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Supreme Court No.
Court of Appeals No. 339581

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO J. RESENDEZ-MIRANDA,

Petitioner,

ON APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
The Honorable Bruce A. Spanner

AMENDED PETITION FOR REVIEW

TANESHA LA'TRELLE CANZATER
Attorney for Petitioner
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

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A. IDENTITY OF PETITIONER

Francisco J. Resendez-Miranda (Mr. Miranda) asks this court to review the decision designated in Part B below.

B. DECISION

Division Three Court of Appeals (Division Three) affirmed Mr. Miranda's convictions for first-degree aggravated murder, in *State of Washington v. Francisco J. Resendez-Miranda*, No. 339581, filed on December 21, 2017. A copy of the decision is attached as an appendix. This petition cites parts of the decision as "Div. III at page number."

This petition also cites the verbatim report of proceedings as "the date of trial RP and page number" and clerks' papers as "CP page number."

C. ISSUES PRESENTED FOR REVIEW

1. After jurors reacted viscerally to a pregnant murder victim, was it likely an autopsy photograph of a full-term fetus in utero aroused more of the jury's passions enough to prejudice Mr. Miranda's right to a fair trial?

2. Whether the accomplice liability instruction materially affected the jury's deliberations because it allowed the jury to find Mr. Miranda guilty based on perceived complicity in this case, because there was no physical evidence to prove he was a major participant in the crimes?

3. Whether the lower court's decision to deny Mr. Miranda a lesser included jury instruction conflicts with this Court's State v. Condon ruling?

D. STATEMENT OF THE CASE

Dubbed by the media as "The Benton County Cornfield Killer," Mr. Miranda was sentenced to life without the possibility of parole, CP 77-86, after a jury found him guilty of three counts first-degree aggravated murder for the deaths of David Saucedo Perez (David), Abigail Renteria Torres (Abigail), and Victoria Torez (Victoria). 11/4/15 RP 555; 11/4/15 RP 453- 455; 11/4/15 RP 412-414; *See* Jake Dorsey, *Tri-City Herald*, 'Court rules on appeal of Benton County cornfield killer' [December 2017].

A farmworker discovered David's and Abigail's bodies next to David's truck, in a corn field, on a remote area of a farm. The first detective to arrive at the scene discovered Victoria's body situated in corn stalks some distance away. 11/4/15 RP 454-455.

David sustained two gunshot wounds to the head. 11/6/15 RP 771. A pathologist surmised from gunpowder residue around the wounds, the gun used to kill David was either near or touching his scalp when it discharged. 11/6/15 RP 778. Abigail, who the pathologist confirmed was pregnant with a full-term fetus, sustained a gunshot wound to her right cheek which passed through the check and settled in the most vital area of her brain. 11/6/15 RP 783;11/6/15 RP 788-89. The pathologist surmised because there was little gunpowder residue around the wound, the gun used to kill Abigail could have been either a couple of feet or 200 feet away when it discharged. 11/6/15 RP 785; 11/4/15 RP 452; 11/6/15 RP 786.

Victoria sustained a gunshot wound, to the right side of her neck. Given there was no gunpowder residue around the wound, the pathologist surmised the gun used to shoot Victoria was more than two feet away when it discharged. 11/6/15 RP 791-93. From how the bullet passed through her neck, it was likely she turned to look at the

person who shot her as she ran away. 11/6/15 RP 794-795. Victoria was also strangled with either rosary beads she had on or with a belt applied tightly over the beads. 11/6/15 RP 797-800.

A firearms and tool marks forensic scientist examined the bullet casings and opined the bullets could have been fired from Ruger, Smith & Wesson and Taurus revolvers, .357 Magnums, and .38 Special calibers and FN Smith & Wesson pistols in nine-millimeter Luger caliber. 11/6/15 RP 824-827, 11/6/15 RP 829. In other words, there could have been more than one caliber weapon used to kill David, Abigail, and Victoria. 11/18/15 RP 2035-36.

The state theorized Mr. Miranda, possibly along with his father and two brothers, who fled to Mexico the day after the bodies were discovered, lured David, Abigail, and Victoria to the cornfield where he murdered them as retribution for breaking into his apartment and stealing methamphetamine. 11/13/15 RP 1294; 11/9/15 RP 884; 11/16/15 RP 1428; 11/ 16/15 RP 1578; 11/13/15 RP 1354; 11/18/15 RP 1970. However, the state's theory did not match any of the physical evidence.

Shoe impressions found at the scene did not match shoes collected from Mr. Miranda. 11/ 9/15 RP 948; 11/9/15 RP 951. The tread design from the shoe impressions at the scene was consistent with the tread design on Mr. Miranda's sneakers. However, there was a sufficient difference in the sizes to say with certainty Mr. Miranda's shoes made those impressions. 11/9/15 RP 950. Someone else could have made those impressions. 11/4/15 RP 496.

A forensic scientist took soil samples from the scene and botanical matter from David's truck. He compared the samples to soil and botanical matter found on Mr.

Miranda's sneakers. He concluded there was no soil, just dust particles on one pair of sneakers. The amount of soil on another pair of sneakers was not enough for comparison. And on the pair that had enough soil to compare, the soil did not match. Moreover, there was no botanical matter from the scene on any of Mr. Miranda's sneakers. 11/18/15 RP 2098-99.

A forensic scientist tested three pieces of clothing taken from Mr. Miranda's apartment that had reddish brown stains. The reddish-brown stains tested positive for blood. 11/6/15 RP 834. One of the pieces was a tank top found inside an ammunition box. 11/6/15 RP 835-36. The scientist extracted three DNA profiles from the tank top. 11/9/15 RP 985. The DNA profile that was found most on the tank top came from Victoria. 11/9/15 RP 975. The second DNA profile belonged to an unknown contributor the scientist dubbed, "Individual A." The third DNA profile also belonged to another unknown contributor the scientist dubbed, "Individual B." 11/9/15 RP 980-81. The second piece taken from the apartment was a T-shirt. The DNA profile obtained from that shirt belonged to Individual B. The third piece taken from the apartment was a pair of green jeans. The DNA profile obtained from the waistband of those jeans belonged to Individual A. 11/9/15 RP 991.

The scientist examined blood stains on another T-shirt and a pair of blue jeans collected from Mr. Miranda's truck. 11/9/15 RP 986. Those clothing items seemed consistent with the clothes Mr. Miranda wore the day of the murders. The DNA profile obtained from the jeans belonged to another unknown contributor the scientist dubbed, "Individual C." No DNA from David, Abigail, or Victoria was found on the jeans. 11/9/15 RP 991.

Finally, the state's forensic scientist lifted fingerprints from David's truck. 11/4/15 RP 533. Most of the prints lifted could not be identified. 11/4/15 RP 551. However, three prints on the exterior of the passenger's rear door belonged to Archivaldo Marquez (Marquez), not Mr. Miranda. 11/4/15 RP 535.

With no physical evidence that linked Mr. Miranda to the crimes and no eyewitnesses, the state's case at trial was based largely on testimony. Cristian Hurtado (Hurtado), an ex-convict, who worked at the same farm as David and the Miranda family, told police Mr. Miranda confessed to the killings. 11/13/15 RP 1219. According to Hurtado, Mr. Miranda told him that he shot David and claimed when one of the girls did not die after she was shot, he and his father finished her with a belt. 11/13/15 RP 1283. Detectives found out later Hurtado owned a .45 caliber handgun. 11/10/15 RP 1065.

Marquez, whose fingerprints were found on David's truck, also worked at the farm. 11/16/15 RP 1454-55. He testified Mr. Miranda borrowed his .38 caliber handgun. When he retrieved the gun the next day, he noticed blood spatter and something white around the barrel. He freaked out and threw the gun over a bridge. 11/16/15 RP 1461-62; 11/13/15 RP 1325-26; 11/16/15 RP 1488-1490.

Omar Vargas (Vargas), a supervisor at the farm, told police Mr. Miranda confessed to him that his brothers were there when he shot David in the head. Vargas claimed Mr. Miranda told him, "Nobody's gonna steal from me!" 11/9/15 RP 865; 11/9/15 RP 898-902.

The state sought to admit photographs from autopsies to further explain for the jury how David, Abigail, and Victoria died, including a photograph of Abigail's dead fetus in her open womb to prove an aggravating factor based on the fact she was pregnant.

11/6/15 RP 749; 753. Mr. Miranda objected to the photograph of Abigail's open womb because the state could have established she was pregnant with the pathologist's testimony. 11/6/15 RP 756-57.

Although the court acknowledged during jury selection, jurors had visceral reactions, when it was mentioned one of the victims was pregnant, the court admitted the photograph, over Mr. Miranda's objection. It concluded the photograph was extremely probative, it was also extremely prejudicial. But its probative value outweighed any prejudicial effect. 11/6/15 RP 761-62.

Mr. Miranda moved the court to include a lesser-included jury instruction. CP 167. He argued evidence presented at trial was sufficient for the jury to infer something other than premeditation. There were no eyewitnesses to describe what happened on the farm and there was no testimony to prove he told anyone he planned to kill. There was testimony that Mr. Miranda confessed after the fact, but no physical evidence to place him at the scene. 11/19/15 RP 2137-38.

The court denied Mr. Miranda's motion. It reasoned based the totality of the evidence the court could not justify instructions on the lesser-included because there were no facts to suggest or to support they were out on the farm to either frighten or intimidate them. 11/19/15 RP 2148-49.

Mr. Miranda also objected to an accomplice liability instruction the state sought to admit. Mr. Miranda argued it was not fair to allow the jury to consider that theory when he was the only person on trial and the state failed to prove the major participant. 11/18/15 RP 2122-23; CP 168. The state argued testimonies from Hurtado, Marquez, and Vargas that Mr. Miranda confessed to the killings, were enough to prove he played a

major part in the events that lead to the murders. Although it could not prove who actually killed David, Abigail, and Victoria, the state argued the accomplice liability instruction allowed the jury to consider whether or not Mr. Miranda was just there or whether or not he was involved in the crimes. 11/ 18 /15 RP 2125. The court agreed and allowed the instruction. 11/ 18 /15 RP 2125.

On appeal, Mr. Miranda challenged the trial court's decisions to admit the autopsy photograph and to instruct the jury on accomplice liability, as well as its decision to deny him an instruction for a lesser included offense. Division Three upheld the trial court's decisions. It found because the jury determined Mr. Miranda did not know Abigail was pregnant, the autopsy photograph could not have had an improper impact on the verdict. Div. III at 7; 11/23/15 RP 2299; CP 76. It concluded the state presented sufficient evidence, through trial testimony, to justify the accomplice liability instruction. Div. III at 8. And it found the affirmative evidence Mr. Miranda relied on to qualify for a lesser included jury instruction was only suggestive of one crime-premeditated first-degree murder. Div. III at 11.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. GIVEN JURORS VISCERAL REACTIONS TO A PREGNANT MURDER VICTIM, IT IS UNLIKELY THEIR PASSIONS WERE NOT FURTHER AROUSED WHEN SHOWN AN AUTOPSY PHOTOGRAPH OF THE DEVELOPED BABY IN ITS DEAD MOTHER'S WOMB.

Division Three's decision to affirm the trial court's decision to admit an autopsy photograph to which jurors, and the judge, reacted viscerally, likely prejudiced Mr. Miranda's right to a fair trial, which raises a significant question of law under our Constitution and involves an issue of substantial public interest that should be determined by this Court.

Autopsy photographs are admissible if they are "[a]ccurate," and "if their probative value outweighs their prejudicial effect." State v. Crenshaw, 98 Wash.2d 789, 806, 659 P.2d 488 (1983); ER 403. Autopsy photographs have probative value when "used to illustrate or explain the testimony of the pathologist who performed the autopsy." State v. Lord, 117 Wash.2d 829, 870, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Gruesome photographs are admissible if accurate and if their probative value outweighs their prejudicial effect. Crenshaw, 98 Wash.2d at 806, 659 P.2d 488. An ugly crime need not be prettified for the jury. State v. Adams, 76 Wash.2d 650, 656, 458 P.2d 558 (1969), *rev'd on other grounds*, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971)). "'[A] bloody, brutal crime cannot be explained to a jury in a lily-white manner.'" State v. Crenshaw, 98 Wash.2d at 807 (*quoting* State v. Adams, 76 Wash.2d 656); State v. Lord, 117 Wash.2d 829, 871, 822 P.2d 177, 201 (1991). However, prosecutors are not given a carte blanche to introduce every piece of admissible evidence if the cumulative effect of such evidence is inflammatory and unnecessary. Id. They "as well as trial courts must exercise their discretion in the use of gruesome photographs." Id. at 807. When proof of criminal acts may be amply proven through testimony and non-inflammatory evidence, prosecutors must "use restraint in their reliance on gruesome and repetitive photographs." Id. But a brutal crime cannot be explained as anything other than a brutal crime. Id. (*quoting* Adams, 76 Wash.2d at 656, 458 P.2d 558); State v. Stackhouse, 90 Wash. App. 344, 357–58, 957 P.2d 218, 225–26 (1998); 5 Wash. Prac., Evidence Law and Practice § 402.24 (6th ed.).

This Court will generally uphold trial courts' decisions to admit autopsy photographs that show injuries and the relationship between different injuries, that explain how a person died, that show the extent of injuries which were relevant to the contested issues of intent to kill and premeditation, and to illustrate or explain the testimony of the pathologist who performed the autopsy. State v. Finch, 137 Wash. 2d 792, 813, 975 P.2d 967, 982 (1999); State v. Yates, 161 Wash. 2d 714, 768–69, 168 P.3d 359, 389 (2007).

However, there was no reason for the trial court to admit the autopsy photograph of Abigail's fetus in her open womb, other than to arouse the jury's passion. There was testimony and other less inflammatory evidence the state could have relied on to establish that Abigail was pregnant. The detective, at the scene, testified when the coroner rolled Abigail's body, he noticed significant movement in her belly and presumed she was pregnant. 11/4/15 RP 452. The pathologist that performed her autopsy confirmed she was pregnant. 11/6/15 RP 786. He measured and weighed the fetus and determined it was full-term. 11/6/15 RP 788-89. His expert testimony would have been enough for the jury to determine whether or not Mr. Miranda knew Abigail was pregnant.

Division Three concluded the trial court appropriately weighed the probative value of the autopsy photo against its potential prejudice. It found,

> While the autopsy photo was somewhat cumulative of other evidence, Mr. Miranda cannot establish any prejudice from its admission. If the jury had been improperly inflamed by the photo, one would expect the prejudice would have manifested itself through an adverse finding on the pregnancy aggravator, RCW 9.94A.535(3)(c). But the jury did not make this finding. When asked if the State had proved Mr. Miranda knew Abigail Torres was pregnant, the jury answered, "No." Clerk's Papers at 76. Given the jury's

> disposition, it is apparent the photograph had no improper impact on the verdict.

Div. III at 7.

Division Three's concession the photograph was cumulative of other evidence proves it was unnecessary. And although the jury ultimately determined Mr. Miranda did not know Abigail was pregnant, it convicted him on all counts aggravated murder. Given the lack of physical evidence presented to link Mr. Miranda to the murders, and the fact he was the only one to stand trial, it is unlikely the image of the dead fetus in its mother's dead womb had no effect on proceedings.

2. DIVISION THREE'S DECISION TO UPHOLD THE TRIAL COURT'S DECISION TO INSTRUCT THE JURY ON ACCOMPLICE LIABILITY, WHEN THE ONLY EVIDENCE PRESENTED TO PROVE MR. MIRANDA PLAYED A MAJOR PART IN THE MURDERS WAS TESTIMONY THAT CONFLICTED WITH PHSYCIAL EVIDENCE, MATERIALLY AFFECTED THE JURY'S DELIBERATIONS AND TAINTED MR. MIRANDA'S RIGHT TO A FAIR TRIAL.

Division Three's decision to uphold the accomplice liability instruction, presents an issue of substantial public interest in that it has the potential to affect every other defendant faced in a similar circumstance where the state is allowed to rely solely on testimony, in the face of conflicting and even non-existent physical evidence, to prove a defendant was a major participant in a crime.

Division Three applied a sufficiency analysis to evidence the state presented to justify an accomplice liability instruction and concluded the evidence was sufficient. It reasoned while it is unclear exactly who did what at the murder scene, the state's evidence shows Mr. Miranda played a significant role because Mr. Miranda procured a firearm before going out to the farm and he confessed to firing the shots at the victims.

Although Mr. Miranda's family members may have also facilitated the victims' deaths, the state's evidence showed Mr. Miranda was closely involved. Div. III at 8.

For accomplice liability to attach "a defendant must not merely aid in any crime but must knowingly aid in the commission of the specific crime charged." State v. Brown, 147 Wash.2d 330, 338, 58 P.3d 889 (2002). However, a defendant may be convicted of first-degree aggravated murder based solely on an accomplice theory, State v. Mak, 105 Wash.2d 692, 718 P.2d 407 (1986) (*overruled in part on other grounds in* State v. Hill, 123 Wash.2d 641, 870 P.2d 313 (1994)), but only when the state can prove "major participation by [the] defendant in the acts giving rise to [the] homicide." State v. Roberts, 142 Wash.2d 471, 505, 14 P.3d 713 (2000); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (4th Ed).

Division Three concluded the totality of the evidence provided a strong basis for the jury to find Mr. Miranda liable as either a principal or an accomplice to all three murders. Div. III at 8-9. "While it is unclear exactly who did what at the murder scene, the state's evidence shows Mr. Miranda played a significant role. Mr. Miranda procured a firearm before going out to the farm and he confessed to firing shots at the victims." Div. III at 8.

Had Division Three considered all of the evidence, and the lack thereof, and not just trial testimony, it would have found the state's evidence did not prove Mr. Miranda played a major part in the murders. The gun, Division Three maintained Mr. Miranda procured, was never presented at trial. 11/16/15 RP 1461-62; 11/13/15 RP 1325-36; 11/16/15 RP 1488-1490. In fact, according to the firearms and tools marks forensic scientist, there could have been more than one caliber weapon used to kill David,

Abigail, and Victoria. 11/18/15 RP 2035-36. And there was no evidence to prove Mr. Miranda was anywhere near the farm. Shoe impressions found at the farm did not match Mr. Miranda's size and the state's own expert witness concluded someone else could have made the impressions. 11/9/15 RP 948; 11/9/15 RP 95; 11/4/15 RP 496. There was no soil or botanical matter from the scene on sneakers that belonged to Mr. Miranda. 11/18/15 RP 2098-99.

DNA extracted from clothes similar to clothes Mr. Miranda wore that day contained no samples from David, Abigail, or Victoria. 11/9/15 RP 991; 11/9/15 RP 986. However, DNA extracted from a tank top found in Mr. Miranda's apartment belonged to Victoria and two unknown contributors dubbed "Individual A" and "Individual B." 11/9/15 RP 975. And, fingerprints lifted from David's truck belonged to Marquez, not Mr. Miranda. 11/4/15 RP 535.

The jury found Mr. Miranda guilty of aggravated first-degree murder, on all three counts, even though there was no evidence he committed the murders. CP 70-76. That suggests the jury convicted him solely on an accomplice theory, without sufficient evidence to prove he was a major participant.

3. DIVISION THREE'S DECISION TO NOT CONSIDER THE AFFIRMATIVE EVIDENCE MR. MIRANDA USED TO QUALIFY FOR A LESSER INCLUDED JURY INSTRUCTION IN A LIGHT MOST FAVORABLE TO HIM CONFLICTS WITH THIS COURT'S RULING IN STATE V. CONDON.

Division Three concluded the affirmative evidence Mr. Miranda used to qualify for the lesser included offense of second-degree murder is suggestive of only one crime-premeditated first-degree murder. Div. III at 10-11. But neither Division Three nor the trial court viewed the affirmative evidence in the light most favorable to Mr. Miranda. And according to State v. Condon, 182 Wash.2d 307, 311, 343 P.3d 357, 359 (2015), that

is enough to warrant a reversal and a new trial, Id. at 311, and, we believe, it is enough for this Court to accept review.

Both the defendant and the state have a statutory right to present lesser-included offense instructions to the jury. State v. Davis, 121 Wash.2d 1, 4, 846 P.2d 527 (1993), *abrogated on other grounds by* State v. Berlin, 133 Wash.2d 541, 947 P.2d 700 (1997). The relevant statute provides: "[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." RCW 10.61.006; State v. Gamble, 154 Wash. 2d 457, 462–63, 114 P.3d 646, 648 (2005). Either party may request an instruction on a lesser crime, State v. Lyon, 96 Wash.App. 447, 450, 979 P.2d 926 (1999), and the court may give such an instruction on its own motion. State v. Rhinehart, 92 Wash.2d 923, 927, 602 P.2d 1188 (1979). However, if the defendant requests the instruction, in an appropriate case, it is reversible error to refuse to give the instruction. State v. Parker, 102 Wash.2d 161, 683 P.2d 189 (1984).

Division Three surmised this was not an appropriate case for the instruction because unlike Condon, there was no evidence of a "startling event or provocation that might have led Mr. Miranda and his companions to kill the victims." Div. III at 10.

In Condon, the state in that case charged Condon with first-degree aggravated murder and first-degree felony murder when he shot and killed a homeowner during a home invasion robbery attempt. Condon and his associate mistakenly believed the home was that of a drug dealer he planned to rob. Instead of a drug dealer, Condon and his associate encountered a man, a woman, and three children. The woman testified when the man tried to wrest a gun away from Condon, a car pulled into the driveway and

frightened him. She heard gunshots. Condon and associate fled but left behind a cell phone. State v. Condon, 182 Wash. 2d 307, 311, 343 P.3d 357, 359 (2015).

Condon's associate told police the man managed to get him in a chokehold and as he lost consciousness, Condon shot him. The man later died. At trial, the state presented the associate's testimony that Condon was the shooter, testimony by a jailhouse informant that Condon admitted he shoot the man when he "screwed up on a home invasion," and the woman's pretrial lineup and in-court identification. State v. Condon, 182 Wash. 2d at 312–13.

Before closing arguments, Condon's attorney asked the court to instruct the jury on second-degree intentional murder as a lesser-included offense to aggravated (premeditated) first-degree murder. The attorney reasoned the jury could find he committed the murder but without premeditation. The court denied the request for two reasons: first, that the evidence presented did not support an inference that the shooting was not premeditated, and second, that second degree murder was a lesser-included offense to the first-degree (premeditated) murder charge, but not to the first-degree felony murder charge. Id.

The court of appeals found the trial court's failure to instruct on the second-degree intentional murder as a lesser degree to the state's first-degree premeditation charge was harmful error and reversed the conviction. This Court upheld the court of appeal's decision and found the trial court failed to view evidence presented in the light most favorable to Condon. Although there was evidence to support the premeditation finding, namely that Condon entered the man's home with a loaded handgun to commit robbery, there was evidence the shooting was a sudden reaction, based in fear rather than

"weighing or reasoning, when the man tried to wrest the handgun away from Condon." "A jury could conclude from eyewitness testimony Condon shot the man in reaction when the man tried to wrest the handgun from him, or that he shot the man because his associate was turning purple from the man's chokehold." Id. at 307.

Had Division Three viewed the forensic evidence in the light most favorable to Mr. Miranda, as Condon requires, the same evidence could have allowed for a scenario other than premediated first-degree murder. For example, although the pathologist confirmed David's and Abigail's deaths were immediate, and Victoria likely ran away from her killer, there were no eyewitnesses to the shootings and no evidence to confirm who was shot first. Victoria could have prompted the shootings by running away or by attempting to run away. In which case, the shooters could have panicked and reacted by shooting. But the jury was instructed to infer only one scenario to fit.

This created a risk that the jury convicted Mr. Miranda of aggravated first-degree murder despite having reasonable doubts. *See* State v. Henderson, 182 Wash. 2d 734, 736, 344 P.3d 1207, 1208 (2015). To minimize that risk, the trial court should have erred on the side of instructing juries on lesser- included offenses. A jury must be allowed to consider a lesser-included offense if the evidence, when viewed in the light most favorable to the defendant, raises an inference that the defendant committed the lesser crime instead of the greater crime. State v. Fernandez–Medina, 141 Wash.2d 448, 455–56, 6 P.3d 1150 (2000). If a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense. Id. at 456, 6 P.3d 1150; State v. Henderson, 182 Wash. 2d at 736.

F. CONCLUSION

While Division Three's decision to allow the state to expose an already emotional jury to unnecessary and inflammatory autopsy photographs, to afford the state the benefit of an accomplice liability instruction without sufficient evidence to prove Mr. Miranda played a major role in the crimes, and to deny an appropriate lesser included jury instruction, affects Mr. Miranda's right to a fair trial, it also has the potential to affect other defendants in similar circumstances. For that reason, we believe Division Three's findings raise issues of substantial public interest and we ask this Court to accept review.

January 22, 2018

Respectfully submitted,

s/Tanesha La'Trelle Canzater
Attorney for Francisco J. Resendez-Miranda
Tanesha L. Canzater, WSBA# 34341
Post Office Box 29737
Bellingham, WA 98228-1737
(360) 362-2435 (mobile office)
(703) 329-4082 (fax)
Canz2@aol.com

DECLARATION OF SERVICE

I declare under penalty and perjury of the laws of Washington State that on **Tuesday, January 23, 2018,** I filed this **AMENDED PETITION FOR REVIEW** with Division Three Court of Appeals and served copies of the same to the following counsel of record and/or other interested parties:

BENTON COUNTY PROSECUTORS OFFICE
prosecuting@co.benton.wa.us
*This office accepts service by email.

WASHINGTON STATE PENITENTIARY
Francisco J. Resendez-Miranda DOC #387673
E-204
1313 North 13th Avenue
Walla Walla, WA 99362

s/Tanesha La'Trelle Canzater
Attorney for Francisco J. Resendez-Miranda
Tanesha L. Canzater, WSBA# 34341
Post Office Box 29737
Bellingham, WA 98228-1737
(360) 362-2435 (mobile office)
(703) 329-4082 (fax)
Canz2@aol.com

LAW OFFICES OF TANESHA L. CANZATER

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Address:
PO BOX 29737
BELLINGHAM, WA, 98228-1737
Phone: 877-710-1333

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Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

December 21, 2017

E-mail
Tanesha La Trelle Canzater
Attorney at Law
PO Box 29737
Bellingham, WA 98228-1737

E-mail
Andrew Kelvin Miller
Kristin Marie McRoberts
Benton County Prosecutors Office
7122 W Okanogan Pl Bldg A
Kennewick, WA 99336-2359

CASE # 339581
State of Washington v. Francisco J. Resendez Miranda
BENTON COUNTY SUPERIOR COURT No. 141011087

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and <u>two copies</u> of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment
c: **E-mail** Honorable Bruce A. Spanner
c: Francisco J Resendez-Miranda #387673
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

FILED
DECEMBER 21, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 33958-1-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
FRANCISCO J. RESENDEZ MIRANDA,	)	
	)	
Appellant.	)	

PENNELL, J. — Francisco Miranda appeals his convictions for three counts of aggravated first degree murder. We affirm.

FACTS

The facts of this case are lengthy and well known to the parties. We discuss only those portions necessary to resolve the parties' contentions.

In the early hours of an August 2014 morning, three dead bodies were located in a remote area of a Benton County farm. The victims were identified as David Perez Saucedo Jr., Abigail Renteria Torres, and Victoria Torres. Forensic examiners opined that Mr. Saucedo and Abigail Torres had been shot at close range and died quickly. Mr. Saucedo had two gunshot wounds to his head. Abigail Torres had a single gunshot wound to her head and was discovered to have been pregnant with a full-term child. The condition of Victoria Torres's body was different. It appeared to examiners that Victoria Torres had been shot while trying to run away. Victoria Torres also had marks on her neck consistent with strangulation and a physical struggle.

Law enforcement's investigation came to focus on Francisco Miranda, his father, and his two brothers. Only Mr. Miranda was ultimately arrested. Mr. Miranda's family members all left for Mexico prior to coming to the attention of the authorities.

Mr. Miranda made a number of statements that were used against him at trial. While Mr. Miranda's statements to law enforcement were merely inconsistent, as opposed to directly incriminating, the same was not true of his statements to lay witnesses. Several witnesses testified that Mr. Miranda had admitted to being involved with the shootings along with his family members. One of the lay witnesses (a jail inmate)

reported Mr. Miranda stating that one of the female victims had not died right away, so his family members took a belt and stepped on her throat.

Apart from recounting Mr. Miranda's various confessions, several witnesses placed Mr. Miranda together with the victims the night before the murders. One of the witnesses also said Mr. Miranda had borrowed his loaded .38-caliber revolver the night of the murders. When the firearm was later returned, the ammunition was gone and blood spatter was located around the barrel.[1]

The State's theory was that Mr. Miranda sought revenge against Mr. Saucedo for burglarizing his apartment. Mr. Miranda and his family members abducted Mr. Saucedo and his two female companions, took them out to a remote farm, and then shot them execution style. Consistent with Mr. Miranda's confession, the State theorized that Mr. Miranda's family members had strangled Victoria Torres after she escaped from the initial shooting.

The forensic evidence implicating Mr. Miranda was limited. The suspect firearm had been thrown in a river. Shoe prints and trace evidence from the scene did not connect back to Mr. Miranda. However, law enforcement were able to uncover a relevant item of

[1] The witness threw the firearm into a river before it could be analyzed by law enforcement.

clothing during a search of Mr. Miranda's apartment. The article was a tank top marked with a blood stain that was traced to Victoria Torres.

Mr. Miranda was charged with three counts of first degree murder with aggravating factors for there being more than one victim as to all three counts, RCW 10.95.020(10), and an additional aggravating factor based on the fact that one of the victims was pregnant at the time of her death, RCW 9.94A.535(3)(c).

At trial, the State introduced through its medical examiner an autopsy photograph depicting the fetus taken from Abigail Torres's womb. The medical examiner explained he had selected the photograph as a jury exhibit because it was helpful in explaining that the baby was full term and that the victim's pregnancy would not have appeared subtle to the outside observer. The trial court admitted the autopsy photo over Mr. Miranda's objection, reasoning its probative value outweighed any prejudice.

At the conclusion of trial, Mr. Miranda objected to the court's inclusion of an accomplice liability instruction. Relevant to this appeal, Mr. Miranda argued there was insufficient evidence to prove he was a major participant in the killings and, therefore, it was unfair to allow the State to prove he acted as an accomplice to uncharged individuals. The trial court disagreed with Mr. Miranda's arguments and permitted the instruction.

In addition to his objection to the State's instructions, Mr. Miranda also requested lesser included instructions on second degree murder. The court determined this instruction was factually unwarranted. The judge explained that, without resorting to speculation, he was "unable to postulate or to put together any line of reasoning that's supported by the evidence that would justify instructions on the lesser included," 14 Verbatim Report of Proceedings (Nov. 19, 2015) at 2147, and there were no "facts that would support anything other than premeditated and first degree murder with respect to all three victims," *Id.* at 2149.

The jury found Mr. Miranda guilty of all three charges. It further found the common scheme aggravator applied to all three counts. However, the jury did not find Mr. Miranda knew Abigail Torres was pregnant at the time she was killed. Thus, an aggravator was not imposed under RCW 9.94A.535(3)(c). Mr. Miranda was sentenced to life in prison without the possibility of parole. He appeals.

ANALYSIS

Autopsy photo

A trial court's admission of autopsy photographs is reviewed for abuse of discretion. *State v. Yates*, 161 Wn.2d 714, 768, 168 P.3d 359 (2007). Such photos, even

if gruesome, are admissible when the probative value outweighs the prejudicial effect. *Id.*; ER 403.

Autopsy photos can be relevant to help the jury understand a medical examiner's testimony. *State v. Whitaker*, 133 Wn. App. 199, 229, 135 P.3d 923 (2006); *State v. Gentry*, 125 Wn.2d 570, 608, 888 P.2d 1005 (1995). Such photos may also help show the extent of a victim's injuries, or tend to establish elements of the offense such as intent, premeditation, or knowledge. *Yates*, 161 Wn.2d at 768-69; *State v. Crenshaw*, 98 Wn.2d 789, 806-07, 659 P.2d 488 (1983).

While autopsy photos are often relevant, they can also be prejudicial and unnecessarily cumulative. Trial courts should be wary of admitting autopsy photographs that are cumulative of other evidence. *See Crenshaw*, 98 Wn.2d at 807. But while the law requires restraint, it does not demand "preclusion simply because other less inflammatory testimonial evidence is available." *State v. Stackhouse*, 90 Wn. App. 344, 358, 957 P.2d 218 (1998).

Here, the trial court appropriately weighed the probative value of the autopsy photo against its potential for prejudice. The judge stated he admitted the photo because it would aid the jury's understanding of the medical examiner's testimony and help the State show a reasonable person would have known the victim was pregnant at the time of

her death. There is no indication the State sought to use the autopsy photograph for emotive purposes. Given these circumstances, the trial court had a reasonable basis for admitting the photo. *See Whitaker*, 133 Wn. App at 227 ("Unless it is clear from the record that the primary reason to admit gruesome photographs is to inflame the jury's passion, appellate courts will uphold the decision of the trial court.").

While the autopsy photo was somewhat cumulative of other evidence, Mr. Miranda cannot establish any prejudice from its admission. If the jury had been improperly inflamed by the photo, one would expect the prejudice would have manifested itself through an adverse finding on the pregnancy aggravator, RCW 9.94A.535(3)(c). But the jury did not make this finding. When asked if the State had proved Mr. Miranda knew Abigail Torres was pregnant, the jury answered, "No." Clerk's Papers (CP) at 76. Given the jury's disposition, it is apparent the photograph had no improper impact on the verdict.

Accomplice liability jury instruction

The theory of accomplice liability set forth at RCW 9A.08.020 permits the State to hold individuals accountable for the conduct of others. A person may be found guilty as an accomplice when, "[w]ith knowledge that it will promote or facilitate the commission of the crime," the person "[s]olicits, commands, encourages, or requests such other person

to commit it," or "[a]ids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a)(i)-(ii). Essentially, the State "must prove the substantive crime was committed and the accused acted with knowledge that he or she was aiding in the commission of the offense." *State v. Lazcano*, 188 Wn. App. 338, 363, 354 P.3d 233 (2015).

Mr. Miranda argues the court should not have provided the jury with an accomplice liability instruction because it lacked evidentiary support. We apply a sufficiency analysis to this argument. *State v. Munden*, 81 Wn. App. 192, 195, 913 P.2d 421 (1996).

The State presented sufficient evidence to justify an accomplice liability instruction. According to the trial testimony, Mr. Miranda and his brothers confronted Mr. Saucedo about burglarizing Mr. Miranda's apartment. Mr. Miranda and his family members then abducted Mr. Saucedo and his female companions and took them out to the farm. While it is unclear exactly who did what at the murder scene, the State's evidence shows Mr. Miranda played a significant role. Mr. Miranda procured a firearm before going out to the farm and he confessed to firing shots at the victims. Although Mr. Miranda's family members may have also facilitated the victims' deaths, the State's evidence showed Mr. Miranda was closely involved. The totality of the evidence

provided a strong basis for the jury to find Mr. Miranda liable as either a principal or an accomplice to all three murders.

Lesser included jury instruction

At trial and on appeal, Mr. Miranda has argued that the trial court should have instructed the jury on the lesser included offense of second degree murder. While second degree (intentional) murder legally qualifies as a lesser included offense to aggravated first degree (premediated) murder, the trial court denied Mr. Miranda's request because it was factually inapplicable. We review the trial court's assessment for abuse of discretion. *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015).

A lesser included instruction is only factually appropriate when the affirmative evidence at trial supports an inference that the lesser crime was committed. In assessing the factual basis for a lesser included instruction, courts view the evidence in the light most favorable to the requesting party. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). A lesser included instruction is appropriate if the trial evidence affirmatively tends to show the lesser included offense was committed to the exclusion of the greater offense. *Id.* at 455. A lesser included instruction is not warranted simply because the jury might disbelieve the State's evidence. *Id.* at 456.

To qualify for an instruction on the lesser included offense of second degree murder, Mr. Miranda was obliged to point to facts suggesting the victims were murdered in a manner that did not involve premeditation. *See* RCW 9A.32.050(1)(a). As recognized by the trial court, no affirmative facts support this scenario.

To the extent one believes (as the jury did) that Mr. Miranda was responsible for killing the three victims, the evidence supported only premeditation. Even if one could interpret the evidence to suggest Mr. Miranda originally abducted the victims with the intent to scare them, not kill them, the evidence from the murder scene shows that once everyone was out at the farm, the murders were committed with deliberate intent. Unlike *Condon*, there is no evidence of a startling event or provocation that might have led Mr. Miranda and his companions to kill the victims. To the contrary, the forensic evidence indicates the murders were dispassionate and methodical. Two of the victims were shot at close range without any signs of resistance. Although the injuries to the third victim suggest she did not immediately die after being shot, the victim's struggle appeared purely defensive. There is no indication the victim engaged in some sort of affirmative or surprising conduct that could have prompted Mr. Miranda and his family members to fire shots. While one could speculate as to some sort of scenario whereby the victims provoked an attack, there is no affirmative evidence supporting such a hypothesis.

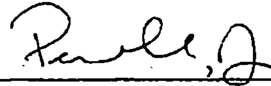
Speculation is not sufficient to justify a lesser included instruction.

Because the affirmative evidence was only suggestive of one crime—premediated first degree murder—the court's instructional decision was appropriate.

CONCLUSION

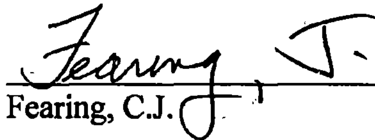
The judgment and sentence of the trial court is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

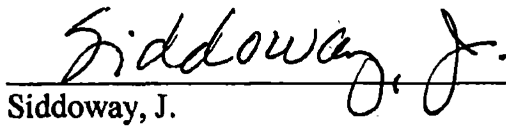


Pennell, J.

WE CONCUR:



Fearing, C.J.



Siddoway, J.

LAW OFFICES OF TANESHA L. CANZATER

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