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Court of Appeals
Division I
State of Washington

No. 72068-6-I

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

STATE OF WASHINGTON, Respondent,

v.

BRUCE HUMMEL, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether looking at the evidence most favorable to the state, there is sufficient evidence to support the jury finding Hummel killed Alice Hummel with premeditated intent to cause her death.
2. Whether there is sufficient evidence in the record to support the jury's finding that Hummel killed Alice Hummel with premeditated intent to cause her death *in the state of Washington*.
3. Whether the trial court erred declining to instruct the jury on lesser included offense of manslaughter in the first or second degree when no evidence in the record affirmatively supports the theory Hummel may have killed Alice recklessly or negligently.
4. Whether Hummel's strategic decision to forego instructing the jury on the lesser included murder in the second degree instruction was reasonable where the record reflects Hummel determined, based on his age and health that a conviction for either murder charge would 'effectively' result in the same penalty and, where based on the evidence Hummel wanted the opportunity for a full acquittal, not a compromise verdict, if the jury couldn't find the evidence supporting a finding that he killed Alice with premeditated intent.
5. Whether Hummel waived his challenge to the imposition of legal financial obligations by not objecting below or whether this matter should be remanded back to the sentencing court for reconsideration of Hummel's ability to pay discretionary and mandatory legal obligations.

C. FACTS

In October 1990, Bruce Hummel's wife, Alice Hummel, suspicious of sexual abuse, asked the Hummel's youngest of three children, S.K. if she was being sexually abused. RP 45. S.K. was twelve years old and recalled this happened the week leading up to her 13th birthday. Id. S.K. had previously denied any sexual abuse to her mom but this time, feeling close and protected by her mom, S.K. finally admitted Bruce Hummel had been sexually abusing her for years. RP 22, 42-45. S.K. didn't previously reveal abuse because she was afraid it would cause arguing or violence in the Hummel home. RP 45.

S.K. said Hummel abused her frequently, sometimes daily particularly when she was younger. RP 41. Hummel sexually abused her at home, at parks or in remote wooded areas within driving distance of their home. RP 41. Hummel also would climb in the bathtub or hot tub with S.K. and have her help him masturbate or sometimes asked her to tie nylons around his genitalia and pull. RP 40, 42. As S.K. got older, Hummel explained the sexual abuse was to help educate her on how to please a man when she grew up. Id.

After having an emotional talk with her mom, S.K. believed her mom, whom she described as very protective, would take action, confront Hummel and take care of the molestation issue for her. RP 54, 71, 82.

Instead, within 3-5 days of her disclosure, S.K. came home from school on the Friday before her 13th birthday and Alice Hummel was gone. RP 47.

Hummel told S.K. her mom received a call from a place in California and flew down there for an interview. RP 47. S.K. reported however, her mom, who had been home all week, never mentioned any job interviews, never packed for a trip or discuss getting a plane ticket. RP 48. In fact, Alice and S.K. had plans to attend a ballet performance at Western Washington University on Sunday October 20th to celebrate S.K.'s 13th birthday. RP 433. S.K. never saw or heard from her mother, Alice Hummel again. RP 49. S.K. didn't understand or think her mom would just leave for a job like that but Hummel over time, repeatedly told S.K. that her mother was too busy with her work, wasn't a good mom and didn't want to be part of her children's lives. RP 54, 57. After Alice Hummel disappeared, Hummel continued to sexually molest S.K. RP 52.

S.H., S.K.'s older brother, then a senior in high school, confirmed their mom was gone when he came home from school on Friday October 18th 1990. Hummel also told him that their mom had gone to a job interview in California. RP 133. Like S.K., S.H. also never saw Alice Hummel pack a bag or prepare for a trip. RP 134. Hummel told S.H. that his mom was staying at the Pony motel that evening but that he was going

to pick her up the next day and drive her to the airport. RP 136. S.H. never saw or heard from his mother again RP 136.

Alice Hummel who suffered from Lupus, was on disability and received a monthly pension from the state of Alaska, where she previously worked a teacher. RP 135. Despite her illness, Alice ran a computer business doing typesetting, graphic design and print jobs out of the Hummel family home in Bellingham for additional income. RP 32, 136. Alice was considered locally to be the go-to person in troubleshooting or working on Macintosh/ Laser printer computer jobs. RP 136. While not bedridden, Alice was nonetheless very social. Alice rarely left the Hummel home to go shopping or on extended family trips but would occasionally leave the house and stay at the Pony express motel when she wasn't feeling well. RP 65, 116, 135. Despite her illness, Alice still did typical 'mom' jobs when she could, like cleaning the house or doing laundry. RP 39. At the time of her disappearance Alice was on many prescription medications for her illness. RP 31,153.

Alice and Bruce Hummel's relationship was contentious, tense and argumentative leading up to Alice's disappearance. RP 131. There was also a lot of financial stress on the family and Alice always seemed to have more money than Hummel. RP 34-5, 38. Bruce and Alice lived in the same home but led separate lives. RP 35. Sometimes following a big

blow up between Alice and Hummel, Hummel would leave for a few days. RP 39. S.K. observed Hummel get physical with her mom and her brother. RP 36. S.C., the oldest of the Hummel children, recalled seeing Hummel, who was angry with Alice, hitting her repeatedly with a cupboard door down a hall way of the family home. RP 121. This image was so shocking, it always stuck out in S.C.'s mind. Id.

After moving full time to Bellingham from Alaska, Bruce Hummel stopped teaching and worked odd jobs, occasionally collecting natural materials like cedar foliage and flowers to sell and also doing home repair work for a local realtor. RP 26, 33. Hummel drove the family's large 1985 Econoline van to remote areas of Whatcom County, off of logging roads to collect these items, often with one or more members of his family. RP 49, 34, 94. Hummel was very familiar with these areas; often driving up remote dirt roads and past gated areas. RP 34-35. The van had been converted and had carpet and two comfy chairs in the back. RP 149-50.

At the time of her disappearance Alice Hummel not only had special Birthday plans with S.K. but was also working on a job to recover lost data from computer disks provided by client, Alton Terry. RP 299. Terry, a retired Seattle Police Department detective was working on a publication and was trying to recover data stored on damaged floppy

disks. RP 299. Alice was considered an expert on computer applications in Bellingham so he took the disks to her to work on the week prior to Alice's death in October 1990. RP 299. Terry found Alice to be friendly, outgoing and reliable. Id. Alice promised she would try to resolve the problem and return the disks to Terry the following week. RP 299. Terry never heard from Alice again. RP 300. Terry described Alice Hummel as competent and reliable and thought it was not like Alice to just vanish or take off for another job without talking to him or returning the computer disks she had agreed to repair for him. RP 300.

When Terry asked Hummel where Alice was, Hummel initially told him on the phone she was interviewing in Houston but then later told him she was interviewing in California or Montana. RP 301. Wanting to find his computer disks, Terry used his detective skills and employed various search tools in November-December of 1990 including LEXIS NEXIS, to try to locate or get a hit on Alice Hummel's whereabouts. Terry did not get any leads from any of his searches and was never able to locate either Alice or his computer disks. RP 302.

Neither S.H. or S.K. saw their mom pack or prepare to leave for a trip prior to her disappearance. RP 133. But within two weeks of her sudden disappearance, Bruce Hummel directed S.K. to pack up her mom's personal belongings purportedly to be forwarded to her. RP 49. While

doing so, S.K. found the current purse Alice Hummel had been using at the time she disappeared. The purse still had Alice Hummel's wallet, gum and prescription drugs in it. RP 50. S.K. explained Alice kept her identification and credit cards in her wallet. Id. S.K. gave the packed boxes to Bruce Hummel to forward to her mom but later found these same items hidden in the basement when the family was preparing for a garage sale in the spring. RP 50.

S.H. also recalled seeing Bruce Hummel packing a suitcase and boxes with needlepoint his mom had been working on when Alice 'disappeared' and MAC computer stuff within weeks of his mom's disappearance, reportedly to be sent to his mom. RP 139. Months later however, S.H. found these same boxes/suitcase hidden in their basement by the hot water tank and in the false ceiling of the Hummel home. RP 140.

After Alice disappeared, Hummel would get agitated when any of the children would ask about their mom. RP 51. Hummel initially told them Alice was calling on Thursdays when they were at school but then S.K. would pretend to be sick on Thursdays in hopes of hearing from her mom and found Alice Hummel never called. RP 51 . Hummel also became very guarded about incoming mail after Alice's disappearance; telling their kids they were not allowed to get the mail. RP 56. S.K.

nonetheless would sneak out to examine the mail but never found anything from her mom. RP 56. S.K. got an occasional card allegedly from her mom but they were typed and didn't sound like her mom. At Christmas, S.H. received a Christmas card from allegedly from his mom but the \$50.00 check inside of it was signed by his dad. RP 138. In the spring of 1991 Hummel told his three children Alice would be coming to S.H.'s high school graduation. RP 143. Just days before the graduation ceremony, however, Hummel told S.H. and his other children that their mom had to work and could not make the trip. Hummel told his oldest daughter S.C. and S.K. separately over time that Alice first went for a job interview, then got a job, then fell in love and wanted nothing more to do with her children. RP 57,100.

Prior to her sudden 'disappearance', Alice Hummel helped move her father, Ernie Wehr to a Bellingham retirement facility and would visit him approximately twice a month. RP 39, 284. After she disappeared and her dad died, Ernie's step son in law, Don West, found a typed letter in Alice's dad's belongings, purportedly sent in March 1991 from Alice stating she had left Hummel, moved to California, got a job, fell in love and based on her childhood had decided to disassociate herself from her dad who she claimed had treated her poorly. RP 286. West as executor of Ernie's estate, tried to notify Alice of her dad's death in 1993 by

publishing notices in Texas and California newspapers but never heard from or found Alice. RP 289.

After Alice Hummel disappeared and S.H. graduated, Bruce and S.K. moved away to Okanogan and then Enumclaw, Washington. RP 26. S.K. reported receiving typed letters purportedly from her mom stating she found someone else who didn't want kids around and that she would always take care of the family financially. RP 53. S.K. stated these letters didn't sound like her mom. Id. A forensic scientist from the Washington State Patrol, who examined Alice's signature on various pieces of correspondence allegedly sent by Alice after she disappeared, testified there were indications the signatures were made by Bruce Hummel, not Alice. RP 440-448.

S.H. and his mom had a history of leaving notes for each other in the false ceiling of their basement. RP 142. After his graduation S.H. returned to temporarily live at the Hummel home after traveling and found an apparent suicide note from his mom hidden in the false ceiling where the two used to exchange notes. Id. Sean said the note didn't sound like his mom and appeared to be written in his dad's handwriting. RP 148, 169-70. In the letter Alice allegedly wrote she would be killing herself and would never see S.H. again. Id. S.H. found this letter really upsetting. Id.

In the early 90's S.H. tried to find his mom after purchasing search software for the Northwest, California and Texas regions. RP 144. S.H. found a few 'hits' within the databases for A. Hummel and a A. Wehr but follow up phone calls confirmed the hits were not associated with his mom. 145-47,162.

S.C., the oldest of the Hummel children, did not live at 2426 Vista Drive when Alice, her mom 'disappeared.' Hummel told S.C., as he did his other children, that Alice had left the Hummel family to start a job in California. RP 97. In March of 1991 S.C. received a letter allegedly from Alice congratulating S.C. on her wedding anniversary but later determined the card appeared to be sent from her dad claiming to be her mom. RP 100, 103. S.C. looked for Alice periodically, including after Alice's dad Ernie Wehr, died in 1993 but never found any trace of her. RP 97-100, 103 .

Eventually in 2003, after sharing details and discussing their mom's disappearance with her younger sister S.K. and learning of Hummel's sexual molestation of S.K. during her childhood, S.C. filed a missing persons report with the Bellingham Police Department. RP 107. Hummel never filed a missing person's report. RP 211. While searching for Alice, detectives discovered her monthly disability pension was still being collected and that Alaska was forwarding her statements to areas

within 60 miles or so of where Hummel was residing. RP 176. At that point, the FBI began investigating financial fraud while Bellingham detectives continued looking for Alice. RP 177.

In 2004 Bellingham Police Detectives Gitts, Huchings and Mozelewski along with an FBI Agent contacted Hummel at his home in Billings Montana. RP 202. Hummel maintained he last saw Alice when he drove her to SeaTac in October 1990 so she could fly to California for a job interview. RP 208, 212. He confirmed he had boxed up her belongings and maintained he sent them along to her even though the Hummel children had reported they later found Alice's personal belongings in their basement and when Hummel was organizing a garage sale in the spring of 1991. RP 208. Hummel also denied taking Alice's disability pension payments from the state of Alaska. RP 204.

When confronted with evidence that Hummel had falsely represented himself as Alice to the Alaska Teacher's Retirement Fund and arranged for these payments to be deposited into bank accounts so he could collect these funds, Hummel changed his story and admitted taking the money allegedly for the good of his children. RP 204-206. He also admitted molesting S.K. from when she was three to twelve years old. Hummel told investigators that had Alice known of the sexual abuse, he was confident she would have confronted him about it. RP 214-15. When

Detective Mozelewski informed Hummel during their discussion that they wouldn't ask him any questions unless they knew the answer, Hummel immediately responded by stating, "Well, where is Alice?" RP 217. Detectives then said "you tell us." To which Hummel responded that he wasn't going to change his story. RP 217.

Detectives searched the grounds of the Hummel's home at 2426 Vista Drive Bellingham in 2004 with ground penetrating radar, cadaver and rescue dogs. RP 182. They found two areas, a raised flower bed and ground of a metal shed area that had disturbances in the ground but nothing else. RP 185. The Hummel children confirmed that Hummel had done some remodeling in the basement sometime after Alice disappeared, including removing some cement and completing some piping work to the downstairs bathroom, RP 33. Hummel worked part time doing odd repair jobs for a local realtor who needed homes to get up to 'code' so they could be ready to sell. RP 35. Extensive searches in the Hummel home however, revealed nothing of forensic value.

After meeting with detectives in Montana, Hummel the area and left a letter directed to Detective Gitts apologizing for the smoke screen he threw at them in Montana, stating "but what else would you expect when it's the same story I have been telling you for thirteen years...." RP 221.

Hummel then went on to confirm that Alice Kristina Hummel was dead but asserted she died “of her own hand” on October 18 1990. Id. Hummel then described in excruciating detail that he came home on the morning of October 18th, 1990 to find Alice dead lying in a large pool of blood in the downstairs bathroom with a large gash across her left wrist and a note asking him not to tell the children. RP 221.

I apologize for the smoke screen I threw at the three of you, but what else could you expect when it is the same story I’ve been telling for 13 years? You must admit, it sounded rehearsed. Parts of it are true, mostly false.

What I’m about to write in the best detail is the absolutely truth and accurate to the best of my ability considering the amount of time that has passed.

First fact, Alice Kristina Werh Hummel is dead.

Second fact, she died of her own hand.

Third fact, I covered up her suicide for two reasons: A, on a note I found half laying in the bathroom sink was a request, “Don’t let the kids know.” B, I didn’t want TRS to be aware of her death for fear of losing her disability payments.

Let me set the scene. The day was Thursday, October 18th, 1990. Place, our home at 2426 Vista Drive, Bellingham, Washington, 98226. Time, during the week Sean and I would leave home at 6:45 in order to get him to a 7:00 fire class. Shanalyn would leave by 7:45 for school at Whatcom Middle School. Kristy usually slept until 9:30 to 10:30.

I was doing maintenance work for a property management company and had my own business of bringing house up to code so banks would loan purchase money.

On Wednesday night, the four of us had attended a concert at Sehome, and the day’s mail wasn’t picked up until after I returned from Sehome. I dropped Shanalyn off at school on the way to a job I was working on.

Needing additional tools, I came home at about noon to a nightmarish scene that so shocked me that it has stayed with me to this day, and initially made sleep hard to come by.

Stopping in the kitchen to get a drink, I saw that some of the mail had been opened. Our bedroom door at the end of the hall was wide open, so I figured Kristy must be downstairs in our office.

Not getting a response, I started up the hall toward our bedroom, but stopped dead in my tracks as I passed the open bedroom door. I found Kristy laying on her left side with her back to the bathtub. There was a lot of blood in and around the toilet, and in front of her there were splatters of blood on the base of the vanity and pools of it, one a small one in front of her face, and a large one in front of her waist. She had also urinated.

I first turned her head to check for a pulse, but her rolled-up eyes told me she was dead.

As I turned her slightly, I could see that her left wrist had a terrible gash across it. I had to get out of there.

I grabbed a towel to step on so as to not track blood through the hall. It is then that I noticed the note playing mostly down in the sink. Right at the bottom were the words, "Don't tell the kids." There was more, but it was written in a smaller hand and read only later.

I thought what do you mean don't tell the kids? What in the hell am I supposed to do? Sean would be home in three hours.

I had some plastic sheeting left over from one of my jobs. I decided to roll Kristy up in it, and then more towels to clean the plastic so I could pull it through the house.

How I managed, I don't know. I was both angry and numb. Kristy weighed a good 200 pounds, but somehow I managed to lift her in the back of our van and covered her with a blanket.

While cleaning up the blood, I found a ribbed back razor between the toilet and the outside wall. The rubber was beyond saving, so I trashed it. I cleaned the walls, floor, and toilet, and laundered the towels.

Exhausted, I took the time to read the rest of the note. One of the letters that Kristy opened was from that fellow in California. She was banking on a positive response, but

instead, it was a rejection letter. The note included the statement like what are we going to do now?

She blamed me for our IRS problems which resulted in the IRS taking all of the money out of our Anchorage account.

I went to the mall to get a replacement rug and got it down before Sean got home.

Almost once a month, Kristy would check herself into the Pony Soldier for a one night R and R. This was my excuse to the kids for why Kristy wasn't home. I took Shanalyn to the grocery store so she could get what she needed to make something special for dinner. I spent the night at the Pony. It was a night without sleep. It was during the night that I came up with the idea of Kristy going to California.

I come home early Friday morning to take Sean to school and had Shanalyn help me pack a couple suitcases for her mother's trip to San Luis Obispo.

What to do with the body? I had some two-by-fours, and two very large truck inner tubes still inflated from summer use. I used my afternoon to cut pieces for the raft shown below [and there is a depiction of the raft]. Size, almost eight feet by four feet w. All the joints were lashed as were the inner tubes lashed to the two-by-fours ...

Friday night after the kids were asleep, almost midnight for Sean, I loaded the tubes, rope and boards in the van along with my five-man inflatable raft. I drove to Fairhaven and assembled the tube raft, and used my electric pump to inflate my five man. I took a rock from our rick wall and after loading Kristy onto the tube raft, I untied the bottom of the plastic sheeting, and placed the rock between Kristy's feet and retied the bottom, and tied Kristy to the two-by-four frame.

I decided on this harebrained way of ridding the body, because I didn't think anyone else would think it possible. They would almost be right.

We had both aluminum handled oars, or there would not have been a chance. This is the one and only time I had been on Bellingham Bay, but I figured if I took Kristy out close to the middle, it would be deep enough so as not to be snagged by anchors or fishing nets.

Rowing was very difficult, and I almost conceded to the bay. The tube raft capsized leaving Kristy suspended by the ropes. Holding her to the frame while the frame was hanging by ropes tied to the inner tubes, I rowed and bailed for an hour and a half at least, but the wind got worse, and I had to let her body go.

I cut the ropes and up come the two-by-four frame as her weight was gone. I was too tired to cry, but I remember saying a silent prayer.

Rowing back was aided by the wind, but finding my way to the marina took a long time. I cut the tube raft loose after making holes in the tubes.

It was about six before I got home. I still could not sleep.

On Sunday, October 21st, it was Shanalyn's birthday. We went to a concert at Western and had her favorite dish for dinner at home.

You asked me what I would think if the situation were reversed. There were two elements in your assumption: One, you never knew Kristy or about the attempted suicides, and two, you don't know me, and the fact that I can't kill anything, let alone anybody.

You say why didn't I level with you after you shot down my smoke screen story. Part of it was saving face, but more so, it was the effect the FBI information about the money that I had taken and used. At that point, I figured it would put me in a worse position if you knew I was taking the money even though I knew Kristy was dead. '91-'94, I figured using the money was safe, because I was helping both Shanalyn and Sean, paying private school costs for Shanalyn.

I had to resign from teaching in Okanogan in November of '91 because of heart problems, restricted blood supply, and did not work other than occasional subbing including Auburn and Buckley, Washington. I took a part-time maintenance job to supplement what I was getting from Kristy's disability.

In '94, I met Sharon, and we were married December 23rd, 1995 in Auburn. I had been teaching in Alaska from August of '95, so after the wedding, Sharon and I went back to Alaska. After the wedding Sharon went back to Alaska with me, and we both taught at [I believe it's Tuntutuliak] and a year later at Kotzebue.

During April of '97, I got critically ill with liver failure, a condition never fully diagnosed by 40 plus doctors, two hospitals, and the U.W. Medical School

My income ended with the end of summer. I tried real estate, but it was a cash-out sort of situation. This was the first time I mentioned the annuity to Sharon.

We were living in Kent, and even with Sharon teaching part-time, we would not have survived without my dipping. I tried to get disability for me in 1998, but since no one could say what I had or how long it would last, it didn't stand a chance. This even though I could hardly work.

I did do a couple of short long-term subs in Saint Maries, but with the failing economy, dipping continued. I rationalized that if I couldn't get a disability from Alaska, why not use hers?

Since Kristy had somehow withdrawn the entire balance from my retirement account, which would have amounted to more than \$90,000 and with interest by 1997, I had to somehow put in enough money to be able to get some retirement.

We borrowed from Sharon's brother, Richard, and sister, Bernice, \$36,000, and added \$7,000 that Sharon had in her non-vested retirement account. These amounts plus what I had accumulated in two years, '95 to '96, '96 to '97, was what was needed to give me a very basic retirement of \$1200 to \$1300. This amount is about \$1600 a month less than what I would have retired at had not my retirement fund been totally depleted. This difference is about what I was withdrawing each month from Kristy's account.

Two more facts: One, this is the first time, this in its entirety has been shared with anyone; two, Sharon Mulsted Hummel, my wife, had no knowledge of the nature of my annuity since she began to know of it. The post office boxes were set up only to keep it that way.

Through the years, I had only limited contact with the Credit One credit union or the TRS people. I may have looked at the total of six statements in all the years this has been going on.

Detectives Mozelewski and Gitts of the Bellingham Police Department went back to the 2426 Vista drive home after receiving Hummel's letter and attempted to confirm Hummel's story by searching and testing the home for the presence of blood applying hemaglow and luminol to various areas of the former Hummel home. RP 229, 324. Nothing, not even trace amounts of blood, were detected. RP 241. Detectives were also never able to trace or find the 1985 Econoline Van transferred to Hummel in 1989 that Hummel was using at the time Alice disappeared, to test the van for possible forensic evidence. RP 391.

Working with Dr. Goldfogel, the Whatcom County Medical examiner, detectives also reconstructed a bathroom to scale of the downstairs bathroom in the Hummel home. Goldfogel assisted investigators by demonstrating the extensive amounts of blood that Alice Hummel would have bled out in the Hummel basement bathroom if she died in the manner described by Hummel. RP 334, 338, 392-95, see also, exhibit 12. Dr. Goldfogel explained Alice would likely have bled at least two quarts of blood. Id. He also concluded it was unlikely she could have bled out by slashing across her wrist as described by Hummel because successful suicide victims slash their wrists vertically, not horizontally. RP 396. When detectives later told Hummel they didn't find any forensic

trace of blood in the bathroom or home to support his story, Hummel changed his story and said Alice bled into the toilet. RP 242.

Dr. Toby Hayes, a professor of biomechanical engineering also explained that it would be next to impossible for a man Hummel's size to move a dead woman of Alice Hummel's size from the floor of the bathroom into his van, then on to a raft without suffering a significant injury given her dead weight and the effects of rigor mortis. RP 483. Investigators also learned that contrary to the facts asserted in Hummel's letter, Bellingham Bay was not stormy, but incredibly calm with no wind throughout the night of October 19 and 20th, 1990. RP 360-365. Dr. Goldfogel also explained based on his experience, that if Hummel had dumped Alice's body in Bellingham bay as he claimed, her body would eventually be found because it is a relatively contained area and gases build up in the body as it decomposes that causes the body to rise up to the surface of the water. RP 390. He explained it is much more difficult to find bodies in the forest areas because decomposition of the body necessarily occurs faster in these circumstances. RP 391. When Hummel first, unsuccessfully petitioned for divorce from Alice in King County in March 1995, Hummel listed Alice's last known address as 602 Forest Road, suite 701, in Dallas TX. RP 316. Later in August 1995, Hummel sought the divorce in Alaska listing Alice's last known address as 2050

Forest Road, suite 701, Dallas Texas. RP 243. Neither address was confirmed by investigators as a valid address. Id.

Detectives continued to search for Alice utilizing LEXIS NEXIS Accurint database using Alice Hummel's married and maiden name and social security number looking for possible leads to Alice Hummel's whereabouts. RP 414. Detectives also had the stamps and envelopes of letters purportedly sent by Alice Hummel analyzed for fingerprints and DNA evidence but found no trace of any persons DNA; even on stamps where DNA would be expected to be found in abundance. RP 408. No trace of Alice was found.

Investigators also put a 'watch for' out on Hummel's vehicle, which at that time was a GMC van, in an effort to re-locate Hummel after he disappeared from Montana. RP 230. After receiving a tip from authorities in Idaho in June 2004, investigators went to St. Maries Idaho and located Hummel at a camp ground. RP 230-1. When approached Hummel stated he wasn't ready to talk to them yet. RP 231. After investigators asked if Hummel would come into town and talk to them, Hummel agreed. RP 231. Hummel acknowledged he had written the letter found in Montana directed to detectives and that he had told his story and wasn't going to change it. RP 232. Hummel agreed nonetheless, to follow investigators back to Bellingham the next day. RP 233. When Hummel

and investigators arrived in Bellingham around 8:30 p.m., Hummel stated he still wanted to cooperate and talk to investigator's but because he was tired asked if they could resume in the morning. RP 234. When investigators returned to the Bellingham police department parking lot in the morning where Hummel had planned to sleep in his van however, Hummel was gone. RP 235.

In 2007 Hummel was finally found in Westport Washington and arrested by the FBI for wire fraud related to his stealing Alice's disability pension payments. Detectives from Bellingham were on scene in Westport and, after advising Hummel of his Miranda warnings, again asked about Alice Hummel. RP 241 . Detectives told Hummel that they were not able to find any blood to confirm the story he previously gave them. First, Hummel said he was disappointed with the investigators techniques for searching for blood. RP 241. When pressed, Hummel stated he "told you the story. I'm not going to change it. Id. He mentioned he felt he was ill and didn't have much time here left anyhow. Id. When detectives gave Hummel the opportunity to make things right and provide closure to his family, Hummel teared up, lowered his head but then regained his composure and looked at detectives and said, "I don't care. They don't care about me. I don't care about them." RP 241.

In 2007 Hummel pled guilty to twelve counts of federal wire fraud for unlawfully stealing Alice Hummel's disability payments from the Alaska Retirement System from the time Alice 'disappeared' November 1990 until February 24th, 2004. RP 242-3. In his guilty plea statement Hummel admitted Alice died on October 18th, 1990 and that after she was dead he falsely represented himself to be his wife and forged Alice's name to documents in an effort to maintain the fiction that she was alive and still collecting her disability payments. Id. See, Supp CP ___ (sub nom 172, plaintiff's exhibit 6). Hummel was subsequently charged with Alice's murder. Following a jury trial, Hummel was convicted of premeditated first degree murder in 2009. CP 34. Hummel's conviction was overturned on appeal due to a right to public trial violation. CP 30. Following a second trial in 2014, Hummel was again convicted of first degree premeditated murder. CP 310-312.

D. ARGUMENT

- 1. Looking at the direct and circumstantial evidence in the light most favorable to the state, there is sufficient evidence to support the jury finding Hummel murdered Alice Hummel with premeditated intent.**

Hummel first asserts the State failed to present sufficient evidence to support the jury's finding that Hummel acted with 'premeditated' intent despite the fact that the direct and circumstantial evidence below sufficiently reasonably demonstrates Hummel acted with ample motive and a sufficient plan that enabled him to effectively conceal Alice's murder so he could poison Alice's memory to her children, steal her monthly disability pension for financial support and continue to sexually molest S.K.. Hummel's argument should be rejected.

A challenge to the sufficiency of the evidence in a criminal case is made by examining whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995). A claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from them. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This Court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992).

A person is guilty of first degree murder when with a premeditated intent to cause the death of another person, he causes the death of that person. RCW 9A.32.030(1). Premeditation involves "more than a moment

of time.” RCW 9A.32.120(1). Mere opportunity to deliberate is not sufficient to support a finding of premeditation. *Id.* Premeditation is “the deliberate formation of and reflection upon the intent to take a human life” and involves the mental process of thinking beforehand, deliberation and reflection, weighing or reasoning for a period of time, however short. State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1985), State v. Ollens, 107 Wn.2d 848, 733 P.2d 984 (1987). A wide range of facts can support an inference of premeditation. *Id.* Four characteristics not required but are particularly relevant to establishing premeditation are motive, procurement of a weapon, stealth and the method of the killing. State v. Gentry, 125 Wn.2d 597, 888 P.2d 1105, *quoting*, State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992).

Premeditation may be proven by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury finding is substantial. *Id.* Hummel confirmed Alice died on October 18th 1990. At that time Hummel had significant motive to kill Alice. Alice knew three to five days before she died, that Hummel had been sexually molesting S.K.. S.K. was confident that Alice would take care of the molestation and Hummel admitted to investigators he was confident that if Alice knew of the molestation, she would have confronted him. The jury could reasonably infer from this evidence that Alice did in

fact confront Hummel, particularly since Alice was killed within days of S.K.'s revelation. Further, Hummel was motivated to kill Alice in a manner to conceal her death so he could steal her disability payments for financial support, continue to molest S.K. and convince anyone interested in Alice's whereabouts, that she had abandoned her family.

Hummel's manner of concealing Alice's murder also demonstrated the killing was premeditated and intentional. Alice by all accounts rarely left the Hummel home. Yet, investigators could find no evidence Alice died in the home as Hummel claimed; based on biomechanics and forensics. Based on biomechanical evidence, Hummel could not have moved Alice's dead body from the home if she had died in the house—either of her own hand or in a heat of the moment physical confrontation with Hummel. Moreover, there was no forensic evidence in the home to support a finding Alice was killed or died there. This evidence reasonably infers Hummel lured Alice out of the home prior to killing her. Killing Alice outside the home in a manner that concealed her death allowed Hummel to assert Alice had abandoned her children, steal Alice's disability and continue to molest S.K.. There is substantial circumstantial evidence in the record therefore, that reasonably demonstrates Hummel killed Alice in a manner that required a premeditated plan.

Hummel relies on State v. Bingham, 105 Wn.2d 820, 719 P.2d 820 (1986), to argue evidence in this case is insufficient to support the jury's verdict on premeditation. In Bingham, the court held the manner of death, strangulation that took anywhere from 3-5 minutes, showed only that Bingham an opportunity to deliberate and contemplate taking a life but was insufficient, standing alone, to sustain the element of premeditation. The Bingham court's decision is limited in application and distinguishable from the facts in this case where Hummel not only had opportunity to premeditate murder but ample motive and used a method that required a plan. Id at 827.

In State v. Ollens, 107 Wn.2d 848, our state supreme court recognized premeditation may be predicated on circumstantial evidence where not only opportunity to premeditate exists from the manner of the death but where the defendant also has motive to kill. In Ollens, the defendant stabbed his victim multiple times and then slashed his throat in order to execute a robbery. Id. The evidence suggested Ollens attacked his victim from behind. The Court held these facts, as distinguished from Bingham, supported the jury's finding that Ollens killed with premeditation and deliberation. *See also*, State v. Neslund, 50 Wn.App. 531, 749 P.2d 725 (1988). (No-body homicide prosecution, evidence of stormy and violent relationship between Neslund and victim, including

prior threats and concern by the victim prior to the murder that Neslund was mismanaging their money provided motive for murder sufficient to support the jury's finding the murder was premeditated).

Hummel's argument that there is insufficient evidence to support the jury finding of premeditation is not supported by the record. Similar to Ollens and Neslund, Hummel had more than just mere opportunity to kill Alice. Hummel was motivated to kill her for financial and personal reasons. Hummel had previously physically abused Alice and the two had a very contentious relationship. Moreover, the very manner of Alice's convenient 'disappearance' when the Hummel children were at school and concealment of her body reflect circumstantially that Hummel planned and executed Alice's murder in a manner to avoid detection, allowed him to steal Alice's disability payments and continue molesting S.K.. Hummel's motive combined with his method of killing Alice in a manner away from the home that concealed her murder from her family and authorities reasonably infers Hummel acted with deliberate premeditated thought.

2. There is sufficient evidence in the record to support the jury's finding that Hummel committed the 'acts' of premeditated murder in the state of Washington.

Prior to trial Hummel filed a motion to dismiss for lack of venue asserting the state had not alleged any of Hummel's acts in killing Alice occurred in Whatcom County. CP 192-3. The trial court denied Hummel's motion after the state asserted in response, that the inferences from the circumstantial evidence established the crime occurred in Whatcom County, where Alice lived and was last seen alive.

Now, for the first time on appeal Hummel argues the state failed to sufficiently prove Hummel murdered in the state of Washington as set forth in the 'to convict' jury instructions. Br. of App. at 19. Drawing all reasonable inferences from the evidence in favor of the state, a rational trier of fact could reasonably find Hummel murdered Alice in the state of Washington.

Venue is proper when prosecution is commenced in a county where an element of the crime charged allegedly occurred. CrR 5.1, Wash., Const. Art. 1, sec. 22. (amendment 10). Venue is not an element of a crime nor a matter of jurisdiction. State v. Hardamon, 29 Wn.2d 182, 188, 186 P.2d 634 (1947), State v. Escue, 6 Wash. App. 607, 495 P.2d 351 (1972). However, if the evidence reveals a genuine issue of fact regarding

venue, the question becomes an issue for the trier of fact to determine venue is proper by a preponderance of the evidence. State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994). Hummel did not take exception to the proposed jury instructions or request that the state prove venue was properly laid in Whatcom County to jury by a preponderance of the evidence. Hummel therefore waived this non-constitutional issue. See, State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994). Moreover, any procedural error regarding venue is harmless because the evidence presented at trial is such that any reasonable jury would have found proper venue resided in Whatcom County where Alice was last living with her family when she was killed. State v. McCorkle, 63 Wn.App. 798, 801, 822 P.2d 795 (1992).

While there is no genuine issue of fact regarding venue and Hummel did not request the jury be instructed to find venue was proper in Whatcom County by a preponderance of the evidence, the trial court nonetheless included within the ‘to convict’ instruction that the state had the burden of proving the “acts” as alleged “occurred in the state of Washington” beyond a reasonable doubt. CP 242 (instruction 12). See, Br. of app. at 20, *citing* State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). Hummel now asserts the jury’s jurisdictional finding is not supported by sufficient evidence.

The sufficiency of the evidence reviews whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found evidence to prove the essential elements, including venue beyond a reasonable doubt. *Id.* Direct testimony is not necessary to prove venue. It is enough if inferences from circumstantial evidence show that venue was properly laid. State v. Johnson, 45 Wn.App. 794, 796, 727 P.2d 693 (1986), *review denied*, 107 Wn.2d 1035 (1987).

When viewed in the light most favorable to the state, the inferences from the evidence presented in this case support the jury determination that Hummel committed the ‘acts’ of first degree premeditated murder within the state of Washington. Alice lived in the state of Washington with Hummel in Whatcom County until the day she was murdered. Alice was in her Whatcom County home Thursday and or Friday morning with Hummel and was gone when her children returned from school Friday afternoon. Hummel admits she was dead. Moreover, the circumstances of Alice’s murder reasonably suggest Hummel made a plan to kill Alice prior to her death, while he was living with Alice in Whatcom County. In order to kill Alice in a manner to conceal her death, enable Hummel to steal her pension and continue to molest S.K., Hummel was tied geographically to the Hummel home in executing this murder.

Evidence that Hummel was living with the family prior to the murder and was the only person home when the children returned from school that Friday reasonably infers Hummel committed his crime within a reasonably close distance to the Hummel home and does not support the supposition that Hummel went through the Canadian border or traveled south or east at least 6 hours to get to another state to either murder or dispose of Alice's body. The facts instead reasonably suggest Hummel planned Alice's murder in Washington, stayed in the area he was most familiar with; likely in the remote areas and logging roads in Whatcom County, to hide and conceal Alice's murder. Circumstantial evidence therefore supports the jury's determination that Hummel's crime occurred in the State of Washington beyond a reasonable doubt. See, state v. Hurlbert, 153 Wn.2d 60, 279 P. 123 (1929).

3. Hummel provided no affirmative evidence to support a theory that he recklessly or negligently caused Alice's death and therefore was not entitled to have the jury instructed on the charge of either first or second degree manslaughter.

Hummel asserts that the trial court erred denying his request to have the jury consider manslaughter in the first or second degree even though no evidence in the record affirmatively supports a contention that Hummel recklessly or negligently caused Alice's death.

A defendant is entitled to a requested lesser included instruction when every element of the lesser included offense is a necessary element of the charged offense *and* the factual evidence supports the inference that only the lesser included crime was committed. State v. Workman, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). The trial court in this case concluded Hummel failed to demonstrate the *factual evidence* in the record supported the inference that Hummel was only guilty of the lesser included crimes of manslaughter in the first or second degree and therefore declined to give the requested instructions.

In examining whether the evidence supports the factual prong of the Workman test, this Court must determine if the trial court, in examining the record in the light most favorable to Hummel, abused its discretion determining the evidence did not affirmatively establish that Hummel either recklessly or negligently caused Alice's death, as opposed to premeditated murder as alleged by the state. State v. Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000), State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds*, State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997).

Hummel argues if the jury didn't believe Hummel premeditated Alice's murder, the evidence could support a theory that Hummel instead recklessly or negligently caused her death. Hummel's reliance on the jury

disbelieving the state's evidence and theory is in of itself, insufficient to support Hummel's request for lesser included manslaughter jury instruction. See, Br. of App. at 26, *citing* Keeble v. United States, 412 U.S. 205, 208, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). Instead, the Workman test required Hummel demonstrate below that evidence in the record *affirmatively* supports his request for manslaughter instructions. Hummel's reliance on Keeble to assert that a less stringent standard of evidence should apply when considering whether to give a lesser included instruction is misguided. Keeble, while a United State Supreme Court decision, is based on the federal rules of criminal procedure, not Constitutional considerations or provisions and as such, is not applicable here. Workman continues to set forth the appropriate considerations the trial court was required to weigh in determining whether to give the lesser included jury instructions Hummel requested. State v. Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000).

The evidence presented at trial did not affirmatively infer that Hummel recklessly or negligently killed Alice. Hummel admitted Alice was dead but never acknowledged he played any part in her death. At most, Hummel stated Alice killed herself. Additionally, no forensic evidence was found at the Hummel home to support the inference Alice died there and the children recalled no heated or physical altercations

between Hummel and Alice in the week prior to Alice's alleged 'disappearance' at the home that could have provided a basis for Hummel to assert the evidence affirmatively suggested Alice died accidentally or recklessly in the passion of the moment as a result of his actions.

The evidence instead revealed Alice knew Hummel was molesting S.K. 3-5 days before she was killed and had let S.K. feel reassured she would take care of the molestation problem. Hummel admitted to investigators, that if Alice knew of the molestation, he was confident she would have confronted him about it. This evidence infers Alice did confront Hummel and Hummel, motivated by not wanting to face consequences for the molestation or change in lifestyle formed a plan to kill Alice in a manner that would conceal her death, would not alert his children or authorities, allow him to continue to be financially supported by Alice's pension and finally would allow him to continue to molest S.K.. The evidence examined in the light most favorable to Hummel was at best that Alice killed herself or really 'abandoned' her family; neither of these alternatives supported the theory Hummel negligently or recklessly killed Alice. In light of the evidence presented below, the trial court did not abuse its discretion concluding there was no evidence to support lesser included manslaughter first or second or assault in the fourth degree jury instructions.

- 4. Hummel made a reasonable tactical decision, based on the evidence presented, his age and health issues, to go for an all or nothing strategy to forego instructing the jury on the lesser included offense of murder in the second degree in hopes of achieving an outright acquittal on the premeditated murder charge.**

Next, Hummel contends his trial attorney was constitutionally ineffective for employing an all or nothing strategy in requesting the trial court withdraw his initial request to instruct the jury on the lesser included offense of murder in the second degree. Br. of App. at 30. Hummel made this strategic decision after consulting with his attorney to increase his chance of outright acquittal, in the event the jury rejected the circumstantial evidence presented to prove Hummel killed Alice with premeditated intent. Hummel also asserted to the court that based on his age and health that he considered conviction for either first degree or second degree murder to “essentially” result in the same penalty to him. An ineffective assistance of counsel claim cannot be predicated on reasonable strategies of trial counsel.

To prevail on a constitutional ineffective assistance of counsel claim, Hummel must demonstrate that his attorney’s performance was constitutionally deficient in that her performance fell below a standard of reasonableness and that the deficient performance resulted in prejudice. The defendant must show his attorney’s deficient performance essentially

deprived him of a fair trial, a trial whose result cannot be considered reliable. State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). Unless Hummel can make both showings, his claim should be denied. *Id.* An ineffective assistance claim is reviewed de novo because it presents a mixed question of law and fact. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

To establish deficient performance, Hummel has the burden of demonstrating his attorney ‘made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Moreover, Hummel has the burden of overcoming the strong presumption of effective representation of counsel and show, based on the record there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 988 P.2d 1251 (1995). If counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Hummel concedes his trial attorney strategically decided to withdraw, with Hummel’s support, a request to instruct the jury on the lesser included offense of murder in the second degree. This decision was to Hummel’s advantage to possibly secure an acquittal if the jury did not

believe the evidence demonstrated Hummel was guilty of premeditating Alice's murder. Having had that strategy fail, Hummel now argues his trial attorney's conduct was strategically unreasonable because had she understood the differences in the standard range penalty for first and second degree murder as they relate to a 1990 conviction, she would not have withdrawn the request to instruct the jury on second degree murder. The record doesn't support Hummel's argument.

Nowhere does the record reflect Hummel's trial attorney affirmatively misunderstood or misadvised Hummel of the particular sentence range Hummel would face if he was convicted of second degree versus first degree premeditated murder. Hummel's argument is based on speculation, not fact. When viewed in context, the record instead reflects Hummel and his attorney decided personal 'to' Hummel based on considerations of his age and health, Hummel would 'effectively' face the same amount of time regardless of any differences in the particular penalty whether he was convicted of murder in the first or second degree. RP 562. Moreover, Hummel's attorney was well aware that Hummel was charged with a 1990 offense and that the jury had previously been instructed on both first and second degree murder in Hummel's first trial. This Court must give deference to Hummel's attorney that she understood and discussed the risks and possible consequences with Hummel, prior to

seeking this strategy. Additionally, this Court must examine this issue based on the specific facts presented below when viewed in context and not add facts that can distort what was actually intended.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. 2052.

Hummel's attorney also stated below that she and Hummel discussed the concern that the jury may convict him of murder in the second degree if they couldn't find evidence to support the element of premeditation as to the first degree murder charge and that Hummel was therefore opting, for strategic and personal reasons, to forego having the jury instructed on the lesser included offense of murder in the second degree to avoid a compromise verdict. RP 563. Under these circumstances Hummel cannot overcome the presumption that his attorney's strategy for all of the reasons provided was strategically reasonable. As the Court explained in Grier, even when "the risk is enormous and the chance of

acquittal minimal it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision. State v. Grier, 171 Wn.2d at 39. Hummel's attorney strategically chose, after consulting with Hummel based on multiple considerations not to seek an instruction for murder in the second degree. This decision could have resulted in Hummel's outright acquittal. The record reflects this strategy was reasonable and within the range of reasonable professional conduct when considering the evidence before the jury and considerations of the penalties in light of Hummel's age and deteriorating health. Hummel therefore cannot demonstrate his attorney's conduct constitutes deficient performance.

Even if Hummel's attorney's conduct were considered deficient, Hummel can't establish the requisite prejudice to establish ineffective assistance of counsel given that the jury unanimously found every element, including premeditated intent, in order to convict Hummel of first degree murder. Given the jury finding of Hummel's guilt and the sufficiency of the evidence as to his guilt, there is no risk that had Hummel sought a second degree murder instruction that decision would have resulted or led to a different result. Therefore, even if Hummel's attorney's actions could be considered deficient, no prejudice could have

resulted to warrant a new trial based on his ineffective assistance of counsel claim.

5. Hummel waived his right to object to the imposition of legal financial obligations by failing to object below when the sentencing court imposed both mandatory and discretionary financial fees.

Hummel next argues the sentencing court erred imposing legal financial obligations without also making an individualized inquiry into his current and future ability to pay them pursuant to State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). To the extent that Hummel relies on a statutory basis, RCW 10.01.160, for his argument regarding imposition of the fees, Hummel waived the issue by failing to raise it at sentencing. State v. Lyle, 188 Wn.App. 848, 355 P.2d 327 (2015).

Hummel had an obligation to bring the statute, and the underlying factual basis, to the sentencing court's attention. Twice the sentencing court mentioned legal financial obligations to Hummel. First, Hummel was informed the court would impose standard legal financial obligations. RP 26 (6/16/14 sentencing hearing). Then, towards the end of the sentencing hearing the court advised Hummel that he had imposed legal financial obligations that were set out in the judgment and sentence but that if Hummel thought it was appropriate, Hummel could request to have

some of those waived through counsel or at his own request. Id at 30.

Hummel nor his attorney made such a request.

Additionally, Blazina was issued before Hummel's June 16th 2015 sentencing hearing providing notice that the failure to object to the imposition of LFO's permits the appellate court to find within its discretion that Hummel waived his right to claim error on appeal. Hummel therefore waived any statutory error and any error regarding failure to consider underlying facts in deciding how much to impose in fees and court costs by failing to bring those matters to the court's attention at the time of sentencing.

Moreover, it should be noted that a defendant's indigent status at the time of sentencing does not preclude the imposition of mandatory court costs, and a defendant's inability to pay is best addressed at the time the State attempts to enforce collection. State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008), *rev. den.*, 165 Wn.2d 1044 (2009); *see also*, State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (the time to address the defendant's ability to pay is at the time the State seeks to enforce collection as court's determination at sentencing is speculative). This court should decline to consider Hummel's blanket request to strike all financial penalties.

To the extent Hummel asserts constitutional error, Hummel bears the burden of showing that the trial court's imposition of court costs based on the court's failure to consider his inability to pay under RCW 10.01.160 is a constitutional error that he may raise for the first time on appeal. RAP 2.5(a). Simply asserting a constitutional equal protection or due process allegation without more, does not meet this burden.

If this Court determines it wishes to exercise its discretion, the state requests this matter be remanded to the sentencing court for an individualized inquiry of Hummel's ability to pay in addition to a determination of appropriate mandatory and discretionary legal financial obligations.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm Hummel's conviction for murder in the first degree. If this Court determines Hummel did not waive his right to challenge the legal financial obligations imposed below, the state respectfully requests this matter be remanded to the trial court to re-consider the imposition of those costs and to correct the judgement and sentence accordingly.

Respectfully submitted this _____ day of October 2015.

Kimberly Thulin
KIMBERLY THULIN, WSBA #21210
Senior Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

NANCY P. COLLINS
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TD Astavik
Legal Assistant

10/30/15
Date