No. 326951

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

State of Washington, Respondent

v.

Oscar Alfred Alden, Appellant

BRIEF OF RESPONDENT

Ryan S. Valaas, WSBA #40695
Deputy Prosecuting Attorney
Douglas County Courthouse
P.O. BOX 360
Waterville, WA 98858
(509) 745-8535

Table of Contents

Table of Authorities

Cases

Statutes

Evidence Rules

Secondary Authorities

I. STATEMENT OF THE ISSUES

A. Was Alden afforded his constitutional right to a unanimous verdict when (1) the jury was instructed that the verdict must be unanimous, and (2) jurors are presumed to follow these instructions?

B. Pursuant to ER 404, did the court abuse its discretion when it excluded evidence of the victim's prior misconduct that was unknown to Alden at the time he shot the victim?

C. Pursuant to ER 608, did the court abuse its discretion when it excluded reputation evidence for peacefulness on the basis that merely being friends with someone, without laying further foundation, did not constitute a sufficient "community" for establishing reputation?

D. Did the court err when it included a self-defense instruction that was separate from the to-convict instruction?

E. Was Alden provided with effective assistance of counsel when his counsel did not object to a correct statement of law during closing argument?

F. Did the court properly deny Alden's request for an exceptional sentence by articulating the reasons that an exceptional sentence would be unjust?

II. STATEMENT OF THE CASE

A. Statement of Facts:

1. Summary:

In the early morning of June 9, 2013, Tom Maks (the victim) was down on the ground, on his knees, unarmed, and wearing only a pair of boxer-shorts when Oscar Alden walked up to within a few feet of him,

pointed a gun directly at his head, and fired one shot, instantly killing him. RP 244, 401-02, 412-20, 455-56.

2. June 7, 2013:

On Friday June 7, 2013, Alden, along with some of his friends, went to party at a vacation home in Orondo, WA owned by Dayton Wiseman's family. RP 325-30. They went there for the weekend to celebrate Wiseman's birthday. RP 326. Wiseman had invited around 11 to 12 other people to the house, including Oscar Alden, Dane Meier, Raymond Roberts, Victoria Lincoln, Andrew Ross, and Jordan Court. RP 326. During this same weekend, Tom Maks (the victim) was staying at his parents' house next door. RP 331.

During that day, the victim helped Wiseman fix a jet ski and the two chatted for a while. RP 333.

3. June 8, 2013:

On Saturday June 8, 2013, the group spent most of the day hanging out on the beach, drinking, and boating on the jet ski. RP 336. That evening, the group planned to go out partying in Chelan, WA, and the victim was encouraged to go with them. RP 334. All of them rode up to Chelan together and began drinking at one of the local bars. RP 337-38.

4. Returning home from Chelan:

After having spent time drinking at the bar for a while, many members of the group got drunk and drove back to Wiseman's house in Orondo. RP 339. It was unclear to most of the group whether anyone had given Tom Maks a ride back to the house (or whether he'd been left at Chelan). RP 377. Once home, most of the group fell asleep in various parts of the house; Alden fell asleep in one of the recliners. RP 379-80.

5. The murder:

After most of the group had fallen asleep, they were woken up in the early hours of June 9, when the victim entered the house and began talking in a loud voice. RP 383. The victim proceeded to wake the group up even more by shaking them, and in the case of Alden, flipping over the recliner he was in. RP 385-87. Eventually, most of the group was woken up, and the victim was escorted out of the house by Raymond and Meiers. RP 392-93, 498.

After being escorted out of the house, the victim left the property; however approximately a minute later, he returned. RP 396. Shortly thereafter, the victim and Raymond got into a verbal argument; however the victim didn't make any threats against either Raymond or Meiers during this argument. RP 400. Furthermore, although Raymond had seen what appeared to be a gun tucked into the victim's pants earlier in the night, during the verbal argument that was occurring, the victim showed

both Raymond and Meier that he was not carrying a weapon by lifting his shirt up. RP 402, 497.

Eventually, the verbal argument escalated into a physical confrontation with the victim hitting Meier. RP 404-05, 514. Both Meier and Raymond responded by hitting back at the victim, knocking him to the ground, on his knees. RP 405-08, 515. After being knocked down, the victim was punched a couple more times by Raymond. RP 409.

At some point during this altercation between Raymond, Meier, and the victim, Alden showed up on the scene (as well as Andrew). RP 412-13. When Raymond saw Alden approaching the scene, Raymond asked him to get his gun. RP 521. Shortly thereafter, both Raymond and Meier observed Alden walk up to within a couple feet of the victim while the victim was still down on his knees, unarmed, and wearing only a pair of boxer-shorts (having recently taken off his shirt and pants), point a gun at the victim's head, and fire one round directly into the victim's head. RP 401-02, 416-20, 524-28. When the victim was shot, he stopped moving and fell over. RP 420. The gunshot fired by Alden killed the victim. RP 528.

B. Evidentiary Rulings:

During the trial, both parties made a number of evidentiary motions. Alden moved to introduce evidence of the victim's conduct

leading up to the point where Alden shot the victim. CP 152-54; 163-64. The court granted Alden's motion to the extent that Alden had knowledge of these acts. RP 112. The court reasoned that, to the extent Alden knew of the victim's behavior, it would be relevant to show self-defense, but that any of the victim's behavior unbeknownst to Alden would be irrelevant and not part of the res gestae. RP 112-13.

Alden also moved to introduce evidence of his reputation for peacefulness through the testimony of his friends. The court denied this motion, stating that mere association by friendship did not, by itself, establish the requisite "community." RP 184-85. The court stated that Alden's friends may constitute a community for purposes of reputation evidence, but only if Alden was able to lay an adequate foundation first. RP 184-85.

C. Jury Instructions and Verdict:

The court's instructions to the jury were based off the Washington Pattern Instructions. These included an instruction stating that the jury must be unanimous in its verdict:

> When completing the verdict forms, you will consider the crime of Murder in the Second Degree as charged. If you unanimously agree on a verdict, you must fill in the blank in Verdict Form A the words "not guilty" or the word "guilty," according to the decision you reach . . . You will also consider the crime of Manslaughter in the First Degree as charged. If you unanimously agree on a verdict, you

> must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty," according to the decision you reach . . . Because this is a criminal case, each of you must agree for you to return a verdict.

CP 329. The instructions also included the to-convict instructions for each of the crimes. CP 313, 316, 319. The court also included an instruction on self-defense, which stated that it was the State's burden to disprove self-defense. CP 321. None of these instructions were objected to by either party.

During deliberations, the jury asked the court whether it needed to convict on both Murder in the Second Degree and Manslaughter in the First Degree. CP 302. The court responded by saying that the jury could "find [Alden] not guilty of either or both and/or guilty of either or both." CP 302. Again, neither party objected to this response. RP 1492. Soon thereafter, the jury convicted Alden of Murder in the Second Degree and Manslaughter in the First Degree.

D. Sentencing:

Because the court found that convicting Alden of both Murder in the Second Degree and Manslaughter in the First Degree would violate Double Jeopardy, it properly dismissed the less serious charge of manslaughter before sentencing, leaving only Murder in the Second Degree as the sole conviction. CP 422.

For Murder in the Second Degree, the court sentenced Alden to a total of 231 months in prison. CP 425. Although Alden argued that the court should impose an exceptional sentence based on the mitigating factors that (1) the victim was a participant and/or initiator to the crime, and that (2) Alden committed the crime under duress/coercion, the court denied his request. RP 1563. In denying the exceptional sentence, the court reasoned that an exceptional sentence would be unjust and offensive when taking into consideration the impact on the victim's parents, his daughters, and his friends, as well as on the jurors themselves. RP 1563.

III. ARGUMENT

A. The jurors were properly instructed that they must be unanimous to find Alden guilty of each crime.

Defendants have a constitutional right to a unanimous verdict. *See State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963). Alden's right was not violated in this case. The jurors were instructed that to find Alden guilty or not guilty as to each crime, they must be unanimous:

> When completing the verdict forms, you will consider the crime of Murder in the Second Degree as charged. If you unanimously agree on a verdict, you must fill in the blank in Verdict Form A the words "not guilty" or the word "guilty," according to the decision you reach . . . You will also consider the crime of Manslaughter in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty," according to the decision you reach . . . Because this is a criminal case, each of you must agree for you to return a verdict.

CP 329. Ignoring the fact that the jury instructions made the unanimity requirement clear, Alden argues that the verdict forms were insufficient because they failed to expressly require unanimity. Alden cites no authority for his proposition that verdict forms must repeat the requirement of unanimity previously given in the instructions.

The present case is distinguished from *State v. Russell*, 101 Wn.2d 349, 678 P.2d 332 (1984), which Alden relies on to support his argument. In *Russell*, the Court was asked to decide whether the defendant's right to

a unanimous verdict was violated when the trial court failed to submit a verdict form that distinguished between the alternative means of committing second-degree murder (intentional murder or felony murder). *Id.* at 354. The court reversed the second-degree murder conviction, holding that the right to a unanimous verdict was violated because "the verdict form supplied to the jurors did not distinguish between second degree felony murder and intentional second degree murder . . . [i.e.,] no provision was made for considering each of the alternatives that composed the charge" *Id.* Because of this omission, the court held it would be "impossible to know whether the jury returned a guilty verdict on intentional second degree murder or the 'alternative' charge of second degree felony murder." *Id.*

The present case is distinguished from *Russell* for a couple reasons. First, in the present case, the State did not charge alternative means of committing a single crime; it charged two separate crimes: Murder in the Second Degree and Manslaughter in the First Degree. Second, the jury was provided a verdict form for each of these crimes. CP 332-7. Coupled with the jury instructions requiring unanimity, the separate verdict forms for each crime leave zero ambiguity or doubt as to the jury's decision.

1. The court properly instructed the jurors that one of their options was to find Alden guilty of both Murder in the Second Degree and Manslaughter in the First Degree.

Alden argues the verdicts on Murder in the Second Degree and Manslaughter in the First Degree are contradictory and mutually exclusive because a juror cannot simultaneously find a killing to be both intentional and unintentional. Alden is incorrect. Alden mistakenly argues that one of the elements of Manslaughter in the First Degree is that the killing was unintentional. No such element exists. RCW 9A.32.060(1). On the contrary, "manslaughter is a lesser included offense of intentional murder." *State v. Berlin*, 133 Wn.2d 541, 550, 947 P.2d 700, 704 (1997). If anything would have been contradictory, it would have been the jury finding Alden guilty of intentional murder and not guilty of manslaughter.

2. Alden failed to preserve the issue of jury polling for appeal by failing to make a timely objection to it at trial.

Although defendants have a right to poll a jury, errors as to jury polling are waived if not objected to at trial. *State v. Strine*, 176 Wn.2d 742, 749-50, 293 P.3d 1177, 1180 (2013). Despite this, an inquiry into jury polling may still be made if there is a doubt as to unanimity caused by an omission in the instructions or other instructional anomaly. *State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963); *State v. Lamar*, 180 Wn.2d

576, 327 P.2d 576 (2014). Fortunately, this court does not need to look at jury polling for evidence of unanimity because there was no underlying flaw or omission in the instructions. However, a cursory overview of both *Badda and Lamar* remains helpful.

In *Lamar,* the Washington Supreme Court held the trial court erred when it instructed the jury to bring a newly added alternate juror up to speed on the deliberations. *Lamar* at 586-87. The Court specifically held this instruction violated the defendant's constitutional right to a unanimous verdict because the newly added juror "had no opportunity to offer his views or try to convince his fellow jurors of a different view if he disagreed with any determinations about the evidence or anything else that had been decided [before he came into the deliberations]." *Id.* The Court in *Lamar* briefly referenced the fact that jury polling can be evidence of jury unanimity in certain cases, but it ultimately concluded evidence of jury polling was insufficient in rectifying the trial court's previous instructional error. *Id.* at 587-88.

In *Badda*, the Washington Supreme Court held the trial court erred when it completely failed to inform the jury, "at any time during the trial or in the instructions, that their verdict must be unanimous." *Badda* at 181. As in *Lamar*, the Court went on to briefly discuss the ability of jury polling to potentially rectify the unanimity omission but ultimately

concluded the trial court's record on polling was too sparse to make any affirmative finding on unanimity. *Id.* at 182; *see also State v. Mickens*, 61 Wn.2d 83, 87, 377 P.2d 240 (1962) (holding jury polling can be used to assuage any doubts regarding unanimity).

It is a stretch to see how either *Lamar* or *Badda* are applicable to the present case. Other than standing for the broad and undisputed proposition that jury verdicts must be unanimous, the facts in the two cases are in no way analogous to those in the present case. Unlike the critical flaw in *Badda*—a complete failure to give any instructions (written or oral) as to the unanimity requirement—the jury in the present case was given clear and explicit instructions that unanimity was required. And as to *Lamar*, where the trial court instructed the jurors to (essentially) not restart the deliberations with the addition of the new juror, there was no similar occurrence in the present case (the original 12 jurors never changed).

As discussed in *Badda*, *Lamar*, and *Mickens*, this court does not need to attempt to rely on jury polling to support jury unanimity because of the simple fact that the unanimity requirement was made clear in the instructions. Even so, superfluously examining the jury poll in the present case only adds support to the conclusion that the jury was unanimous: all 12 jurors affirmatively answered that the verdict was their own verdict and

the verdict of the entire jury. RP 1581. Although the trial court referred to all the individual verdicts as "the verdict" rather than separately inquiring into each of them, the fact that all 12 jurors confirmed that "the verdict" was both theirs and the jury's only reinforces the unanimity requirement contained in the instructions.

In conclusion, there is no question that the jurors were properly instructed as to their duty to reach a unanimous verdict. The jury instructions clearly specified that the jurors must be unanimous and in agreement as to each verdict. Furthermore, there is no ambiguity as to which crimes the jury found Alden guilty of because each crime had its own verdict form. And as mentioned previously, this court does not need to examine the thoroughness of the jury polling where the court's instructions to the jury make the unanimity requirement clear, and any errors as to the polling are waived because they were not preserved at the trial court level.

B. The trial court's evidentiary rulings limiting the scope of the victim's prior acts and limiting evidence of Alden's reputation for peacefulness were not abuses of discretion.

In general, evidentiary rulings made by a trial court are reviewed for abuse of discretion. *State v. Benefiel*, 131 Wn. App. 651, 654, 128 P.3d 1251, 1252 (2006). An abuse of discretion only occurs when the trial

court's decision is "manifestly unreasonable, or is exercised on untenable grounds for untenable reasons." *Id.* (quoting *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)).

1. The trial court did not abuse its discretion when limiting evidence of the victim's prior acts.

Alden attempts to argue the res gestae rule is an independent avenue for admissibility. This is not so. Rather, the res gestae rule is a conglomerated synthesis of the evidence rules, primarily ER 401 and 404. *See State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989).

> The State apparently argues that res gestae is a separate ground for admissibility unrelated to ER 404(b). However when evidence of res gestae involves other crimes or acts, the evidence must meet the requirements of ER 404(b) . . . [Furthermore,] in deciding whether evidence of other crimes or acts is admissible for a proper purpose, the trial court must first consider the relevance of the evidence.

Id. (citing ER 404(b); *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980); *State v. Saltarelli*, 98 Wn.2d 358, 361, 655 P.2d 697 (1982)).

Therefore, in order for the victim's prior acts to be admissible, they must be relevant and within one of the exceptions to ER 404(b). As the court correctly determined (and discussed *supra*), the prior acts would only have been relevant to the extent Alden was aware of them.

Although Alden cites to cases from other states to support his proposition that evidence of the victim's acts may still be relevant even if the defendant was unaware of them, Washington has taken the opposite position. *State v. Adamo*, 120 Wash. 268, 271, 207 P. 7 (1922). "Acts of the deceased may not be shown unless it appears they were brought to the knowledge of the defendant before he committed the crime charged." *Id.* "Prior violent incidents [of the victim] would be relevant to establish [a defendant's] reasonable apprehension on the night of the crime, **but only if it was shown that [the defendant] knew of those incidents**" (emphasis added). *State v. LeFaber*, 77 Wn. App. 766, 769, 893 P.2d 1140, 1143 (1995), *rev'd on other grounds in State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996); *see also State v. Walker*, 13 Wn. App. 545, 550, 536 P.2d 657 (1975) (holding that the victim's acts of violence were properly excluded because it was not established that the defendant knew of those acts).[1]

Although evidence of reputation for violence may be admissible even if it is unknown to a defendant for the purpose of proving who was the aggressor, this reputation evidence must be based upon the witness's

[1] *See also State v. Callahan*, 87 Wn. App. 925, 934, 943 P.2d 676 (1997) (holding that the victim's "reputation for violence was not a factor affecting Callahan's perception of imminent danger and was [therefore] not admissible as evidence that Callahan's apprehension was reasonable"); *State v. Negrin*, 37 Wn. App. 516, 526, 681 P.2d 1287 (1984) (victim's reputation for violence irrelevant and inadmissible where defendant testified that he had no knowledge of it).

personal knowledge of the victim's reputation in a relevant community during a relevant time period. *Callahan* at 934 (citing *State v. Riggs*, 32 Wn.2d 281, 284, 201 P.2d 219 (1949)). And while ER 405(a) allows for reputation evidence whenever a trait of character is otherwise admissible, ER 405(b) limits admissibility of specific instances of conduct to those situations where character of a person is an essential element of the defense. Character of the victim is not an essential element of self-defense. *State v. Alexander*, 52 Wn. App. 897, 901, 765 P.2d 321, 324 (1988) (distinguishing between admissible character evidence and inadmissible specific acts for the purpose of asserting self-defense).

Alden was not seeking to introduce evidence of the victim's reputation, he was seeking to introduce the victim's specific acts. Therefore, the cases cited by Alden stating that reputation evidence may be admissible, despite a defendant being unaware of it, are inapplicable. Rather, as made clear by the holdings in *Adamo*, *LeFaber*, and *Walker*, specific acts of the victim are only admissible if they are known to the defendant at the time he committed the crime. Because this was exactly how the trial court ruled, no error occurred.

Even if the court did err by excluding some of the victim's acts, the error was harmless. "The improper admission of evidence constitutes

harmless error if evidence is of minor significance in reference to overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

In the present case, the large majority of the victim's acts and behavior that night were admitted by the court. That is to say, the jury heard in great detail about the victim's belligerent and sometimes aggressive behavior during the night. Instead of Alden being precluded from offering any evidence regarding the victim's behavior, he was allowed to introduce most of the victim's behavior that night.[2] The only evidence excluded involved the victim's acts for which Alden had no knowledge. As such, the excluded evidence was of minor significance in reference to the overall evidence presented to the jury.

2. The trial court did not abuse its discretion when limiting evidence of Alden's reputation for peacefulness.

In general, evidence of a trait of character offered by an accused is only admissible if it is relevant. ER 404(a)(1); *City of Kennewick v. Day*, 142 Wn.2d 1, 6, 11 P.3d 304, 307 (2000) (citing *State v. Eakins*, 127 Wn.2d 490, 495, 902 P.2d 1236 (1995). Specifically, character evidence of peacefulness may be relevant to show that either (1) a defendant did not

[2] *See e.g.,* RP 386-87, 390, 395, 400-02, 404, 435, 439-44, 448, 457, 560, 605-07, 610, 612-13, 637, 639, 643, 645

commit the act he is accused of, and/or (2) that he lacked the requisite mental state at the time of the act. *Eakins* at 499.

However before admission, "a witness offering reputation testimony must [first] lay a foundation establishing that the subject's reputation is based on perceptions in the community." *Callahan* at 682 (citing ER 608(a)). Personal opinion is insufficient. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993) (holding that a work community could constitute a community for purposes of admitting reputation evidence). The Washington Supreme Court in *Land* articulated the high burden a proponent has when seeking to admit reputation evidence:

> To establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general . . . Some relevant factors might include the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community. The decision as to whether the foundation for a valid community has been established rests within the proper discretion of the trial court.

Land at 500. A trial court's decision regarding the sufficiency of this foundation is reviewed for abuse of discretion, and a trial court only abuses its discretion when it acts in a manner that is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

Family members do not constitute a neutral community. *State v. Gregory*, 158 Wn.2d 759, 804, 147 P.3d 1201 (2006). In holding that family members of the defendant could not constitute a community, the Washington Supreme Court reasoned that "[t]he inherent nature of familial relationships often precludes family members from providing an unbiased and reliable evaluation of one another." *Id.* Although not specifically mentioned by the trial court, the reasoning in *Gregory* is equally applicable in the present case: the inability of family members to elicit unbiased and reliable evaluations applies equally to Alden's close friends.

In the present case, the court denied Alden's request to admit reputation evidence on the basis that the requisite foundation had not been laid. RP 184-85. Alden moved the court to allow his friends to testify about his general character as a non-violent person for the time they had known him. The court found that on this basis alone, there was an insufficient "community" from which reputation evidence could be used:

> The Court: I don't believe that his friends that he associates with, etcetera, constitutes a community. And if, they can have some testimony that constitutes an appropriate community, then I think as defined by State v. [Thach] (phonetic) and primarily State v. Callahan, a valid community must be neutral enough and generalized enough to be classed as a community. In that particular case it was Weyerhauser, they allowed it, 1,100 people he worked with, worked sometimes seven days a week. The family in

> and of itself of the Defendant was not a natural community. So if they can develop—I don't doubt that it's relevant, but they need to develop a community.

RP 184-84.

The court found that Alden's friends, without further elaboration as to what this community consisted of, did not constitute an adequate community for admitting reputation testimony. The court did leave open the possibility of reconsidering the motion if Alden subsequently laid an adequate foundation. Ultimately, the court did not abuse its discretion in denying Alden's motion, nor did the court act in a manner that was manifestly unreasonable or based on untenable grounds.

Even if the court erred in excluding evidence of Alden's reputation, it was harmless. The evidence overwhelmingly showed that Alden intended to shoot the victim. Alden even testified at trial and admitted he intended to shoot the gun (rather than it simply being an accident). RP 1200.

Furthermore any error was harmless because Alden was ultimately able to introduce evidence of his reputation for peacefulness through multiple witnesses, despite the court's prior ruling.[3]

C. The jury instructions properly included all elements of the offense of Murder in the Second Degree.

[3] *See e.g.,* RP 444-45, 556, 865.

As Alden correctly asserts, it is error to not include all essential elements in the "to-convict" instruction. The elements of Murder in the Second Degree are that the defendant, "with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person." RCW 9A.32.050(1)(a). If such an error is present it does not mandate automatic reversal as Alden argues. "An erroneous jury instruction that omits an element of the offense is subject to harmless error analysis." *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002) (adopting the U.S. Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed.2d 35 (1999)); *see also State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012) (omitted element in to-conviction instruction subject to harmless error analysis).

1. It is proper to include self-defense as a separate instruction rather than including it in the to-convict instruction.

Washington's prior jurisprudence includes some inconsistency about whether the burden of disproving certain defenses (such as self-defense) should be set forth in the to-convict instruction. However, the Washington Supreme Court clarified this ambiguity almost three decades ago: "We now believe that the better practice is simply to give a separate instruction clearly informing the jury that the State has the burden of

proving the absence of self-defense beyond a reasonable doubt." *State v. Acosta*, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984).

The issue of where the self-defense burden should be included in the instructions was further clarified in *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). In *Hoffman*, the court held there was no error in leaving the self-defense burden out of the "to-convict" instruction and instead including it in a separate instruction:

> Defendants argue that the self-defense instructions must be part of the 'to-convict' instruction which sets forth the elements of the crime of murder in the first degree. We disagree. As emphasized above, the jury was instructed to consider the instructions as a whole. No prejudicial error occurs when the instructions taken as a whole properly instruct the jury on the applicable law. The self-defense instructions properly informed the jury that the State bore the burden of proving the absence of self-defense beyond a reasonable doubt. In giving a separate instruction on self-defense, which included the State's burden of proof on self-defense, the trial court followed the method for instructing juries recommended by the Washington Supreme Court Committee on Jury Instructions . . . We perceive no error in this instructional mode.

Hoffman at 109; s*ee also State v. Meggyesy*, 90 Wn. App. 693, 705, 958 P.2d 319 (1998) (holding that self-defense need not be included in "to convict" instruction as long as instructions as a whole properly instruct the jury). Neither *Acosta* nor *Hoffman* has been overturned, and both are controlling.

Despite the Washington Supreme Court's express approval of using a separate jury instruction for self-defense in *Hoffman*, Alden cites five post-*Hoffman* cases to support his initial argument that the burden of proving self-defense should be inclusively contained in one instruction (the "to-convict" instruction).[3] However none of these cases overturn *Hoffman*. Furthermore, none of the five cases even address the present issue of where the self-defense burden should be included in the instructions. Rather all five stand for the general, uncontroverted point that relieving the State of proving one or more of the essential elements of a crime (by omitting it) is error (and as held in *Brown*, subject to harmless error analysis).

In the present case, the State was not relieved of its burden of proving every element of the crime of Murder in the Second Degree. And in compliance with the holdings in *Acosta* and *Hoffman*, the State in the present case properly included both a "to-convict" instruction with the essential elements of Murder in the Second Degree and a separate self-defense instruction. CP 313, 321. Neither instruction deviated from its respective Washington Pattern Jury Instruction. *See* WPIC 16.02, 27.02.

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[3] Post-*Hoffman* cases cited by Alden include *State v. Eastmond*, 129 Wn.2d 497, 503, 919 P.2d 577 (1996); *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325 (1995); *State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997); *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002).

2. Even if the court erred by including self-defense as a separate instruction, Alden invited the error at trial and is thus prohibited from now asking for reversal.

Even if this Court finds that including the self-defense instruction as a separate instruction was error, the error is subject to the invited error doctrine, as well as harmless error analysis.

The invited error doctrine was created to "prohibit a party from setting up an error at trial and then complaining about it on appeal." *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (quoting *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). More specifically, "[A] party may not request an instruction and later complain on appeal that the instruction was given." *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999), *quoted by Patu* at 720. The invited error doctrine applies in cases where the "to-convict" instruction omitted an essential element of the crime. *See Patu* at 720 (holding the invited error doctrine prohibited defendant from requesting reversal where he proposed instruction that omitted essential element); *State v. Henderson*, 114 Wn.2d 867, 869, 792 P.2d 514 (1990); *State v. Summers*, 107 Wn. App. 373, 380-82, 28 P.3d 780 (2001) (holding defendant not entitled to reversal where he proposed instruction omitting the knowledge element of unlawful possession of a firearm).

Alden, in his proposed jury instructions to the court, specifically proposed leaving out the self-defense language from the "to-convict" instruction and including it, instead, in a separate self-defense instruction. CP 249, 256. Under the invited error doctrine, Alden is prohibited from setting up the error at trial and then complaining about it on appeal.

D. Alden received effective representation at trial.

For a defendant to prevail on an ineffective assistance of counsel claim, both prongs of the *Strickland* test must be satisfied:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), *quoted by State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome 'a strong presumption that counsel's performance was reasonable.'" *Grier* at 33 (quoting *State v. Kylio*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

When examining whether a prosecutor made improper comments, those comments are examined in "the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 579, 79 P.3d 432 (2003).

In the present case, Alden fails the first prong of the *Strickland* test because he cannot show a deficient performance. Alden argues that his trial counsel was deficient for failing to object during the State's closing argument, specifically discussing self-defense. However the prosecutor's statement, when taken in context, was not a misstatement of law, and thus not objectionable:

> When you read the jury instruction on self-defense, the language is important, and that would be instruction number 15. And I say there's three elements, we've numbered them 1, 2, and 3, but when you read them you'll see that they're separated by the term and. Not the term or, the term and, which means that all three must be satisfied in order for you to return a not guilty verdict by reason of self-defense. **The State does bear the burden of showing that there's insufficient evidence to support that, and the State gladly bears that burden.**

RP 1386 (Emphasis added). In his brief, Alden enigmatically omitted the portion of the State's closing argument that correctly articulates the State's burden (i.e., Alden omitted the bolded portion of the quote above). The jury instruction on self-defense also correctly stated the law, and the jury

is presumed to follow the court's instructions and to disregard any argument by either counsel that is contrary to it. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

Despite what Alden argues, the State did not shift the burden to the defense, and thus Alden's counsel had no grounds to object. Therefore, it cannot be said his performance was deficient. And even if the State's closing argument had misstated the law and counsel had been deficient in failing to object to it, Alden cannot show any prejudice because it's presumed that the jury would have nevertheless followed the jury instructions. *Swan* at 661-62. In summary, Alden falls far short of overcoming the "strong presumption" that his counsel's representation was reasonable.

E. The trial court did not abuse its discretion when it sentenced Alden within the standard range.

Generally, "a sentence within the standard sentence range . . . shall not be appealed." RCW 9.94A.585(1); *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994); *State v. Rousseau*, 78 Wn. App. 774, 776, 898 P.2d 870 (1995). "A trial court's decision regarding the length of a sentence within the standard range is not appealable because 'as a matter of law there can be no abuse of discretion.'" *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993) (quoting *State v. Ammons*, 105

Wn.2d 175, 183, 713 P.2d 719 (1986)). "This accords with the traditional notion that, outside of narrow constitutional or statutory limitations, a sentencing judge's discretion remains largely unfettered." *Id.*

Appellate review of a sentence is only permitted when the court refuses to exercise its discretion or relies on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). When the trial court considers the facts and concludes that there is no basis for an exceptional sentence, the court has exercised its discretion and the defendant may not appeal the ruling. *Garcia-Martinez* at 330.

In the present case, as in *Garcia-Martinez*, the trial court considered the mitigating factors proposed by Alden, but ultimately decided that an exceptional sentence would not be appropriate when all the evidence was considerd. Although the court never expressly ruled on whether any mitigating factors were present, it nevertheless implied that an exceptional sentence was available to the court when it described why the court would not grant an exceptional sentence. Specifically, the court reasoned that it would not grant the exceptional sentence based on consideration for both the victim's family as well as the jurors.

Alden cites no authority (and the State is not aware of any) prohibiting a trial court from considering the victim's family (as well as

the jurors) in its sentencing decision. On the contrary, impact on the victim' family is highly relevant to sentencing; "The legislature intended the sentencing court to consider a crime's impact on victims and their survivors." *State v. Crutchfield*, 53 Wn. App. 916, 927-28, 771 P.2d 746 (1989) (impact of crime on victim's family may be aggravating factor supporting an exceptional sentence); RCW 7.69.010-030; *see also State v. Gentry*, 125 Wn.2d 570, 626-27, 888 P.2d 1105 (1995) (evidence about victim and impact of murder on victim's family is relevant to jury's decision as to whether death penalty is appropriate). The trial court did not abuse its discretion because it (1) provided proper reasoning why it would not grant an exceptional sentence and (2) proceeded to sentence Alden within the standard range.

IV. CONCLUSION

Based on the foregoing analysis, all of the issues before this Court should be resolved in favor of the State. First, as to the issue of jury unanimity, the instructions clearly inform the jurors that they must be unanimous to reach a verdict. Second, as to the evidentiary issue related to the victim's prior bad acts, the court properly excluded this evidence to the extent that Alden was unaware of it. Third, as to the evidence of Alden's reputation for peacefulness, the court properly excluded this

evidence because Alden was unable to establish the necessary "community" from which this reputation derived.

Fourth, the Washington Supreme has repeatedly made it clear that it is perfectly acceptable to include the self-defence instruction separately from the to-convict instruction. Fifth, Alden was provided effective assistance of counsel because the prosecutor's statement of law was correct, and thus, his counsel's decision to not object was correct. And finally, the court properly denied Alden's request for an exceptional sentence by articulating the specific reasons why an exceptional sentence would be unjust.

Based on these arguments, Alden's appeal should be denied and this Court should affirm his conviction and sentence for Murder in the Second Degree.

DATED: July 16, 2015

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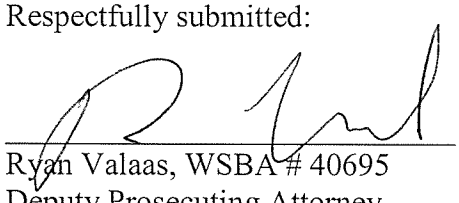
Respectfully submitted:



Ryan Valaas, WSBA # 40695
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Respondent,	)	NO. 326951
vs.	)	AFFIDAVIT OF MAILING
OSCAR ALFRED ALDEN, Appellant.	)	

STATE OF WASHINGTON)
: ss.
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath deposes and says: That on the 16th day of July, 2015, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing a copy of this Affidavit and a copy of the Brief of the Respondent, addressed to:

James E. Lobsenz
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010

SUBSCRIBED AND SWORN to before me this 16th day of July, 2015.

NOTARY PUBLIC in and for the State of Washington, residing at East Wenatchee; my commission expires 02/26/2019.