Supreme Court No. 93840-7
(COA No. 72068-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BRUCE HUMMEL,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

ANSWER TO PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Court Decisions

United States Constitution

Washington Constitution

Statutes

Court Rules

A. IDENTITY OF RESPONDENT

Bruce Hummel, respondent here and appellant below, asks this Court to deny the request to review the Court of Appeals' decision terminating review pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

The Court of Appeals decision was issued on October 17, 2016, and neither party moved for reconsideration.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals decision relies on well-settled law that the State bears the burden of proving the essential elements of a charged offense. Bruce Hummel's wife disappeared in 1990, but no one reported her missing for 11 years. In 2008, the State charged Mr. Hummel with first degree murder. The State never found any evidence showing what happened to her, including when, where, how, or if she died. The State gambled by accusing Mr. Hummel of committing premeditated murder. Did the Court of Appeals apply established law to conclude that without evidence showing when, where, or how a person died, the State failed to prove a deliberately premeditated killing?

2. The State had the opportunity to request instructions on a lesser included offense. The prosecution chose not to ask the jury to

consider lesser offenses. Having found insufficient evidence to prove premeditated intent based on non-existent proof of how a killing may have occurred, the Court of Appeals applied established law to hold that it could not impose a conviction for a lesser offense never presented to the jury. Is the State's desire to overturn this Court's precedent and have the appellate court decide what additional offenses the prosecution should have presented to the jury and then speculate about a possible jury verdict on an uncharged offense contrary to precedent and fail to present cause for further review?

D. STATEMENT OF THE CASE

In October 1990, Alice Hummel disappeared. 1RP 49.[1] No one reported her disappearance to authorities until 2001. 1RP 106-07.

Ms. Hummel was married to Bruce Hummel and they had three children. 1RP 20-22. In 1990, their oldest child Sharinda was married, lived in another state, and did not have a close relationship to her mother. 1RP 94, 97. The middle child, Sean, was a senior in high school who also "didn't have a great relationship" with his mother. 1RP

[1] The verbatim report of proceedings ("RP") from the trial is consecutively paginated. Non-trial proceedings are referred to by their date.

54-55, 132, 147. The youngest, S.H., was turning 14 years old in October 1990 and was closest to her mother. 1RP 20, 43.[2]

Mr. and Ms. Hummel moved frequently and lived separately for many portions of their marriage, working as teachers in different schools in rural Alaska. 1RP 89-90, 92, 105. Due to Ms. Hummel's health problems, she settled in Whatcom County and received a monthly disability stipend from the Alaska school system. 1RP 9, 105.

In 1986, Mr. Hummel retired from his job as a principal and teacher in Alaska so the family could live together. 1RP 92, 115. He worked fixing homes for a real estate agent, was a substitute teacher, and collected pinecones sold as potpourri. 1RP 33-35. The children recalled that money was tight and there was regular bickering among the siblings and the parents. 1RP 35-36, 95, 121-22, 131.

One afternoon near October 18, 1990, Bruce Hummel told Sean and S.H. that Ms. Hummel flew to California for a job interview. 1RP 47, 134. Sean knew Ms. Hummel was looking for work in California. 1RP 135. S.H. was surprised Ms. Hummel left because they had tickets

[2] S.H. is referred to by her initials due to the sensitive nature of her allegations against her father. S.H. now uses her married name. 1RP 20. The other family members are referred to by their first names as needed for purposes of clarity, no disrespect is intended.

to a ballet. 1RP 43. Sharinda was not surprised because her parents had moved often and lived separately as she was growing up. 1RP 112. Later, Mr. Hummel said Ms. Hummel was starting the job in California without returning and over time, he said she met another man, moved to Texas, and wanted to start a new life. 1RP 51-52, 98, 137-38. When the children got older, they looked for Ms. Hummel but never found her. 1RP 57, 102-03, 162-63.

In 2008, the prosecution charged Mr. Hummel with one count of first degree premeditated murder. CP 5. The police searched extensively for evidence indicating how Ms. Hummel might have disappeared, including using cadaver dogs, ground penetrating radar, and other tools to search for residual forensic traces. 1RP 183-85; 2RP 229, 230, 259-60, 320-21, 327, 331. They found no useful evidence. 2RP 259-60, 348-49, 353; 3RP 389, 401. Police found no evidence she used her name or social security number in databases after she disappeared. 2RP 318; 3RP 415, 419-21.

In 2004, when police first asked Mr. Hummel what happened to Ms. Hummel, he wrote a long letter addressed to Officer Les Gitts that a neighbor found and gave to the police. 2RP 219. The letter said he found Ms. Hummel dead in her bathroom, having committed suicide,

and at her request, he did not tell their children and disposed of the body in the Bellingham Bay. 2RP 221-26. The police could not corroborate any aspect of this account: physically, Mr. Hummel could not have lifted Ms. Hummel's body into his van as the letter described, there were no traces of blood in the bathroom even though the amount of blood would have left some trace, and Bellingham Bay was not windy on the night in question as stated in the letter. 2RP 324, 327, 331, 366-67; 3RP 395-96; 4RP 483. If the body was put in Bellingham Bay, it would have appeared eventually due to the bay's confined nature. 3RP 390.

Mr. Hummel admitted that after Ms. Hummel died, he continued cashing her disability checks and used them to support himself and his family. 2RP 205-06. For these actions, he was convicted of wire fraud in federal court. 2RP 242. He also admitted that he had sexually abused his youngest daughter, S.H., mostly by having her touch him inappropriately. 1RP 40; 2RP 214. S.H. said that about two days before Ms. Hummel disappeared, she had told her mother about the abuse and believed Ms. Hummel would confront Mr. Hummel. 1RP 44-45.

After a jury trial in 2009, Mr. Hummel was convicted of first degree murder in part because of a fellow jail inmate's testimony that

Mr. Hummel confessed to him. CP 34. Mr. Hummel's conviction was overturned on appeal due to an improper courtroom closure. CP 30. The jail inmate's story was not presented at the second trial. Mr. Hummel was convicted of premediated murder. CP 247. No lesser included offenses were presented to the jury. CP 227-46; 4RP 557-60.

The Court of Appeals closely reviewed the evidence. Slip op. at 1-20. It found insufficient evidence of premeditated murder due to the lack of information about how the death might have occurred. Slip op. at 25-28. Applying the remedy required by precedent, it reversed the conviction for insufficient evidence of the charged crime and ordered its dismissal, without addressing the remaining issues. Slip op. at 29. The State seeks review of the insufficiency of the evidence.

E. ARGUMENT.

The Court of Appeals relied on settled law and established principles to conclude the State presented insufficient evidence that Mr. Hummel committed the charged offense

1. It is well-settled that the State bears the burden of proving the essential elements of a charged offense

The State must prove the essential elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof

beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence that the State must establish to garner a conviction. *Winship*, 397 U.S. at 364.

In order to enforce the prosecution's burden of proof, a court reviewing the sufficiency of evidence may not simply assume that a properly instructed jury will reach the correct result as long as there is some evidence in the record that supports a conviction. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

Under the test mandated by *Jackson*, reasonable inferences from the evidence are construed in favor of the prosecution but a case may not rest on speculation or conjecture. *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). As this Court recently explained in *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013), "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation."

The prosecution desires a different standard of review that would require courts to defend the jury's verdict simply because the jury reached it. State's Petition at 14. But the Court of Appeals properly

applied this established law when evaluating the sufficiency of the State's evidence to prove premeditated murder.

2. The State's evidence was based on pyramiding speculative inferences.

To prove premeditated murder, the State must establish the "deliberate formation of and reflection upon the intent to take a human life." *State v. Hoffman*, 116 Wn.2d 51, 82, 804 P.2d 577 (1991). Although it requires proof of the perpetrator's "mental process" such as deliberation, weighing and reasoning before acting, it may be inferred from the perpetrator's actions, such as obtaining and bringing a weapon and taking a victim to an isolated area. *Id*.

Unlike the cases the prosecution musters in its request for discretionary review, there is no evidence of when, how, or where Ms. Hummel died, no evidence of planning, and no reasonable basis to infer she was killed in a premeditated fashion. This critical distinction undermines the case law the State offers as the basis for seeking review.

In *State v. Giffing*, 45 Wn.App. 369, 370, 375, 725 P.2d 445 (1986), the victim was killed by a single deep stab wound, inflicted from behind by a sharp knife, in an isolated location, and just before she died she told a passerby that the defendant did it. In *State v. Luoma*,

88 Wn.2d 28, 558 P.2d 756 (1977), the five-year-old victim was killed after she was taken down the steep bank of a culvert and beaten with a large rock at the scene; the defendant was responsible for her care, was seen fleeing the scene, and gave inconsistent explanations. In *State v. Lanning*, 5 Wn.App. 426, 487 P.2d 785 (1971), the victim was found dead from a severely lacerated throat on an isolated logging road, with no evidence of a struggle, and her boyfriend, the defendant, was found nearby with human blood on his clothes.

These cases do not establish that any killing in an isolated location is premeditated. And there is no evidence Ms. Hummel was killed in an isolated place. Her body has never been found. The circumstances of her death are wholly unknown.

The State turns on its head the absence of evidence showing how or when Mr. Hummel was the perpetrator to instead claim he must have acted premeditatedly. If the lack of evidence implicating Mr. Hummel is not outright exculpatory, it is patently equivocal and may not be the core evidence against him. *See Vasquez*, 178 Wn.2d at 7 (intent "may not be inferred from conduct that is 'patently equivocal'").

In its petition for review, the State also denounces the Court of Appeals for failing to properly defer to testimony by its expert

witnesses. State's Petition at 14-16. But the State gives muddled, obtuse descriptions of testimony from these witnesses. Their testimony focused on discrediting the story Mr. Hummel gave in 2004 about Ms. Hummel's suicide. None of these witnesses explained how, when, or where Ms. Hummel died. Taking their testimony as true, they showed Ms. Hummel did not die as described in the letter written many years after she left the family home. They did not show Mr. Hummel killed his wife by intentional, deliberate and premeditated acts.

The only case the State cites that appears remotely like Mr. Hummel's is *State v. Thompson*, 73 Wn.App. 654, 870 P.2d 1022 (1994), where the manner of killing is not clear because the body was never located. The defendant did not challenge premeditation, but claimed a lack of evidence connecting him to the crime. *Id*. at 665.

The evidence in *Thompson* was far less speculative. He confessed to kidnapping the victim, holding her until he was sure she gave him the right password for her ATM card, then killing her and disposing of her body in a way that would make her impossible to find. *Id*. at 663. Police found her property, including her checkbook and car key, in the defendant's apartment and they did not know each other beforehand. *Id*. at 657, 665. Multiple bank cameras showed him making

daily withdraws from her bank account after she disappeared. *Id*. at 657. Her car had blood stains and Thompson's fingerprints inside it. *Id*. Taken together, this evidence sufficiently showed his connection to the crime. *Id*. at 665-66.

The State's case against Mr. Hummel lacks this degree of inculpatory evidence. The State had no evidence of blood stains in his car or elsewhere; it did not offer a detailed admission by the defendant; and because they were married with children in common, his possession of her property was equivocal. Unlike the victim in *Thompson* whose disappearance was promptly noticed and reported, Ms. Hummel's disappearance was not reported for 11 years, undercutting the State's claim that her deviation from habit could only be evidence of foul play. And suspicion of foul play does not provide the modicum of evidence needed to tip the scales one way or another. She could have disappeared from reckless or negligent behavior or a combative argument, as readily as anything else.

Having taken on the burden of proving premeditated, deliberate acts caused her murder, the State was obligated to produce some evidence of steps taken through the manner or method of killing or in its planning. Every other case the State cites had such evidence, as the

Court of Appeals noted. Slip op. at 23-28 & n.13. The Court of Appeals correctly found there was insufficient evidence to prove premeditation, and that finding does not merit further review.

3. The State misrepresents its decision to pursue an all-or-nothing strategy.

Either party may offer instructions on lesser included offenses. *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) ("A lesser included instruction is available to both the prosecution and the defense"); *State v. Tamalini*, 134 Wn.2d 725, 728, 953 P.2d 450 (1998) ("Either the defense or the prosecution is entitled to request a lesser included offense instruction"); *see also State v. Porter*, 150 Wn.2d 732, 736, 82 P.3d 234 (2004) ("the lesser included offense doctrine entitles the prosecution or the defendant to a jury instruction on a crime other than the one charged" if properly requested based on facts and law).

In its petition for review, the State incorrectly asserts that the State had no role in the "all or nothing" strategy of only presenting the charge premeditated murder to the jury, without any lesser included offenses. State's Petition at 26. The prosecution proposed instructions, as it must under CrR 6.15, and it did not ask for any lesser included offenses. 4RP 541 (prosecution tells court it has all of its instructions);

4RP 550-51 (court explaining procedure for addressing each instruction proposed by State); 4RP 551-56 (court lists and discusses each instruction proposed by State).

After the court addressed each of the State's proposed instructions one by one, the court turned to the defense instructions, beginning with lesser included offenses sought by the defense. 4RP 557.

Mr. Hummel initially proposed an instruction on second degree murder, but his request was contingent on the court also instructing the jury on the lesser offenses of first and second degree manslaughter. 4RP 469, 557, 559-61. The prosecutor objected to the defense proposed instructions for manslaughter. 4RP 557-58. The court ruled there was an insufficient factual basis for manslaughter instructions. 4RP 561.

When the court ruled there was no legal basis for manslaughter instructions, Mr. Hummel withdrew his request for lesser offense instructions. *Id*. The defense stated they did not "accept the State's version of just the murder I," but would not seek second degree murder when the State was not asking for it and the court would not give manslaughter lesser offense instructions. *Id*.

The State's petition for review portrays this in-court discussion as a defense request for an all-or-nothing strategy. State's Petition at 26. But the defense was responding to the instructions the State submitted that were "just the murder I." 4RP 561. It was because the State opted only for a first degree murder theory, without asking the jury to consider any lesser degrees, that the defense weighed whether it wanted to propose additional offenses for the jury to consider.[3] The defense did not preclude or even encourage the prosecution to decline to offer the jury less serious offenses to consider.

The State uses its misrepresentation of the record as the platform for distinguishing *In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 294, 274 P.3d 366 (2012), *Green*, 94 Wn.2d at 234, and related precedent. *Heidari* affirmed the principle that "remand for simple resentencing on a 'lesser included offense' . . . is only permissible when the jury has been explicitly instructed thereon." *Id*. at 292 (quoting *Green*, 92 Wn.2d at 234).

The State's petition claims that because Mr. Hummel asked for all-or-nothing instructions, the jury's and reviewing court's inability to

[3] Similarly, at the prior trial for the same offense, the defense was the party requesting second degree murder as a lesser offense. *See* 8/19/09RP 696,

consider lesser offenses are not its fault. The record belies the State's assessing of blame. The prosecution proposed instructions, could have sought lesser offense instructions, but instead asked for "just the murder I." 4RP 541, 551-56, 561.

In *Heidari*, this Court affirmed the State's obligation to seek lesser included offense instructions when it wants to avoid dismissal in the event it does not have proof of the greater offense. "[T]he State can easily avoid the force of *Green* by requesting a lesser included offense instruction at trial." 174 Wn.2d at 294. *Heidari* was decided in April 2012, two years before Mr. Hummel's May 2014 trial. The State was on notice of its obligations.

Heidari reflects longstanding precedent, which the State's petition ignores. 174 Wn.2d at 292-94; *see, e.g.*, *State v. Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993) ("To find the accused guilty of a lesser included offense, the jury must, of course, be instructed on its elements."). The State tries to portray *Heidari* as an anomaly by repeatedly citing and misrepresenting *State v. Friedrich*, 4 Wash. 224, 29 P. 1055 (1892). In *Friedrich*, this Court found abundant evidence the defendant was responsible for killing the victim but insufficient

---

704-05.

evidence it was premediated as required for first degree murder. *Id*. at 222-25. It ordered the judge to enter a second degree murder conviction. *Id*. at 222, 224-25 (citing former § 1429 Hill's Code).

The State assumes this remedy occurred without the jury having received an instruction on second degree murder, but the history of the case reveals the jury would have been so instructed. This *Friedrich* opinion followed a retrial ordered due to instructional errors. *Friedrich v. Terr*., 2 Wash. 358, 369, 26 P. 976 (1891). In *Friedrich I*, the Court chastised the judge for failing to tell jurors "they could return a verdict of murder in the second degree only." *Id*. *Friedrich II* praised the judge for fairly instructing the jury and discussed the jury's difficulty distinguishing "between murder of the first and second degrees," demonstrating the judge followed the remand instructions to charge the jury with both offenses. 4 Wash. at 213. The *Friedrich II* Court's determination that first degree murder was insufficiently proved but a second degree murder conviction could be sustained was consistent with *Heidari*.

The State does not show how *Heidari* is wrong or harmful. The jury's role is to decide the degree of offense committed. RCW 10.61.010 ("the jury shall find" and "shall in their verdict specify the

degree or attempt of which the defendant is guilty."). Where a lesser offense is not presented to the jury for consideration, the defendant never defends against that charge and may forgo strategies, evidence, and arguments relevant to the charge.

Under the State's theory, the reviewing court would sit in judgment as a 13th juror and weigh how it would have voted on an uncharged lesser offense, but this notion is contrary to settled law. *See State v. Williams*, 96 Wn.2d 215, 221-22, 634 P.2d 868 (1981) (judge "is not deemed a 'thirteenth juror'" but rather "[i]t is the province of the jury to weigh the evidence, under proper instructions, and determine the facts). This theory disregards the inviolate right to trial by jury expressly guaranteed in Washington by directing the court to impose punishment based on an offense the jury never considered or legal requirements it did not weigh. *See State v. Williams-Walker*, 167 Wn.2d 889, 899-900, 225 P.3d 913 (2010); Const. art. I, §§ 21, 22.

The State's desire to have this Court overrule its recent decision in *Heidari* should be rejected. There is no substantial public interest in granting review, as demonstrated by the obscure, factually distinguishable cases the State relies upon. *See* RAP 13.4(b)(iv).

As *Heidari* recognized, the State may seek lesser included offense instructions to avoid the consequence of dismissal when it fails to prove the most serious offense charged. This Court should reject the State's efforts to dilute the requirements that it prove the essential elements to the jury following fair notice to the accused and fair argument to the jury.

Finally, there are remaining unresolved issues raised on appeal. *See* Opening Brief at 18-36. These issues also require reversal of Mr. Hummel's conviction for independent reasons the Court of Appeals did not reach. Further appellate proceedings would be required if the Court of Appeals ruling is modified on review.

F. CONCLUSION.

Respondent Bruce Hummel respectfully requests that the Court deny review.

DATED this 15th day of December 2016.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Respondent

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 93840-7**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ petitioner Kimberly Thulin
Whatcom County Prosecuting Attorney
[Appellate_Division@co.whatcom.wa.us]

☒ respondent

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 15, 2016

WASHINGTON APPELLATE PROJECT

December 15, 2016 - 4:16 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	93840-7
Appellate Court Case Title:	State of Washington v. Bruce Allen Hummel

The following documents have been uploaded:

- 938407_20161215161456SC155226_3645_Answer_Reply.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was washapp.org_20161215_160249.pdf

A copy of the uploaded files will be sent to:

- kthulin@co.whatcom.wa.us
- nancy@washapp.org
- Appellate_Division@co.whatcom.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Nancy P Collins - Email: nancy@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20161215161456SC155226