwash, he was alone. 22 RP 2877. No one saw, nor did the video show, Clemmons walking from the carwash. The video did show (22RP 2882) and witnesses did see him walking back. Bryan, Kirk, and Austin Waage, across the street at an Arco AM/PM gas station/convenience store, saw the defendant at the carwash. They all described his actions as "pretending" or going through the motions with the car wash. 19 RP 2471, 2511, 2542. Kirk Waage said that the truck seemed to be ready to leave when Clemmons arrived (19 RP 2526), and that the defendant seemed to be waiting for someone. 19 RP 2530.

Flight may be considered as circumstantial evidence of guilty knowledge. *See*, ***State v. McDaniel***, 155 Wn. App. 829, 853-854, 230 P. 3d 245 (2010); *see, also*, ***State v. Graham***, 130 Wn.2d 711, 726, 927 P. 2d 227 (1996)(in context of probable cause).

As soon as Clemmons walked up, rejoining the defendant, they sped out of the carwash. Witnesses said the truck "peeled out". 17 RP 2122, 2172, 19 RP 2476-2477, 2539. The defendant was in such a hurry that he tossed the carwash "wand" into the bed of the truck. The wand snapped off as the defendant sped off. 19 RP 2480, 2525, 2539, 21 RP 2733. The defendant drove Clemmons quickly south on Ainsworth. 20 RP 2576.

The defendant drove the truck to the parking lot of a grocery store near Clemmons' home and left it there. 20 RP 2625. A police canine unit unsuccessfully tried to track the occupants of the truck. 20 RP 2374. The canine officer opined that the occupants may have got out of the truck and into another vehicle at the location. *Id.*

After ditching the truck, the defendant took a city bus back home. 23 RP 2967. The bus driver testified that there was a northbound bus stop conveniently located directly across the street from where police found the truck abandoned. 24 RP 3105.

Soon thereafter, the defendant showed up at Cicely Clemmons' house. 21 RP 2761. The defendant almost immediately went to Federal Way, where he checked into the New Horizon Motel under the name

"Randy Huey". 24 RP 3115. During a post-arrest interview, Det. Kobel asked the defendant's name. The defendant did not answer right away. First, the defendant asked "Who are you looking for?" 23 RP 2945. Then, he identified himself as "Randy Huey". *Id.* In the interview, the defendant gave Det. Kobel multiple versions of his actions during the past couple of days and his interaction with Clemmons. 23 RP 2947.

Based on this evidence, a jury could certainly conclude that the defendant dropped Clemmons off at the coffee shop, knowing Clemmons' intent was to kill police officers. He himself admitted that he drove Clemmons to the area. The time frame was very brief; insufficient for Clemmons to walk the ¼ mile from the carwash to the coffee shop, struggle with and kill four police officers, himself get shot, and walk back. The defendant knew of Clemmons' recent threats to kill police and that he was armed. The jury could conclude from the defendant's flight, hiding out, and use of an assumed name that he knew what Clemmons was going to do and that the defendant had assisted him. The jury could conclude that the defendant further participated where he agreed to wait nearby to pick Clemmons up to escape. There was sufficient evidence for the jury to convict the defendant as charged.

2. THE PROSECUTING ATTORNEYS DID NOT COMMIT MISCONDICT IN CLOSING WHERE THEY ARGUED THE LAW AS PROVIDED IN THE JURY INSTRUCTIONS.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. ***State v. Carver***, 122 Wn. 2d 300, 306, 93 P. 3d 947 (2004). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by* ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002); *see*, ***State v. Warren***, 165 Wn. 2d 17, 195 P. 3d 940 (2008).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994). Where defense counsel objected to a prosecutor's

remarks at trial, the trial court's rulings are reviewed for abuse of discretion. ***State v. Gregory***, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006).

The major issue in this case was whether the defendant knew that Clemmons was going to go into the coffee shop to kill police officers. The argument at issue was regarding the mens rea element for an accomplice. Knowledge may be inferred from circumstantial evidence. If information is sufficient to cause a reasonable person in the same situation to believe that a fact exists, the trier of fact may infer that the defendant had knowledge. ***State v. Perebeynos***, 121 Wn. App. 189, 196, 87 P. 3d 1216 (2004): ***State v. Shipp***, 93 Wn. 2d 510, 610 P. 2d 1322 (1980). The prosecuting attorney in the present case was arguing this concept to the jury. The prosecutor acknowledged the challenge of determining what a person knows, absent an admission. 29 RP 3544. He accurately pointed out that the jury could use circumstantial evidence, and with that evidence, infer that if a reasonable person would have known a fact, the defendant did. 29 RP 3545.

The state must prove that the defendant did know that he was assisting in a crime. A jury is permitted to infer the defendant's personal knowledge if an ordinary person would have had knowledge under the circumstances but such an inference is not mandatory. ***State v. Shipp***, 93 Wn.2d, at 517. This is different than proving what the defendant "should have known". A defendant might correctly argue: "Maybe I should have known, but I did not." In arguing that the defendant did know and the

permissible inference, the prosecutor conflated the subjective "did" with the objective "should have".

The prosecutor referred the jury to instruction no. 9 which provides a clear and accurate statement of the law and told the jurors that they would be applying that instruction during deliberation. 29 RP 3544-3545. The court also instructed the jury that the law was contained in its instructions and that they must disregard any remark, statement, or argument that was not supported by the law in those instructions. CP 2017. The jury was clearly instructed that they could infer the defendant's knowledge by applying a reasonable person standard but they were not required to do so. *See* Instruction 9, CP 2026.

A prosecutor's misstatement of the law in closing argument does not warrant a new trial where the jury was properly instructed. ***State v. Classen***, 143 Wn. App. 45, 64-65 n. 13, 176 P.3d 582 (2008). Here, the jury was correctly instructed on each of the elements it needed to find in order to convict the defendant. A jury is presumed to follow the instructions given. ***State v. Stein***, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

In the present case, the jury was properly instructed that:

> A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime.
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which

> are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Instruction 9, CP 2026. The defendant did not object to this instruction.

The jury was also correctly instructed that:

> It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.
>
> ...
>
> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

See, Instruction 1, CP 2016, 2017.

In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? ***Smith v. Phillips***, 455 U.S. 209, 102 S. Ct. 940, 71 L.Ed.2d 78 (1982); ***State v. Weber***, 99 Wn. 2d 158, 164, 659 P. 2d 1102 (1983). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the

petitioner's due process rights to a fair trial. ***State v. Davenport***, 100 Wn. 2d 757, 675 P.2d 1213 (1984).

The appellate court should review this argument in the context of the entire closing and the court's instructions. The Court's focus is less on what the prosecutor said; but rather on the effect which was likely to flow from the remarks. *See*, ***State v. Emery***, 174 Wn. 2d 741, 762, 278 P. 3d 653 (2012). "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Id.*, quoting ***Slattery v. City of Seattle***, 169 Wash. 144, 148, 13 P.2d 464 (1932).

Here, the prosecuting attorney argued that the jury was permitted to infer from the circumstantial evidence that the defendant knew that Clemmons intended to kill the police officers. 29 RP 3544. The prosecutor referred specifically to the instruction. 29 RP 3545, 3546. The prosecutor pointed out that his phrase "he should have known" was a summary or shorthand way to describe the combined concepts of circumstantial evidence and subjective knowledge. 29 RP 3545. He went on to properly argue, based on the evidence, that: "if a reasonable person would have known that Maurice Clemmons was going to go in there and kill these cops, then his getaway driver knew, too." 29 RP 3545. The defendant's initial objection was regarding shared premeditation. 29 RP 3545. The

court's ruling was correct under ***Breube*** and ***Hoffman***, *supra.* The defendant then also objected to the "should have known" argument.

The "should have known" aspect of the prosecutor's argument was improper. Under the law, a person may only be convicted for the criminal act that he or she intends or knows, as the elements of the crime require. The jury may conclude, from circumstantial evidence, that a reasonable person knowing all the facts and circumstances that the defendant knew would have known, and therefore that the defendant acted knowingly. The jury may not find a person guilty of a crime where the defendant did not have guilty knowledge, but, from all the facts and circumstances, should have.

The prosecutor went on to repeat that a reasonable person would know what Clemmons' intent was, and that the defendant was assisting in it, therefore the defendant knew. 29 RP 3566. Again the prosecutor argued: "He knew. Really, how could he not." *Id.* The prosecutor went on to further argue that the evidence showed that the defendant had the required knowledge: "He knew, and he knew his actions would help that murder." 29 RP 3567.

It would have been more correct and legally accurate for the prosecuting attorney to have focused on how the circumstantial evidence proved the defendant's intent, rather than including the "should have

known" theme. However, the prosecuting attorney also repeatedly correctly argued the same legal principle of "knowledge" in this context. He referred the jury to Instruction 9. 29 RP 3546. The jury was correctly instructed and followed the law.

The prosecutor's argument was made in the initial closing. The defendant objected, but did not request a jury instruction. In his closing, the defendant had the opportunity to likewise argue the meaning of Instruction 9. The defendant could have also pointed out the language of the instruction and argue that the State was misrepresenting the meaning of the second paragraph. The defendant touched on that briefly. 29 RP 3604. The defendant made a strong factual argument that, while Clemmons did commit these murders, the defendant did not know what Clemmons was going to do, and the defendant had nothing to do with it. 29 RP 3583. He argued that the evidence showed that Clemmons was delusional and unpredictable. 29 RP 3576-3577. He disputed the evidence and the prosecutor's conclusions.

No prejudice resulted from the prosecutor's misstatement of the law. Both sides argued the meaning and application of the instructions. Both argued the evidence and their theories of the case. The defendant was able to respond to and rebut the prosecutor's arguments by pointing out a correct jury instruction. The defendant received a fair trial.

3. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS MADE DURING HIS ARREST.

a. The defendant does not assign error to the trial court's Findings from the CrR3.5 hearing.

In reviewing findings of fact on a motion to suppress evidence, the appellate court only reviews those findings of fact to which error has been assigned to determine whether substantial evidence in the record supports them. ***State v. Hill***, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings are deemed verities on appeal. *Id.* at 644; ***State v. Eserjose***, 171 Wn. 2d 907, 912, 259 P. 3d 172 (2011). The Court reviews conclusions of law in a suppression order de novo. ***State v. Armenta***, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Following the CrR 3.5 hearing, the trial court entered findings on the disputed and undisputed facts. CP 2172-2178. The defendant does not assign error to the trial court's findings of fact from the CrR 3.5 hearing. These Findings are verities.

b. The Findings from the January, 2011 CrR 3.6 hearing are supported by evidence.

The defendant assigns error to Findings 8, 9, 11, and 12 from the January, 2011 CrR 3.6 hearing. App. Br., at 3. All of these Findings are supported by evidence and the law]

At the hearing, King County Sheriff Det. Johnson testified that he had gathered information that the person later identified as the defendant

was the getaway driver. 1/21/2011 RP 42-43. The suspect was possibly a co-conspirator in the murders. *Id.*, at 43. Reggie Robinson had informed Det. Johnson that the defendant was a close friend or associate to killer Maurice Clemmons. *Id.*, at 44. Robinson told Det. Johnson that the defendant was currently stating at the New Horizons Motel. *Id.*, at 45.

Det. Johnson was the person who knocked on the door of room 25 of the New Horizon Motel. 1/21/11 RP 50. He believed the situation was dangerous because police had reason to believe that the man they were looking for, "Randy Huey" or "Dorcus", was involved in the homicides as the driver. Det. Johnson and the other law enforcement personnel present knew that Clemmons was armed and dangerous and had been killed by police in Seattle. 1/21/2011 RP 46. They feared that "Randy" or "Dorcus" would "shoot it out" with the police. 1/21/2011 RP 47-48. Police considered "Randy" or "Dorcus" armed and dangerous. *Id.*, at 48.

When a woman (later identified as Maurice Clemmons' sister, Latonya) opened the door, Det. Johnson could see that the defendant was in the bed, only a few feet from the door. The defendant was partially covered. *Id.*, at 50. The defendant had pillows around him. Det. Johnson was concerned that the defendant was armed and a threat. *Id.*

c. Police could lawfully enter the room without a warrant, under the exigent circumstances presented.

The trial court found that:

> Exigent circumstances existed to detain the defendant because of the grievous circumstances of four police officers having been murdered for no other reason than their status as police officers, and the alleged getaway driver of the murderer being located at the motel.

Reason IV. 8 (CP 812).

Police may enter a premises without a warrant under exigent circumstances. ***State v. Smith***, 165 Wn. 2d 511, 517-518, 199 P. 3d 386 (2009). In ***State v. Cardenas***, 146 Wn. 2d 400, 47 P. 3d 127 (2002), the Supreme Court laid out six factors to consider in determining whether exigent circumstances justify a warrantless entry:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry is made peaceably.

146 Wn. 2d at 406; ***Smith***, 165 Wn. 2d at 518.

There was no dispute that police were investigating an extremely violent crime: the deliberate murders of four police officers. The murders

had occurred less than 48 hours earlier. The killer had used two guns and taken the pistol from one of the victims. The killer was still at large. They had information that killer was aided by a getaway driver, and that the driver was staying in room 25 of the motel. They knew that the getaway driver was known by two names. Police knocked on the door and waited for someone to open it. The trial court's finding is supported by evidence and the law.

d. Contacting the defendant and use of force.

Reason IV. 9 states:

> It was reasonable for the officers to not take chances with their own personal safety when contacting the alleged getaway driver.

Reason IV. 11 states:

> It was reasonable for the officers to act swiftly to detain the defendant because there was enough light to recognize him, and he was located next to pillows which obscured his movements, thereby creating an officer safety risk.

Reason IV. 12 states:

> For the officers to have done anything other than what they did, knowing the circumstances and what had happened, would have been to risk their own lives and the officers did not have to risk their lives.

No hard and fast rule governs the display of weapons in an investigatory contact. The court must look at the nature of the crime under

investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the police, all of which bear on the issue of reasonableness. ***State v. Belieu***, 112 Wn.2d 587, 600, 773 P.2d 46 (1989). In such circumstances, courts are reluctant to substitute their judgment for that of police officers in the field. *Id.*, at 601; ***State v. Collins***, 121 Wn.2d 166, 173, 847 P.2d 919 (1993). The court's Reasons IV. 9, 11, and 12 were supported by the record and reflect the principles articulated in ***Belieu*** and ***Collins***.

e. Police had probable cause to arrest the defendant.

Probable cause exists when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe that a suspect has committed or is committing a crime. ***State v. Afana***, 169 Wn.2d 169, 182-183, 233 P.3d 879 (2010).

Probable cause "boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed a crime." ***State v. Louthan***, 158 Wn. App. 732, 741, 242 P. 3d 954 (2010), quoting ***State v. Klinker***, 85 Wn.2d 509, 521, 537 P.2d 268 (1975). The relevant inquiry in a probable cause determination is whether an officer had objectively sufficient probable cause to arrest for an offense; the officer's

subjective intent to arrest for a particular offense is immaterial. ***Louthan***, at 742.

In circumstances where police officers act together as a unit, the "fellow officer" rule provides that the collective knowledge of all the officers involved in the arrest may be considered in determining whether probable cause existed. ***State v. Nall***, 117 Wn. App. 647, 650, 72 P.3d 200 (2003). Under the fellow officer rule, the information known to one officer may be considered in deciding whether or not there was probable cause to arrest, even if it was not expressly communicated to the actual arresting officer. ***State v. Wagner-Bennett***, 148 Wn. App. 538, 542, 200 P. 2d 739 (2009).

Here, the testimony and the findings of fact state that Maurice Clemmons murdered the four police officers at a coffee shop. Undisputed Fact I.1. CP 2172. The defendant drove Clemmons to the area in a white pick-up truck. Undisputed Fact I.2. CP 2172. A witness told Det. Johnson that the defendant had admitted droving Clemmons to the area of the murder. Undisputed Fact I. 10. CP 2174. Det. Johnson knew of additional information from other police officers confirming that the defendant ("Randy Huey") was Clemmons' driver. Undisputed Fact I. 11. From these facts alone, a police officer or the trial court could reasonably believe that the defendant had committed a crime: by driving, helped Clemmons commit the murders or get away; and was therefore either an accomplice or rendered criminal assistance.

In this case, the police did not need a bench warrant or a search warrant to knock on the defendant's motel room door. The display of weapons by police, and their entry to the room to do a protective frisk were reasonable and prudent given the nature of the crimes and all the factors known to the police. Police had probable cause to arrest the defendant for his involvement in the murders of four police officers. At minimum, police had reason to detain the defendant for investigatory purposes. The police could lawfully contact the defendant to question him regarding the murder of the officers.

The defendant's statements at the scene were spontaneous. His statements were not in response to questioning or interrogation. CrR 3.5 Undisputed Fact I. 15; Conclusion IV. 3. It is unclear if the statements were even made before or after the police entered the room. The alleged illegal act of entering the room did not result in the discovery or production of evidence. There is nothing to indicate that the act of the police stepping across the threshold to arrest the defendant precipitated the defendant's statements.

4. THE TRIAL COURT DID NOT ERR IN DECLINING TO INSTRUCT THE JURY WHERE RENDERING CRIMINAL ASSISTANCE IS NOT A LESSER-INCLUDED OFFENSE OF FIRST-DEGREE MURDER.

A defendant is entitled to a lesser-included offense instruction if (1) there is evidence to support an inference that the lesser crime was committed; and (2) each element of the lesser offense is a necessary

element of the offense charged. ***State v. Workman***, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). A person is equally guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable including as "an accomplice of such other person in the commission of the crime". *See,* RCW 9A.08.020(1), (2)(c); ***State v. Carter***, 154 Wn.2d 71, 78, 109 P.3d 823 (2005).

The analysis here focuses on the second ***Workman*** requirement.

> [A] person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows *has committed* a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or *has escaped* from a detention facility, he:
> (1) Harbors or conceals such person; or
> (2) Warns such person of impending discovery or apprehension; or
> (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or
> (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or
> (5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or
> (6) Provides such person with a weapon.

RCW 9A.76.050 (emphasis added).

This statutory language implies that a crime or escape has already been committed. *See* ***State v. Anderson***, 63 Wn. App. 257, 818 P.2d 40 (1991), *review denied*, 118 Wn.2d 1021 (1992). Clemmons' and the

defendant's liability, whether as principal or accomplice, occurred at the time of the murders. The defendant was charged as a participant, not one involved after the fact. Therefore, the crime of rendering criminal assistance contains elements that were not necessary elements of the charged crimes, and is not a lesser offense. Rendering criminal assistance under RCW 9A.76.050 is not a "lesser included offense" of accomplice liability. The trial court did not err in refusing the requested instructions.

5. FACTORS FOR A SENTENCE OUTSIDE (ABOVE) THE STANDARD SENTENCING RANGE APPLY TO ALL PARTICIPANTS IN A CRIME.

a. Caselaw holds that exceptional sentences may be imposed on accomplices.

As pointed out above, one who is an accomplice to a crime is as guilty of committing the crime as the principal or other participant. *See*, ***Carter***, 154 Wn. 2d at 78. The law does not distinguish between exceptional sentences for accomplices and participants. In ***State v. Hawkins***, 53 Wn. App. 598, 769 P. 2d 856 (1989), the defendant was convicted of murder, under accomplice liability. The court imposed an exceptional sentence, aggravated by deliberate cruelty to the victim. *Id.*, at 606. Hawkins objected, arguing that the aggravating factor could not be applied to him, as he was "only" an accomplice. The Court of Appeals disagreed, saying: "[W]e will not split hairs in an effort to determine the greater or lesser roles of these three participants." *Id.*

In ***State v. Sweet***, 138 Wn.2d 466, 980 P.2d 1223 (1999), the defendant was convicted of first degree burglary and first degree assault under accomplice liability. Finding deliberate cruelty, particular vulnerability, and abuse of a position of trust, the trial court imposed an exceptional sentence above the standard range. He asserted that he stayed in the vehicle and never entered the house. *Id.*, at 479. He, like Hawkins, argued that the aggravating factor did not apply to him as an accomplice. 138 Wn. 2d at 482. The Supreme Court rejected this argument and affirmed his exceptional sentence. *Id.*, at 484.

b. ***McKim*** and statutory application.

The defendant's reliance on ***State v. McKim***, 98 Wn.2d 111, 653 P.2d 1040 (1982) is an incomplete analysis. ***McKim*** interpreted the language a pre-SRA statute; former RCW 9.95.040, a deadly weapon sentence enhancement. The Court looked at the language of the complicity statute, former RCW 9A.08.020, to determine if the sentence enhancement was applicable to accomplices. *Id.*, at 116.

In ***State v. Silva-Baltazar***, 125 Wn.2d 472, 886 P.2d 138 (1994) and ***State v. Pineda-Pineda***, 154 Wn. App. 653, 226 P. 3d 164 (2010), the Courts examined the statutory language of RCW 69.50.435, the school zone sentencing enhancement as it applied to accomplices. Based upon the statutory language and the facts of the respective cases, the same enhancement was affirmed against the accomplice in ***Silva-Baltazar***, and reversed in ***Pineda-Pineda***.

The analyses of ***McKim*** and ***Pineda-Pineda*** are also distinguishable due to the nature of how the sentence is extended beyond the standard range. Sentence *enhancements*, like those discussed in ***McKim*** and ***Pineda-Pineda***, are different than *exceptional* sentences. Sentence enhancements under RCW 9.94A.533 (3)-(13) are mandatory; they "shall be added". *Id.* A sentence outside (above) the standard range under RCW 9.94A.535(2)(a)-(d) and (3)(a)-(cc) are discretionary; they "may" be imposed. *Id.* In both ***McKim*** and ***Pineda-Pineda*** the Courts were concerned regarding the "strict liability" of the enhancement statutes. *See*, ***McKim***, 98 Wn. 2d at 117; ***Pineda-Pineda***, 154 Wn. App. at 662. Because the imposition of an exceptional sentence is discretionary, the danger of "strict liability" is avoided.

c. The statutory language of RCW 9.94A.535(3)(r) and (v) permits application against an accomplice.

The application of the exceptional sentence statute to an accomplice depends on which aggravating circumstance in RCW 9.94A.535 is being considered. The aggravating circumstances set forth in 9.94A.535 cover a broad range of factors. Some of the circumstances focus on the defendant's actions such as when the defendant manifests deliberate cruelty to the victim, RCW 9.94A.535(3)(a), or uses his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense, RCW 9.94A.535(3)(n). Other circumstances

discuss what the defendant knew or should have known about his victim, such as being particularly vulnerable, RCW 9.94A.535(3)(b), or pregnant, RCW 9.94A.535(3)(c). Other circumstances do not focus on the defendant's actions or what he knew, but on the impact of the crime, i.e. a rape of child resulting in the victim's pregnancy, RCW 9.94A.535(3)(i), or the victim's injuries substantially exceeding the level of bodily harm necessary for the element of crime, RCW 9.94A.535(3)(y). Some aggravating circumstances simply describe some aspect of the offense: it involved a high degree of sophistication or planning, RCW 9.94A.535(3)(m), or an invasion of the victim's privacy, RCW 9.94A.535(3)(p).

Examination of the varied wording of these aggravating circumstances indicates that the Legislature intended some of them to apply to any participant in the substantive crime while others must be attributable to a particular defendant. Generally, the Legislature's use of the phrase "the defendant" in setting forth an aggravating circumstance signals its intent that the circumstance be assessed against the individualized defendant while use of the term "the current offense" signals its intent that the aggravating circumstance can be applied to any participant in the crime.

The language of RCW 9.94A.535(3)(r)and (v) apply the factor to the offense, not the particular defendant:

> (r) *The offense involved* a destructive and foreseeable impact on persons other than the victim

Similarly:

> (v) *The offense was committed against* a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

Thus, the language focuses on the status of the victim, not on the "defendant". The analyses in ***McKim*** and ***Pineda-Pineda*** focus on the language and behavior regarding the defendant.

In this case, the aggravating factor pertains to the nature of the offense committed. There is no reference to "the defendant" or even an indirect reference to the entity committing the crime. These factors do not change from one participant to the next. Once the jury finds the crime meets the criteria set forth in the aggravating circumstance, it is applicable to all the participants in the crime and need not be assessed on an individualized basis. Such an aggravating circumstance should apply equally to all participants in a crime regardless of whether they are the "principal" or "accomplice"; minor or major participant.

Here, the State alleged sentencing aggravating factors that the victims were law enforcement officers performing their official duties at the time, and that the offense involved a destructive and foreseeable

impact on a person other than the victim, under RCW 9.94A.535(3)(r) and(v). The jury found the presence of factor (v), the victims were law enforcement officers. It was equally applicable to the defendant as an accomplice as a principal.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHERE IT DECLINED TO INTERFERE WITH CERTAIN SPECTATORS' RIGHTS UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 22 OF THE STATE CONSTITUTION.

In a criminal trial, the court must balance fundamental constitutional principles and rights of those present. *See*, Article 1, §§ 10 and 22 of the Washington Constitution; 5th, 6th and 14th Amendments to the United States Constitution. The 1st Amendment of the United States Constitution guarantees freedom of expression. The 5th and 6th Amendments accord an accused the rights to a fair, public, trial. Article 1, §§ 10 and 22 of the Washington Constitution require a public trial and an open courtroom. *See, e.g.*, ***State v. Bone-Club***, 128 Wn. 2d 254, 259-260, 906 P. 2d 325 (1995). The public in general and the accused each have a right to an open, public trial. Each may assert and enforce these rights. *See*, ***Bone-Club***, *supra*, and ***Allied Daily Newspapers v. Eikenberry***, 121 Wn.2d 205, 210, 848 P.2d 1258 (1993).

a. The trial court did not abuse its discretion in permitting spectators to wear shirts commemorating the victims.

A silent showing of sympathy or affiliation in a courtroom, without more, is not inherently prejudicial. ***State v. Lord***, 161 Wn. 2d 276, 284, 165 P. 3d 1251 (2007). In ***Lord***, the trial court allowed the presence of spectator buttons for a portion of the trial. When courtroom conduct is challenged as inherently prejudicial to the defendant, the court must determine whether "an unacceptable risk is presented of impermissible factors coming into play" to affect the jury. ***Lord***, at 285, citing ***Holbrook v. Flynn***, 475 U.S. 560, 570, 106 S. Ct. 1340, 89 L.Ed.2d 525 (1986). The court should consider the scene presented to the jury and determine whether it was "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." ***Lord***, 161 Wn. 2d at 285.

Silent displays of affiliation by trial spectators, which do not explicitly advocate guilt or innocence, are permissible. ***In re Personal Restraint of Woods***, 154 Wn.2d 400, 416, 114 P.3d 607 (2005). ***Woods***, like the defendant in the present case, was charged with aggravated first degree murder. Woods was facing the death penalty.

In ***Woods***, the defendant complained of black and orange remembrance ribbons worn by spectators during the trial. *Id.* at 417. Woods objected to the presence of the ribbons, and requested that they be removed. The trial judge allowed the ribbons, with the suggestion that the

court could provide a jury instruction, if necessary, to mitigate any prejudicial effects. *Id.*

The Supreme Court held that this matter was completely within the trial court's discretion. The Court applied the U.S. Supreme Court's decision in ***Holbrook v. Flynn***, 475 U.S. at 572 as the controlling law and upheld the conviction. 154 Wn. 2d at 416–418. The trial court must "look at the courtroom scene presented to the jury and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial". 154 Wn. 2d at 417.

Here, spectators wore shirts depicting the names of the deceased officers, with the words "You are not forgotten". 24 RP 3024. The prosecuting attorney described the shirts as "subdued and respectful" and "tasteful and muted". 24 RP 3025. Unlike the buttons in ***Lord***, the shirts did not depict photographs of the officers. *Id.* The shirts did not have anything designed to draw the jurors' attention. *Id.* The shirts did not advocate a verdict or any finding the jury was to make. The shirts did not express a point of view or opinion regarding the proceedings.

The spectators had the right to express themselves and be present in the courtroom. The defendant had a right to a fair trial. The trial court viewed the shirts and their purpose. After evaluating the scene presented in the courtroom, the court weighed the rights of the spectators and the rights of the defendant. He denied the motion. There was no error.

The following day, the defense again objected to the same shirts the spectators were wearing. 25 RP 3156. Counsel extended the objection to the officers in uniform that were present as spectators. 25 RP 3157. An officer wearing a uniform in court, as a spectator or otherwise, is permissible under ***Flynn***, 475 U.S. at 571. In ***Flynn***, four state troopers, armed and in uniform, sat in the front row of the spectators' section. They were part of a security detail that also included two deputy sheriffs and six Committing Squad officers; all in uniform. The Supreme Court found that the presence of 12 officers, all armed and in uniform, was not inherently prejudicial to Flynn's right to a fair trial. Here, the trial judge was able to assess the appearance and potential impact of the officers as spectators. There was no error.

b. <u>The defendant waived this issue where he failed to request a curative instruction or a mistrial</u>.

The defendant did not make a motion for mistrial or for a curative jury instruction. Such inaction has been held to constitute waiver, unless manifest constitutional error is found. *See* ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). A mistrial would have been appropriate only if an error or misconduct was s so prejudicial that it could not be cured, and thus, the

defendant did not receive a fair trial. ***State v. Hopson***, 113 Wn.2d 273, 284–85, 778 P.2d 1014 (1989). A defendant generally cannot decline to ask for a mistrial or jury instruction, gamble on the outcome, and when convicted, reassert the waived objection.

Here, defense counsel twice called the spectators' shirts to the court's attention. 24 RP 3024, 25 RP 3156. The defense requested that the court order that the shirts be covered or turned inside-out. 24 RP 3024. The defense did not request a curative instruction or a mistrial. Therefore, the defendant waived this argument on appeal.

PART II

STATE'S CROSS-APPEAL

D. ASSIGNMENTS OF ERROR.

1. The trial court abused its discretion where, considering the evidence in the light most favorable to the State, it found that no reasonable juror would have found all the elements of felony murder, specifically that the principal actor, Maurice Clemmons, intended to assault the victims.

2. The trial court erred in finding that the evidence required the jury to find the defendant guilty or not guilty of premeditated murder, but not felony murder in the second degree.

E. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court accorded the proper weight to the State's evidence of felony murder?

2. Whether the evidence applied only to the theory of premeditated murder, to the exclusion of felony murder? Whether the evidence required a verdict of all or nothing/"stop or go", in the words of the trial court, to the exclusion of a jury verdict on felony murder?

3. Whether the evidence [in the light most favorable to the State] could have supported a verdict of felony murder, predicated on assault?

F. ARGUMENT.

1. THE TRIAL COURT ERRED IN DISMISSING COUNTS V-VIII, FELONY MURDER.

It is difficult to tell if the court's error is one of law or an abuse of discretion. The trial court correctly permitted the filing of the Amended Information which added four counts of felony murder regarding the same criminal acts. *See, e.g.*, ***State v. Womac,*** 160 Wn. 2d 643, 160 P. 3d 40 (2007). The court failed to specifically articulate how or why the evidence did not support the felony murder charges. The court several times described its view that the evidence either supported premeditated murder or nothing: that the case was "either a red light or a green light". 27 RP

3365, 28 RP 3446, 3489, 3504-3505. The court, therefore, seemed to think that the evidence could not support both premeditated murder and felony murder at the same time. This is incorrect. *See e.g.*, ***State v. Roberts,*** 142 Wn.2d 471, 513–514, 14 P.3d 713 (2000).

A trial court's decision to dismiss charges is reviewable under the manifest abuse of discretion standard. ***State v. Puapuaga***, 164 Wn. 2d 515, 520, 192 P. 3d 360 (2008). A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices. ***State v. Rohrich***, 149 Wn.2d 647, 654, 71 P. 3d 638 (2003)(internal cites omitted).

When deciding whether to dismiss a charge for insufficiency of evidence, the trial court views the evidence in the light most favorable to the State, and determines if any rational trier of fact could find guilt beyond a reasonable doubt. ***State v. Collins***, 112 Wn.2d 303, 306-307, 771 P.2d 350 (1989). A motion to dismiss admits the truth of the State's evidence and all the inferences which could reasonably be drawn from that evidence. ***State v. Jesse***, 65 Wn.2d 510, 512, 397 P.2d 1018 (1965); *See, also*, ***State v. Brockob***, 159 Wn. 2d 311, 336, 150 P. 3d 59 (2006).

As argued earlier in this brief, the jury had evidence that the defendant knew that Clemmons intended violence to the police and others. While Clemmons had displayed a pistol at Thanksgiving, there was no direct evidence that the defendant knew that Clemmons had a gun at the

time the defendant left Clemmons at the Forza coffee shop. Therefore, a reasonable juror could conclude that the defendant knew that Clemmons was at least going to assault the officers.

The trial court employed the correct legal standard in reviewing the evidence: prima facie evidence in the light most favorable to the State. 28 RP 3442. The court initially agreed with the State's argument and decided to send the felony murder determination to the jury. 28 RP 3460. The court later re-initiated the argument regarding the felony murder counts. 28 RP 3478.

Where the defendant was equally complicit in Clemmons' assault on the police, the defendant would be complicit in an assault which resulted in death. The State would only have been required to prove the defendant's knowledge that he was assisting Clemmons' criminal assault on the victims. It would have been unnecessary for the State to prove the defendant's actual knowledge of Clemmons' possession of a firearm or whether he intended to assault or to kill. *See*, ***State v. Rice***, 102 Wn. 2d 120, 125-126, 683 P. 2d 199 (1984).

The relationship between assault and murder has been discussed at length in this State. This discussion culminated in ***In re Personal Restraint of Andress***, 147 Wn.2d 602, 56 P.3d 981 (2002), which held that felony murder could not be predicated on assault because the murder included assaultive conduct. *Id.*, at 610. The Legislature immediately reacted to ***Andress*** by reasserting and clarifying that felony murder could

be predicated on assault. *See*, Laws of 2003, chapter 3 § 2, Findings – Intent; RCW 9A.32.050(1)(b).

In the present case, the evidence could be equally applied to prove the charged felony murder, predicated on assault, as well as premeditated murder. There is no question, had one of the officers survived, the defendant could have lawfully been charged with, and convicted of, of felony assault, based upon the same evidence. Clemmons necessarily assaulted the officers when he shot them. As argued above, in the sufficiency of evidence section of this brief, the evidence showed that the defendant knew that Clemmons was going into the coffee shop to shoot the officers. This evidence supported both premeditated murder and felony murder. The court erred in dismissing counts V-VIII.

G. CONCLUSION.

The defendant received a fair trial where the State adduced sufficient evidence to carry its burden of proof beyond a reasonable doubt. The State's closing argument did not deprive the defendant of a fair trial. The trial court did not err in ruling on jury instructions, spectator behavior, imposing an exceptional sentence, or in admitting the defendant's statements. The State respectfully requests that the judgment be affirmed.

The trial court erred where it failed to accord the proper weight to the evidence and apply it equally to the felony murder counts. The evidence equally supported a jury determination on premeditated murder

and felony murder. If this case is reversed and remanded for a new trial, the State respectfully requests that the trial court's dismissal of counts V-VIII be reversed.

DATED: September 27, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.28.12
Date Signature

PIERCE COUNTY PROSECUTOR

September 28, 2012 - 10:38 AM

Transmittal Letter

Document Uploaded: 422573-Respondent Cross-Appellant's Brief.pdf

Case Name: St. v. Allen

Court of Appeals Case Number: 42257-3

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent Cross-Appellant's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

greg@washapp.org