NO. 48087-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANGEL A. FERNANDEZ,

Appellant.

PRO SE SUPPLEMENTAL BRIEF

Pursuant to RAP 10.10

Angel A. Fernandez #286520
Clallam Bay Corr. Cntr.
1830 Eagle Crest Way
Clallam Bay, WA 98326

A. ASSIGNMENTS OF ERROR

1. Judicial Misconduct deprived appellant of his right to a fair trial.

2. Prosecutor Misconduct deprived appellant of his right to a fair trial.

3. Appellant was deprived of his right to a fair sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1(a); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the State charged Aggravated Murder in the First Degree after it elected to not seek the death penalty?

1(b); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial when the jury (hung) on the aggravating factors?

1(c); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the jury was not instructed that the appellant had personally committed the aggravating factors?

1(d); Based on a recent Supreme Court decision was the appellant deprived of his 6th amendment right to a fair trial where the liability instruction allowed the jury to find guilt

solely on his codefendant's conduct?

2(a); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the Prosecutor failed to prove aggravated murder in the first degree?

2(b); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the Prosecutor failed to prove robbery in the first degree?

2(c); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the Prosecutor failed to prove appellant was an accomplice to the aggravating factors to increase the penalty of the crime(s)?

3(a); Was the appellant deprived of his 6th and 14th amendment rights to a fair and just sentence where the Judgment and Sentence states that the appellant was convicted of Robbery, Theft, kidnapping, to conceal the commission of the crime(s) and the identity of the defendant or any person committing a crime, where the jury (hung) or was not unanimous?

3(b); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the charging document failed to allege the underlying crimes as separate counts?

3(c); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the jury was not

instructed properly on the to-convict instruction on aggravated murder?

B. STATEMENT OF THE CASE

Since the appellant's assigned counsel on direct appeal has informed him that the Verbatim Report of Proceedings are lost or have been destroyed, the appellant is forced to rely on the facts asserted in this Courts previous opinion. COA. NO. 26327-1-II consolidated with 26342-4-II.[1]

1. Substantive Facts

Ed Ross, Paul Sarkis, and Angel A. Fernandez were in the drug business. RP____. Ross was the dealer, Sarkis the delivery man, and Fernandez the debt collector. RP____. Sarkis introduced Jesse Osalde, a high school friend to Fernandez. RP____. Osalde did not regularly participate in the drug business; but Osalde, along with the others, regularly used the drugs. RP_____.

In October 1999, Fernandez and Ross had an argument over an outstanding debt. RP____. This argument spawned the following sequence of events. RP____. On the morning of October 10, 1999, Ross and his girlfriend, Cat Fischer, planned to pick up some methamphetamine at a house on Whidbey Island. RP____. While waiting in line for a ferry, Ross had a heated cell phone conversation with Fernandez. RP____. About

1. Appellant is entitled to a complete record. State v. Tilton 149 Wn.2d 775 (2003)

two minutes after the phone call, Fernandez and Osalde, displaying a knife and a gun respectively entered Ross's vehicle. RP____.

According to Fischer, Fernandez said '[g]ive me your gun, your wallet, your drugs, your money." 1RP July 20, 2000, at 84. At Fernandez's instruction, Ross drove the vehicle out of the ferry line and proceeded through Mukilteo to I-5. RP____.

Sarkis testified that he and Talee Coulter followed Ross in his Ford Explorer. RP____. He followed Ross, Fischer, Fernandez, and Osalde around Whidbey Island, to the top, through Oak Harbor and down to the bottom of the Island. RP____, ____. They stopped the vehicles, where everybody switched cars. RP____. Ross got into the explorer, Coulter, Osalde, and Fischer rode in Ross's car. RP____. Fernandez, Ross, and Sarkis rode in the Explorer stopped someplace to sell drugs. RP____. Eventually the group split up while Coulter and Osalde drove Fischer home. RP____.

After dropping off Fischer, while heading back to Coulter's home the car broke down. RP____. Fernandez, Ross, and Sarkis went to pick them up. RP____. That evening upon arrival to Coulter's home, Osalde, Sarkis, and Ross went down stairs to the basement. RP____. They proceeded to tie

Ross up. RP____. Sarkis testified that Ross was only tied up for a few minutes. RP____. All through the night they got high. RP____. Ross was freely moving about. RP____. At some point Fernandez, Ross, and Sarkis went to a house on Whidbey Island belonging to Yvette Hoy and Kodie Kinser. RP____. They were there for a long time drinking and getting high before they caught the ferry to Everett to meet back up with Coulter and Osalde. RP____.

During opening statements the Prosecutor stated that he planned to introduce testimony from Hoy and Kinser to corroborate the movements of Ross, Fernandez, and Sarkis. The testimony being presented was an out of court statement by Hoy and Kinser. Hoy and Kinser did not testify due to unavailability. RP____. During closing counsel for the defense argued that the testimony of Hoy, eliminated the elements of kidnapping. RP____.

Sarkis further testified that the following day Ross, Fernandez, Osalde and himself drove to some property that Fernandez claimed his family owned in Rose Valley, Cowlitz County. RP____. At some point while on the property Sarkis observed Ross running from behind a large bush while blood ran from his neck. RP____. Ross ran to the front of Sarkis's vehicle, with Fernandez about 20 feet behind and then

collapsed. RP____. Fernandez then picked Ross up, hit in the face, "stomped" on his head, and made two stabbing motions at Ross with a knife. RP____.

After Ross fell, Fernandez tried to drag him into the bushes. RP____. Finding Ross too heavy, Fernandez told Sarkis and Osalde to help. RP____. The three carried Ross, who was moaning and flailing, "into the woods." 2RP July 24, 2000 at 273. When Sarkis returned to his vehicle, he cleaned blood off of the front of the car with "[b]eer and the shirt Ross was wearing." 2RP July 24, 2000 at 276.

When the three men left the property, Sarkis heard Fernandez state that "he loves it when takes somebody's soul[.] 2RP July 24, 2000 at 278. Prior to returning to Seattle that evening, the men disposed of Ross's clothes in garbage dumpsters.[2]

After not hearing from Ross State's witness Fischer called the FBI on Tuesday, October 12, 1999. Based on the statement she had given, the next day, a Mukilteo police officer arrested Fernandez. Osalde was arrested in another state. RP____, ____. On November 18, 1999, the Cowlitz County Prosecutor charged Fernandez with first degree murder of Ross, and kidnapping of Fischer. RP____. Count 1 of the information alleged first degree murder by 'aggravated murder and or felony murder." Count 2 alleged "kidnapping in the first

2. Appellant does not agree with the facts found in the opinion because the facts are not complete

degree." RP____.

Prior to trial the state amended the charges/information for a third time. The state charged 1 count of Aggravated Murder in the First Degree. Alleging that the defendant...on or about October 11, 1999, with premeditated intent to cause the death of another person, **RCW 9A.32.030(1)(a),** did feloniously cause the death of Edward Ross, a human being; and the murder was committed in the course of, in furtherance, or in immediate flight from the crime of **kidnapping** in the first degree and/or the murder was committed to conceal the commission of a crime, to wit: **robbery** and/or **theft** and/or **kidnapping** and/or to conceal the identity of the defendant or any other person committing a crime; to wit: **robbery** and/or **theft** and/or **kidnapping;** and/or

Felony Murder in the First Degree. Alleging, while **committing or attempting to commit** the crime of Robbery in the First Degree, and/or **robbery in the second degree,** and/or **kidnapping in the first degree,** and/or **kidnapping in the second degree,** and in the course of or in furtherance of such crime or crimes or in immediate flight therefrom, the defendant or another participant, caused the death of a human being, a person other than one of the participants, to wit: Edward Ross... See Third Amended Information attached as App.

A. to this brief.

2. Procedural Facts.

On 07/27/2000, the appellant was found guilty by jury of Aggravated Murder in the First Degree, and Felony Murder in the First Degree as charged in the information. The jury concluded that premeditated murder was committed by the defendant and or an accomplice, and that felony murder was committed by the defendant and or an accomplice. However, the defendant Angel A. Hernandez was not charged as an accomplice.

B). The jury was not instructed on criminal attempt **RCW 9A.28.020(1),** where the state alleged that the crime(s) of attempt had occurred, i.e. Attempted Robbery and and Attempted Kidnapping in the First Degree.

C). In the special verdict form to convict on Aggravated Murder, not only was the word "should" added to the instruction the element of Attempted Kidnapping in the First Degree was "omitted". See Court's Instructions To The Jury attached as App. B. to this brief. And

D). The information that the court read to the jury was and is defective. the information charges the defendant with Aggravated Murder in the First Degree. According to the 2008 WPIC the law clearly states that "Aggravated Murder" isn't a crime. However, none of the above was challenged or raised as

constitutional errors on appellant's initial direct appeal in 2000. In 2015 the court remanded appellant back to Superior Court to correct the judgment and sentence where double jeopardy attached to both of the crimes of Premeditated Murder and Felony Murder. The court vacated the Felony Murder but continued to add the underlying crimes of Robbery, Kidnap, and Theft to the Aggravating Circumstance of **RCW 10.95.020(9); RCW 10.95.020(11)(d)**. This anomaly is highly troubling as well as the other claimed 10 errors, in that the jury was not unanimous as instructed in the special verdict to convict on the aggravators. Effectively stating that the jury had hung on the elements and was not convinced beyond a reasonable doubt.

By law, the appellant's judgment and sentence is in error based on this revelation and because the jury was not instructed on the element of attempted kidnapping that is charged in the information, the appellant's entire sentence and conviction is in error. Thus, reversal is required as shown below. **State v. Irby; State v. Green;** supra, controls.

C. ARGUMENT/GROUNDS

1. Introduction

Due Process requires the state to prove each element of an offense charged beyond a reasonable doubt. **In re Winship**, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). The state bears the burden of proving the elements. Apprendi v. New Jersey, 530

U.S. 466, 490, 190 S.Ct. 2348, 147, L.ed.2d 435 (2000). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. **In re Winship**, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Const. amend. XIV. On Appellate review evidence is sufficient to support a conviction only if "after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); **State v. Green**, 94 Wn.2d 216, 616 P.2d 628 (1980); **State v. Irby**, 187 Wn.App. 183, 347 P.3d 1103 (2015).

2. Supplement of The Record

Because the issues pertaining to assignments of error are purely based on the sufficiency of the evidence presented at trial through the state's key witnesses Fischer, Sarkis, Hoy, and Kinser as well as opening and closing arguments it is vital to Fernandez' additional grounds for review that the Court supplement this brief with the record. **State v. Tilton**, 149 Wn.2d 775, 783, 72 P.3d 739 (2003). A criminal defendant is "constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his or her claims." **State v. Thomas**, 70 Wn.App. 296, 298,

852 P.2d 1130 (1993).

[I]f this Court finds that there is a defect in the record, or the record cannot be reproduced then the remedy is to allow the appellant to "supplement the record with appropriate affidavits and discrepancies resolved by the judge who heard the case. RAP 9.3, 9.4, 9.5. However, where the affidavits are unable to produce a record which satisfactorily recounts the events material to the issues on appeal, the Appellate Court must order a new trial." Id. Citing **State v. Larson**, 62 Wn.2d 64, 381 P.2d 120 (1963). Further, although it it is not mandatory that the prosecutor respond to appellant's SAG on direct review. Since the issues are directed at the way the prosecutor charged or failed to charge or instruct the jury, where the errors directly affect the appellant's current sentence of life without parole, it is imperative that the prosecutor respond to the allegations found herein. See, **Beck Dye**, 200 Wash. 1, 92 P.2d 1113 (1939).[3]

3. **Insufficient Evidence Deprived Fernandez The Right To A Fair Trial Where The Prosecutor Charged and Tried Him On A Defective Charging Document/Information.!**

First: Aggravated Murder in the First Degree is Premeditated Murder in the First Degree accompanied by presence of one or more **aggravating circumstances** listed in

3. SEE LETTER FROM LAWYER APP. C.

the criminal procedure title of the code (RCW 10.95.020). Thus, **Aggravated Murder in the First Degree** is not a crime in and of itself! State v. Roberts, 142 Wn.2d at 501 (quoting State v. Irizarry, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988)).

Here, the prosecutor charged Fernandez with Aggravated Murder in the First Degree, (count 1) and Felony Murder in the First Degree as an alternative to the Aggravated Murder. See App. B. A defendant cannot be tried for a crime that don't exist. See In re Hinton, 152 Wn.2d 853, (2004); In re Stoudmire, ____Wn.2d____, ____. To do so would constitute a defective charging document, that could not be treated as a true bill of particulars because the framework on which the elements of the underlying offenses would be tainted. The court cannot charge the jury to hear a case based on a crime that does not exist. Id.

Felony Murder is not an alternative to Aggravated Murder and Fernandez should not have been charged in that manner. Instruction 35 and 36 clearly show the effects of the charging error. In the to-convict instruction 35 the word aggravated was crossed out and replaced with premeditated. And in Instruction 36 the word aggravated was crossed out and replaced with premeditated.

To correct the error in the charging document, the prosecutor could have amended the information a fourth time and changed the language to the following:

Tnat the defendant Angel A. Fernandez and/or and **accomplice** in the County of Snohomish and/or Island and/or Cowlitz, State of Washington, on or about October 11, 1999, did unlawfully and feloniously, with premeditated intent to cause the death of another person, did cause the death of Edward Ross, a human being, and that **further aggravated circumstances exists**, to wit: the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of **Kidnapping in the First Degree** and/or Theft and/or Robbery, and/or the murder was committed to conceal the commission of a crime, to wit: Robbery,and/or Theft and/or Kidnapping and/or to conceal the identity of the defendant or any person committing a crime; to wit: Robbery and/or Theft and/or **Kidnapping...**

[E]ven if this Court was to conclude that aggravated murder could be charged as a crime. That still would not cure the defect in the charging information.

Adequate notice of the specific crime charged is an absolute requirement of law. U.S. Const. amend. VI: Wash. Const. art. 1, § 22. State v. Vangerpen, 125 Wn.2d 782, 787,

888 P.2d 117 (1995), A charging document is constitutionally adequate only if all essential elements of a crime, statutory, and nonstatutory are included in the document so as to apprise the accused of the charges against him. State v. Brewczynski, 173 Wn.App. 541, 294 P.3d 825 (2013). Words in a charging document are read as a whole, construed according to common sense and include facts which are necessarily implied. State v. Kjorsvik, 117 Wn.2d 93, 109, 812 P.2d 86 (1991). See also State v. Taylor, 140 Wn.2d 229, 243, 996 P.2d 571 (2000). If the necessary elements are neither found nor fairly implied in the charging document the court presumes prejudice and reverse without reaching the question of prejudice. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Here, two essential elements were not included in the charging document. 1) the elements **"of a common scheme or plan"** and 2) **accomplice** was ommitted. Both of the missing elements are an important component to the crimes charged.

The prosecutor alleged that felony murder was committed but failed to add the crimes was... part of a common scheme or plan. **RCW 10.95.020(11)(d)** requires a nexus between murders alleged to be part of a common scheme or plan. State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999). Although the phrase "common scheme or plan" need not be defined for jurors. State

Yates, 161 Wn.2d 714, 168 P.3d 359 (2007), the phrase is mandated by law to be included in the information when charged with a felony to the murder in the first degree. **See WPIC's 30.03 Volume 11 Third Edition 2010 Pocket Part** issued in August 2010 at Page 36. The element "common scheme or plan was crucial in the notification of the charge of Felony Murder, because the jury was instructed on accomplice liability to both premeditated murder and felony murder.

In order for Fernandez to be an accomplice in the commission of a crime... he either 2) aids or agree to aid another person in planning or committing the crime.. **RCW 9A.08.020.** Both elements require some form of planning, and when tied together it paints a strong picture of a defendants actions. However, Fernandez was not charged as an accomplice. And since due process requires that the defendant be informed of the nature of the offense charged, including the manner of committing the crime. State v. Bray, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988), failure to include the elements of a "common scheme or plan" and "accomplice liability" are considered to be uncharged offenses. The manner of committing a crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense. See State v. Carothers, 84 Wn.2d 256, 263, 525 P.2d 731 (1974)(One

cannot be tried for an uncharged offense). The adequacy of a charging document is reviewed de novo. A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and Article I section 22 of the Washington State Constitution if it fails to include "all essential elements of a crime." State v. Johnson, 289 P.3d 662 (2012). The rationale underlying this rule is that a defendant must be apprised of the charges against him or her and allowed to prepare a defense. An "essential element is one whose specification is necessary to establish the very illegality of the behavior charged." Id.

Simply put, where the prosecutor "omitted" the element of "a common scheme or plan" in relation to the felony murder and aggravated murder statutes **RCW 10.95.020(11)(d) and RCW 9A.32.030(1)(c)**, and where the prosecutor also "omitted" the element of "accomplice liability" from the information it relieved the state of its burden to prove every element of the crime(s) charged beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 318, 99 S.Ct. 628, (1970). And by doing so, it allowed the jury to guess at what actions Fernandez was actually guilty of, since the jury was not instructed on "a common scheme or plan" but was instructed instructed on "accomplice liability". See Instructions 18, 26,

35, and 36. "Either Fernandez was a part of the plan or he wasn't." See Maddox v. City of L.A., 792 F.2d 1408, 1412 (9th Cir. 1986). However, the question of guilt cannot be answered by this Court in the affirmative because the instructions at best mislead the jury in their deliberations. Binks Mfg. Co. v. Nat'l Presto Indus.,Inc., 709 F.2d 1109, 117 (7th Cir. 1983). Thus, absent the essential elements in the charging document, the jury had no way to fully understand the legal significance of the evidence supporting the felony aggravated murder circumstances. See App. B. Jury Notes. The remedy for informations failure to include essential elements is reversal and dismissal without prejudice. State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995).

4. **Insufficient Evidence Deprived Fernandez The Right To A Fair Trial Where The Prosecutor Failed To Prove Every Element Of Kidnapping And Attempted Kidnapping In The First Degree As Charged In The Charging Document/Information.!**

Standard of Review

The U.S. Const. 5th Amendment provides "no person shall be deprived of life liberty or property, without due process of law." Washington Constitution Article 3 provides "no person shall be deprived of life, liberty or property without due process of law".

The state "must prove the elements of the predicate felony to prove the offense of felony murder." State v. Gamble, 154 Wn.2d 457, 466, 114 P.3d 646 (2005); State v. Carter, 145 Wn.2d 71, 80, 109 P.3d 823 (2005)("in order for a person to be found guilty of felony murder the state must prove that he or she committed or attempted to commit a predicate felony"). State v. Wanrow, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978). While a predicate felony such as kidnapping and attempted kidnapping in the first degree are elements of this felony murder charge, Fernandez was not actually charged with the underlying crime(s). See App. A. However, our Supreme Court made it very clear that the jury must be instructed on and the state must actually prove each element of a predicate felony in felony murder. State v. Gamble, supra. And the proof can be substantiated in the to-convict instructions and the companion instructions. State v. Irby, 187 Wn.App. 183, 347 P.3d 1103 (2015); State v. Majors, supra. State v. Collins, supra; State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

In this case the state had the burden to prove that Fernandez "committ[ed] or attempted to commit kidnapping in the first or second degree or theft or robbery in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, Fernandez, or another

participant, cause[d] the death of a person other than one of the participants" as charged in the information for felony murder. RCW 9A.32.030(1)(c). RCW 9A.56.190, RCW 9A.56.200, 9A.56.210, RCW 9A.40.010, RCW 9A.40.020 and RCW 9A.40.030.

In the to-convict instruction for felony murder the the jury was instructed that "the defendant or an accomplice, was committing or attempting to commit Robbery in the first degree and/or Robbery in the Second Degree and/or Kidnapping in the First Degree and/or Kidnapping in the Second Degree. See App. A. Instruction 26.

However, in the special verdict to convict on the aggravating circumstances the jury was only instructed on Kidnapping in the First Degree. See App. A. Special verdict Form A. In the companion Instructions 32, 33, the jury was instructed on abduction and kidnapping, but the jury was not instructed on "attempted kidnapping". Criminal Attempt. RCW 9A.28.020(1) Being instructed on the definition of attempt was paramount in this case, because there was evidence that a possible abduction had occurred while Ross was briefly tied up in the basement. RP____. And because Attempted Kidnapping does not require the use of deadly force as where kidnapping does, the jury should have been instructed on attempt because kidnapping and attempted kidnapping are separate and distinct

crimes which require the jury to base there determination on a separate set of facts. See State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). For example: The state charged that kidnapping and or attempted kidnapping was committed by (intent to facilitate the commission of any degree of murder) RCW 9A.40.020(b) and/or (inflicting bodily injury on the person) RCW 9A.40.020(c) and/or (inflicting extreme mental distress on that person or on a third person) RCW 9A.40.020(d). See App. A. Information. Instruction 31 "omits the attempt elements. The above set of facts were crucial to the aggravating circumstances as will be shown below.

In State v. Majors, the court opined that to establish the attempt, the state need only prove that the defendant took a substantial step toward completion of the crime. 82 Wn.App. 843, 847, 919 P.2d 1258 (1996). RCW 9A.28.020(1) would have correctly set forth the applicable law as stated in RCW 9A.32.030(1)(c). State v. Collins, 45 Wn.App. 541, 726 P.2d 491 (1986). The Appellate Courts has repeatedly held that attempt crimes have two elements (1) intent, and (2) a substantial step. Both of these essential elements should have been included in the instructions. Where the only evidence of a kidnapping was during the time Ross was in the basement briefly tied up. Absent the attempt definition the jury was

forced to equate what could have been contrued as unlawful imprisonment with first degree kidnapping. See State v. DeRyke, 110 Wn.App. 815, 41 P.3d 1225 (2002). Because there was evidence that Ross was under no restraint and was freely moving around with Fernandez and the others getting high prior to the basement ordeal and after they left the basement the state could not have proved kidnapping or attempted kidnapping in the first degree. State v. Wanrow, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978)("The intent necessary to prove the felony murder is the intent necessary to prove the underlying felony. The intent must be proved by the state as a necessary element of the crime, and the question it was present is presented to the jury.").

It is constitutional error not to give instruction defining **attempt** and informing the jury that both intent and a substantial step are elements of an attempt to commit a crime. See State v. Jackson, 62 Wn.App. 53, 813 P.2d 156 (1991)(citing the note on use to WPIC 100.01 with approval); State v. Stewart, 35 Wn.App. 552, 555, 667 P.2d 1139 (1983). Thus, reversal is required. Green, controls, the consideration of the appellate court to review error(s) raised for the first time on appeal when the giving or failure to give an instruction invades a fundamental constitutional right of the

accused. Such as the right to a jury trial. State v. Green, 94 Wn.2d 216 supra, citing Const. 1 § 21: State v. McHenry, 88 Wn.2d 211, 213, 558 P.2d 188 (1977). Moreover, in considering kidnapping by any of the four means set forth in this case it is important to note that each is wholly separate and distinct from the others. RCW 9A.40.010, RCW 9A.40.020(b), (c), and (d). Each must be independently proved and none can stand upon a combination of the others to fill a critical void. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). To consider the kidnapping we must first analyze the element of kidnapping. RCW 9A.40.010; Abduction. There was no evidence that Ross was secreted in a place where he could not be found, and there was no evidence of use or threatened use of force. Other than the brief moment Ross was bound or tied up, the state cannot attribute those actions as abductions under the statute.

In Green, the court reasoned that "considering the unusually short time involved, the minimal distance the victim was moved, the location, the clear visibility of that location from outside as well as the total lack of evidence of actual isolation from public areas there was no substantial evidence of restraint by means of secreting the victim in a place where she was not likely to be found. Id. Here, there was evidence that after the group left the basement they went looking for

drugs to get high. There was evidence that Ross was free to move about in the home of Hoy and Kinser and that no one was threatening him to stay in the company of Fernandez or Osalde.

Although RCW 9A.40.020(b), (c), and (d) was not alleged in the felony murder alternative, it was alleged in the aggravated murder. Which was confusing and quite possibly mislead the jury. In order for first degree felony murder to be proved the state must allege certain acts had occurred. Yet the only acts that they alleged were (abduction RCW 9A.40.010 and general kidnapping RCW 9A.40.020)(by committing or attempting to commit).

In the to-convict instruction for aggravating circumstances the state asks whether the murder was committed in the course of, in furtherance of, or in immediate flight from kidnapping in the first degree. See App. B. Instruction 18. The elements of RCW 9A.40.020(b), (c), and (d) were not included. But they were included in the information for aggravated murder.

In order to convict on aggravating circumstances the jury had to be unanimous as to which aggravating circumstances exists. However, the jury could not make the determination if they were not instructed on which act of kidnapping to rely on. State v. Irby, 187 Wn.App. 183, 347 P.3d 1103 (2015).

In Irby, the Court was asked two significant questions of law. 1) Was there a lack of jury unanimity where the state failed to tell the jury which act to rely on: and 2) Was there sufficient evidence to convict on the aggravating circumstances.

Under Washington's constitution, a defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. WASH. CONST. art.I, § 21; State v. Petrich , 101 Wash.2d 566, 569, 683 P.2d 173 (1984); State v. Ortega-Martinez, 124 Wash.2d 702, 707, 881 P.2d 231 (1994). When the prosecutor presents evidence of several acts which could form the basis of one count charged, either the state must tell the jury which act to rely on in its deliberations or the court must give what is known as a Petrich, instruction requiring all jurors to agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Kitchen, 110 wash.2d 403, 409, 756 P.2d 105 (1988), citing Petrich, 101 Wash.2d at 570, 683 P.2d 173; State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911).

The jury was instructed that, to convict Irby of burglary in the first degree, the state had to prove the following four elements beyond a reasonable doubt:

1) That on or about the 8th day of March, 2005, the

defendant entered or remained unlawfully in a building;

2) That the entering or remaining was with intent to commit a crime against a person or property therein;

3) That in so entering or while in the building or in immediate flight from the building, the defendant was armed with a deadly weapon or assaulted a person; and

4) That the acts occurred in the State of Washington.

The state invited the jury to rely on either of these acts to convict **Irby**, of first degree burglary without no election by the state and no **Petrich**, instruction. Id. at 198.

The jury was also instructed on aggravating circumstances, with burglary in the first or second degree being the charged aggravator. The state charged two aggravating circumstances: 1) the murder was committed in the course of, in furtherance of, or in immediate flight from burlary in the first or second degree or residential burglary and 2) the murder was committed to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime...RCW 10.95.020(9) (concealment); RCW 10.95.020(11) (committed in the course of a felony).

The special verdict form split the two aggravators into five questions. The jury answered "yes" to all but one of them:

We, the jury having found the defendant guilty of premeditated murder in the first degree as defined in instruction 8, unanimously make the following anwsers to the questions submitted by the court:

Has the state proven the existence of the following aggravating circumstance beyond a reasonable doubt?

Did the defendant intend to conceal the commission of a crime?

ANSWER: yes

(Yes, No or Not Unanimous)

Did the defendant intend to protect or conceal the identity of any person committing a crime?

ANSWER: yes

(Yes, No or Not Unanimous)

Was the murder committed in the course of, in furtherance of, or in immediate flight from burglary in the first degree?

ANSWER: yes

(Yes, No or Not Unanimous)

Was the murder committed in the course of, in futherance of or in immediate flight from burglary in the second degree?

ANSWER: no

(Yes, No or Not Unanimous)

Was the murder committed in the course of, in furtherance of, or in immediate flight from residential burglary?

ANSWER: yes

(Yes, No or Not Unanimous)

Irby, Id. at 200-201.

The Court concluded that the it could not sustain the jury findings that the murder was committed in the course of in furtherance of, or in immediate flight from residential burglary, and that insufficient evidence supports the jury finding of a concealment aggravator. Id. at 203.

Similar to Irby, where there is no distinction the jury was instructed that, to convict the defendant of the crime of felony murder in the first degree, as charged as the second alternative in the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

1) That on or about the 11th day of October, 1999, Edward Ross was killed by the defendant or one with whom he was an accomplice;

2) That the defendant or an accomplice, was committing or attempting to commit Robbery in the First Degree and/or Robbery in the Second Degree and/or Kidnapping in the First

Degree and/or Kidnapping in the Second Degree;

3) That the defendant or an accomplice caused the death of Edward Ross in the course of or in furtherance of such crime or in immediate flight from such crime;

4) That Edward Ross was not a participant in the crime; and

5) That the acts which caused the death of the decedent occurred in the State of Washington.

Instruction 26

Although Fernandez was not charged with Robbery or Kidnapping in a separate count like **Irby**, the crime(s) of Robbery and Kidnapping was bundled into one element of the to-convict for felony murder. However, what is problematic about instruction 26, is the state did not instruct the jury on which act that they had to rely on to find Fernandez guilty of felony murder in the first degree. **WPIC 4.25** should have been given to ensure that the jury was convinced beyond a reasonable doubt that the state had effectively proven its case.

Further, in the to-convict instruction for aggravating circumstances it appears that the state chose the crime for the jury. See Instruction 18. Kidnapping in the second degree or robbery in the first or second degree was not included, yet

they were a part of the jury's determination to convict on felony murder. This omission was critical because we will never know how the jury arrived to their verdict. Whether they relied on robbery or kidnapping because there wasn't a separate verdict for the underlying crime(s) charged like in Irby. Speculating on what the jury might have decided is a grave error. State v. Irby, 187 Wn.App. at 202. And it should be considered error where the prosecutor interjected its own verdict to determine the aggravating circumstances. If anything the prosecutor should have included kidnapping in the second degree, and robbery in the first or second degree. However, absent an election by the state on which crime to rely on it is understandable how the state was forced to just put kidnapping in the first degree as an aggravating circumstance irregardless of the effect of the constitutional error that attached.

In the special verdict to convict on the aggravating circumstances, the form was split into two questions, the jury answered yes to the first one and was not unanimous to the second one.

We, the jury return a special verdict by answering as follows:

1) that the murder was committed in the course of, in

furtherance of, or in immediate flight from Kidnapping in the First Degree.

(yes) (no) (no unanimous agreement)

ANSWER: yes

2) that the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, to-wit: Robbery and/or Theft and/or Kidnapping.

(yes) (no) (no unanimous agreement)

ANSWER: no unanimous agreement

Special verdict Form A. App. B.

The question raised to this Court is how can the jury find guilt of kidnapping in the first degree as an aggravator, and in the same breadth not be unanimous on the kidnapping as an aggravator. Maybe its because both aggravators rely on the same elements and require that the killing occurred in the course of, in furtherance of, or in immediate flight from a felony. **State v. Irby**, 187 Wn.2d at 204, 347 P.3d 1103 (2015). And maybe its because in the charging document for aggravated murder the information charged four means of committing first degree kidnapping; Abduction by secreting or holding the person in a place where that person is not likely to be found and/or using or threatening to use deadly force **RCW 9A.40.010**

with intent to facilitate the commission of any degree of murder and/or robbery RCW 9A.40.020(b), intent to inflict bodily injury on the person RCW 9A.40.020(c), and with intent to inflict extreme mental distress on that person or on a third person RCW 9A.40.020(d), where the state failed to elect which act of the crime of kidnapping it was relying on. And/Or maybe it was because the prosecutor "omitted" the elements of attempted kidnapping or robbery and the phrase "a common scheme or plan". State v. Jackson, 62 Wn.App. 53 supra; State v. Finch, 137 Wn.2d 792 supra, to show that the crime(s) or acts were in conformity. Equally troubling is Fernandez' current judgment and sentence shows that he was found guilty of the aggravating circumstances in section 2 of special verdict form A. See App. E. Judgment and Sentence. Nevertheless, RCW 9A.40.010 and 020(b),(c), and (d), are separate means distinct from each other and must be proved independently. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), and a Petrich, instruction should have been given or the state should have told the jury which act of kidnapping it was relying on. State v. Irby, controls.

And like Irby, none of the special verdict findings of aggravating circumstances are supported by the evidence, and the felony murder verdict is not supported by the evidence,

because the only evidence of Kidnapping was the incident in the basement of Coulters home. The drive to Rose Valley was a drive in pursuit of more drugs. Edward Ross, was a willing participant in the hunt for drugs. However, when the group arrived to Fernandez' property things took a turn for the worse. There was no evidence of restraint or abduction. The only evidence came from Sarkis where he testified that at some point he seen Ross and Fernandez coming from some bushes where Ross had blood on him and moments later Fernandez stabbed him ultimately killing him. Id. at COA Opinion **No. 26342-4-II.** App. F.

The state may establish kidnapping if the victim is restrained by the use of deadly force. Restraint by an ultimate killing does not, in and of itself, establish kidnapping. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). Therefore, based on the facts of this case insufficient evidence deprived Fernandez of his right to a fair trial, because the prosecutor omitted the attempt element where Fernandez was charged with an attempt crime; omitted the phrase common scheme or plan, where aggravated murder requires the phrase; omitted accomplice liability from the charging document where the jury was instructed on accomplice acts; omitted a **Petrich** instruction and failed to instruct the jury

on which act of kidnapping to rely on. State v. Irby, controls.

Finally!

A corollary of due process requirement that a jury find proof beyond a reasonable doubt in order to return a verdict of guilty is that it must return verdict of not guilty if the state does not carry its burden. Jury instructions must convey this. It is reversible error to instruct the jury in a manner relieving the state of its burden. State v. Bennett, 161 Wash.2d 303, 307, 165 P.3d 1241 (2007).

Here, in the to-convict instruction on aggravating circumstances it states the following in part:

The state has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that either aggravating circumstance 1) or aggravating circumstance 2) or both, has been proved beyond a reasonable doubt.

You "**should**" consider each of the aggravating circumstances above separately. If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you "**should**" answer "yes" on the special verdict form as to that circumstance. Instruction 18., App. B,

Fernandez briefly argues that the word "**should**" reduced the state's burden by connoting what is proper rather than what is required. By directing the jury that it "**should**" consider each aggravating circumstances separately and "**should**" answer yes if they unanimously agreed that the state has proven beyond a reasonable doubt the circumstances, the jury was left with the impression that it ought to acquit if possessed of reasonable doubt but that it was not mandatory. See State v. Smith, 174 Wn.App. 359, 298 P.3d 785 (2013).

5. Remedy

A jury is not required to search other instructions to see if another element should have been included in the instruction defining a crime. Failure to instruct on an element of an offense is automatic reversible error. the omission of an element of the crime produces a "fatal error" by relieving the state of its burden of proving every essential element beyond a reasonable doubt. State v. Smith, 131 Wn.2d 258 (1996).

As shown above the remedy when the state presents insufficient evidence is dismissal with prejudice. State v. Irby, supra; citing State v. Hickman, 135 Wash.2d 97, 103, 954 P.2d 900 (1998). Because the issues raised herein are directed at Fernandez' life sentence based on the aggravators, this

this Court should vacate Fernandez' aggravated murder conviction, and remand to Cowlitz County Superior Court for new trial. [I]f the state objects, then this Court should require the state to make a prima facie showing why this remedy should not be allowed. Further, this Court should remand to correct the current judgment and sentence showing the convictions for Robbery, Concealment of the Commission of a crime, Concealment of the identity of the persons, and Theft.

D. CONCLUSION

Based on the above constitutional errors, this Court should vacate Fernandez' Aggravated Murder in the First Degree sentence and grant new trial. In the alternative this Court should remand for an evidentiary/reference hearing on the points raised. State v. Irby, controls.

Respectfully submitted,,,

Angel A. Fernandez Pro Se

Dated this 11th, 2016

APPENDIX A. CHARGING DOCUMENT/INFORMATION

FILED
SUPERIOR COURT

2000 JUL 18 P 3:54

COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON, Plaintiff, - vs. - **ANGEL ANTHONY FERNANDEZ,** JESSE OSALDE 99-1-01005-9 Defendant.	**No. 99-1-00998-1** **THIRD AMENDED INFORMATION AS TO DATE** **AGGRAVATED MURDER IN THE FIRST DEGREE and/or FELONY MURDER IN THE FIRST DEGREE**

COMES NOW JAMES J. STONIER, Prosecuting Attorney of Cowlitz County, State of Washington, and by this Information accuses the above-named defendant of violating the criminal laws of the State of Washington as follows:

AGGRAVATED MURDER IN THE FIRST DEGREE

The defendant, in the County of Snohomish and/or Island and/or Cowlitz, State of Washington, on or about October 11, 1999, with premeditated intent to cause the death of another person, did feloniously cause the death of Edward Ross, a human being; and the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of Kidnapping in the First Degree and/or the murder was committed to conceal the commission of a crime, to-wit: Robbery and/or Theft and/or kidnapping and/or to conceal the identity of the defendant or any person committing a crime; to-wit: Robbery and/or Theft and/or Kidnapping; contrary to RCW 9A.32.030(1)(a); RCW 9A.40.010; RCW 9A.40.020(b) and/or (c) and/or (d); RCW 9A.56.190; RCW 9A.56.020; RCW 9A.56.030; RCW 9A.56.040; RCW 9A.56.050; RCW 10.95.020(9); RCW 10.95.020(11)(d) and against the peace and dignity of the State of Washington.

0248

Cowlitz County Prosecuting Attorney
312 S.W. 1st Street
Kelso, Washington 98626
Telephone [360] 577-3080

AND/OR

FELONY MURDER IN THE FIRST DEGREE

The defendant, in the County of Snohomish and/or Island, State of Washington, on or about the 11th day of October, 1999, while committing or attempting to commit the crime of Robbery in the First Degree, and/or Robbery in the Second Degree, and/or Kidnapping in the First Degree, and/or Kidnapping in the Second Degree, and in the course of or in furtherance of such crime or crimes or in immediate flight therefrom, the defendant or another participant, caused the death of a human being, a person other than one of the participants, to-wit: Edward Ross; contrary to RCW 9A.32.030(1)(c), 9A.56.190, 9A.56.200, 9A.56.210, 9A.40.010, 9A.40.020 and 9A.40.030 and against the peace and dignity of the State of Washington.

DATED: Tuesday, July 18, 2000.

14021

JAMES J. STONIER, WSBA #4890
Cowlitz County Prosecuting Attorney

DEFENDANT INFORMATION						
NAME: ANGEL ANTHONY FERNANDEZ				DOB: 01/04/1965		
ADDRESS:				*CITY:*		
STATE:		ZIP CODE:		PHONE #(s):		
DRIV. LIC. NO.	DL ST	SEX: M	RACE:	HGT: 508	WGT: 190	EYES: Bro
HAIR: Blk	OTHER IDENTIFYING INFORMATION:					

STATE'S WITNESSES:

REFER TO SUPPLEMENTAL WITNESS LIST(S).

Cowlitz County Prosecuting Attorney
312 S.W. 1st Street
Kelso, Washington 98626
Telephone [360] 577-3080

APPENDIX B. JURY INSTRUCTION

INSTRUCTION NO. ____/____

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 3

A separate crime is charged against each defendant in each of the alternative offenses. The defendants have been joined for trial. You must decide the case of each defendant on each alternative crime separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

INSTRUCTION 4

The defendants have entered pleas of not guilty. Those pleas put in issue every element of the crimes charged. The State is the plaintiff and has the burden of proving each element of the crimes beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 5

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

INSTRUCTION NO. 6

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 7

The testimony of an accomplice, given on behalf of the Plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

INSTRUCTION NO. 8

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 9

You may give such weight and credibility to any alleged out-of-court statement of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 10

You may not consider any admission or incriminating statement that was made by one defendant as evidence against a co-defendant when such statement was made out of court and after an event that is the subject of a criminal charge.

INSTRUCTION NO. 11

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 12

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 13

A person commits the crime of Premeditated Murder in the First Degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or another person.

INSTRUCTION NO. 14

To convict the defendant, Angel Anthony Fernandez, of the crime of Premeditated Murder in the First Degree as charged as the first alternative, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 11th day of October, 1999, the defendant, or one with whom he was an accomplice, stabbed Edward Ross;

(2) That the defendant, or one with whom he was an accomplice, acted with intent to cause the death of Edward Ross;

(3) That the intent to cause the death was premeditated;

(4) That Edward Ross died as a result of defendant's or his accomplice's acts; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

To convict the defendant, Jesse Osalde, of the crime of Premeditated Murder in the First Degree as charged as the first alternative, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 11th day of October, 1999, the defendant, or one with whom he was an accomplice, stabbed Edward Ross;

(2) That the defendant, or one with whom he was an accomplice, acted with intent to cause the death of Edward Ross;

(3) That the intent to cause the death was premeditated;

(4) That Edward Ross died as a result of defendant's or his accomplice's acts; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. 17

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 18

If you find the defendant, Angel Anthony Fernandez, guilty of Premeditated Murder in the First Degree as defined in Instruction 14, you must then determine whether any of the following aggravating circumstance exists:

(1) That the murder was committed in the course of, in furtherance of, or in immediate flight from Kidnapping in the First Degree; or

(2) That the defendant or an accomplice committed the murder to conceal the commission of a crime, to-wit: Robbery and/or Theft and/or Kidnapping or to protect or conceal the identity of any person committing a crime, to-wit: Robbery and/or Theft and/or Kidnapping.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that either aggravating circumstance (1) or aggravating circumstance (2) or both, has been proved beyond a reasonable doubt.

You should consider each of the aggravating circumstances above separately. If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer "yes" on the special verdict form as to that circumstance.

INSTRUCTION NO. 19

If you find the defendant, Jesse Osalde, guilty of Premeditated Murder in the First Degree as defined in Instruction 15, you must then determine whether any of the following aggravating circumstance exists:

(1) That the murder was committed in the course of, in furtherance of, or in immediate flight from Kidnapping in the First Degree; or

(2) That the defendant or an accomplice committed the murder to conceal the commission of a crime, to-wit: Robbery and/or Theft and/or Kidnapping or to protect or conceal the identity of any person committing a crime, to-wit: Robbery and/or Theft and/or Kidnapping.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that either aggravating circumstance (1) or aggravating circumstance (2) or both, has been proved beyond a reasonable doubt.

You should consider each of the aggravating circumstances above separately. If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer "yes" on the special verdict form as to that circumstance.

INSTRUCTION NO. 20

Theft means to wrongfully obtain or exert unauthorized control over the property of another with intent to deprive that person of such property.

INSTRUCTION NO. 21

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Premeditated Murder in the First Degree necessarily includes the lesser crime of Murder in the Second Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he shall be convicted only of the lowest degree.

INSTRUCTION NO. 22

A person commits the crime of Murder in the Second Degree when, with intent to cause the death of another person, but without premeditation, he or she causes the death of such person.

INSTRUCTION NO. 23

To convict the defendant, Angel Anthony Fernandez, of the crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt :

(1) That on or about the 11th day of October, 1999, the defendant or an accomplice killed Edward Ross;

(2) That the defendant or an accomplice acted with the intent to cause the death of Edward Ross;

(3) That Edward Ross died as a result of the defendant's or an accomplice's acts;

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 24

To convict the defendant, Jesse Osalde, of the crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt :

(1) That on or about the 11th day of October, 1999, the defendant or an accomplice killed Edward Ross;

(2) That the defendant or an accomplice acted with the intent to cause the death of Edward Ross;

(3) That Edward Ross died as a result of the defendant's or an accomplice's acts;

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

A person commits the crime of Felony Murder in the First Degree, when he or an accomplice commits or attempts to commit Robbery in the First Degree and/or Robbery in the Second Degree and/or Kidnapping in the First Degree and/or Kidnapping in the Second Degree, and in the course of or in furtherance of such crime or in immediate flight from such crime, he or another participant causes the death of a person other than one of the participants.

INSTRUCTION NO. 26

To convict the defendant, Angel Anthony Fernandez, of the crime of Felony Murder in the First Degree, as charged as the second alternative in the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 11th day of October, 1999, Edward Ross was killed by the defendant or one with whom he was an accomplice;

(2) That the defendant or an accomplice, was committing or attempting to commit Robbery in the First Degree and/or Robbery in the Second Degree and/or Kidnapping in the First Degree and/or Kidnapping in the Second Degree;

(3) That the defendant or an accomplice caused the death of Edward Ross in the course of or in furtherance of such crime or in the immediate flight from such crime;

(4) That Edward Ross was not a participant in the crime; and

(5) That the acts which caused the death of the decedent occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 27

To convict the defendant, Jesse Osalde, of the crime of Felony Murder in the First Degree, as charged as the second alternative in the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 11th day of October, 1999, Edward Ross was killed by the defendant or one with whom he was an accomplice;

(2) That the defendant or an accomplice, was committing or attempting to commit Robbery in the First Degree and/or Robbery in the Second Degree and/or Kidnapping in the First Degree and/or Kidnapping in the Second Degree;

(3) That the defendant or an accomplice caused the death of Edward Ross in the course of or in furtherance of such crime or in the immediate flight from such crime;

(4) That Edward Ross was not a participant in the crime; and

(5) That the acts which caused the death of the decedent occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 24

A person commits the crime of Robbery when he unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases, the degree of force is immaterial.

INSTRUCTION NO. 29

A person commits the crime of Robbery in the First Degree when in the commission of a robbery or in immediate flight therefrom he is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon or inflicts bodily injury.

INSTRUCTION NO. 30

A person commits the crime of Robbery in the Second Degree when he commits robbery.

INSTRUCTION NO. 31

A person commits the crime of Kidnapping in the First Degree when he or she intentionally abducts another person with intent to facilitate the commission of any degree of murder and/or robbery in any degree or flight thereafter or to inflict bodily injury on the person or to inflict extreme mental distress on that person or on a third person.

INSTRUCTION NO. 32

A person commits the crime of Kidnapping in the Second Degree when under circumstances not amounting to Kidnapping in the First Degree he or she intentionally abducts another person.

INSTRUCTION NO. 33

Abduct means to restrain a person by either: 1) secreting or holding the person in a place where that person is not likely to be found or 2) using or threatening to use deadly force.

INSTRUCTION NO. 34

Bodily injury, physical injury or bodily harm means physical pain or injury, illness, or an impairment of physical condition.

INSTRUCTION NO. 35

There are two separate crimes charged in the Information. All twelve of you must be unanimous as to which crime, if any, has been proved to you beyond a reasonable doubt.

If some of you find that ~~Aggravated~~ Premeditated Murder in the First Degree has been proven beyond a reasonable doubt and some others of you find Felony Murder in the First Degree has been proven beyond a reasonable doubt, you are not unanimous as to either crime.

All twelve of you must agree as to a verdict of guilty or not guilty on the charge of either:

(a) Premeditated Murder in the First Degree;

or

(b) Felony Murder in the First Degree

or both.

You must be unanimous as to your verdict on each alternative charge.

As to the charge of Premeditated Murder in the First Degree and lesser included offense of Murder in the Second Degree, you must first consider the crime of Premeditated Murder in the First Degree. If you unanimously agree on a verdict, or you cannot agree on a unanimous verdict as to that charge, then and only then will you consider the offense of Murder in the Second Degree.

INSTRUCTION NO. 36

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror to chair the deliberations. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and three (3) Verdict Forms for each defendant, Verdict Form A, A-1, and B, for Defendant Fernandez and Verdict Form C, C-1 and D for Defendant Osalde, plus a Special Verdict Form for defendant Fernandez and for defendant Osalde. You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach. If you find either defendant guilty of ~~Aggravated~~ Premeditated Murder in the First Degree you will complete the Special Verdict Form A for Defendant Fernandez and Verdict Form C for Defendant Osalde provided to you.

If you find either defendant not guilty of the crime of Premeditated Murder in the First Degree on Verdict Form A as to Defendant Fernandez or Verdict Form C as to Defendant Osalde, do not use the Special Verdict Form A as to Defendant Fernandez or Special Verdict Form C as to Defendant Osalde, or if after a full and careful consideration of the evidence you cannot agree on the crime of Premeditated Murder as to either defendant, then as to that defendant you will consider the lesser crime of Murder in the Second Degree in Verdict Form A-1 for Fernandez and/or Verdict Form C-1 for Defendant Osalde.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decisions. The presiding juror will sign them and notify the bailiff, who will conduct you into court to declare your verdicts.

JUDGE

99-1-00998-1
99-1-01005-9

Do we need to vote on the second alternative if we have found them guilty of greater crime?

FILED
SUPERIOR COURT
2000 JUL 27 A 11: 32
COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY DMW

7-27-00
Jury Oaths
0945

The jury must deliberate, and reach a decision if possible, on the 2 alternative charges of Premeditated Murder in the 1st Degree and of Felony Murder in the 1st Degree as to both defendants.

If you have found either defendant guilty of Premeditated Murder in the 1st Degree, you need not consider the lesser included offense of Murder in the 2nd Degree

88

06226

FILED
SUPERIOR COURT

2000 JUL 27 A 11:32

COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY

99-1-00998-1
99-1-01005-9

We would like an explanation of instruction No. 18

Deg Oaths

7-26-00

1900 HR.

Review instructions as a whole, and all information contained within those instructions

0627

89

FILED
SUPERIOR COURT

2000 JUL 27 1 P 10: 59

COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 99-1-00998-1
	)	
v.	)	VERDICT FORM A
	)	
ANGEL ANTHONY FERNANDEZ,	)	
	)	
Defendant.	)	

We, the jury, find the defendant, Angel Anthony Fernandez, GUILTY
(Write in "not guilty" or "guilty")

of the crime of Premeditated Murder in the First Degree as charged in the First Alternative.

Gregory A. Oakes
PRESIDING JUROR

If this Verdict Form is "guilty", please complete "Special Verdict Form A".

90

0631

FILED
SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

2000 JUL 27 P 10:59

COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY

STATE OF WASHINGTON, Plaintiff,	)	No. 99-1-00998-1
vs.	)	SPECIAL VERDICT FORM A
ANGEL ANTHONY FERNANDEZ, Defendant.	)	

THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT, ANGEL ANTHONY FERNANDEZ, GUILTY OF PREMEDITATED MURDER IN THE FIRST DEGREE AS CHARGED IN THE FIRST ALTERNATIVE.

We, the jury, return a special verdict by answering as follows:

(1) that the murder was committed in the course of, in furtherance of, or in immediate flight from Kidnapping in the First Degree.

(yes)	(no)	(no unanimous agreement)
ANSWER: YES		

(2) that the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, to-wit: Robbery and/or Theft and/or Kidnapping.

(yes)	(no)	(no unanimous agreement)
ANSWER:		NO UNANIMOUS AGREEMENT

Please answer "yes" or "no" or "no unanimous agreement" as to both (1) and (2).

Dwayne O. Oakes
PRESIDING JUROR

0628

91

FILED
SUPERIOR COURT

2000 JUL 27 P 10: 59

COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 99-1-00998-1
	)	
v.	)	VERDICT FORM A-1
	)	
ANGEL ANTHONY FERNANDEZ,	)	
	)	
Defendant.	)	

We, the jury, having found the defendant, Angel Anthony Fernandez, not guilty of the crime of Premeditated Murder in the First Degree in Verdict Form A, as charged, or being unable to unanimously agree as to that charge, find the defendant, Fernandez, _____ (Write in "not guilty" or "guilty")

of the lesser included crime of Murder in the ~~First~~ Second Degree.

_____
PRESIDING JUROR

0629

92

FILED
SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

2000 JUL 27 P 10: 59

COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY

STATE OF WASHINGTON, Plaintiff, v. ANGEL ANTHONY FERNANDEZ, Defendant.	)	No. 99-1-00998-1 VERDICT FORM B

We, the jury, find the defendant, Angel Anthony Fernandez, GUILTY
(Write in not guilty or guilty)

of the crime of Felony Murder in the First Degree as charged in the Second Alternative.

Gregory A. Oathes
PRESIDING JUROR

0630

93

APPENDIX C. LETTER FROM APPELLATE ATTORNEY

LAW OFFICES OF
NIELSEN, BROMAN & KOCH P.L.L.C.
1908 E. MADISON STREET
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON

JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILA BAKER

OF COUNSEL
K. CAROLYN RAMAMURTI

March 29, 2016

Angel Fernandez
DOC No. 286520
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Re: State v. Fernandez, No. 48087-5-II

Dear Mr. Fernandez:

Well, it looks like obtaining a transcript of closing argument from your trial is more difficult than I expected. Your case is so old, it is unlikely the attorneys involved still have a copy. My office manager tried to contact the court reporter to request a copy, but she passed away two years ago. You may want to contact the Court of Appeals and ask if they kept a copy archived somewhere, but I am sorry to report that I do not have one to give you.

Sincerely,

David B. Koch
Attorney at Law

APPENDIX D. REPORT OF PROCEEDINGS TO BE SUPPLEMENTED BY THE COURT

APPENDIX E. JUDGMENT AND SENTENCE

DEFENDANT'S COPY

FILED
SUPERIOR COURT
2015 AUG 25 P 5:23
COWLITZ COUNTY
STACI L. MYKLEBUST, CLERK

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ANGEL ANTHONY FERNANDEZ Defendant. DOB: 1/4/1965 PCN: SID: WA12201151	No. 99-1-00998-1 ---AMENDED--- **Felony Judgment and Sentence -- Prison (FJS)** ☐ **Clerk's Action Required, para 2.1, 4.1, 4.3, 4.8 5.2, 5.3, 5.5 and 5.7** ☐ **Defendant Used Motor Vehicle**

15 9 01357 9

I. Hearing

1.1 The court conducted a sentencing hearing this date 8/25/15; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon ☐ guilty plea (date) _____ ☒ jury-verdict (date) 07/27/2000 ☐ bench trial (date) _____. SMW

Count	*Crime*	*RCW (w/subsection)*	*Class*	*Date of Crime*
I	AGGRAVATED MURDER IN THE FIRST DEGREE	9A.32 030(1)(a), 9A.41.010, 9A.40.020(b) and/or (c) and or (d), 9A 56.190, 9A.56 020, 9A.56.030, 9A.56.040, 9A.56.050, 10.95.020(9), 10 95 020(11)(d)	FA	10/11/99

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)

☐ Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

☐ The **burglary** in Count _____ involved theft or intended theft

GV☐ For the crime(s) charged in Count _____, **domestic violence** was pled and proved. RCW 10.99.020.

☐ The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.

☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____. RCW 9.94A.825, 9.94A.533.

☐ Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

☐ In count _____ the defendant committed a robbery of a pharmacy as defined in RCW 18.64.011(21), RCW 9.94A.____.

☐ The offense in Count _____ was committed **in a county jail or state correctional facility**. RCW 9.94A.535(5).

☐ The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

☐ Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.

☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.829.

☐ The defendant committed ☐ **vehicular homicide** ☐ **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.

☐ In Count _____, the defendant had (number of) _____ **passenger(s) under the age of 16** in the vehicle. RCW 9.94A.533.

☐ Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.

☐ In Count _____ the defendant has been convicted of **assaulting a law enforcement officer** or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault, as provided under RCW 9A.36.031, and the defendant intentionally committed the assault with what appeared to be a firearm. RCW 9.94A.831, 9.94A.533.

☐ Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW46.20.285.

☐ The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

☐ In Count _____, assault in the 1st degree (RCW 9A 36.011) or assault of a child in the 1st degree (RCW 9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be subject to a mandatory minimum term of 5 years (RCW 9.94A.540).

☐ Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.

☐ **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	*Cause Number*	*Court (county & state)*	*DV* Yes*
1.				
2				

* DV: Domestic Violence was pled and proved.

☐ Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime	DV* Yes
1	BURGLARY 2		10/08/82	COWLITZ CO., WA	A		
2	ESCAPE 2		10/28/82	LEWIS CO., WA	A		
3	TMVWP		08/27/85	EUREKA, CA	A		
4	ESCAPE Paroled 10/13/87		01/25/86	EUREKA, CA	A		
5	ASSAULT 4 02/28/90 ASSAULT 4 03/09/03 DWLS 07/11/97						

* DV: Domestic Violence was pled and proved.

☐ Additional criminal history is attached in Appendix 2.2.

☐ The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

☐ The prior convictions listed as number(s) _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

☐ The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements *	Total Standard Range (including enhancements)	Maximum Term
I	0	XVI	PRISON WITHOUT PAROLE			LIFE

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12), (P16) Passenger(s) under age 16.

☐ Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are ☐ attached ☐ as follows: _____.

2.4 ☐ Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

☐ below the standard range for Count(s) _____.

☐ above the standard range for Count(s) _____.

☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

☐ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☐ found by jury, by special interrogatory.

☐ within the standard range for Count(s) _____, but served consecutively to Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01 160). The court makes the following specific findings:

☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____.

☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

☐ (Name of agency) _____ 's costs for its emergency response are reasonble. RCW 38.52.430 (effective August 1, 2012).

2.6 ☐ Felony Firearm Offender Registration. The defendant committed a felony firearm offense as defined in RCW 9.41.010.

☐ The court considered the following factors:

☐ the defendant's criminal history.

☐ whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

☐ evidence of the defendant's propensity for violence that would likely endanger persons.

☐ other:_____.

☐ The court decided the defendant ☐ should ☐ should not register as a felony firearm offender.

III. Judgment

3.1 The defendant is *guilty* of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☐ The court *dismisses* Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) ***Confinement.*** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

LIFE W/O PAROLE months on Count I _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

☐ The confinement time on Count(s)_____ contain(s) a mandatory minimum term of _____.

☐ The confinement time on Count _____ includes _____ months as enhancement for ☐ firearm ☐ deadly weapon ☐ VUCSA in a protected zone ☐ manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is:_____.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:_____.

This sentence shall run consecutively with the sentence in the following cause number(s) (see RCW 9.94A.589(3)): _____.

Confinement shall commence immediately unless otherwise set forth here: _____
_____.

(b) ***Credit for Time Served.*** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for:

Count(s) _____ 36 months for Serious Violent Offenses
Count(s) _____ 18 months for Violent Offenses
Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

☐ consume no alcohol or marijuana.
☐ have no contact with: _____.
☐ remain ☐ within ☐ outside of a specified geographical boundary, to wit:
_____.
☐ not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.
☐ participate in the following crime-related treatment or counseling services:
_____.
☐ undergo an evaluation for treatment for ☐ domestic violence ☐ substance abuse ☐ mental health ☐ anger management, and fully comply with all recommended treatment.
☐ comply with the following crime-related prohibitions: _____
_____
_____.
☐ Other conditions:
_____
_____
_____
_____.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision RCW 9.94A 562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE			
PCV	$ 500.00	Victim assessment	RCW 7 68.035
PDV	$	Domestic Violence assessment	RCW 10.99.080
CRC	$ 110.00	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee $ 110.00 FRC	
		Witness costs $ WFR	
		Sheriff service fees $ SFR/SFS/SFW/WRF	
		Jury demand fee $ JFR	
		Extradition costs $ EXT	
		Incarceration Fee $ JLR	
		Other $	
PUB	$ 619.00	Fees for court appointed attorney	RCW 9.94A.760
WFR	$	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	$	Fine RCW 9A.20.021; ☐ VUCSA chapter 69.50 RCW, ☐ VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	$	Drug enforcement fund of Cowlitz County Prosecutor.	RCW 9.94A.760
	$	DUI fines, fees and assessments	
CLF	$	Crime lab fee ☐ suspended due to indigency	RCW 43.43.690
	$	DNA collection fee	RCW 43 43.7541
FPV	$	Specialized forest products	RCW 76.48.140
MTH	$	Meth/Amphetamine Clean-up fine $3000. 69.50.401(a)(1)(ii).	RCW 69.50.440,
	$	Other fines or costs for:	
DEF	$	Emergency response costs ($1000 maximum, $2,500 max. effective Aug. 1, 2012.) RCW 38.52.430 Agency:	
	$	Restitution to.	
RTN/RJN	$	Restitution to:	
	$	Restitution to: (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
	$ 1229.00	***Total***	RCW 9.94A.760

☐ The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

☐ shall be set by the prosecutor.

☐ is scheduled for _____ (date).

☐ The defendant waives any right to be present at any restitution hearing (sign initials): _____.

☐ Restitution ordered above shall be paid jointly and severally with:

Name of other defendant	*Cause Number*	(Amount-$)
RJN		

☐ The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8)

☒ All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $ 25.00 per month commencing_____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

☐ The court orders the defendant to pay costs of incarceration at the rate of $_____ per day, (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

☐ ***HIV Testing*** The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

☐ The defendant shall not have contact with _____ (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until _____ (which does not exceed the maximum statutory sentence).

☐ The defendant is excluded or prohibited from coming within _____(distance) of: ☐ _____(name of protected person(s))'s ☐ home/ residence ☐ work place ☐ school ☐ (other location(s)) _____, or ☐ other location: _____, until _____ (which does not exceed the maximum statutory sentence)

☐ A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Stalking No-Contact Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections:_____.

4.8 Forfeiture: The Court hereby forfeits these items: _____ to _____ a law enforcement agency.

4.9 Exoneration: The Court hereby exonerates any bail, bond and/or personal recognizance conditions.

V. Notices and Signatures

5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). **You are required to contact the Cowlitz County Collections Deputy, 312 SW First Avenue, Kelso, WA 98626, (360) 414-5532 with any change in address or employment or as directed. Failure to make the required payments or advise of any change in circumstances is aviolation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 days in jail.** The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **Community Custody Violation.**
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5a **Firearms. You may not own, use or possess any firearm, and under federal law any firearm or ammunition,** unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. **You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.5b ☐ **Felony Firearm Offender Registration.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Reserved

5.7 ☐ **Department of Licensing Notice:** The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. **Clerk's Action**–The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.285. **Findings for DUI, Physical Control, Felony DUI or Physical Control, Vehicular Assault, or Vehicular Homicide (ACR information) (Check all that apply):**
☐ Within two hours after driving or being in physical control of a vehicle, the defendant had an alcohol concentration of breath or blood (BAC) of ____.
☐ No BAC test result.
☐ BAC Refused. The defendant refused to take a test offered pursuant to RCW 46.20.308.
☐ Drug Related. The defendant was under the influence of or affected by any drug.
☐ THC level was_____ within two hours after driving.

☐ Passenger under age 16. The defendant committed the offense while a passenger under the age of sixteen was in the vehicle.

Vehicle Info.: ☐ Commercial Veh. ☐ 16 Passenger Veh. ☐ Hazmat Veh.

5.8 IF AN APPEAL IS PROPERLY FILED AND APPEAL BOND POSTED, THE DEFENDANT WILL REPORT TO THE DEPARTMENT OF CORRECTIONS, WHO WILL MONITOR THE DEFENDANT DURING THE PENDENCY OF THE APPEAL, SUBJECT TO ANY CONDITIONS IMPOSED BY DOC AND/OR INCLUDED IN THIS JUDGMENT AND SENTENCE AND NOT SPECIFICALLY STAYED BY THE COURT.

5.9 FAILURE TO COMPLY WITH THE CONDITIONS OF THIS JUDGMENT & SENTENCE, INCLUDING ANY REPORTING CONDITIONS OR CONDITIONS OF COMMUNITY CUSTODY, MAY RESULT IN A FORFEITURE OF YOUR RIGHT TO APPEAL AND DISMISSAL OF ANY PENDING APPEAL OR COLLATERAL ATTACK.

5.10 Other: _____.

Done in Open Court and in the presence of the defendant this date: 8/25/15.

Judge/Print Name:

Deputy Prosecuting Attorney WSBA No.36637 Print Name: DAVID PHELAN	Attorney for Defendant WSBA No Print Name:	Refused Defendant Print Name: ANGEL ANTHONY FERNANDEZ

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: REFUSED

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) _____, (state) _____, on (date) _____.

_____ _____

Interpreter Print Name

VI. Identification of the Defendant

SID No. WA12201151 (If no SID complete a separate Applicant card (form FD-258) for State Patrol)

Date of Birth: 1/4/1965

FBI No.: 378932AA8

Local ID No. _____

PCN No. _____

Other _____

Alias name, DOB _____

Race:			**Ethnicity:**	**Sex:**
☐ Asian/Pacific Islander	☐ Black/African-American	☐ Caucasian	☒ Hispanic	☒ Male
☐ Native American	☐ Other: _____		☐ Non-Hispanic	☐ Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, _____ Dated: _____

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk.

The defendant's signature: Refused

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

REFUSED

APPENDIX F. COURT OF APPEALS OPINION

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, Issue Summaries, and General Information at http://www.courts.wa.gov/courts

April 15, 2003

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Jessie Osalde
1313 N 13th Ave
Walla Walla Washington 99362

Angel A. Fernandez
1313 N. 13th
Walla Walla Washington 99362

CONSOLIDATED CASE #: 26327-1-II and 26342-4-II
State of Washington, Respondent V. Jessie Osalde and Angel Anthony Fernandez, Apps.

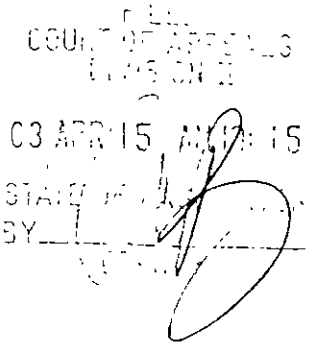
Counsel:

An opinion was filed by the court today in the above case. A copy of the opinion is enclosed.

Very truly yours,

David C. Ponzoha
Court Clerk

DCP:cjb
Enclosure
cc: Judge Stephen Warning
Indeterminate Sentence Review Board



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JESSE OSALDE, ANGEL ANTHONY FERNANDEZ, Appellants.	No. 26327-1-II (consolidated with 26342-4-II) UNPUBLISHED OPINION

QUINN-BRINTNALL, A.C.J. — A jury found Angel Fernandez guilty of first degree aggravated murder and Jesse Osalde guilty of first degree felony murder for the killing of Ed Ross. On appeal, Fernandez contends that his speedy trial right was violated and that the trial court erred in allowing the testimony of Paul Sarkis, a former co-defendant turned state's witness. Osalde contends that (1) the trial court should have severed his trial from Fernandez's, (2) the trial court erred in allowing Sarkis's testimony, (3) the State's charging scheme was improper, (4) the trial court gave an improper jury instruction, and (5) he received ineffective assistance of counsel. Finding no error, we affirm

FACTS

Ross, Sarkis, and Fernandez were in the drug business. Ross was the dealer, Sarkis the delivery man, and Fernandez the debt collector. Sarkis introduced Osalde, a high school friend,

to Fernandez. Osalde did not regularly participate in the drug business; but Osalde, along with the others, regularly used the drugs.

In October 1999, Fernandez and Ross had an argument over an outstanding debt. This argument spawned the following sequence of events. On the morning of October 10, 1999, Ross and his girlfriend, Cat Fischer, planned to pick up some methamphetamine at a house on Whidbey Island. While waiting in line for a ferry, Ross had a heated cell phone conversation with Fernandez. About two minutes after the phone call, Fernandez and Osalde, displaying a knife and gun respectively, entered Ross's vehicle.

Fernandez said "[g]ive me your gun, your wallet, your drugs, your money." 1 Report of Proceedings (RP) (July 20, 2000) at 84. At Fernandez's instruction, Ross drove the vehicle out of the ferry line and proceeded through Mukilteo to I-5 south. Sarkis and Talee Coulter followed in Sarkis's Ford Explorer. Eventually, the group split up so that Ross, Fernandez, and Sarkis rode in Sarkis's vehicle, while Coulter and Osalde drove Fischer home.

That evening, Fernandez, Osalde, and Sarkis held Ross in the basement of Coulter's home. The following day, Fernandez, Osalde, and Sarkis transported Ross to some property that Fernandez claimed his family owned in Rose Valley. There, Ross was murdered.

According to Sarkis, the sequence of events at the murder was as follows: Sarkis observed Ross running from behind a large bush while blood ran from his neck. Ross ran to the front of Sarkis's vehicle, with Fernandez about 20 feet behind, and then collapsed. Fernandez then picked Ross up, hit him in the face, "stomped" on his head, and made two stabbing motions at Ross with a knife.

After Ross fell, Fernandez tried to drag him into the bushes. Finding Ross too heavy, Fernandez told Sarkis and Osalde to help. The three carried Ross, who was moaning and

flailing, "into the woods." II RP (July 24, 2000) at 273. When Sarkis returned to his vehicle, he cleaned blood off of the front of the car with "[b]eer and the shirt that Ed was wearing." II RP (July 24, 2000) at 276.

When the three men left the property, Sarkis heard Fernandez state that "he loves it when he takes somebody's soul[.]" II RP (July 24, 2000) at 278. Prior to returning to Seattle that evening, the men disposed of Ross's clothes in garbage dumpsters.

Fischer called the FBI on Tuesday, October 12, 1999. The next day, a Mukilteo police officer arrested Fernandez. Osalde was arrested in another state. On November 18, 1999, the Cowlitz County Prosecutor charged Osalde and Fernandez with murdering Ross and kidnapping Fischer. Count I of the information alleged first degree murder by "Aggravated Murder . . . and/or Felony Murder." Count II charged "Kidnapping In The First Degree."

On November 18, 1999, Osalde and then co-defendant Sarkis moved for continuance of the trial date that was originally set for December 13, 1999. The trial court granted the motion over Fernandez's objection that his speedy trial rights would be violated.

Trial was to a jury. The jury found Osalde not guilty of first degree premeditated murder, guilty of second degree murder, and guilty of first degree felony murder. The trial court sentenced Osalde to 261 months for first degree felony murder. The jury found Fernandez guilty of first degree aggravated murder and first degree felony murder. The trial court sentenced Fernandez to life in prison without the possibility of parole.[1]

We address each issue raised in turn.

[1] The kidnapping charges are not at issue on appeal.

ANALYSIS

I. SEVERANCE

Osalde contends that the disparity in strength between the case against him and that against Fernandez, and their mutually antagonistic defenses, required the trial court to separately try the co-defendants. We disagree.

The law does not favor separate trials *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). We review the denial of a motion to sever for manifest abuse of discretion. *State v Bythrow*, 114 Wn 2d 713, 717, 790 P.2d 154 (1990) In order to support a claim that the trial court abused its discretion, the defendant must demonstrate specific prejudice. *State v Kinsey*, 20 Wn. App. 299, 304, 579 P.2d 1347, *review denied*, 91 Wn 2d 1002 (1978) "Specific prejudice may be demonstrated by showing 'antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive.'" *State v Medina*, 112 Wn. App 40, 52-53, 48 P.3d 1005, (citing *State v Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995), *review denied*, 128 Wn.2d 1025 (1996)), *review denied*, 147 Wn.2d 1025 (2002)

Mutually antagonistic defenses may on occasion be sufficient to support a motion for severance, but this is a factual question that the defendant must prove. "It does not represent sufficient grounds as a matter of law." *State v. Grisby*, 97 Wn.2d 493, 508, 647 P 2d 6 (1982), *cert denied*, 459 U.S. 1211 (1983) Under CrR 4.4(c)(2)(i) the trial court should grant severance if "it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant[.]"

According to Osalde, the disparity in strength between the cases against him and Fernandez prevented him from receiving a fair trial "because of the likelihood of being found guilty due to his association with [Fernandez]." Br. of Appellant (Osalde) at 44. But Osalde

cites no authority for the proposition that relative equality in the strength of co-defendants' cases is necessary for a fair determination of guilt or innocence. Nor does he describe how the disparity in the strength of the cases may have impacted the jury's determination of his guilt or innocence. Also, Osalde fails to point to "specific *prejudice*" caused by the joint trial. We perceive no basis on which to find that the trial court abused its discretion by denying severance.

As to his mutually antagonistic defenses claim, Osalde does not indicate what defenses were mutually antagonistic. Instead, he merely cites *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991), an antagonistic defenses case, in passing. We will not review an issue raised in passing or unsupported by authority or persuasive argument. *See State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

Fernandez also contends that the trial court should have severed his trial from Osalde's. He asserts that severance was required to preserve his right to a timely trial under CrR 4.4(c)(2). But Fernandez did not ask the trial court to sever his trial from Osalde's. We will not review an alleged error not raised at trial unless it is a "manifest error affecting a constitutional right." RAP 2.5(a); *see also State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). As Fernandez does not contend that his *constitutional* speedy trial rights were violated, we will not review the claim.

II. SPEEDY TRIAL

Fernandez did object, however, to the trial court granting Osalde and Sarkis's motion to continue. He argued that a continuance would violate his right to a timely trial under CrR 3.3(c)(1).

On appeal, Fernandez contends that the continuance was not proper under the case law and that the trial court therefore erred by not severing his case from the co-defendants' cases.

The State responds that Fernandez's speedy trial right was not violated because the continuance was proper under CrR 3.3(h)(2), which allows continuances beyond speedy trial "when required in the administration of justice and [where] the defendant will not be substantially prejudiced in the presentation of the defense." Br. of Respondent at 19.

CrR 3.3(c)(1) provides that a defendant who is not released from jail must be brought to trial no later than 60 days after the date of arraignment. But "[t]rial within 60 days is not a constitutional mandate." *Hoffman*, 116 Wn.2d at 77. The decision to grant a continuance under CrR 3.3 rests in the trial court's sound discretion and we will not disturb it absent a manifest abuse of that discretion. *State v. Kokot*, 42 Wn. App. 733, 735, 713 P.2d 1121, *review denied*, 105 Wn.2d 1023 (1986). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." *State v. Barnes*, 58 Wn. App. 465, 471, 794 P.2d 52, *review granted*, 115 Wn.2d 1022 (1990). The defendant must also show that he was prejudiced by the improper continuance. *State v. Melton*, 63 Wn. App. 63, 66, 817 P.2d 413 (1991), *review denied*, 118 Wn.2d 1016 (1992).

At the pre-trial hearing on the continuance motion, counsel for then co-defendant Sarkis cited a need to review hundreds of photographs, consult an expert, and address many other matters as grounds for a continuance. In referring to the 60-day timely trial limit, Sarkis's counsel stated "[i]t's laughable to think we could be ready to go to trial in that period of time." RP (Nov. 18, 1999) at 10. Osalde's counsel also indicated the need for time to adequately prepare, stating that he had recently received written discovery materials five inches thick and that he only had "40 days to prepare for this case." RP (Nov. 18, 1999) at 10. Fernandez made no responsive showing that granting the continuance would prejudice him in presenting his

defense. Thus, the co-defendants' need to prepare for trial was an appropriate grounds to continue the trial. *Dent*, 123 Wn.2d at 484.

Nor do we agree with Fernandez's assertion that the trial court improperly relied on *Dent* in granting the continuance. Although the continuance in *Dent* was granted to allow *new* counsel adequate time to prepare, both *Dent* and this case involved serious criminal charges requiring extensive trial preparation. Therefore, consistent with *Dent*, the trial court did not abuse its discretion by allowing Osalde and Sarkis's counsels adequate time to prepare for trial.

III SARKIS'S TESTIMONY

Before trial, Sarkis entered into a plea bargain with the State. Sarkis pleaded guilty to first degree felony murder and second degree kidnapping and agreed to testify against Osalde and Fernandez. Both Osalde and Fernandez challenge the trial court's decision allowing Sarkis's testimony. They argue that Sarkis's testimony was unreliable and denied them a fair trial because the plea agreement conditioned the State's performance on Sarkis testifying "as desired by the State." Br. of Appellant (Osalde) at 46.

Osalde and Fernandez cite two cases from other jurisdictions in support of their argument. In the first, *People v. Medina*, 41 Cal. App. 3d 438, 453, 116 Cal. Rptr. 133 (1974), an immunity agreement required the witness to testify *without a material or substantial change from a prior recorded statement*. The *Medina* court acknowledged that "immunity could be conditioned on 'the accomplices testifying fully and fairly as to their knowledge . . . ,'" but held that the immunity agreement at issue went beyond that standard by requiring testimony based not on a truthful account of facts, but on a prior statement. 41 Cal. App. 3d at 456 (quoting *People v. Lyons*, 50 Cal. 2d 245, 324 P.2d 556 (1958)). This, the court held, caused the testimony to be

impermissibly tainted. *Medina*, 41 Cal. App 3d at 456. In contrast, Sarkis's plea agreement did not dictate the substance of his testimony other than by requiring "truthful" testimony.

The second case cited by appellants, *State v Franklin*, 94 Nev 220, 577 P.2d 860 (1978), *overruled by Sheriff, Humboldt County v Acuna*, 107 Nev. 664, 819 P.2d 197 (1991), was cited with approval in *State v Brown*, 29 Wn. App. 770, 630 P.2d 1378, *review denied*, 96 Wn.2d 1013 (1981). *Franklin* also focused on the agreement's requirement of specific testimony. The Nevada court stated:

> By bargaining for *specific testimony* to implicate a defendant, and withholding the benefits of the bargain until after the witness has performed, the prosecution becomes committed to a theory quite possibly inconsistent with the truth and the search for truth. We deem this contrary to public policy, to due process, and to any sense of justice.

Franklin, 94 Nev. at 225-26 (emphasis added).

Although Sarkis's plea agreement did indicate that sentencing was to occur after trial, there was no bargain for "specific testimony." Sarkis's agreement required only that he "testif[y] in all co-def's trials truthfully." Clerk's Papers (CP) (Osalde) at 162. The agreement does not require "specific testimony" beyond true testimony, nor do appellants assert that it does. Plea agreements in which a lesser charge is consideration for "truthful" testimony are proper. *See State v Clark*, 48 Wn. App. 850, 859, 743 P 2d 822, *review denied*, 109 Wn.2d 1015 (1987), *Brown*, 29 Wn App. at 773. Sarkis's plea agreement required nothing more than "truthful" testimony; thus, it did not deprive Osalde or Fernandez of a fair trial

IV. Challenges to Instruction No. 35

Osalde asserts that jury Instruction No. 35 misstated the law by allowing the jury to find him guilty of *both* first degree felony murder and first degree premeditated murder when only

one death occurred. He claims that the instruction deprived him of his "constitutional right to only be convicted of one charge of murder." Br. of Appellant (Osalde) at 38.

Before raising an alleged instructional error on appeal, the party challenging the instruction must show that he objected to the instruction at trial. *State v. Reid*, 74 Wn. App. 281, 292, 872 P.2d 1135 (1994). Osalde's counsel did not object to Instruction No. 35 during trial or propose an alternative instruction. When, as here, a defendant does not object to an instruction at trial, we will review the alleged error only when giving the instruction invaded a fundamental right of the accused. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Osalde asserts that giving Instruction No. 35 invaded his substantive due process "right to only be convicted of one charge of murder." Br. of Appellant (Osalde) at 38.

While it may be true that substantive due process rights are implicated where a defendant is convicted on two counts of murder when only one killing occurred, those facts are not present here. The State charged Osalde with only *one* count of murder committed by alternative means, and Osalde was convicted and sentenced on only *one* count. This was proper. *See State v. Johnson*, 113 Wn. App. 482, 54 P.3d 155 (2002).

"Where, by statute, several acts can constitute a single crime, it is permissible and proper to charge one crime in one count and the commission of the crime by alternative acts." *State v. Scott*, 64 Wn.2d 992, 993, 395 P.2d 377 (1964). RCW 9A.32.030 is precisely such a statute; it sets forth three alternative means of committing first degree murder: (a) with premeditated intent, (b) with extreme indifference to human life, or (c) by felony murder. "Premeditated murder and felony murder are not separate crimes. They are alternative ways of committing the single crime of first degree murder." *State v. Bowerman*, 115 Wn.2d 794, 800, 802 P.2d 116

Two crimes

(1990).[2] As Osalde was charged and convicted of only one count of murder, his due process rights were respected.

Osalde also attacks Instruction No. 35 from a different angle. He claims that guilty verdicts on both alternatives violated his right against double jeopardy. Osalde frames his argument with the question, "whether the double jeopardy clause would also protect against two convictions for the same offense?" Reply Br. of Appellant (Osalde) at 4.

The Fifth Amendment to the U.S. Constitution and Washington Constitution article I, section 9 protect a defendant from multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). In this case, the jury found Osalde guilty of first degree felony murder and second degree murder, but not first degree premeditated murder. The trial court sentenced Osalde on the first degree murder verdict only; Osalde received 261 months, which was within the standard range for first degree murder. The trial court did not sentence Osalde for second degree murder. Because Osalde was only sentenced for first degree felony

---

[2] Osalde also contends that, although the State may lawfully charge alternative means, the jury cannot be allowed to find the defendant guilty of both alternatives. Instruction No. 35 stated:

> All twelve of you must agree as to a verdict of guilty or not guilty on the charge of either
>
> (a) Premeditated Murder in the First Degree;
>
> or
>
> (b) Felony Murder in the First Degree,
>
> *or both*.

CP (Osalde) at 233 (emphasis added).

Osalde's only support for his theory is a comment from the dissent in *State v. Irizarry*, 111 Wn.2d 591, 763 P.2d 432 (1988). The dissent stated that "the defendant may be found not guilty under both counts, and may be convicted under either one count or the other but not both." *Irizarry*, 111 Wn.2d at 608 (Callow, J., concurring in part, dissenting in part). Osalde's reliance on *Irizarry* is misplaced. First, the portion cited is not only taken from the dissenting opinion, but it is also dictum in that opinion. Second, the cited portion dealt with charging separate offenses (aggravated murder and felony murder one), not alternative means of committing the same offense. *Irizarry*, 111 Wn.2d at 608. Third, the issue the majority decided was whether first degree felony murder is a lesser included offense of aggravated murder, a question not relevant in this case. *Irizarry*, 111 Wn.2d at 592. The *Irizarry* dissent does not support Osalde's claim.

murder, he was not subjected to multiple punishments for the same offense, and his right to be free from double jeopardy was not violated. *See Johnson*, 113 Wn. App. at 487-88.

Osalde also contends that the trial court "took that fact-finding role away from the jury by choosing to sentence appellant for murder 1° rather than murder 2°" (Br. of Appellant at 39-40), thereby denying his right to a jury trial. In a criminal proceeding, the constitution guarantees the defendant a jury trial only on the *issues of fact* that determine his guilt or innocence. U.S. CONST. amend. VI; CONST. art. 1, § 22 (amend. 10). *State v. Price*, 59 Wn.2d 788, 791, 370 P.2d 979 (1962). Osalde does not contend that the trial court usurped the jury's role as fact finder by deciding an issue of fact or taking one from the jury. Rather, he argues that the right to a jury trial requires that the jury elect which alternative the sentence will be based on. The right does not encompass so much. As stated in *Price*, a defendant has a right to jury trial "only on the issues of fact which determine his guilt or innocence." 59 Wn.2d at 791. Because the jury found the facts necessary to determine Osalde's guilt or innocence, Osalde's right to a jury trial was respected.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Osalde next asserts that he received ineffective assistance of counsel. To succeed on this claim, Osalde must establish both that (1) his counsel's performance fell below an objective level of reasonableness; and (2) his counsel's errors prejudiced the result of the proceeding rendering it unreliable. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

A counsel's performance is not deficient if it concerns trial strategy or tactics. *State v Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). "There is . . . a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment." *State v Glenn*, 86 Wn. App 40, 45, 935 P.2d 679 (1997), *review denied*, 134 Wn.2d 1003 (1998)

Osalde claims that his counsel's performance fell below an objective standard of reasonableness on a variety of grounds First, Osalde contends that his counsel's failure to recognize or object to the charging of alternative means was unreasonable As discussed above, the State properly charged one count of first degree murder and alleged the alternative means of felony murder and premeditated murder. *See Bowerman*, 115 Wn.2d at 800. Additionally, Washington courts have settled that alternative means can be joined in the information by the conjunctive "and" as opposed to the disjunctive "or." *See State v Walker*, 14 Wn. App. 348, 354, 541 P.2d 1237 (1975), *review denied*, 86 Wn 2d 1008 (1976). As the information properly charged Osalde with first degree murder committed by premeditated murder "and/or" felony murder, Osalde's counsel's failure to object to that charging scheme was not unreasonable.

Osalde's second ground is his counsel's failure to object to Instruction No. 35. Specifically, Osalde asserts that the instruction was improper because it allowed the jury to render a guilty verdict on both alternative means As discussed above, Instruction No. 35 was proper Therefore, Osalde's counsel's failure to object to the instruction was not unreasonable.

Osalde's third ground is his counsel's failure to move for a new trial or for arrest of judgment. For failure to move for arrest of judgment to be unreasonable performance, Osalde's counsel must have had grounds to make the motion. CrR 7.4 states the grounds on which counsel may move: (1) lack of jurisdiction, (2) the information does not charge a crime, or (3)

insufficiency of proof. Osalde contends that the "two inconsistent verdicts" were grounds for arrest of judgment. Br. of Appellant (Osalde) at 42. But the jury's guilty verdicts on first degree felony murder during a kidnapping and second degree intentional, but not premeditated, murder (a lesser included of premeditated murder) are not inconsistent. One can commit an intentional, unpremeditated murder in the course of a kidnapping. Therefore, Osalde's counsel's failure to move for arrest of judgment was not unreasonable.

A defendant may move for a new trial on any of several grounds enumerated in CrR 7.5 (formerly CrR 7.6), including "[t]hat the verdict or decision is contrary to law[.]" Although a jury's guilty verdict on alternative means would be contrary to law if the means are "repugnant," premeditated murder and first degree felony murder are not repugnant means of committing first degree murder. Therefore, the jury's guilty verdicts on first degree felony murder and second degree murder were not repugnant or inconsistent. As such, Osalde's counsel's failure to move for a new trial on grounds of inconsistent verdicts was not unreasonable.

VI OSALDE'S PRO SE BRIEF ARGUMENTS

Osalde raises several additional issues in his pro se brief. First, Osalde cites *State v Stattonak*, 73 Wn.2d 647, 440 P 2d 457 (1968), for its rule that

> (w)here the evidence would support a conviction for either two degrees of the same crime, an accused is entitled to an instruction telling the jury that if [he] is found guilty, but there is a reasonable doubt as to which degree, then he is to be convicted of the lesser degree of the crime.

Pro se Br. of Appellant (Osalde) at Introduction (citation omitted). Here, the trial court instructed the jury that "(w)hen a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he shall be convicted

only of the lowest degree." CP (Osalde) at 219. This instruction clearly satisfies the *Stationak* requirement.

Osalde's second issue questions the ordering of Instruction No 5,[3] which explained accomplice liability. Osalde argues that the jurors could not have understood what an "accomplice" is because the instruction states that an accomplice is guilty of his principal's crime before it defines the term "accomplice." Although the instruction is ordered in this manner, it clearly defines the elements of accomplice liability and is not facially confusing in any manner. Additionally, the instruction directly tracks RCW 9A.08.020, Washington's accomplice liability statute. When viewed in the entirety, the instruction was proper.

Osalde also contends that the word "encourages," as used in Instruction No. 5 and RCW 9A.08 020, criminalizes any action that lends "any stimulus to creative thought or action," and is thus too broad; and further, that "a person expressing even innocuous ideas could, by inference alone, be deemed to have inspired a crime." Pro se Br of Appellant (Osalde) at 5. Osalde strains the word "encourage." Accomplice liability requires that the person act "[w]ith knowledge that [the act] will promote or facilitate the commission of the crime[.]" RCW

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[3] Instruction No. 5 states:

> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP (Osalde) at 203.

9A.08.020(3)(a). An idea that one knows will promote or facilitate a crime is not, by definition, an innocuous one. Instruction No. 5 accurately stated accomplice liability law, and it was neither confusing nor overbroad.

Osalde's last pro se argument alleges prosecutorial misconduct. But because Osalde does not state or allege any specific act of misconduct, we have no basis on which to address the issue *See State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).

There being no error, we affirm the judgments and sentences entered on the jury's verdicts finding Fernandez guilty of aggravated first degree murder and Osalde guilty of first degree felony murder occurring during a kidnapping.

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

QUINN-BRINTNALL, A.C.J

We concur:

MORGAN, J.

HOUGHTON, J.

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, ANGEL ANTHONY FERNANDEZ, declare that, on this 11TH day of APRIL, 2016 I deposited the forgoing documents: PRO Se SUPPLEMENTAL BRIEF, INCLUDING ATTACHED EXHIBITS IN SUPPORT OF SAID BRIEF UNDER RAP 10.10 A COPY WAS SENT TO ALL PARTIES INVOLVED.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at CLALLAM BAY, WA. on 4/11/16
(City & State) (Date)

Angel Anthony Fernandez
Signature

ANGEL ANTHONY FERNANDEZ
Type / Print Name