NO. 46066-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DONNELL W. PRICE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper, Judge

No. 06-1-04159-5

BRIEF OF RESPONDENT

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

1. Has defendant raised an unreviewable ***Blakely***[1] challenge to the aggravating factor special verdict form in his appeal from resentencing when he failed to raise it at trial, or in his first appeal, and the resentencing court refrained from deciding it on remand?

2. Is the claimed violation of defendant's allocution right unreviewable since defendant did not object to proceeding to allocution and resentencing before the allegedly offending judge?

3. Is it appropriate to remand the judgment and sentence for ministerial correction of scrivener's errors misstating the offender score and the standard range sentence for defendant's offenses?

B. STATEMENT OF THE CASE.

Defendant was convicted of firearm enhanced first degree murder with a domestic violence aggravator for intimidating his girlfriend Olga Carter before fatally shooting her (Count I), and unlawful possession of a firearm in the second degree (Count II). Appx.A, p. 1 (CP 35-47). The evidence proved Carter called 911 to report defendant's commission of a firearm related act of domestic violence. *Id.* Responding officers heard defendant arguing with Carter inside the residence. *Id.* 1-2. Defendant briefly stepped outside only to rapidly shut himself back inside the

[1] ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

residence once police announced their presence. *Id.* at 2. Carter screamed. *Id.* Police forced entry to find her dead on the utility room floor. *Id.* A note Carter managed to write as she died identified defendant as her killer. *Id.* The autopsy revealed Carter died from a single contact-gunshot to the neck which fired the bullet through her throat, spinal cord, and brain. *Id.* at 2-3. Gunpowder burns on defendant's body were consistent with him holding Carter very close to him as he fired the fatal shot. *Id.*

On October 10, 2007, the judge who presided over defendant's trial heard his allocution before imposing a 494 month sentence, which included a 60 month firearm enhancement, as well as a 60 month upward deviation from the standard range for a domestic violence aggravator. CP 14, 16-17; Appx. E. Defendant's convictions were affirmed following his first appeal, which alleged a public trial right violation and evidentiary error, but did not challenge the special verdict on which the exceptional sentence was based. Appx.A, pg.1; CP 35. The judgment and sentence became final October 8, 2010. CP 66-78.

The first of defendant's three personal restraint petitions[2] (PRP No. 42646-3-II) included several *rejected* allegations of error, to include:

[2] PRP No. 43697-3-II sought remission of legal financial obligations. This Court dismissed it as successive and for seeking relief that must come from the trial court. PRP No. 47380-1-II, which is still pending before this Court, challenges the firearm enhancement as a double jeopardy violation, citing ***Alleyne v. United States***, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). The State contends that claim is time-barred, successive, and meritless.

"the trial court gave the jury erroneously worded special verdict instructions". Appx. B, p. 1. This Court "remand[ed] for resentencing so ... the State [could] ... prove [defendant's] criminal history and resulting offender score." *Id.* at 4. The Court "also remand[ed] for correction of the seriousness levels pertinent to each current offense ...." *Id.*

The honorable Ronald E. Culpepper held a hearing to comply with the mandate January 31, 2014, as the trial judge who imposed defendant's sentence had retired. RP 1-3. A continuance was granted to facilitate appointment of defendant's assigned counsel. RP 8-9. When the hearing reconvened February 27, 2014, the court summarized its understanding of the limited issues before it:

> "As I understand it from the Court of Appeals' decision ... [the case] was ... remanded to review the offender score and just sentencing if the offender score was wrong, as I understand it, and the issue of whether some prior offenses that Mr. Price had washed ...."

RP 14-15.

Conviction data adduced to support defendant's offender score of 4 was analyzed under the SRA's wash-out rule. RP 16-22. Several members of the victim's family addressed the court. RP 20, 23. RP 20-21, 24. The court responded to one of them by reiterating the limited scope its mandate on resentencing:

> "Just, again, so everybody knows what I have to decide, the jury was asked whether there were factors justifying an exceptional sentence and the jury found that there were. Judge Fleming gave an exceptional sentence, which I think was 60 months above the high end of the standard range, is the way I read it. The standard range was 434 months with his prior history. If the prior history doesn't count, the standard history would be lower ...I didn't do the trial, so I don't know a lot of the facts. I have read most of the file and read the Affidavit of Probable Cause, so I have an idea of what happened, but if the standard range is, say, 100 months less, I have to somehow guess would Judge Fleming have given him the same end result, 494, or would he have meant to give him 60 above that standard range. And that's one issue, because I have no idea what was in Judge Fleming's mind."

RP 25-27. A recess was called to locate misplaced conviction data. *Id.*

Resentencing resumed March 7, 2014. RP 35. The court decided the State's evidence supported defendant's previously calculated offender score of 4. RP 61-62, 73. The misstated seriousness levels were corrected. RP 71-72. Several more members of victim's family addressed the court. RP 63-65. The State summarized the evidence adduced at trial. RP 65-71. Defendant attempted to raise the ***Blakely*** challenge to the special verdict form he challenges on appeal, but the court refrained from considering the merits of that claim. RP 73-76. Judge Culpepper then revealed his intent to reimpose Judge Fleming's sentence without first giving defendant a second opportunity to speak. RP 78. Defendant alerted the court to his desire to be heard, then proceeded to allocution and sentence

without objecting to the timing of his allocution or requesting the judicially prescribed relief of resentencing before a different judge. RP 78-79; App.Br., p.21. Defendant timely filed a notice of appeal. CP 104.

C. ARGUMENT.

1. DEFENDANT'S BLAKELY CHALLENGE TO THE AGGRAVATING FACTOR SPECIAL VERDICT FORM IS UNREVIEWABLE SINCE IT WAS NOT PRESERVED AT TRIAL, ARGUED IN HIS FIRST APPEAL, OR DECIDED BY THE COURT THAT REIMPOSED HIS SENTENCE.

Defendants are generally prohibited from raising issues in a second appeal which were or could have been raised in the first appeal. ***State v. Mandanas***, 163 Wn. App. 712, 716, 262 P.3d 522 (2011)(citing ***State v. Sauve***, 100 Wn.2d 84, 87, 666 P.2d 894 (1983)). A "trial court's discretion to resentence on remand is [concomitantly] limited by the scope of the appellate court's mandate." ***State v. Kilgore***, 167 Wn.2d 28, 42, 216 P.3d 393 (2009)(citing ***State v. Barberio***, 121 Wn.2d 48, 51, 797 P.2d 511 (1990)). Once the mandate has issued, a trial court may only decide postjudgment motions authorized by court rule or statute provided they do not raise issues an appellate court already decided. *Id.* At 38-39 (citing RAP 12.2); RAP 2.5(c)(1). Issues raised in postjudgment motions are not appealable unless the trial court exercised independent discretion to decide

them. *Id.* at 39; ***State v. Parmelee***, 172 Wn. App. 899, 905, 292 P.3d 799 (2013). The decision not to decide an issue raised on remand is not reviewable. ***Kilgore***, 167 Wn.2d at 40.

Defendant did not raise a ***Blakely*** challenge to the validity of the aggravating factor special verdict at trial, in his first appeal, or in the PRP causing the judgment to be remanded for a hearing on his offender score and ministerial correction of misstated seriousness levels. Appx. A; CP 35-47. The State promptly objected to defendant's effort to raise the ***Blakely*** issue at resentencing. RP 74. After allowing defendant to respond, the court ruled:

> "[w]ith respect to the issue of the exceptional sentence, the jury did find by special verdict that there was an aggravating circumstance, so I think Judge Fleming did have the ability, if he wished, to impose an exceptional sentence."

RP 76. The court did not reach the merits of the alleged ***Blakely*** issue, so there is no decision on the ***Blakely*** issue to review. RP 76-78, 82; ***Barberio***, 121 Wn.2d at 5; ***Kilgore***, 167 Wn.2d at 42; ***Parmelee***, 172 Wn. App. at 905.

Defendant incorrectly contends the fact of resentencing reinstated the reviewability of every issue affecting his sentence, in particular his ***Blakely*** claim. That position cannot be reconciled with ***Barberio***, which restricts review from resentencing to issues a trial court exercised

independent discretion to decide. 121 Wn.2d at 51. Strictly limiting review in this way enables appellate oversight of newly decided issues while safeguarding the public's profound interest in the finality of judgments by shielding them from untimely or repetitive attacks. ***Kilgore***, 167 Wn.2d at 41, Fn.12; *see also* ***In re Coates***, 173 Wn.2d 123, 133-35, 143-44, 267 P.3d 324 (2011); ***In re Toledo-Sotelo***, 176 Wn.2d 759, 768, 297 P.3d 51 (2013); ***In re Adams***, 178 Wn.2d 417, 423, 309 P.3d 451 (2013); ***In re Snively***, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014).

Considering the merits of defendant's ***Blakely*** claim on appeal is again improper since it was never properly before the resentencing court. This Court remanded the case only "for resentencing so ... the State may ... prove [defendant's] offender score" and "for correction of the seriousness levels pertinent to each current offense." Appx. B, p.1. The mandate did not empower the trial court to decide untimely attacks on validity of defendant's convictions—base offense, enhancement or aggravator, which is what the ***Blakely*** claim is despite defendant's effort to frame it as a sentencing issue. *See* ***State v. Mandanas***, 163 Wn. App. 712, 716-17, 262 P.3d 522 (2011). Stated otherwise, defendant cannot properly use this appeal from resentencing as a second appeal of the convictions underlying his sentence. *See* ***Kilgore***, 167 Wn.2d at 41 Fn.12, 43 Fn. 16; ***Mandanas***, 163 Wn. App. at 716-17. Review of the ***Blakely***

claim is further barred by RCW 10.73.090's collateral attack time limit, the invited error doctrine, and RAP 2.5.

a. Defendant cannot circumvent RCW 10.73.090's time limit by framing a time-barred attack on the special verdict form as a direct appeal from resentencing.

"[F]inality and reviewability are intrinsically bound." ***Kilgore***, 167 Wn.2d at 36. A trial is only permitted to consider postjudgment motions authorized by statute or court rule, and a postjudgment challenge to the validity of a special verdict more than one year after the judgment became final is precluded by the one year time limit carefully crafted through the Legislature's enactment of RCW 10.73.090 and the Supreme Court's adoption of CrR 7.8(c)(2); RAP 12.2, RAP 16(d) as well as its holdings in ***In re Coates***, 173 Wn.2d at 133-35; ***In re Toledo-Sotelo***, 176 Wn.2d at 768; ***In re Adams***, 178 Wn.2d at 423, 309 P.3d 451 (2013), and ***In re Snively***, 180 Wn.2d at 32; *see also* RAP 1.1(c), RAP 2.5(b)(3).

Defendant's judgment became final October 8, 2010. CP 66-78. Remand for a hearing on defendant's offender score and misstated seriousness levels three years after RCW 10.73.090's one year time limit expired did not reopen the convictions underlying the sentence to untimely claims of special verdict error since a defendant "may not rely on the existence of ... facial sentencing error[s] to assert ... time-barred

claims." *See* ***Snively***, 180 Wn.2d at 32 (citing ***Adams***, 178 Wn.2d at 424-26; ***In re Clark***, 168 Wn.2d 581, 587, 230 P.3d 156 (2010); ***Coates***, 173 Wn.2d at 144). The authority defendant relies on to urge review does not govern time-barred PRPs, which is what his ***Blakely*** claim is. *See* ***In re Stockwell***, 179 Wn.2d 588, 601-02, 316 P.3d 1007 (2014); ***State v. Gudgel***, 170 Wn.2d 656, 657, 224 P.3d 938 (2010); RAP 1.1(c), RAP 2.5(b)(3), RAP 16.4(d).

b. The ***Blakely*** claim is also precluded by the invited error doctrine since defendant agreed to the wording of the challenged special verdict form at trial.

The invited error doctrine prohibits a defendant from complaining on appeal about an error he helped to create at trial. ***State v. Wakefield***, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). Review of alleged verdict form error is therefore forfeited when the defendant agreed to the wording at trial, even where constitutional rights are involved. *See* ***State v. Wirings***, 126 Wn. App. 75, 89 107 P.3d 141 (2005).

Defendant wrongly attempts to win reversal of his 60 month exceptional sentence through an untimely challenge to the special verdict form he acquiesced to at trial. Appx. C (RP 1158-85).[3] Having approved it then, he cannot properly assign error to it now. For the ambiguity now

[3] Defendant proposed several instructions at trial; none of which suggested an alternative to the challenged special verdict form with the additional language defendant now deems indispensable. CP 155-162 (anticipated based on State's supplemental designation).

attributed to it could have been readily corrected with far less expense to the public had defendant voiced disagreement with the draftsmanship at trial. The invited error doctrine justly bars his request for review.

c. Defendant's failure to challenge the special verdict form at trial also precludes review under RAP 2.5 as the alleged drafting error was not manifest in the context of the jury's accurate instructions on the applicable law.

An appellant hoping to raise an unpreserved claim bears the initial burden of showing the alleged irregularity is manifest error of constitutional dimension. ***State v. O'Hara***, 167 Wn.2d 91, 98, 106, 217 P.3d 756 (2009); ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Error is only "manifest" if it has a practical and identifiable consequence at trial. ***Gordon***, 172 Wn.2d at 676.

Defendant failed to preserve his ***Blakely*** claim by waiting to raise it until resentencing. *See* RAP 2.5(a); ***State v. Grimes***, 165 Wn. App. 172, 189, 267 P.3d 454 (2011). Assuming constitutional dimension *arguendo*, the unpreserved allegation of error would have been unreviewable in defendant's first appeal, much less his second, since it was not manifest error to refrain from repeating the comprehensive instructions the jury received on the aggravating factor's elements in the associated special verdict form. This is because a special verdict form need not recite a sentencing aggravator's elements when an adequate accompanying

instruction is given. *See* ***State v. Davis,*** 116 Wn. App. 81, 95, 64 P.3d 661 (2003)(citing ***State v. Emmanuel***, 42 Wn.2d 799, 819, 259 P.2d 845 (1953); ***Seattle Western Indus., Inc., v. Mowat Co.***, 110 Wn.2d 1, 10, 750 P.2d 245 (1988); ***Tiderman v. Fleetwood***, 102 Wn.2d 334, 340, 684 P.2d 1302 (1984); ***Raum v. City of Bellevue***, 171 Wn. App. 124, 148, 286 P.3d 695 (2012) (quoting ***Capers v. Bon Marche***, 91 Wn. App. 138, 144, 955 P.2d 822 (1998). Accompanying instructions are adequate when they accurately state the law, do not mislead the jury, and permit the parties to argue their case. ***State v. Teal***, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). Even "to convict" instructions need not specify every element of a charged offense unless they specifically tell the jury it can convict if the recited elements are found. ***Davis,*** 116 Wn. App. at 95.

Instruction No. 23 accurately told the jury what was required to answer the challenged special verdict form in the affirmative:

> "You will also be furnished with additional special verdict forms relating to aggravating factors ... alleged by the State on Count I ... fill in the blank with the answer 'yes' or 'no' according to the decision you reach. In order to answer the special verdict form 'yes' you must unanimously be satisfied beyond a reasonable doubt ... 'yes' is the correct answer... The State ... alleged ... the following aggravating factors exist in this case ... (2) That the current offense **involved domestic violence and the defendant's conduct manifested intimidation of the victim**...." CP 148; Appx. D (emphasis added).

The elements were reiterated in Instruction No. 25:

> "For the purposes of a special verdict, the State must prove beyond a reasonable doubt the presence of an aggravating factor. An aggravating factor alleged in this case is that the offense **involved domestic violence, and the defendant's conduct during the commission manifested intimidation of the victim**...." CP 150; Appx.D (emphasis added).

The purpose of the special verdict form was to record the jury's verdict based on those instructions, not to redundantly instruct the jury on the law. Each of the aggravator's two elements were accurately set forth in Instructions No. 23 and No. 25, with clear directions on how the special verdict form was to be completed. RCW 9.94A.535(h)(iii) (2005); RCW 10.99.020. It was not manifest error for the trial court to rely on the strong presumption the jury would follow those instructions when filling out the challenged special verdict form that incorporated them through reference to the "intimidation" element distinguishing that aggravator from the other one the jury was instructed to decide. *See* ***State v. Kirkman***, 159 Wn.2d 918, 928, 155 P.3d 125 (2007); ***State v. Kester***, 38 Wn. App. 590, 594, 686 P.2d 1081 (1984); CP 8-9; Appx.D. The omission of the "domestic violence" element from the verdict form was also harmless, if error, as it was an uncontroverted component of defendant's well proven crime. *See* ***State v. Brown***, 147 Wn.2d 330, 341, 344, 58 P.3d 889 (2002) (citing ***Neder v. United States***, 527 U.S. 1, 18-19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); ***State v. Berube***, 150 Wn.2d

498, 79 P.3d 1144 (2003); ***State v. Ballew***, 167 Wn. App. 359, 367-68, 227 P.3d 925 (2012). The unpreserved, time barred, waived, and meritless challenge to the special verdict form should be rejected.

2. DEFENDANT'S RIGHT OF ALLOCUTION CLAIM IS ALSO UNAPPEALABLE SINCE HE RESPONDED TO THE COURT'S PRE-ALLOCUTION REVELATION OF ITS INTENT TO REIMPOSE HIS SENTENCE BY PROCEEDING TO ALLOCUTION AND SENTENCE WITHOUT INTERPOSING AN OBJECTION THAT REQUESTED RESENTENCING BY A NEW JUDGE.

Convicted defendants only enjoy a statutory right of allocution at sentencing. ***State v. Hatchie***, 161 Wn.2d 390, 405, 166 P.3d 698 (2007)(citing RCW 9.94A.500(1)); ***State v. Gonzales***, 90 Wn. App.852, 854, 954 P.2d 360 (1998). Denial of the right is neither structural error nor a fundamental defect resulting in a complete miscarriage of justice. ***State v. Canfield***, 154 Wn.2d 698, 702-03, 116 P.3d 391 (2005)(quoting ***Hill v. United States***, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962)).

The trial court revealed its intent to reimpose defendant's exceptional sentence before giving him an opportunity to supplement the allocution he made when the sentence was first imposed:

> "I don't see any reason to vary from what Judge Fleming, who heard the trial and heard all the details, did, so I'm going to sentence [defendant] to 374 months in prison, the high end, plus the additional 60 months for the deadly

> weapon enhancement, and I'm also going to sentence him to an additional 60 months exceptional sentence upward. I'm simply adopting what Judge Fleming, who heard the trial and knows it a lot better than I did and was there, did. Count I is a level 15, Count II is a level three." ...
>
> "So I'm basically affirming Judge Fleming's sentence, and I will say I am, to some extent, deferring to his judgment because he was there; he heard the trial; I wasn't. There's nothing I've heard or seen that indicates there was anything wrong with Judge Fleming's sentence, so I am, in effect, adopting it." RP 77-78; Appx.E.

Defense counsel advised the court of defendant's desire to be heard. RP 78. The court asked defendant if he had anything to say since the sentence was not final. RP 78-79. Defendant accepted the invitation to allocute, then proceeded to imposition of sentence instead of objecting to going forward on account of the belated request for allocution. *Id.*

a. <u>The assigned allocution error is not reviewable due to defendant's failure to object on that basis below</u>.

Appellate courts will not review alleged violations of the allocution right which were not preserved through a proper objection. ***Hatchie***, 161 Wn.2d at 405. The procedure for preserving such a claim is for the aggrieved defendant to object to the offending judge's imposition of sentence with a request for the case to be transferred to a new judge able to hear allocution prior to imposing sentence according to RCW 9.94.500(1) since it is the only remedy available for a violation of the

right. *See Id.*; ***State v. Aguilar-Rivera,*** 83 Wn. App. 199, 203, 920 P.2d 623 (1996); ***State v. Crider***, 78 Wn. App. 849, 899 P.2d 24 (1995); *see also* ***State v. Padilla***, 69 Wn. App. 295, 300, 846 P.2d 564 (1993); ***Workman v. Marshall***, 68 Wn.2d 578, 581, 414 P.2d 625 (1966); ***Cook v. Von Stein***, 97 Wn. App. 701, 706, 985 P.2d 956 (1999).

A trial court met with the objection can either neutralize the alleged error by transferring the sentencing to another judge as requested, or proceed to sentence; whereupon the issue would be properly preserved for appeal. *See Id.* An objection grounded in a perceived violation of the allocution right is consequently inadequate to preserve the issue for appeal unless it articulates opposition to proceeding to allocution and sentence before the offending court. *See Id.*

After Judge Culpepper revealed his intent to adopt Judge Fleming's sentence in its entirety, defense counsel responded:

> "[I] understand that ... I know Mr. Price wanted to address the Court and provide some information, but you've made your ruling without his ability to allocute." RP 78.

Counsel's remark was not a proper objection capable of preserving an allocation claim for appeal. Although it alerted the court to defendant's desire to be heard, it did not expressly request any relief, let alone ask for the available remedy of being sentenced by a different judge. Whereas defendant's ready acceptance of the court's belated invitation for

allocution without further comment on its timing strongly suggests reconsideration of the sentence in light of defendant's allocution was the only relief sought. Even if counsel's remark could be interpreted to be a proper objection (which would require a very generous reading) defendant forfeited his appellate remedy when he proceeded to allocution and sentence without asking to be resentenced by a different judge. RP 78-81; *see* ***State v. Valdobinos***, 122 Wn.2d 270, 274, 858 P.2d 199 (1993)(waiver implied from conduct antithetical to right's assertion).

A great potential for abuse would adhere to a procedural rule allowing defendants to request resentencing based on allocution errors for the first time on appeal. *See Id.*; ***State v Strine***, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013)(citing ***State v. Sullivan***, 69 Wn. App. 167, 172, 847 P.2d 953 (1993); ***State v. Emery***, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). Such a rule would logically motivate calculating defendants to withhold objections until the offending judge's final sentence was revealed in order to assess the probability of obtaining a better outcome from a different judge on remand from appeal. *See* ***Strine***, 176 Wn.2d at 749. Since the new judge could be anticipated to perceive the offending judge's sentence as cap in order to avoid an appearance of vindictive

sentencing,[4] defendants would generally only stand to gain from shopping their cases with two sentencing courts through appeal.

Meanwhile, the public purchases the defendants' opportunity to forum shop at the significant societal cost of a full sentencing by the offending judge, appellate review and resentencing before different judge—often less familiar with the case. *See Id.* At the same time, the uncertainty attending the outcome would deprive victims, or their survivors, the "dignity, respect ... and sensitivity" owed to them under Washington law. *See* RCW 7.69.010. As would a defendant's successful pursuit of resentencing since it would typically impose upon them to endure the hardship of having to emotionally experience the crime a least a fourth time[5] in the defendant's presence.

Whereas strict adherence to the procedural bar to unpreserved claims would enable a trial judge to mitigate the extreme emotional and economic cost of allocution errors by transferring an affected case to another judge upon timely objection before an appeal is necessary. In the event a trial judge refused to cure the error below, a fully developed record would be ready to facilitate a then appropriate use of the appellate process. *See* ***Strine***, 176 Wn.2d at 750 (citing Bennett L. Gershman, Trial

[4] ***North Carolina v. Pearce***, 395 U.S. 711, 723-25, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).
[5] Commission, trial, sentencing, and resentencing.

Error and Misconduct § 6–2(b), at 472–73 (2d ed. 2007)). Defendant's challenge to the timing of his allocution is not properly before this Court.

b. The timing of defendant's allocution was harmless, if error, since he was given a full opportunity to allocute before the sentence adopted by the offending court was reimposed.

A trial court's pre-allocution revelation of a defendant's likely sentence may be harmless error when the defendant is not prejudiced. ***Gonzalez,*** 90 Wn. App. at 854-55 (*cf.* ***Aguilar-Rivera***, 83 Wn. App. at 202; ***Crider***, 78 Wn. App. 849). Absence of prejudice may be shown where a defendant is afforded a full opportunity to allocute prior to the formal imposition of sentence. ***State v. Delange***, 31 Wn. App. 800, 802-03, 644 P.2d 1200 (1982); ***Gonzalez,*** 90 Wn. App. at 854-55.

There is a valid reason to find defendant's allocution right was not violated at resentencing (or the violation was peculiarly harmless) beyond the fact his allocution was heard before the reimposition of his sentence became final. The sentence defendant asks this Court to reverse was first imposed by Judge Fleming October 10, 2007, based in part on defendant's timely exercised right of allocution. CP 11-22; RP77-78; Appx. E. When Judge Culpepper adopted that sentence in its entirety, he reimposed a sentence which already took defendant's allocation into account. *See* ***Kilgore***, 167 Wn.2d at 40-41. That old sentence did not become a new

sentence through Judge Culpepper's act of educating himself about the case in order to decide whether the old sentence should be changed. *See Id.* And the decision to refrain from changing the old sentence is not reviewable. *Id.* Defendant's assignment of error is consequently predicated on the unsupported notion RCW 9.94A.500(1) entitled him to a second opportunity to influence the sentence imposed in light of the allocution he made in 2007.

Should RCW 9.94A.500(1) be interpreted to extend the right of allocution to the reimposition of a RCW 9.94A.500(1)-compliant sentence, the trial court's belated request for defendant's second allocution was harmless in this case. Judge Culpepper adopted the sentence imposed by Judge Fleming on account of his greater familiarity with the case despite being urged by the victim's family to imprison defendant for life, so defendant cannot show he was prejudice in his initial inability to counter their request. *E.g.*, RP 63-65. 77-78. It is likewise untenable to maintain anything defendant said when given a second opportunity to allocute could have altered the outcome had it been received before the sentence was revealed. Most of the allocution did little more than demonstrate defendant's disturbing lack of remorse for his crime by unconscionably referring to Carter's proven murder as an accident. RP 79. If anything, earlier appreciation of defendant's true feelings about the case

was more likely to motivate Judge Culpepper to increase the sentence as evidenced by his reaction to defendant's remarks:

> "You said that it was an accident. Well, that, of course, is a lie by the evidence. Obviously, the gun was held right below the jaw or in the jaw of Olga. That wasn't an accident. That was you executing her with the police breaking down the door. You know you're going to get caught and you killed her anyway. That's what that was. That wasn't an accident." RP 82.

Judge Culpeper responded similarly to defendant's concern about how his punishment for murdering Carter had negatively impacted his family:

> "I don't doubt this has hurt your family. It probably has. It certainly hurt Olga's family just as much, if not more." RP 81-82.

Defendant even shamefully attempted to relitigate a previously rejected public trial right claim predicated on an alleged exclusion of the "victim's mother", while she was in attendance to speak on her slain daughter's behalf. RP 80; Appx.A, pg.1. He went on to articulate complaints about the accessibility of materials apparently related to another collateral attack he intends to pursue. RP 80-81. None of those comments easily approximate true allocution, which is supposed to be a personal request for leniency. *See* ***Canfield***, 154 Wn.2d at 703-05. Given defendant's highly insensitive and self-centered allocution was far more likely to encourage a high sentence than inspire a low one, he was not prejudiced from the timing of its reception.

The argument against applying the harmless error analysis to nonconstitutional allocution error is grounded in a scantly explained and difficult to accept concern an appearance of unfairness adheres to a trial court's attempt to redress allocution errors by hearing allocution before imposing sentence. *See* ***Aguilar-Rivera***, 83 Wn. App. at 202. Yet it does not easily stand to reason the public, which includes criminal defendants, could have so little faith in the ability of judges to reconsider an expressed sentencing decision based on a defendant's belated allocution when judges are regularly entrusted to impartially revisit earlier rulings on constitutional matters based on new information as well as reverse themselves when warranted, and are always rightly presumed to follow the law. *See e.g.* CR 59 (reconsideration); CrR 7.8(b)(mistakes, inadvertence, irregularity in obtaining a judgment); ***State v. Adams***, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); ***State v. Miles***, 77 Wn.2d 593, 601, 464 P.2d 723 (1970); ***State v. Bell***, 59 Wn.2d 338, 360, 368 P.2d 177 (1962). A trial court's correction of an inadvertent failure to timely solicit allocution cannot *seriously* be generally perceived as anything more worrisome to the public than the kind of conscientious remedial measure the public expects judicial officers to routinely take in the dynamic, fast-paced, often unpredictable and procedurally cumbersome environment of a criminal courtroom. *See* ***Delange***, 31 Wn. App. at 802-03 (*Cf.* ***Aguilar-***

Rivera, 83 Wn. App. at 202). Defendant's unpreserved challenge to the timing of his allocution is harmless, if error, so remand for resentencing is unnecessary.

3. DEFENDANT'S JUDGMENT AND SENTENCE SHOULD BE REMANDED FOR MINISTERIAL CORRECTION OF THE SCRIVENER'S ERRORS MISSTATING HIS OFFENDER SCORE AND THE STANDARD RANGE SENTENCE FOR HIS OFFENSES.

It is appropriate to remand a judgment and sentence for correction of an identified scrivener's error when correction is reasonably likely to avoid a future expenditure of judicial resources by eliminating a foreseeable source confusion. *See* ***State v. Stribling***, 164 Wn. App. 867, 878 Fn.6, 267 P.3d 403 (2011); ***In re Mayer***, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

Paragraph 2.3 of the 2014 judgment and sentence misstates defendant's offender score as a 1, then provides a corresponding standard range sentence for each conviction. CP 95 (250-333 months for Count I and 3-8 months for Count II); 9.94A.510 (Laws 2002 § 10). Whereas his offender score was accurately calculated to be a 4. RP 62; CP 14. The resulting standard range sentences were recited on the record at resentencing, and are reflected in paragraph 4.12, to be 341 to be 434 months for Count I (which includes the 60 month enhancement), and 12+

to 16 months for Count II. RP 71-72, 77-78, 82; CP 97; RCW 9.94A.510 (Laws 2002 § 10). Since the inconsistency is foreseeably confusing to anyone who reads the 2014 judgment and sentence without the resentencing transcript, it should be remanded for ministerial correction of the scrivener's errors in paragraph 2.3.

D. CONCLUSION.

The unpreserved time-barred and meritless ***Blakely*** challenge to the special verdict form should be rejected as unreviewable. Defendant's sentence should be affirmed as the alleged allocution error is unreviewable and meritless, or harmless under the circumstances; however, his judgment should be remanded for ministerial correction of the scrivener's errors in paragraph 2.3, which misstate his offender score as well as the standard range sentences for his convictions.

DATED: January 6, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

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

Date Signature

APPENDIX "A"

ALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent, v. DONNELL WAYNE PRICE, Appellant.	)	No. 63814-9-I MANDATE Pierce County Superior Court No. 06-1-04159-5

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Pierce County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on October 12, 2009, became the decision terminating review of this court in the above entitled case on October 8, 2010. An order granting a motion to publish was entered on February 24, 2010. An order denying a petition for review was entered in the Supreme Court on September 8, 2010. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

Pursuant to RAP 14.4, costs in the amount of $12,061.73 are awarded against judgment debtor DONNELL WAYNE PRICE and are awarded in favor of judgment creditor STATE OF WASHINGTON.

c: Thomas Kummerow
Kathleen Proctor, Thomas Roberts
Hon. Frederick Fleming

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 8th day of October, 2010.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 63814-9-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	PUBLISHED OPINION
DONNELL WAYNE PRICE,	)	
	)	
Appellant	)	FILED: October 12, 2009

GROSSE, J. — The right to a public trial is implicated only when the court orders a courtroom closed to the public. Here, the trial court conducted individual voir dire of a potential juror in the courtroom apart from the other potential jurors and a spectator who left the courtroom at the prosecutor's request. Because the other potential jurors were officers of the court, not members of the public, and the spectator was not ordered by the court to leave, there was no court-ordered courtroom closure. Thus, Donnell Price fails to show a violation of his right to a public trial. We affirm.

FACTS

On September 3, 2006, Olga Carter called 911 to report a domestic violence incident involving her boyfriend, Donnell Price. Carter told the 911 operator that Price had a gun. Police responded and arrived at Price's home in Tacoma.

When the officers approached the house, they heard a man and woman arguing inside and then heard the man say something about flashing lights

outside. They then saw Price come to the door and step outside. An officer shined his flashlight on him and announced "Tacoma Police," but Price went back inside and slammed the door shut.

A few seconds later, the police heard a woman scream. Officers quickly approached the front and back doors and demanded that the occupants come out. When there was no response, they kicked in the front door and then heard a gunshot. The officers then continued to announce their presence and to call on the occupants to come out of the house, but there was no response. Price eventually came out through the front door after repeated police demands.

Police then entered the house and found Carter dead on the floor in the utility room. On a nearby table, police also found a handwritten note that contained Carter's fingerprints, was in her handwriting, and was on paper torn from a notebook in her purse. The note read:

To AuBriana
From: Olga Mommy
Mommy Luv
Mr. Price
Shot Me
Dead
He thought
I Fooled Around
A Gun
to my
Head.

Carter had a daughter named AuBriana.

An autopsy confirmed that Carter died of a single gunshot wound. The fatal wound was a contact gunshot wound to her neck. Forensic evidence indicated that the gun had been placed against her neck pointed upward and that

the bullet travelled through her throat, cervical vertebrae, spinal cord, and brain. Forensic evidence also showed that Price had gunpowder burns on his shirt and chest, indicating that he was holding Carter very close to him when the shot was fired.

The State charged Price with one count of first degree murder and one count of unlawful possession of a firearm. The information also included a firearm enhancement allegation and alleged aggravating factors of deliberate cruelty and intimidation of the victim.

During voir dire, one of the jurors requested to discuss an issue in private and the court indicated that it would address it at the end of the day. After voir dire was finished for the day, the court excused the rest of panel so that juror could be questioned alone in the courtroom. Also present in the courtroom at the time was the murder victim's mother, who agreed to step outside of the courtroom at the prosecutor's request. The juror was then questioned in court on the record.

During pretrial motions, the State moved in limine to admit the note found at the murder scene as a dying declaration. Over Price's objection, the trial court ruled that the note was admissible.

The jury found Price guilty as charged. The jury also found by special verdict that he was armed with a firearm and that the crime was committed to intimidate the victim. The court sentenced him to a total of 494 months confinement, which included a 60-month firearm enhancement and an

exceptional sentence of 60 months based on the aggravating factor of intimidating the victim.

ANALYSIS

I. Right to a Public Trial

Price first contends that the trial court violated his right to a public trial by questioning a juror privately without first determining whether a courtroom closure was justified and engaging in the inquiry required by State v. Bone-Club.[1] The State contends that there was no courtroom closure triggering the need for the Bone-Club inquiry. We agree.

Whether a defendant's right to a public trial has been violated is a question of law, reviewed de novo on appeal.[2] A criminal defendant has a right to a public trial under the state and federal constitutions.[3] The right to a public trial applies during jury voir dire.[4]

In Bone-Club, the court set forth the following factors that a trial court must consider on the record before ordering a courtroom closure:

> 1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

[1] 128 Wn.2d 254, 906 P.2d 325 (1995).
[2] State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).
[3] WASH. CONST. art. I, § 22; U.S. CONST. amend VI; Brightman, 155 Wn.2d at 514.
[4] Gannett Co, Inc. v. DePasquale, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1999); Federal Publ'n, Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).

4. The court must weigh the competing interests of the proponent of closure and the public.

5. *The order must be no broader in its application or duration than* necessary to serve its purpose.[5]

Failure to conduct the Bone-Club *inquiry results in reversal for a new trial.*[6]

Recent decisions from the divisions of this court have reached different conclusions about what constitutes a courtroom "closure" triggering the need for a Bone-Club inquiry. In State v. Momah, Division One held that conducting voir dire outside the courtroom does not amount to a courtroom closure if there is no explicit closure order.[7] In State v. Wise, a panel of Division Two followed the reasoning in Momah and held that private questioning of a juror in chambers did not constitute a courtroom closure.[8] But other panels of Division Two and Division Three have held that conducting voir dire of one member of the venire privately outside of the courtroom (e.g., in chambers or the jury room) constitutes a courtroom closure for purposes of Bone-Club, even in the absence of an explicit court order.[9] Here, the individual voir dire was conducted in the courtroom, not in another area that was closed off from the rest of the courtroom

[5] Bone-Club, 128 Wn.2d at 258-59.
[6] Brightman, 155 Wn.2d at 518.
[7] 141 Wn. App. 705, 171 P.3d 1064 (2007), rev. granted, 163 Wn.2d 1012 (2008).
[8] 148 Wn. App. 425, 436, 200 P.3d 266 (2009).
[9] State v. Heath, 150 Wn. App. 121, 206 P.3d 712 (2009) (Div. II); State v. Erikson, 146 Wn. App. 200, 189 P.3d 245 (2008) (Div. II); State v. Duckett, 141 Wn. App. 797, 173 P.3d 948 (2007) (Div. III); State v. Frawley, 140 Wn. App. 713, 167 P.3d 593 (2007) (Div. III).

and the public.[10] This is precisely what the court in Erikson described as the "better practice" for conducting individual voir dire.[11] Nor does questioning of individual jurors apart from other jurors violate the right to a public trial because once the jurors are sworn in, they are no longer members of the public, but officers of the court.[12] Thus, there was no courtroom closure when the trial court conducted individual voir dire of one juror in the courtroom apart from the other jurors.

The question that remains is whether a courtroom closure occurred when the one spectator present in the courtroom was asked to leave during the individual voir dire. To determine whether a closure occurred, the court looks to the plain language of the closure request.[13] Here, the record indicates that the court did not ask the spectator to leave; rather, she left at the prosecutor's request when the judicial assistant asked who she was and whether she would be testifying:

> THE COURT: . . . We will continue with the questioning as requested by 31, and that will be the last thing we do this evening. Everybody else is excused until tomorrow morning at 9:30. Leave your numbers on your bench.
>
> JUDICIAL ASSISTANT: Mr. Hammond [prosecutor], the party that's been sitting in, do you know who that is?

---

[10] The record does not reflect that the courtroom door was closed or locked and during an earlier questioning of an individual juror, the court stated on the record that it was doing so "in open court with just the attorneys and the defendant and security and the staff here."

[11] 146 Wn. App. at 211 n.8 (noting that the "better practice" is inside the courtroom, outside the jurors' presence.)

[12] State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008); see also Erikson, 146 Wn. App. at 205-6 n.2 (agreeing that questioning an individual juror apart from other prospective jurors in open court is not a court closure and secures the right to a public trial).

[13] Bone-Club, 128 Wn.2d at 261.

MR. HAMMOND: Mother of the victim.
JUDICIAL ASSISTANT: And she is not going to be testifying?
MR. HAMMOND: No, she won't be.
THE COURT: I'm going to ask –
MR. HAMMOND: Do you mind stepping out for this part?
UNIDENTIFIED FEMALE: Yes. Could I ask a question of the Court? Start here tomorrow at 9:30, or just at 1:30?
THE COURT: 9:30. But the jury is going to form or the venire is going to form downstairs at 9:30 and then, when we are through here, then we will call up the venire when we are ready for them in the morning. They are going to come in at 9:30 to the first floor.
UNIDENTIFIED FEMALE: Okay. And then the resumption of the pretrial is at 1:30?
THE COURT: No, no. We will start the voir dire about 9:30.
UNIDENTIFIED FEMALE: Okay. So it will be all day?
MR. HAMMOND: Yes, all day.
UNIDENTIFIED FEMALE: Thank you very much.
THE COURT: Thank you.

The prosecutor's request that the spectator leave the courtroom does not amount to a courtroom closure because there was no court order, implied or otherwise: the prosecutor—not the court—requested that the spectator leave and it was a request—not an order—to which the spectator agreed.

Because there was no courtroom closure here, Price's right to a public trial was not implicated. Thus, we need not reach the State's additional arguments that he waived or lacked standing to assert that right.

II. Dying Declaration

Price next contends that the trial court erred by admitting Carter's note because the State failed to lay sufficient foundation to admit it as a dying declaration and was testimonial evidence that violated his right to confrontation. We disagree.

Evidentiary errors are reviewed for an abuse of discretion.[14] ER 804(b)(2) provides an exception to the hearsay rule for dying declarations:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (2) *Statement Under Belief of Impending Death.* In a trial for homicide or in a civil action proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

Price contends that the State failed to lay the proper foundation for admitting the note as a dying declaration because it was impossible to determine if the note was written at a time when Carter reasonably believed she might die. But as he acknowledges, the note was dated either "9/2" or "9/3" and the murder occurred in the early morning of September 3rd. The evidence also showed it was written on paper torn from a notepad in her purse that was found near her body at the scene. Price's argument that the evidence lacks "certainty" that this was when the note was written is an argument that goes to the weight, rather than the admissibility, of the evidence.

The evidence shows that Carter was confronted by Price with a gun during a domestic violence dispute and he was angered even more by the police's arrival. This, together with evidence indicating that the note was written shortly before the shooting, is sufficient to establish that Carter wrote the note at a time when she reasonably believed her death was imminent.

Price further contends that "there is a strong inference" that Carter's statement was erroneous because he did not shoot her for "fooling around" as

[14] State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

the note indicates, but because she had contacted the police during their argument. But again, this is an argument that goes to the weight, not admissibility, of the evidence. The other inference to be drawn is that he shot her for the reason the note stated: he already had the gun and confronted her with it even before she called 911 or the police arrived. The trial court did not abuse its discretion by ruling that the note was admissible as a dying declaration.

Price further contends that the Confrontation Clause prevents admission of the note because it was testimonial and he did not have a prior opportunity to cross-examine her. We disagree.

Admitting hearsay evidence when the declarant is unavailable to testify raises Confrontation Clause concerns.[15] Thus, even if a hearsay exception applies, the Confrontation Clause requires the trial court to also determine whether the hearsay evidence is "'testimonial.'"[16] If it is testimonial, the court may only admit the hearsay evidence if the defendant had a prior opportunity to cross-examine the declarant.[17]

The Supreme Court has not provided a comprehensive definition of "'testimonial'" evidence.[18] But the Court explained that testimonial statements are those that are "formal statement[s] to government officers" or produced with the involvement of government officers "with an eye toward trial."[19] Thus, testimonial statements are those "'that were made under circumstances which

[15] State v. Kirkpatrick, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).
[16] Kirkpatrick, 160 Wn.2d at 882 (quoting Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).
[17] Kirkpatrick, 160 Wn.2d at 882.
[18] Crawford, 541 U.S. at 68.
[19] Crawford, 541 U.S. at 51, 56 n.7.

would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[20]

Here, the statement was not made with police involvement, nor does its content suggest it was made "with any eye toward trial." Identifying the killer to assist police in the prosecution did not appear to be the purpose of the note, as Price suggests. Given the circumstances, Price's identity was not in question: Carter identified him to the 911 dispatcher, he was the only one at the house and police observed him there. Rather, the content of the note conveys an intimate communication, intended as parting words to a family member. It was addressed affectionately to Carter's daughter (as opposed to the authorities or "to whom it may concern"), and was written in verse, rather than as an accusation or bearing witness to a crime for the prosecution. Thus, the note was not testimonial and its admission does not raise Confrontation concerns.

Finally, Price contends that the trial court erred by also ruling that Carter's note was admissible under the doctrine of forfeiture by wrongdoing. Price argues that this ruling was error because the court did not make a finding that Price acted with intent to make Carter unavailable to testify at trial. The doctrine of forfeiture by wrongdoing permits a court to admit evidence that would otherwise be inadmissible under the Confrontation Clause when the defendant acted with intent to make to make the witness unavailable to testify at trial.[21] Because there

[20] Crawford, 541 U.S. at 52.
[21] Giles v. California, 128 S. Ct. 2678, 2686-88, 171 L. Ed. 2d 488 (2008).

was no Confrontation violation here, applicability of the doctrine is irrelevant and the trial court did not need to reach this issue.[22]

Affirmed.

Grosse, J

WE CONCUR:

Leach, J.

Appelwick, J

[22] In any event, the State concedes that the trial court's findings were insufficient to support application of the doctrine.

APPENDIX "B"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the
Personal Restraint Petition of

DONNELL W. PRICE,

Petitioner.

No. 42646-3-II

ORDER GRANTING PETITION IN PART

06-1-04159-5

Donnell W. Price seeks relief from personal restraint imposed following his conviction of first degree murder and second degree unlawful possession of a firearm. After the jury found by special verdict that he was armed with a firearm and that he committed the crime to intimidate the victim, the court imposed an exceptional sentence of 494 months of confinement.

Price makes several claims of error. He asserts that the trial court gave the jury erroneously worded special verdict instructions and that his attorney was ineffective in failing to object to these instructions. He also claims that the trial court miscalculated his offender scores, violated his double jeopardy rights, and erred in refusing to instruct the jury on the lesser-included offenses of first and second degree manslaughter. He makes additional claims of ineffective assistance of counsel in claiming that his attorney failed to conduct an adequate pretrial investigation, failed to obtain a psychiatric evaluation to determine his competency to stand trial, failed to object to the State's use of peremptory

challenges to remove black jurors from the jury pool, and failed to present a coherent closing argument on the defense of police fabrication.

To be entitled to relief, Price must assert either constitutional error that resulted in actual and substantial prejudice or nonconstitutional error that resulted in a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813 (1990). He must also state in his petition the facts on which his claim of unlawful restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365 (1988). When a petition relies on conclusory allegations, we must decline to consider its validity. *In re Pers. Restraint of Cook*, 114 Wn.2d at 813-14.

Special Verdict Instructions

Price argues that the special verdict instructions were erroneous because they failed to inform the jury that unanimity was required for a "yes" vote but not for a "no" vote, citing *State v. Bashaw*, 169 Wn.2d 133 (2010). The Washington Supreme Court recently overruled the nonunanimity rule in *Bashaw*, holding instead that the trial court did not err in informing the jury that it needed to agree unanimously on the answer to the special verdict. *State v. Nunez*, 174 Wn.2d 707, *1 (2012).

Here, the trial court instructed the jury that it "should deliberate on each question presented on the special verdict forms. In order to answer any question, you must unanimously agree on the answer." Instruction 23. The polling of the jury showed that it was unanimous in answering "yes" to the special verdicts. We see no instructional error that entitles Price to relief, and we reject his related claim of ineffective assistance of counsel. *See In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840 (2012) (to prove

DUI offense in 2002. The prosecutor also submitted documents showing that Price received additional jail time in 1994 and 1995 when he violated the conditions of his 1993 sentences, and he stated that a document still in his office showed a third sentence modification in 1999 that resulted in more jail time. The 1999 modification was essential to preventing Price's three prior offenses from washing before he committed the DUI in 2002. The trial court refused the prosecutor's request to set sentencing over until he could retrieve the 1999 modification order, despite Price's argument that his prior convictions washed. Instead, the trial court rested its offender score calculation on the prosecutor's statement that the documentation prepared by his staff indicated that Price's criminal history did not wash.

The State argues here that the failure to provide proper documentation constitutes harmless error because the trial court would have imposed the same sentence regardless of Price's offender score. We disagree. The trial court entered written findings of fact in support of its exceptional sentence, and one finding stated that Price's prior history did not wash and that his offender score was four. The court based its exceptional sentence on the standard range calculated from that offender score. We therefore remand for resentencing so that the State may provide all relevant documentation to prove Price's criminal history and resulting offender score.[1] RCW 9.94A.530(2); *State v. Calhoun*, 163 Wn. App. 153, 167 (2011), *review denied*, 173 Wn.2d 1018 (2012); *see also State v. Jackson*, 150 Wn. App. 877, 890 (2009) (remanding for resentencing in which State may

[1] If possible, that documentation should include the judgment and sentence from Price's prior drug conviction. The prosecutor stated below that its exhibit included that judgment and sentence, but this document is not in the copy of the exhibit provided to this court. *See State v. Ford*, 137 Wn.2d 472, 480 (1999) (although best evidence of prior conviction is certified copy of judgment and sentence, other competent evidence may be introduced to establish criminal history).

present evidence to support offender score). We also remand for correction of the seriousness levels pertinent to each current offense, which should be XV and III instead of XIV and IV. RCW 9.94A.515.

Double Jeopardy

Price contends that his double jeopardy rights were violated, but the source of this alleged violation is unclear. To the extent that he challenges his firearm enhancement because his murder conviction already punished him for using a firearm, his double jeopardy argument fails. *State v. Kelly*, 168 Wn.2d 72, 79-80 (2010); RCW 9.94A.533(3).

Lesser Included Instruction

Price contends here that the trial court erred in refusing to instruct the jury on the lesser included offenses of first and second degree manslaughter. An instruction on a lesser included offense is warranted only if two conditions are met: each element of the lesser offense must be a necessary element of the charged offense, and the evidence must support an inference that the lesser crime was committed instead of the charged crime. *State v. Workman*, 90 Wn.2d 443, 447-48 (1978); *State v. Keene*, 121 Wn. App. 143, 149 (2004). Where the trial court refuses to give an instruction based on a factual determination, we review the denial for abuse of discretion. *State v. Hunter*, 152 Wn. App. 30, 43 (2009), *review denied*, 168 Wn.2d 1008 (2010).

The trial court refused to instruct the jury on either degree of manslaughter because the evidence did not support a manslaughter instruction. First degree manslaughter requires proof that the defendant caused the death of another with recklessness, and second degree manslaughter requires proof that the death was the result

of the defendant's criminal negligence. RCW 9A.32.060(1)(a); RCW 9A.32.070(1). The first degree murder statute under which Price was charged requires proof that the defendant had the premeditated intent to cause the death of another. RCW 9A.32.030(1)(a).

The evidence shows that officers responded after the victim called 911 to report a domestic violence incident involving her boyfriend Price, who had a gun. When the police approached Price's home, they heard a man and a woman arguing inside. Price came to the door and stepped outside, but he went back in and slammed the door shut after the police announced themselves. A few seconds later, the officers heard a woman scream. When they kicked in the door, they heard a gunshot. After Price came out of the house, the police entered and found his girlfriend dead of a single gunshot wound to her neck. They also found a note addressed to her daughter that contained the victim's fingerprints, was in her handwriting, and that was on paper torn from a notebook in her purse. The note explained that Price had shot her because she had "fooled around." *State v. Price*, 154 Wn. App. 480, 484 (2009), *cert. denied*, 131 S. Ct. 1818 (2011). Forensic evidence showed that Price was holding his girlfriend very close to him when the shot was fired.

Price contends that there was evidence that he had been drinking and using drugs that night, and that the jury could have concluded that because he was intoxicated, he engaged in reckless behavior that inadvertently caused his girlfriend's death. He cites no evidence to support his claim of intoxication, and the circumstances of the victim's death contradict his assertion that it was inadvertent. Moreover, the jury rejected the lesser included offense of second degree murder, choosing instead to convict Price of first

degree murder. We see no error in the trial court's refusal to instruct the jury on first and second degree manslaughter.

Ineffective Assistance of Counsel

Price makes several additional claims of ineffective assistance. He contends that his attorney failed to investigate his claims of struggle and to obtain an expert to test and analyze "the alleged controlled substance." The State's documentation shows that defense counsel did investigate the circumstances of the shooting and the issue of the victim's drug use. Counsel also cross examined the medical examiner about drugs and alcohol in the victim's system. We see no deficient performance in this regard and no reasonable probability that the trial's outcome would have differed with additional investigation of these issues. *See State v. McFarland*, 127 Wn.2d 322, 334-35 (1995) (prejudice is shown by reasonable probability that, but for counsel's deficient performance, result of proceeding would have been different).

Price also claims that his attorney was deficient in failing to obtain a psychiatric evaluation to determine his competency to stand trial. Price provides no support for the claim that his drug and alcohol consumption rendered it impossible for him to understand the charges or to assist in his defense, and we need not discuss this claim further. *See State v. Lewis*, 141 Wn. App. 367, 381 (2007) (defendant is competent to stand trial if he understands the nature of the charges against him and is capable of assisting in his own defense).

Price next complains about his attorney's refusal to object when the prosecuting attorney used peremptory challenges to remove blacks from the jury. But Price provides no evidence of any discrimination in the jury's selection. *See State v. Rhone*, 168 Wn.2d

645, 653-54 (2010) (defendant challenging prosecutor's peremptory challenge of venire member has burden to establish prima facie case of purposeful discrimination). Nor does he show the racial composition of the jury venire or the final jury. He again fails to demonstrate that his counsel was deficient.

Finally, Price asserts that his attorney was deficient in failing to present an argument on the defense of police fabrication. He provides no support for his claim of fabrication, and we reject his claim of deficiency. Accordingly, it is hereby

ORDERED that this petition is granted in part and the matter remanded for resentencing.

DATED this 9th day of October, 2012.

Quinn-Brintnall, P.J.

Penoyar

Van Deren, J.

cc: Donnell W. Price
Pierce County Clerk
County Cause No. 06-1-04159-5
Mark Lindquist, Pierce County Prosecuting Attorney
Kathleen Proctor, Deputy Prosecuting Attorney

APPENDIX "C"

(Noon recess taken.)

(Jury out.)

THE COURT: The Court's instructions to the jury consist of 25 instructions and a cover sheet, Court's Instructions to the Jury; and, Verdict Form A, Count I; Verdict Form B, Count I; Verdict Form A, Count II; Special Verdict Form regarding armed with a firearm for Count I; Special Verdict Form regarding deliberate cruelty; and Special Verdict Form regarding manifest intimidation.

State's objections to the Court's instructions?

MR. HAMMOND: Your Honor, as we indicated earlier, you made a ruling yesterday concerning the stipulation that would be read to the jury in terms of what they would learn of the defendant's prior history. And that ruling not only impacted the stipulation that would be read to the jury, but, as I indicated yesterday, that ruling also meant that the Court would have to give the instruction that you now have as -- I'm just numbering my own now. I hope my numbers come out the same. I think it's 17 -- excuse me, 18. The State had originally proposed an instruction which stated what it was our position was, the second element that we would have to prove.

The defense argument that prevailed yesterday means that, instead, that instruction is reading that the

defendant had previously been convicted of a crime that made him ineligible to possess a firearm on or about September 3rd, 2006. And I'm just preserving the record in terms of that.

THE COURT: All right. Of course, we made a complete record of this. I thought that the State's proposed instruction was prejudicial, highly prejudicial, compared to the probative value; and considering that we put on the record the stipulation, and the defendant agreed to testify regarding the stipulation and his knowing and intelligent understanding of the stipulation, and the consequences, are part of the record. And I think that it is an instruction that is within the law as agreed to, and also results in a fair instruction that doesn't unduly prejudice either side.

MR. HAMMOND: And that also would apply for Instruction 14, which defines the crime of unlawful possession of a firearm.

THE COURT: That's correct, they are both the same language.

MR. HAMMOND: I just want to make sure that they don't show as being a State's proposed. That's just drafted in response to the Court.

THE COURT: All right. Any other objections?

MR. HAMMOND: No, Your Honor. We had a

conversation. I should probably make a record of it.

The State had proposed an instruction in terms of the special verdict for the aggravating factor of the defendant's conduct during the commission of the offense manifesting intimidation of the victim. The original proposed by the State did not have a definition for intimidation. I had argued that the term defined itself. The Court directed us to get dictionaries. And, based on that, Black's Law Dictionary, actually both of the editions that we had -- we had an older and newer edition -- they both defined intimidation in the same way and said that it meant unlawful coercion, extortion, duress, putting in fear. That has been added as a third paragraph to Instruction No. 25, and I have no objection. I just want to make clear that we proposed it without that.

THE COURT: All right. Any other objections?

MR. HAMMOND: No, Your Honor.

THE COURT: Mr. Mahoney, objections to the Court's instruction?

MR. MAHONEY: Before doing that, I would object to the failure to bifurcate the trial with regard to the aggravating factors. I believe that the discussion of these issues and this thing, along with the argument as to guilty or not guilty of the crime itself, is a violation of due process of law and that the matters should be

separated.

THE COURT: I think that this jury has heard all of the evidence and is well positioned to, under the law, the case law regarding bifurcation and regarding aggravating circumstances and the authority of a court to find aggravating circumstances being inappropriate, and that those aggravating circumstances must be found by a jury beyond a reasonable doubt; that the structured instructions that have been formulated are fair to both sides, and we're leaving it to the trier of the fact as required by law now to make a determination as to whether or not, beyond a reasonable doubt, aggravating circumstances exist. And I don't think that it's unfair or unlawful to not bifurcate that issue. We will present it to this jury that has heard the guilt phase also.

MR. MAHONEY: I have a couple of other things --

MR. HAMMOND: Can I make an additional record on that issue very quickly before we move on?

The Court had the statute. When we discussed this earlier this morning, we had the statute in front of us. It clearly gives the Court discretion and the authority to weigh the circumstances in the way the Court has done. We had originally proposed instructions to you, the State had proposed instructions which contemplated it being a bifurcated trial, but as things played out in trial

it became apparent that there would be no additional evidence that we would be presenting to a jury should they come back with a guilty verdict. So, given that, that is the reason that we have proceeded from going with the bifurcated proceeding to going with just a single proceeding.

THE COURT: And you're saying the State doesn't object to this, is that what you're saying?

MR. HAMMOND: Yes, Your Honor, that's correct.

THE COURT: All right.

MR. MAHONEY: All right. My second motion -- now, I must concede that I have, during the course of this afternoon, read some annotations generously provided to me by Mr. Hammond. Among those annotations -- and I've been reading enough that it's now making me need to use my glasses a bit -- was State v. Scott, 72 Washington Appeals 207, which, if I interpreted things correctly, says whether or not there should be a review of aggravating factors is a question of law. And I would say, with regard to deliberate cruelty, that this is an issue which should not be submitted to the jury because as a matter of law it should not be present in this case.

There are numerous cases, both recent and old, which talk about deliberate cruelty. And both the statute itself, which is 9.94A.535(3)(y), they indicate that

deliberate cruelty is something that substantially exceeds the harm necessary to satisfy an element of the crime. I believe that there is nothing in this case -- we have an instance of one shot, that one shot being fatal.

The case law which is prior to the statute, as I understand it, because I believe that was a recent amendment, in State v. Barnett, 104 Washington Appeals 191, and a number of other cases, have essentially held that deliberate cruelty is not warranted as an aggravating factor when it involves acts that are just associated with the crime.

There is other case law that says if there is unusual violence -- and these have been, by and large, things where you might have multiple stabbings, or in one case the victim was shot and then some time went by and the victim was shot a second time while still living -- these are the only things that I believe as a matter of law can involve deliberate cruelty. I do not believe that there are sufficient facts in the case at bar to warrant the jury making a decision on deliberate cruelty as an aggravating factor.

THE COURT: Well, it seems to me that we have a conflict in the law. One, the case law, and now the statutes, indicate that they want not the courts to make these decisions about aggravating factors but they want a

jury to make these decisions. And for the spirit of that law, it seems to me that it's not a question of law for the Court to make a determination, it's a question for the jury, and the jury can decide whether or not this is deliberate cruelty, and the jury can decide whether or not appropriately, under the law, it appears to me, intimidation is a factor.

And we even went further to kind of anticipate what the argument might be. There wasn't a definition for intimidation, and so we looked at Black's Law Dictionary, one that was 50 years old, and it's still the same definition for a 2007 publication of Black's Law Dictionary that says the same thing as far as defining intimidation.

So that, it seems to me, with the spirit that the state of the law is, makes it appropriate to leave it up to the jury to see if there are aggravating factors for deliberate cruelty, having defined it, and aggravating factors for intimidation, having defined it as best we can.

MR. MAHONEY: Okay. I might add this one thing, and that is, it strikes me that it is comparable to the common motion at the close of both cases as to whether there is sufficient evidence to dismiss or to carry the case out.

THE COURT: Probably is, and I just found that we got past that threshold. So, in the spirit, as I've

indicated, I think you got past that, and I'm going to leave the decision to the jury.

MR. MAHONEY: Of course, I'm at a point of raising issues in case there should be a conviction and a possible appeal.

THE COURT: Sure.

MR. MAHONEY: In that regard, I will address intimidation. The statute that involves intimidation appears to state it -- and that is, again, 9.94A.530(3) -- or .3(h)(ii) states that the aggravating factor is deliberate cruelty or intimidation of the victim.

It is our position that it may not be both, that it may only be one, since both have been selected. And I think the rule of lenity requires that, since otherwise it would be ambiguous, and since these both -- both of these issues are presented to the jury, and as a matter of law both should not be presented, that we therefore object on that basis. In other words, there should -- an election should be made as to which of those two the jury decides upon as an accurate --

THE COURT: How can a court of law decide deliberate cruelty and intimidation, and then turn around and have the law say that you can't consider them as aggravating factors to increase the sentence? I mean, first of all, you say that the court has to find, by law,

deliberate cruelty and intimidation. And then the law says, even though you find it, the jury has to decide whether it is sufficient, or not, and that there is deliberate cruelty and intimidation in order to increase the sentence outside of the guidelines.

MR. MAHONEY: Well, the first question the Court posed to me is -- I say it should be decided as a matter of law, that is, not a matter of law in terms of is there an aggravating factor, but a matter of law as to whether there is sufficient evidence to present the issue of whether or not there is an aggravating factor.

THE COURT: And I think --

MR. MAHONEY: -- before the jury. And then, in this -- and that would apply to anything.

THE COURT: And I guess I'm saying I'm not taking that issue away from the jury.

MR. MAHONEY: I recall that. However, my last position was one that the statute itself, on this particular section, words it in the alternative, that is, deliberate cruelty or intimidation of the victim. And that being the case, there must be an election of one or the other; and that my interpretation, since the statute would appear to be ambiguous here, is that the rule of lenity applies and therefore both alleged aggravating factors cannot be submitted to the jury but merely one of the two.

THE COURT: And I'm looking at it, it seems to me, that by definition there is -- you can distinguish the two.

All right. Any other objections?

MR. MAHONEY: There will be, but not as -- they will be to the instructions themselves.

THE COURT: That's what I'm asking, any objections to the Court's instructions?

MR. MAHONEY: Yes, because my prior ones I don't think were instruction exceptions -- although I'll get to that -- but, in fact, were just motions without regard to the instructions.

THE COURT: Okay. Your motions are overruled, then.

MR. MAHONEY: Yes.

In terms of my exceptions --

THE COURT: Objections to the instructions.

MR. MAHONEY: Yes.

THE COURT: Okay. One thing that I remember you saying, while you're looking there, you objected when we informally talked about them about not giving the lesser included of first manslaughter and second manslaughter, and I assume that you want to make that part of the record.

MR. MAHONEY: I will, but that would be my exception to failure to give, whereas now I'm looking at

exceptions --

THE COURT: Objections. By rule, you don't need exceptions anymore, just objections for giving or not giving. Don't confuse me.

MR. MAHONEY: I'm more likely to be the one confused.

THE COURT: And the reason I didn't give first and second degree manslaughter is because I didn't think there was any evidence to support it.

MR. MAHONEY: Well, I'll get to that. But, first I would like to look at the ones that the Court is proposing to give, if I may.

THE COURT: Okay.

MR. MAHONEY: Now, mine are not numbered.

THE COURT: So you haven't numbered yours yet. We have numbered them for the Court, of course, and we have numbered them for the jury because they're going to have a copy. So let's just start with, let's take the wording of the instruction you are objecting to, and that will be --

MR. MAHONEY: I shall. Looking at the instruction which is towards the end, which begins: "You will also be furnished with additional Special Verdict Forms."

In the body of that instruction, in paragraph 2 you have the discussion of aggravating factors. For the

reasons given in my motion, or motions, I should say, that the Court has just ruled on, I object to the giving of that instruction.

THE COURT: The one that says: "You will also be furnished with a Special Verdict Form for Count I. If you find the defendant not guilty on Count I, do not use the Special Verdict Form," and so on.

MR. MAHONEY: Yes. So I except to the giving of that -- or object, if you prefer, the giving of that instruction for the reasons that I outlined in the motions I made prior to progressing to the instructions.

THE COURT: Okay. That's part of the record of why I'm giving this instruction.

MR. MAHONEY: Yes.

Then, with regard to at least in the instructions I have, the next instruction, which says: "For purposes of a Special Verdict, the State must prove" -- directing the Court's attention to the last paragraph.

THE COURT: I've got that one.

MR. MAHONEY: "Deliberate cruelty means gratuitous violence or other conduct that inflicts physical, psychological or emotional pain as an end in itself."

I believe that because of the cases cited in my earlier argument, which indicate that deliberate cruelty is

gratuitous violence that goes beyond the violence that amounts to the element of the crime, and the statute even says substantially exceeds harm necessary to satisfy an element, that that is not laid out in deliberate cruelty. I would propose that an addition be made to this instruction which might be put in after the word "conduct" which would say "over and above the act of causing death." Since, certainly, causing death is going to --

THE COURT: It says, "Deliberate cruelty means gratuitous violence or other conduct that inflicts physical, psychological or emotional pain as an end in itself."

MR. MAHONEY: Well, if we believe that he intended to --

THE COURT: Is that the sentence you are talking about?

MR. MAHONEY: Yes.

THE COURT: What do you want to add to that?

MR. MAHONEY: I would add, after the word "conduct," "over and above the act of causing death."

THE COURT: Wait a minute. The instruction I'm looking at, the last sentence it is of Instruction 24, which starts at the top: "For purposes of a special verdict, the State must prove beyond a reasonable doubt the presence of an aggravating factor." And then the last

sentence says: "Deliberate cruelty means gratuitous violence or other conduct that inflicts physical, psychological or emotional pain as an end in itself."

I don't see where you are talking about conduct.

MR. MAHONEY: What I am reading says gratuitous violence or other conduct. Following the word "conduct," unless it has been changed and I was not given the change, after the word "conduct" --

THE COURT: Let me show you Instruction 24. I'm surprised that you don't have -- Is that the instruction you're talking about?

MR. MAHONEY: Yes. The word "conduct" appears right here. I would caret in the language that I cited to the Court.

THE COURT: You're absolutely right. I just glossed over that because it was in the first paragraph. And then the last paragraph, "conduct" is again in that paragraph: "Deliberate cruelty means gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself." And at the end of that you want to add something?

MR. MAHONEY: In between "conduct" the words "conduct" and "that" --

THE COURT: Inflicts?

MR. MAHONEY: That inflicts, yes. I would add:

"Over and above the act of causing death," because certainly shooting someone is a physical act that is going to cause pain.

Even the process, if we are to believe --

THE COURT: That's where your language could go at the end, after "as an end in itself, over and above."

MR. MAHONEY: I have no pride of authorship with regard to where.

THE COURT: Do you have any objection to that?

MR. HAMMOND: I do, Your Honor. If you look at the first paragraph of that instruction, what it indicates is that the aggravating factor alleged in this case is that the offense involved domestic violence and the defendant's conduct during the commission of the offense manifested deliberate cruelty. If you put in the language Counsel is suggesting, it is going to be contradictory because it is going to be both telling them that they have to look at the conduct during the offense, which is in this case murder, and then it is also going to be telling them that it has to be something above and beyond murder.

MR. MAHONEY: I believe that as this instruction reads, the jury can easily be misled from the case law and the statute, which I cited, to come to a conclusion that it is going to be both an infliction of physical pain to shoot someone, that it will be an infliction of psychological or

emotional pain to be pointing the gun, and, as speculated by Mr. McAdam, grabbing --

THE COURT: It doesn't meet the definition of gratuitous violence. If the crime itself -- if they find that to have been committed, they sure are not going to be able to say it is gratuitous. And so that's where gratuitous violence then would be conduct that inflicts physical, psychological, or emotional pain as an end in itself.

MR. MAHONEY: I would respectfully disagree with the Court. And, additionally, I would state that, since the statute itself says that it is something that substantially exceeds harm necessary to satisfy an element, that reading that statute -- this instruction does not sufficiently conform to the statute.

THE COURT: Your objection is noted.

MR. HAMMOND: Just to make a brief record, the State's position is, not everybody who is murdered knows they are going to die. And sort of the underlying facts we are relying on in both the intimidation and deliberate cruelty front.

MR. MAHONEY: I would next then either except or object to the Court's failure to give the defendant's proposed statute with -- and let me grab mine -- and these are not numbered so, again, I will read the first few

words, which begins: "As to Count II of the Information, necessity is available as a defense."

And we object to the Court's failing to give that instruction for the reasons that -- well, I guess we didn't discuss it on the record, but I believe that it can be inferred from the facts, both for this argument and subsequent argument, as well as the discussion on the Court's proposed instructions, I think it's important to note that the entire case with regard to proof of the elements of the two charged crimes is circumstantial. There is no direct evidence to the actual acts which would constitute the murder. There is no direct evidence as to the facts which would constitute possession. And that, for that reason, inferences can be made from the facts that are there. I believe as to this particular objection that an inference can be made that following the acts which resulted in the death of Ms. Carter, that a person in a temporary state of confusion could easily do something such as carry the gun upstairs without intending to possess it, and that there would need to be something -- this being a possible theory of the defense that can be inferred from these facts -- that would warrant the giving of this instruction.

THE COURT: I don't think there is a wit of evidence to support that theory, and that's why I'm not

giving that instruction.

MR. MAHONEY: All right. The defense next objects to the Court's failure to give the proposed instruction which begins: "911 emergency calls and a dying declaration have been admitted in evidence." And it is a cautionary instruction. It was an instruction that was given in essence, not the exact words, but in essence was given in State v. Giffing, 45 Washington Appeals 369, and was reproduced in the footnote of that case by the court in its decision as a justification for the court in that particular case not to have gone against the putting into evidence -- I believe they were -- well, it was something that was ruled to have been a dying declaration. I don't have the case before me, so I can't state specifically. But, I think that that case, by inference, approves the giving of this instruction since they rely on it in the body of their decision and reproduce it in a footnote.

THE COURT: And I think that's a comment on the evidence and I'm not giving that one.

MR. HAMMOND: And as for the State to make additional record on that issue, also, I did get Giffing late this morning, never had a chance to read the entire opinion. I did read the one page that I was provided, and it appears to be dicta, so it doesn't appear to be solid authority for the proposition that the defense is entitled

to the instruction.

THE COURT: All right. I'm not giving it.

MR. MAHONEY: Next, I would do this as a group, if that's appropriate to the Court, the Court's failure to give the defense proposed instruction on lesser included, which begins: "If you are not satisfied beyond a reasonable doubt," which names, in addition to murder two, manslaughter one and manslaughter two; for the same reasons, the failure to give the definitions of the offenses of manslaughter one and manslaughter two, and the failure to give the proposed to-convicts with regard to those.

Now, the basis for that is, once again, as I indicated to the Court, we need to keep in mind that all of the evidence that relates to the alleged crimes is circumstantial evidence. If inferences can be made from this circumstantial evidence, it then becomes a defense which the defendant is entitled to instructions on. I believe that you certainly -- since the only thing that you really have is a scream was heard, a shot was fired, Ms. Carter died as a result of the shot being fired, the --

THE COURT: That's not the only thing they have.

MR. MAHONEY: I'm about to add a few things, Your Honor. According to Mr. McAdam, the position of the body, the blood drops, the blood spatters and so forth, would

indicate that Ms. Carter was next to the left-hand side of the wall in the utility room. All of the other factors would seem to indicate, since the front door had been closed and they suddenly appear in the utility room, that they were in the process of walking towards the back door. I believe that these are things that may be inferred from this fact: The fact that the defendant's t-shirt had gunpowder residue on it and actually had been burned through by the gunpowder, and that his flesh beneath had also been burned by it; and the testimony of Ms. Lawrence -- I believe her name was Brenda Lawrence -- would show that his gun was being held in somewhat the position that my hand is now (demonstrating) with the barrel going from right to left in an upward position. Given this fact, I believe -- and the facts that they appeared to be walking towards the back door -- I believe that a reasonable inference can be made that, as they walked, some event could have occurred above and beyond, especially since Mr. McAdam admitted that there were circumstances other than the one he liked the most, which could have resulted in these things.

If, then, this amounts to negligence -- and I believe Officer Kim testified that they are trained that it is negligent to carry the weapon with the muzzle facing up rather than down --

THE COURT: No. He said the other way around. He said he is trained to hold the revolver down.

MR. MAHONEY: Yes, so the muzzle of the revolver would be down.

THE COURT: So it would be negligent otherwise to have it in any other position, and that's why you want second degree. And you want first degree because you think the whole thing is reckless. And I'm saying, again, that, in my mind, there isn't any evidence for either scenario.

MR. MAHONEY: Well, I was merely outlining some of those facts. And I can go on. That would allow the defense to infer from the circumstantial evidence that there was something other than an intention to inflict death, which would then mean that if the defendant's acts were either reckless in proceeding in that fashion, or negligent, that we then could argue to the jury manslaughter one and manslaughter two. Since I believe there are facts from which such inferences can be made, we are entitled to an instruction on our theory of the case. And both of these instructions fit with that theory of the case and therefore should be given along with their other instructions, vis-a-vis, the definition to convict, et cetera.

THE COURT: If there was any evidence to support it, I would give it.

MR. HAMMOND: And the State has the same position as the Court, there has to be substantial evidence indicating that the lesser and only the lesser happened.

THE COURT: Any other objections?

MR. MAHONEY: For purposes of the record, I would indicate that the standard is not substantial evidence. As I read the case law, if there is any evidence from which the defense theory could be argued, that they are entitled to an instruction on that theory of the case.

THE COURT: For their theory of the case. And I agree with you. And I don't think there is.

MR. MAHONEY: Okay. Now, that is all of my objections, but I would want some direction on something I would raise now, if the Court deems that it's appropriate at this time.

THE COURT: What's the direction?

MR. MAHONEY: I believe that on the issue of intent and knowledge as to Murder 1 and Murder 2, that I can make these types of inferences from the evidence that is in the record, even if I'm not entitled to argue that it would support a lesser crime. In other words, I don't want to be held in contempt and suddenly said, "Mahoney, you shouldn't have argued that," because I certainly intend to.

THE COURT: I'm going to allow you to.

MR. MAHONEY: Okay. Also, the topic hasn't come

up yet and I'm raising it now. It's 4:00. I think it is too late to argue.

THE COURT: Well, we are going to go until we get finished. I warned the Counsel that we were going to start this at 1:30. I'm not going to release this jury for Friday, Saturday, Sunday, and Monday. We're going to get our arguments in and get the jury to begin deliberations. We are going to do it tonight. We are going to take as much time as we need for Counsel, and we are going to take a break in between, but this is, unfortunately, a long weekend and I don't think it is fair to either side to leave it in the posture that it would be for Friday, Saturday, Sunday, and Monday.

MR. MAHONEY: For purposes of the record, I would indicate that tomorrow is a court date. And while I realize that this Court may have set other hearings, I believe that this case should take precedence, that going -- and this is bound to go substantially beyond the court day -- I believe that it prejudices us in that the jury is not in a position to go that long, that it becomes a violation of due process, and that we should return tomorrow morning for argument.

MR. HAMMOND: I have no problem with going tomorrow morning, Your Honor, if the Court can adjust its calendar. I don't know how many civil matters you have on.

THE COURT: That's the best argument you've had all day. Due process is important. So, we're going to let them go. We're going to set everything over tomorrow that's on the civil calendar and the criminal calendar. Maybe we will get to the criminal calendar.

JUDICIAL ASSISTANT: You only have one thing on in the afternoon.

THE COURT: Whatever it is. We will start tomorrow morning at 9:30. Excuse them now. Go in there now.

And we will stay in session a moment.

MR. HAMMOND: I did have to address one thing Mr. Mahoney said before his eminently persuasive argument that he just made.

JUDICIAL ASSISTANT: Judge, do you want them here at 9:00 or 9:30?

THE COURT: 9:30.

(Jurors excused.)

THE COURT: Did you fix the stipulation, is that what you are doing?

MR. HAMMOND: Yes.

THE COURT: As long as we have got until tomorrow, get your staff to take care of that "bailiff" in two places.

MR. HAMMOND: Will do.

We are just filing the stipulation that we read into the record, Your Honor.

THE COURT: I'm not entering into the stipulation. This stipulation is between the parties, not the Court. All right. We will file it.

MR. MAHONEY: If it requires an interlineation, that does not bother me.

THE COURT: I think it does. It says: "It is hereby stipulated by and between the defendant, Donnell Wayne Price, and the State of Washington, that the following is true: As of September 3rd, 2006, the defendant, Donnell Wayne Price, had previously been convicted of a crime that makes him ineligible to possess a firearm as is required to be proven beyond a reasonable doubt by the State of Washington as an element of Count II, unlawful possession of a firearm in the second degree."

MR. MAHONEY: That doesn't say you're entering into it. Just us.

THE COURT: That's right, and I'm not.

MR. MAHONEY: Okay. I thought I missed that and maybe it had wording saying "the Court."

THE COURT: There's a signature space here for the Court, and I'm not part of this.

MR. MAHONEY: That's right. Since that goes back to the jury; is that right?

THE COURT: No, it will not.

MR. MAHONEY: All right. That's fine.

THE COURT: It just is filed in the court file.

MR. MAHONEY: Good enough. See you all tomorrow.

MR. HAMMOND: Thank you, Your Honor.

There was one other issue.

THE COURT: Did you want to add something to the record, you said, Mr. Hammond?

MR. HAMMOND: I did, but I can't remember what it is now. It will come to me as soon as I get in the elevator, and I will do it first thing tomorrow morning.

THE COURT: You said --

MR. HAMMOND: Some time had already passed between -- it was the last issue we addressed before Mr. Mahoney argued to start tomorrow based on the due process argument.

THE COURT: Fairness is what you talked about and that's what I bought. But, just before that we were talking about negligence and recklessness for first and second manslaughter.

MR. HAMMOND: Right. Yes, you brought me right back to it, actually. Between the two he made a mention of concern, he wanted direction from the Court on whether he could make certain arguments. Obviously, he can argue inferences from facts that are in evidence. I know he

probably wouldn't do this, but I better say it just to set the ground for any objection I might have to make. To get up there and make reference to facts that are not in evidence would be different. I think he knows the distinction between that, and he is cautious in his wording, but I want to make clear if I heard anything resembling that, I'm going to object.

THE COURT: All right.

MR. MAHONEY: Same here.

THE COURT: All right. 9:30 tomorrow.

(Proceeding concluded.)

CERTIFICATE

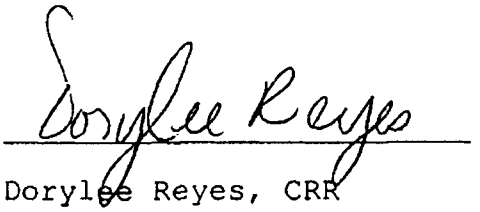
STATE OF WASHINGTON

COUNTY OF PIERCE

I, Dorylee Reyes, Official Shorthand Reporter in and for the County of Pierce, State of Washington, do hereby certify that the foregoing proceedings were reported by me on said date and reduced to computer-aided transcript form.

I further certify that the foregoing transcript of proceedings is a full, true and correct transcript of my machine shorthand notes of the aforementioned matter.

Dated this 16th day of July, 2008.



Dorylee Reyes, CRR

APPENDIX “D”

INSTRUCTION NO. 23

You will also be furnished with additional special verdict forms relating to aggravating factors that have been alleged by the State on Count I. If you find the defendant not guilty on Count I, do not use these special verdict forms. If you find the defendant guilty on Count I of the crime of Murder in the First Degree or Murder in the Second Degree, you will then use these additional special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

The State has alleged that the following aggravating factors exist in this case: (1) That the current offense involved domestic violence and the defendant's conduct manifested deliberate cruelty toward the victim; and (2) That the current offense involved domestic violence and the defendant's conduct manifested intimidation of the victim. You are not to consider the allegations that these aggravating factors exist as proof that they exist.

You should deliberate on each question presented on the special verdict forms. In order to answer any question, you must unanimously agree on the answer. You should consider each question separately. Your answer to one special verdict should not control your answer to the other verdict.

INSTRUCTION NO. 25

For purposes of a special verdict, the State must prove beyond a reasonable doubt the existence of an aggravating factor. An aggravating factor alleged in this case is that the offense involved domestic violence, and the defendant's conduct during the commission of the offense manifested intimidation of the victim.

A crime involves "domestic violence" when it is committed by one family or household member against another. "Family or household members" includes adults who have or have had a dating relationship.

"Intimidation" means unlawful coercion; extortion; duress; putting in fear.

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 02 day of January, 2015

Kevin Stock, Pierce County Clerk

By /S/Teddy Rutt, Deputy.
Dated: Jan 2, 2015 10:22 AM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: ABE43433-110A-9BE2-A94EF31753B313E0**.
This document contains 29 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DONNELL WAYNE PRICE Defendant.	CAUSE NO. 06-1-04159-5 SPECIAL VERDICT FORM

We, the jury, having found the defendant guilty of Murder in the First Degree or Murder in the Second Degree, return a special verdict by answering the following question from the court:

QUESTION: During the commission of this offense, did the defendant's conduct manifest intimidation of the victim?

ANSWER: Yes (Yes or No).

PRESIDING JUROR

Case Number: 06-1-04159-5 Date: January 2, 2015
SerialID: ABE433C6-110A-9BE2-A9F3DDFF91E0931F
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 02 day of January, 2015

Kevin Stock, Pierce County Clerk

By /S/Teddy Rutt, Deputy.
Dated: Jan 2, 2015 10:22 AM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

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APPENDIX "E"

neglected the family or his friends. Thank you.

MR. MAHONEY: I might ask if any of his fellow workers or other friends wish to step forward and speak on his behalf? I would ask that Mr. Price make whatever statement.

THE COURT: Mr. Price?

MR. PRICE: First getting on to God who is ahead of my life, Judge, State, Mr. Mahoney, to the Carter family and the Wright family, to my family, my friends and relatives and loved ones, as I stand here today, I come to you with a touch of reality that comes straight from my grieving heart, not to lecture, but to share words of hope and encouragement. My first response is to first express my love to the Carter family and the Wright family, not only to show but to tell them I am extremely remorsed as the incident that have occurred, for this situation. These are painful times for a person, but the promise of healing enable us to look past the pain, to disclose, to comfort, for passion in our spiritual lives through times of pain and trial and may a good life through times of pain and trial ultimately result if we will allow God to use us. Then, for that purpose, pain and

suffering never despair us, but they are valuable lesson for ones who endures them. Most of all living by faith means that trusting that you will have mercy on me and please forgive me for the incident that have occurred and to show that faith that is trusting in God for salvation, we don't fear judgment, for Jesus, our Savior, has prepared a place for us in heaven. Martin Luther King said that the only saving faith is that which clothe itself, God for life or death. Can we have that faith? We seek to live as God, people in our society, that does not recognize God at all. God often use our Christian friends who are wise enough to help us to deal with reality. A Christian hope is not wishful thinking, but where there is confident expectation of ones faithfulness meaning it overcome any challenge to our relationship with the Lord. We have the remaining faith faithful in spite of oppressions in our faith to overcome. Thus, the overcome is a person who does not melt away when fate is under fire. By giving people labels with negative overturn, we can dismiss their observation unfairly and injustice and therefore irrelevant to a discussion of a proper behavior and fairness for

all. Truth is the truth no matter how many or how many holds to future hold to it, if any at all. As we see bitterness, insults, any animosities present in our media and norm, the destructive ways of pain given us a badly distorted presentation of life and of God, then we experience his comfort daily. As for my conclusion is that no matter I will always love the people to respect, regardless of race, religion, color or disorderly or any creed to the Carter family the rights to the relatives, the friends, their loved ones. I don't know them by nature but I love them anyway. I feel their pain and their suffering. To my family and my friends, we may be separated but by love remain the same, but my love remain the same. To the Court, I show respect that we will last through all of humanity that will change my life but not my love because it will always remain the same toward all mankind and great joy and pain. By furthering my education and spreading my love in the prison system to better my life as a whole, I'll walk with my faith with God. I would like to thank the Court for giving me this opportunity to speak on my behalf as to show not only in my heart but

within my soul the remorse that I feel that would never leave my soul. True enough, there wasn't nobody there and the situation will always remain in my heart as a hurt and pain. As for my family as to show love to each one of them as they chose love and spirit. I pray that we all remain the same. I thank the Court for giving me this opportunity and I ask that you have mercy and leniency on me. Oh, Lord, my God, help that I may spread love throughout all eternity, regardless of where I am, that God may continue to bless me in faith and in wisdom. Thank you.

MR. MAHONEY: May it Please the Court, I believe that the argument that Counsel made was essentially an argument that his actions reflected murder in the first degree and the jury, of course, found that. I, at the time, argued murder in the second degree. I still believe that. The jury did not believe it. In essence, the argument that counsel made this morning is that he was guilty of murder in the first degree and he now is. That in and of itself does not set him apart from other persons convicted of first degree murder. The difference that we're looking at is should we look at this sentencing as an

opportunity to inflict revenge or to punish in a manner similar to the way other persons are punished. Of course the family, and I'm certainly not surprised that the family say that he should be locked away and the key should be thrown away, I don't attempt to put words in their mouth, but it wouldn't surprise me if they would exhibit the same sort of attitude as persons in the past would have argued for in position of death. The real thing that we're looking at here is is there a difference, and you've been exposed to all of the facts throughout the trial, and my argument is merely that this man should be in a position after he has been punished and he should be punished where it will be a severe punishment, and that certainly given his age of 44, whatever punishment you impose he will be an old man when he exits prison. The idea that there should be no sense of forgiveness and that he should be locked away for life is one that if it really was imposed should be imposed by a jury in an aggravated murder case. In essence, each of the persons coming here have said that he should be in prison for the remainder of his life. The law did not contemplate that for this level of act, and I would say that he should

have an opportunity to be released in his senior years to where he can help in the past as those persons who have spoken have indicated he has helped. He has worked as a minister and may in the future should he be released at some point. I would ask that the Court not impose the high end of the range, not find those factors which, in essence, would give him a life sentence.

THE COURT: First I want to address the standard range and the criminal history. I'm satisfied that the standard range as indicated by the State including the 60 months enhancement for the firearm is 341 to 434 months and I'm satisfied based upon the exhibits in the record and also the evidence at the time of trial based upon the testimony, including the Defendant. Now, Mr. Price, based upon the verdict of the jury in Count I, guilty of murder in the first degree, Count II, guilty of unlawful possession of a firearm in the second degree, and the special verdicts that you were armed with a firearm at the time of the commission of the crime and a special verdict of manifest intimidation, it's the judgment of the Court that you are guilty as the jury found. I'm going to sentence you to the high

end of the standard range of 434 months which includes 60 months for the firearm enhancement, plus it seems to me that if an enhancement of 60 months is applicable for having a firearm it sure should be applicable for the manifested intimidation that was exhibited in this case by you and so the total months will be 494 months. This was an incident that sticks out in my mind that was an execution over control of another human being, lost that control and you executed her. The police were outside the home. You knew they were there, and instead of coming out you slammed the door and went back in and moments later you executed this woman. Remorse you've spoken to. I question the genuiness. That's not part of this exceptional sentence, but it's something that I feel compelled to state. Olga Carter was begging to get away. She even wrote a note, a dying note, to her daughter. She knew death was imminent. That's the ultimate in intimidation, it seems to me. If I felt that it would hold up under the law and I feel that it would not because the jury itself said it wasn't deliberate cruelty, I would impose the 600 months that the State is requesting, but I think I'm well

within the range that is contemplated and imposing this exceptional sentence under these circumstances. The other standard conditions including the financial conditions will be made applicable to this judgment and sentence.

MR. HAMMOND: Your Honor, the standard range on Count II is 12 to 16 months.

THE COURT: 16 months to run concurrently.

MR. MAHONEY: I might say, Your Honor, I was so focused on the first count that I certainly was incorrect when stating there would be an offender score of zero. Obviously, the other current offense would add 1 point.

THE COURT: I'm satisfied from the record and the representations made by the State that the standard range that I have indicated is lawful.

MR. HAMMOND: Your Honor, I'd ask that there be no contact by the Defendant with any members of the victim's family.

THE COURT: That will be the order of the Court.

MR. HAMMOND: We need a date for our restitution hearing and also presentation of

PIERCE COUNTY PROSECUTOR

January 06, 2015 - 1:49 PM

Transmittal Letter

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