

63327-9

63327-9

NO. 63327-9-1

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

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STATE OF WASHINGTON,

Respondent,

v.

SAROEUN N. PHAI,

Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Was sufficient evidence presented to the jury supporting the aggravating circumstance that the murders were committed in the course of, or in furtherance of a robbery where testimony of multiple witnesses and defendant's admissions evidenced that the murders were committed in the course of defendant's attempt to rob the victims of money and illegal drugs?

2. Was the trial court required to provide a unanimity instruction as to each 'means within an alternative means,' or require sufficient evidence to be presented as to each 'means within an alternative means,' in light of the fact no unanimity protections apply to means within alternative means?

3. Was the trial court required to separately define 'common scheme or plan' where the Supreme Court has repeatedly and consistently held this is a commonly understood phrase requiring no separate definition?

4. Were defendant's double jeopardy protections violated by the judgment and sentence or order of commitment where neither violated the prohibition on multiple punishment?

## **II. STATEMENT OF THE CASE**

In July of 2007, Linda Nguyen and her fiancé, Kevin Meas, were living in a rented house on Dexter Avenue in Everett, Washington. Though Linda and Kevin lived there, they were not the actual renters. Ngoc Nguyen rented the house from its owner, Vo Van Tran. Linda and Kevin were living there as part of their employment arrangement with Ngoc, working for her by tending to marijuana she had growing in the basement. 1RP 216-27; 387-89.

Ngoc had a separate marijuana grow operation set up in another Everett house on Beech Street. She had two people living and working there: Linda's brother, Hai Nguyen, and Hai's then girlfriend, Natalie Nguyen. The occupants of the houses, being family, visited each other frequently. 1RP 216-27.<sup>1</sup>

On July 2, 2007, at approximately 8:45 pm, Vo Van Tran and his wife Thuy Pham arrived at the Dexter house. The two hoped to confront Ngoc, thinking she actually resided there, and collect back rent. 1RP 390-93. As the pair arrived, they saw a light colored Honda Accord parked near the front of the house. Walking up, Tran heard noises sounding like a nail gun coming from inside.

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<sup>1</sup> For the sake of clarity, the State hereinafter refers to several of the individuals involved by their first name only, given several share the same last name or they are otherwise very similar.

Standing at the door, he noticed the body of woman, later identified as Linda, lying motionless on the floor inside. 1RP 394-99.

Two young Asian males brandishing handguns suddenly appeared inside the house and ran toward Tran. One stopped close, pointed his weapon at Tran's head, and commanded, "Go, go." The husband and wife retreated. 1RP 401-06.

Soon after, Tran called Ngoc explaining something was wrong at the house. 1RP 407. After repeated telephonic prompting from Ngoc, Hai drove to the Dexter house and examined the residence. The door was ajar. His sister, Linda, was on the floor, face down, bleeding and unconscious. 1RP 230-38.

Detective Phillip Erickson of the Everett Police Department made contact with Hai and Natalie at the Everett Hospital where Linda had been transported. She was dead. 1RP 131-35. Hai explained finding her in the Dexter Ave house. Erickson went there. 1RP 134-35; 240-41.

Though stymied at first by a gas leak, officers were eventually able to make their way inside. 1RP 137-39. They discovered Kevin Meas lying at the bottom of the basement stairwell, dead. A search of the house also produced several

bullets and bullet fragments, shell casings, and one unfired 9mm round. 1RP 311-15; 320-40; 430-49.

Doctor Norman Thiersch, chief medical examiner for Snohomish County, autopsied Kevin and Linda's bodies. Linda had been shot in the head twice. Kevin had been shot three times: once in the face; once in the back of the head; and once in the shoulder. Bullets and bullet fragments were recovered from each of their bodies. 1RP 169-215.

In the days following the murders, Det. Erickson spoke with the homeowner, Vo Van Tran. Tran told the detective about the Honda Accord he had seen at the house. 1RP 359-60.

At 9:57 pm on the day of the murders, in a then separate investigation, Everett Police had responded to an arson call in a small cul-de-sac approximately 1.6 miles from the Dexter house. There they found a light colored '91 Honda Accord had been completely burned. 1RP 159-62. Residents of the neighborhood testified that they called the police after hearing the Accord ignite and seeing a dark colored compact or subcompact car speed away from the fire. 1RP 265-76. Det. Erickson showed pictures of the burnt Accord to Tran and he identified it from discoloration to a rear fender as the car he had seen at the Dexter house. 1RP 359-66.

Records revealed that the Accord had been sold months before the murders to a Tacoma resident by the name of Phal Chum. 1RP 360-62.

Chum testified that he lives in Tacoma and is a long-time friend of the defendant and shared an apartment with him during the pertinent time period. He is also close friends with the co-defendant Areewa Saray. 1RP 525-29.

On a date in June, 2007, the three men went to the Tacoma waterfront accompanied by their girlfriends. While there, defendant asked Chum if he wanted to join Saray and him and "get in on a lick." 1RP 529. By "lick," Chum understood the defendant to mean he and Saray planned to commit a robbery. 1RP 529. This was confirmed when defendant explained that he wanted Chum to act as a getaway driver while he and Saray robbed a house in Everett. 1RP 532. Defendant expected to obtain money and marijuana from inside the house. Chum agreed to join them. 1RP 533-34.

Later that evening at their apartment, the defendant discussed the robbery in more detail. He explained "Yeah, we're gonna go in there with guns. We're gonna knock on the door, and as soon as we open the door, then we're going to start shooting[.]" 1RP 535-36. Chum tried to talk defendant into merely tying up the

occupants, but the defendant refused. They were going to shoot them. 1RP 537. His plan was to commit the crime sometime before the Fourth of July, so that the sound of gunfire might be mistaken for fireworks. 1RP 537-39.

Defendant asked Chum to help him get a gun. Chum was able to obtain a 9mm handgun from relatives. Initially, the weapon did not work. Parts from another gun were obtained and it was reassembled. He gave the gun to defendant. 1RP 539-41.

On July 2, the day of the murders, defendant woke Chum, telling him it was time for the robbery. Chum refused to go, troubled with the notion of shooting the occupants. Defendant left, taking Chum's '91 Honda Accord – the car that would be burned after the murders. 1RP 542-44.

Chum saw the defendant the next day. Defendant detailed the robbery to him, explaining Saray shot a female when she answered the door, then he shot her as well. They went downstairs and both shot the male, defendant firing first. He told Chum that someone later knocked on the door and they both ran, "spooked." Afterward, they "torched" Chum's Accord. 1RP 545-548.

Testimony was also presented from Sopheap Phal, another friend of both defendant and Saray. 1RP 565-70. Sometime during

the afternoon of July 2, the day of the murders, defendant and Saray arrived at Sopheap's mother's house. Defendant told Sopheap they were later going to "do a lick" which he understood as slang for a robbery. 1RP 575-77. Defendant spoke of his hope they would obtain money and marijuana during the course of the robbery. 1RP 577.

The pair left sometime in the afternoon. They returned after midnight, looking scared. Defendant gave Sopheap a bag of clothes and asked him to dispose of it. Defendant and Saray discussed alibis. Defendant stated he was going to claim that he had been at a casino earlier; Saray was to claim he had been at home. 1RP 578-87.

Saray asked Sopheap to take him to the waterfront. Sopheap complied and drove Saray to a local pier. There, he saw Saray drop a handgun into the water. 1RP 585-88. A .38 caliber Rossi revolver, a 9mm Glock semi-automatic, and a partially loaded Glock magazine would later be recovered near the pier. 1RP 637-61.

The Washington State Patrol Crime Lab performed an analysis comparing the recovered weapons with the recovered bullets. The Rossi revolver had fired the .38 caliber bullets

recovered from the victim's bodies. In examining the 9mm Glock, while it was determined that the recovered 9mm rounds had been fired from that brand of handgun, salt water corrosion precluded any conclusive *specific* handgun-to-bullet identification. Analysis did reveal, however, that the recovered Glock had been partially reconstructed – parts from different Glocks assembled into one handgun. 1RP 674-90.

After speaking with Chum, Detectives Erickson and Zeka (also with the Everett Police Department) contacted defendant who agreed to an interview. Both detectives testified as to defendant's admissions during that voluntary interview. Defendant stated that he had been broke and that his "homie" had told him of a house in Everett where there was supposedly between \$20,000 and \$40,000. He and Saray had traveled to the house. A female answered the door and Saray shot her in the head. Defendant shot her afterward. They went downstairs where they both shot a male. Afterward a family appeared at the door upstairs. They told them to leave then left themselves. Defendant had used a 9mm Glock and Saray had a .380 revolver. Later, the pair burned their getaway car with gasoline. 1RP 465-73; 517-22.

Defendant was charged with two counts of Aggravated First Degree Murder with a Firearm and two counts of First Degree Murder with a Firearm. Each count alleged that that it was committed while defendant was armed with a deadly weapon, a firearm. Further, on each Aggravated First Degree Murder charge, the State had alleged two aggravating circumstances: (1) each murder was a part of a 'common plan or scheme, or the result of a single act' resulting in more than one victim; and (2) that the murder was committed 'in the course of, in furtherance of, or in immediate flight from Robbery in the First or Second degree.' 1CP 164-65.

The jury found the defendant guilty of every count. It further found the murders were committed while defendant was armed with a deadly weapon and that all aggravating circumstances had been proven as alleged. 1CP 40-51.

At sentencing, the State requested the First Degree Murder with a Firearm charges be dismissed:

**Prosecution:** By operation of law, Counts II and IV, the two convictions for first degree murder with a firearm, should be dismissed or folded into the two remaining counts.

1RP 771.

The court dismissed Counts II and IV, entering judgment and sentence on the remaining counts. 1CP 5-17.

### **III. ARGUMENT**

#### **A. DEFENDANT'S CLAIMS OF ERROR REGARDING THE AGGRAVATING CIRCUMSTANCES ELEVATING THE CRIMES TO AGGRAVATED MURDER IN THE FIRST DEGREE ARE WITHOUT MERIT.**

The jury found, as charged, that two of defendant's murder in the first degree counts were committed under the following alternative aggravating circumstances:

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from [robbery in the second degree].

RCW 10.95.020(10), (11); 1CP 5, 164-65.

The special verdict forms reveals each aggravating circumstance was reviewed by the jury individually, and each was found unanimously. 1CP 43, 49.

The murder in the first degree verdicts were elevated to aggravated first degree murder because of the jury's finding as to *either one* of the aggravating circumstances:

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now

or hereafter amended, *and one* or more of the following aggravating circumstances exist:

RCW 10.95.020 (emphasis added).

Defendant here received a life sentence on those two aggravated first degree murder counts. 1CP 7. A finding as to either aggravating circumstance alone mandated life imprisonment:

Persons convicted of premeditated first degree murder, where one or more of the statutory aggravating circumstances are found, and the death penalty is not sought or obtained, are sentenced to mandatory life imprisonment.

State v. Kincaid, 103 Wn.2d 304, 310, 692 P.2d 823 (1985); RCW 9A.32.040.

Defendant alleges error surrounding each aggravating circumstance. As seen above, defendant will be required to show error as to *both* circumstances or the error is harmless – defendant would have received a mandatory life sentence regardless. Defendant cannot make a showing of error as to *either* circumstance.

**1. Sufficient Evidence Was Presented Supporting The Aggravating Circumstance That The Murders Were Committed In The Course Of, Or In Furtherance Of, An Attempt To Commit Robbery In The Second Degree.**

As noted above, the State alleged defendant committed each murder under the aggravating circumstance detailed in RCW 10.95.020(11)(a), which states:

(11) The murder was *committed in the course of, in furtherance of*, or in immediate flight from one of the following crimes:

(a) Robbery in the ... second degree.

(Emphasis added); 1CP 164-65.

Robbery in the second degree is committed where one:

unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such 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. ...

RCW 9A.56.190; RCW 9A 56.210.

Defense challenge the sufficiency of the evidence submitted as to this aggravating factor. Here, the standard is:

In challenges to the sufficiency of the evidence, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the factor beyond a reasonable

doubt. Circumstantial and direct evidence are equally reliable.

State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007).

In asserting his sufficiency claim, defense raises a legal argument claiming that this particular aggravating circumstance requires the robbery to have been *completed*. Br. of Appellant, pp. 11-12.

Defendant is incorrect. His legal claim ignores the “in the course of, in furtherance of” language of the statute. The Supreme Court rejected an identical defense claim for this reason in State v. Brett, 126 Wn.2d 136, 162, 892 P.2d 29 (1995):

The State asserts a premeditated murder committed in the course of or in furtherance of a robbery, even when the robbery is not completed, is sufficient to find the existence of an aggravating circumstances. We agree.

\* \* \* \*

...Brett’s interpretation is not reasonable because it would render superfluous the ‘in the course of, in furtherance of’ language in the statute.

\* \* \* \*

RCW 10.95.020[(11)] does not require a listed felony be completed in order to constitute an aggravating circumstance and there was sufficient evidence the murder was committed in the course of robbery in the first degree for the jury to consider that aggravator.

Id. at 162-66.

Here, witness Chum testified as to defendant's statements that the murders were a planned part of a robbery and that defendant could not be talked out of the killings as a part of such. 1RP 529-41. Witness Sopheap Phal supported the circumstance as well, noting that defendant explained the pair were on their way to commit a robbery immediately prior to the killings, a robbery where they hoped to obtain money and marijuana. 1RP 575-78. Defendant's interview confirmed the same – that the murders had been committed during a robbery, a robbery committed because he was broke and had heard the house contained large amounts of currency. 1RP 465-73; 517-22.

Reviewing the above in the light most favorable to the State, more than sufficient evidence was presented such that the jury could have reasonably found each murder was committed in the course of, or in furtherance of an attempt to obtain property from a person or presence of another, against their will, by the use or threatened use of force.

## **2. Unanimity Protections Do Not Apply To the Means Within The Alternative Means Of The 'Common Plan Or Scheme Or The Result Of A Single Act' Aggravating Circumstance.**

In Washington, a defendant has a due process right to unanimity that extends to the elements of the crime. “[T]he jury must unanimously agree that every element of the crime is established beyond a reasonable doubt for convictions to be valid.” State v. Franco, 96 Wn.2d 816, 832, 639 P.2d 1320 (1982).

Where, however, a single offense can be committed, per the statute, by a number of alternative methods or means described by alternative elements, different unanimity protections apply. Explicit unanimity as to a *specific* alternative element/means is not required from the jury. State v. Linehan, 147 Wn.2d 638, 646, 56 P.3d 542 (2002) (“There is no requirement that the jurors agree on the facts supporting the alternative means.”)

Rather, sufficient unanimity will be inferred if either (1) the jury was instructed as to only those charged alternative elements for which ‘substantial evidence’ was presented at trial, or (2) if instructions were issued on alternative means for which substantial evidence was not presented, sufficient unanimity is inferred if evidence and argument was presented as to *only one* of the alternative methods:

In sum, where there are three means of committing a crime, and the jury is instructed on all three, either (1) substantial evidence must support each alternative means on which evidence was presented, or (2) evidence and argument must have only been presented on one means.

State v. Lobe, 140 Wn. App. 897, 905, 167 P.3d 627 (2007). See also State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

The “alternative means” lesser unanimity protections above do not exist to protect a direct constitutional right to unanimity. Rather, they exist to protect a defendant’s due process right in avoiding juror confusion:

[T]he two underlying purposes of the alternative means doctrine, ... are to prevent jury confusion about what criminal conduct has to be proved beyond a reasonable doubt and to prevent the State from charging every available means authorized under a criminal statute, lumping them together, and then leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict.

State v. Smith, 159 Wn.2d 778, 789, 154 P.3d 873 (2007); see also Ortega-Martinez.

A separate question arises, however, as to what unanimity protections, if any, apply to potential alternative elements contained *within* a single statutory alternative mean. These situations are

referred to as “means within means” scenarios. As seen below, *no* protections apply in such “means within means” situations.

[W]here a disputed instruction involves an alternative that may be characterized as a ‘means within a means,’ the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply.

\* \* \* \*

[T]hese definitions merely define an element of the crime charged and thereby give rise to a ‘means within a means’ scenario. As stated above, a ‘means within a means’ scenario does not trigger jury unanimity protections.

\* \* \* \*

[T]he common law definition of “assault,” when presented in its entirety as a separate jury instruction, gives rise to a ‘means within means’ situation. ... [T]herefore, [they] *neither require jury unanimity nor have to be supported by substantial evidence on the record.*

Smith, 159 Wn.2d at 783-88 (emphasis added). See also In re Sease, 149 Wn. App. 66, 75-79, 201 P.3d 1078 (2009) (holding ‘means within means’ do not implicate unanimity protections in the context of SVP commitment hearings); and In re Pouncy, 144 Wn. App. 609, 619, 184 P.3d 651 (2008) (“[W]e have consistently held there is no requirement of unanimity with regard to means within means.”)

Means within means scenarios typically arise when one of the statutory alternative circumstances has an “or” embedded within it. The same problem presents itself where a definitional instruction contains an “or” within it. In either case - definitional, or “means within means” - the mere use of the word “or” does not mean that whatever is on each side of the “or” must be supported by substantial evidence in the record or limited and specific argument and evidence. State v. Laico, 97 Wn. App. 759, 762, 987 P.2d 638 (1999) (“Merely because a definition statute states methods of committing crime in the disjunctive does not mean that the definition creates alternative means”); Linehan, 147 Wn.2d at 649-50 (“The jury need not be unanimous as to any of the definitions nor must substantial evidence support each definition.”)

The idea here is that while juror confusion is avoided by the unanimity protections where multiple alternative means are instructed upon, to require the same unanimity protections at the next level of magnification - for every “or” within each of the alternative means, or every “or” in a definitional instruction, would *increase* juror confusion:

[Defendant's] means within a means argument raises the troublesome spectre of a myriad of instructions

and verdict forms whenever a criminal statute contains several instances of the word “or.”

In re Jeffries, 110 Wn.2d 326, 339,752 P.2d 1338 (1988); see also Smith, 159 Wn.2d at 789.

From the above, it is clear that much care must be taken in determining whether a defendant’s unanimity challenge to an instruction involves a challenge to an alternate aggravating factor, or a challenge to “means within means” of an aggravating factor. Some unanimity protections apply to the former, none to the latter. Defendant’s challenge involves the latter.

Defendant was charged with the following two alternative aggravating circumstances:

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from [robbery in the second degree].

RCW 10.95.020(10), (11); 1CP 164-65.

The court instructed the jury for each factor, instructing that it had to review each alternative mean individually, and that to find an individual alternative aggravating factor was present, it had to make such finding for specific alternative aggravating circumstance

unanimously.<sup>2</sup> 1CP 80, 81. The verdict forms provided also necessitated the determinations as to each specific aggravating factor be made individually. 1CP 43, 49.

Defendant points to the “common plan or scheme or single act” alternative circumstance, specifically to the second “or” within it, claiming:

This aggravating circumstance includes two alternatives: either the existence of a common scheme or plan; or the occurrence of a single act that results in two murders.

Br. of Appellant, p. 13.

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<sup>2</sup> The unanimity instruction here required unanimity as to whether a *specific* aggravating circumstance had been proven beyond a reasonable doubt: “If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt...” 1CP 80, 81.

The instruction as to this point simply repeated WPIC 30.03, which, in comment, states, “the jury must be unanimous as to which aggravating circumstance is present in order to convict the defendant of aggravated first degree murder. State v. Mak, 105 Wn.2d 692, 739, 718 P.2d 407 (1986)[.]”

A review of Mak reveals it was a death penalty case and unanimous findings as to each individual aggravating circumstance there was a product of death penalty jurisprudence. Mak cited the need that instructions in death penalty cases be “rationally reviewable,” and that to provide such, “the jury must be requested to specify which aggravating factor it found proved beyond a reasonable doubt.” Id. at 738, quoting State v. Bartholomew, 98 Wn.2d 173, 192, n. 2, 654 P.2d 1170 (1982).

Such ‘rational reviewability’ concerns are not present in this case given the State never sought the death penalty. As a result, the lesser unanimity/substantial evidence requirements of alternative means scenarios properly governed which does not require explicit unanimity as to a *specific* alternative mean. In short, defendant was provided with greater unanimity protections than constitutionally mandated.

From the above, it is evident defendant's challenge concerns a "means within means" scenario. In fact, defendant implicitly concedes such by agreeing the situation is governed by In re Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988). Br. of Appellant, pp. 13-14.

In In re Jeffries, the Supreme Court examined a defendant's exact same claim regarding unanimity as to the elements with the "common scheme or plan or single act" instruction and ruled this was a "means with means" scenario. Id. at 339-40. See also, State v. Strom, 75 Wn. App. 301, 308, fn. 3, 879 P.2d 962 (1994).

Defendant, conceding this is a means within means scenario, nevertheless argues that given there was insufficient evidence presented as to one of the 'means with means' - that the murders were the result of the occurrence of a 'single act' - a unanimity instruction was required as to this means within a means. Br. of Appellant, p. 14.

This argument fundamentally misunderstands unanimity as applied to a 'means with a means.' As seen above, *no* unanimity protections are required for such— no instruction as to unanimity for a means within a means, no requirement as to substantial evidence, no requirement as to limited evidence and argument.

Such requirements apply solely to an alternative means *as a whole*.

See In re Jeffries, Smith, Sease Pouncy, Linehan, Laico.

It is thus irrelevant whether in In re Jeffries, substantial evidence had been presented that would have supported each “aggravating circumstance.” See Br. of Appellant, p. 14. If by ‘aggravating circumstance,’ defendant here means that, in In re Jeffries, sufficient evidence existed to support each alternative means, this is irrelevant as the present issue involves a “means within a means” scenario. If by ‘aggravating circumstance’ defendant is claiming that in In re Jeffries there was sufficient evidence as to each ‘means within means,’ then, as noted above, this claim is irrelevant as sufficiency of evidence is a concern of unanimity protections *of which there are none for means within means*. (Putting aside the fact that there is nothing in In re Jeffries that would support his underlying factual supposition that there was substantial evidence as to each ‘means within means.’)

In an attempt to extend unanimity protections to ‘means within means,’ defendant points to State v. Benn, 161 Wn.2d 256, 165 P.3d 1232 (2007). Here, defendant argues, the court treated each RCW 10.95.020(10) ‘mean within a mean,’ as separate and whole aggravating factors. Br. of Appellant, pp. 14-15.

In that case, the trial court, for unknown reasons, had bifurcated the aggravating factor, separating out its various “means within means” for separate juror examination:

As to Count I and II was there more than one victim and were the murders: part of a common scheme or plan \_\_\_\_ (Yes or No), or the result of a single act of the defendant \_\_\_\_\_ (Yes or No).

State v. Benn, 130 Wn. App. 308, 312, 123 P.3d 484 (2005). The jury had entered “yes” in the first blank, but left the second blank empty. Id.

The sole aggravating factor question presented to the Supreme Court was whether, considering the fact the jury had left the ‘means within means’ blank empty, double jeopardy protections precluded the State was from alleging it again at retrial. Benn, 161 Wn.2d at 259-64.

While defendant is correct in that the court did refer throughout to the individual bifurcated “means within means” as “aggravating factors,” there is nothing in the decision which would lead one to believe that they were reconsidering In re Jeffries’ holding that, for unanimity considerations, the relevant bifurcated sub-parts are actually “means within means.” Further, there is nothing indicating the court is reconsidering their long line of cases

holding “means within means” do not entail unanimity protections. While the court’s verbiage was not precise, it was not uttered in the context of unanimity protection review where fine and careful distinctions between “means within means” and “aggravating factors” would be necessary and expected.

The dissent in State v. Woods, 143, Wn.2d 561, 23 P.3d 1046 (2001) is similarly unavailing. That the prosecution bifurcated the “means within means” and carelessly referred to one such bifurcated sub-part as “aggravating circumstance,” does not change Washington jurisprudence on this point. Id. at 622. A “mean with a mean” remains such, and is not entitled to the unanimity protections accompanying an alternative aggravating circumstance.

Sufficient evidence was admitted supporting the fact that the murders were a result of a ‘common scheme or plan’ therefore satisfying all relevant unanimity requirements for the greater alternative ‘aggravating factor’ of RCW 10.95.020(10). No evidence was required to specially support the lesser ‘single act’ “mean within that mean,” nor was any special separate unanimity instruction required as to it.

### **3. The Trial Court Did Not Err In Failing To Separately Define “Common Scheme or Plan” For The Jury.**

Defendant argues the trial court erred in failing to submit a separate instruction defining “common plan or scheme” as presented in jury instructions 25 and 26, even though defendant never requested such instruction at trial. 1CP 80-121.

As an initial matter, only “manifest error affecting a constitutional right” can be raised for the first time on appeal. RAP 2.5(a). Defendant’s failure to request a definitional instruction, or object to the instructions as given, waives all non-constitutional error. Such definitional error only rises to constitutional level where such error failed to define an element of the offense so as to relieve the State of its burden:

[T]he constitution only requires that the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule. ... Thus, to determine whether the... instruction was an error of constitutional magnitude, we must further examine whether the instruction omitted an element so as to relieve the State of its burden or merely failed to further define one of those elements.

State v. O’Hara, 167 Wn.2d 91, 105, 217 P.2d 756 (2009).

Here, even equating the aggravating circumstance “common scheme or plan” with an element, defendant’s claimed

error is simply an error to *further define* such element. The State was not relieved of its burden with regard to proving that element. Defendant may not raise his claim for the first time on appeal.

Moreover, even if defendant had not waived this claim, as seen below, the court's failure to define "common scheme or plan" was not an error at all, constitutional or otherwise.

"Whether words used in an instruction require definition is a matter of judgment to be exercised by the trial judge." State v. Guloy, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985). The standard properly employed by the trial court in making such determination:

[T]rial courts must define technical words and expression used in jury instructions, but need not define words and expressions that are of common understanding.

State v. Gordon, \_\_ Wn. App. \_\_, 2009 WL 4756146 at 7 (Div. 1 2009).

A term is "technical" when it has a meaning that *differs* from common usage.

State v. Brown, 132 Wn.2d 529, 611, 940 P.2d 546 (1997) (emphasis added).

The Supreme Court has repeatedly held that "common scheme or plan" is not "technical." Rather, it is one that is "commonly understood" by the jury, requiring no further definition:

[T]he phrase 'common scheme or plan' are words of common understanding. These words are found in daily use and are not technical nor were they used in any special legal sense.

Guloy, 104 Wn.2d at 471.

Defendant also claims that the phrase "common scheme or plan" also should have been defined. ... such a simplistic request needs no definition. No error is committed.

State v. Jeffries, 105 Wn.2d 398, 420, 717 P.2d 722 (1986).

This court has held the same, explicitly refusing the claim a definition was required based on Jeffries' holding that "such a simple request needs no definition." State v. Peerson, 62 Wn. App. 755, 770, 816 P.2d 43 (1992).

The Supreme Court affirmed again that no instruction is required for the phrase in State v. Benn, 120 Wn.2d 631, 674, 845 P.2d 289 (1993) ("[W]e have previously rejected this argument as applied to 'common scheme or plan'.")

More recently, in State v. Cross, 156 Wn.2d 580, 132 P.3d 80 (2006), trial counsel specifically requested the phrase be defined, noting a definitional instruction for the phrase was upheld in Kincaid. The trial court refused to define the phrase. The Supreme Court upheld this refusal, writing:

[U]pholding an instruction given is different from requiring an instruction be given. We have repeatedly held that “common plan or scheme are words of common understanding requiring no definition.”

While the trial court could have given the instruction, we find no abuse of discretion in declining to do so.

Cross, 156 Wn.2d at 617.

Even *more* recently, the Supreme Court affirmed yet again the “commonly understood” nature of the phrase, writing:

Because the phrase ‘common scheme or plan’ consists of commonly understood words, the trial court was not required to instruct the jury regarding the definition of the phrase.

State v. Yates, 161 Wn.2d 714, 749, 168 P.3d 359 (2007). Though the trial court had provided a definition, none was required. Id.

Against the above authority, defense cites Gordon. There, at trial, the state alleged aggravating factors which included the phrases “deliberate cruelty” and “particular vulnerability of the victim.” Id. at 6. On appeal, defendant argued the lower court erred in failing to define these phrases for the jury. The appellate court agreed. In determining whether or not a definition was required to have been given by the trial court, the appellate court cited the “technical v. commonly understood standard.” Id. at 7

Gordon provides little guidance in the present situation, however. There the court was examining inarguably technical phrases, elaborated on at length in previous opinions. Id. at 7, citing State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003) (elaborating on what constitutes “deliberate cruelty”) and State v. Sulieman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006) (analyzing at length “particular vulnerability.”) Here the issue concerns a commonly understood phrase, repeatedly ruled to be such by the Supreme Court. See Guloy, Jeffries, Benn, Cross, Yates.

Defendant further attempts to circumvent the holding of the above cases by pointing to cases in which a court used language elaborating on ‘common scheme or plan,’ finding it synonymous with ‘an overarching plan with a criminal purpose connecting the murders.’ Brief of Appellant, p. 17, citing Yates, and Cross. Here, the claim is that because those courts have elaborated on the phrase, it must therefore be considered “technical” (and therefore defined for the jury).

Defendant’s argument is unavailing as Yates and Cross explicitly held the phrase to be commonly understood and not requiring a definition. Thus, though further definition was laid out, the court implicitly found that “overarching plan’ was necessarily

part of what was commonly understood as entailed by the phrase already.

Further, defendant cites to State v. Finch, 137 Wn.2d 792, 835, 975 P.2d 967 (1999). Finch involved a challenge to the sufficiency of the evidence supporting the aggravating factor, specifically whether the murders were “part of,” the common plan or scheme. While the court’s examination of “part of” referred to cases describing such as a “nexus,” this does not mean the court here was required to include a separate instruction defining “part of” as a “nexus.” “Part of” is sufficiently commonly understood, certainly more so than “nexus.”

Ultimately, the mere fact that a phrase is susceptible of rephrasing in synonymous terms does not remove it from the realm of “commonly understood.” *Every* phrase can necessarily be redefined in this manner. If this alone made a phrase a “technical phrase” under the law –requiring a separate definition, then there could be no non-technical phrases. *No* phrase could be regarded as “commonly understood.” Every phrase would require separate definition resulting in a myriad of instructions to confuse the jury.

Again, “[a] term is technical when it has a meaning that *differs* from common usage.” Brown, 132 Wn.2d at 611 (emphasis

added). None of the rephrasings cited by defendant employed wordings that have a meaning *different* from what is commonly understood by the phrase already. They are entailed by within what is *already* understood, commonly, by the phrase. The court did not abuse its discretion in failing to further define the phrase.

**B. RESENTENCING IS NOT REQUIRED GIVEN DEFENDANT'S DOUBLE JEOPARDY RIGHT AGAINST MULTIPLE PUNISHMENT WAS NOT VIOLATED.**

The double jeopardy clauses of the U.S. and Washington constitutions coextensively prohibit: (1) a second prosecution after acquittal or conviction; and (2) multiple punishments for the same offense. State v. Crisler, 73 Wn. App. 219, 222, 868 P.2d 204 (1994).

The multiple punishments prohibition does not preclude the State from pursuing convictions, or the jury rendering convictions on multiple charges that constitute the same offense. It does, however, preclude the court from subsequently (1) entering judgment on, or (2) sentencing on, convictions that constitute the same offense.

The State may bring multiple charges *and the jury may convict on all charged counts without violating double jeopardy*. It is only when the trial court enters judgment and imposes sentence on more than one

conviction for the same crime that double jeopardy is implicated.

State v. Schwab, 134 Wn. App. 635, 644, 141 P.3d 658 (2006) (Emphasis added). See also, State v. Freeman, 153 Wn.2d 765, 700, 108 P.3d 753 (2005) (“Courts may not, however, *enter* multiple convictions for the same offense without offending double jeopardy.”) (Emphasis added).

In State v. Womac, 160 Wn.2d 643, 656-58, 160 P.3d 40 (2007), the court clarified that entry of judgment for offenses that are the same, even without pronouncing sentence on one of the offenses, is sufficient to offend the multiple punishment prohibition. This is because once the judgments have entered, the convictions can be used in later sentencings to increase defendant’s offender score. In addition to this, the attached stigma, and potential for impeachment at a subsequent trial were sufficient consequences of entry of judgment alone such that entry is properly considered ‘punishment’ under double jeopardy. Id. at 656-57.

In the present case, the State agrees Counts I and II constitute the same offense for double jeopardy purposes, as do Counts III and IV. And defendant was *convicted*, for double jeopardy purposes, of “same offenses” when the jury returned

verdicts of guilty with regard to Counts I and II, and again with regard to Counts III and IV. Crisler, 73 Wn. App. at 222; RCW 9.94A.030(9).

The prohibition on multiple punishments for the same offenses was not violated, however. This is because the court entered judgment only on Counts I and III. The court dismissed the convictions on Count II and IV at the State's request. 1RP 771. The Judgment and Sentence supports these assertions:

### 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 II + IV.

1CP 8.

Additionally, the court sentenced defendant only on Counts I and III. There are no orders of confinement or terms imposed in the SENTENCE AND ORDER section, or elsewhere, regarding the dismissed counts. 1CP 8-12.

The defendant points to the FINDINGS section of the Judgment and Sentence in support of his claim that the "Judgment and Sentence does not vacate the two lesser convictions." Here, the FINDINGS section notes that "[t]he defendant was found guilty

on March 17, 2009, by jury verdict of: [all four counts].” 1CP 5. This language does not mean, however, that the court has *entered judgment* on all four counts. Rather, it is simply a recitation of the facts authorizing and giving rise to the later pronounced judgment in the JUDGMENT section.

The judgment of the court is *entered by and contained in* the JUDGMENT section of the Judgment and Sentence. Here, the two relevant counts are dismissed. 1CP 8. Thus judgment has not entered on those counts. Therefore the prohibition on multiple punishments has not been violated.

Defendant also points to the “Order of Commitment” which includes the following language:

WHEREAS, [Defendant], has been duly *convicted* of the crime(s) of Count 1 ... *Count 2* ... *Count 3*... *Count 4* ..., as charged in the Amended Information ... and judgment has been pronounced against him/her that he/she be punished therefore by imprisonment ... for the terms(s) as provided in the judgment as provided in the judgment which is incorporated by reference, all of which appears of record in this court; a certified copy of said judgment being endorsed hereon and made a part thereof, ...

1CP 17 (Emphasis added.)

From the above, it is plain that the Order of Commitment notes that defendant has been convicted of Counts II and IV. This

is a correct statement. Defendant *was convicted* of Counts II and IV - conviction occurring when the jury returned verdicts of guilty on the counts. Crisler, 73 Wn. App. at 222; RCW 9.94A.030(9). The convictions were not subsequently *entered* by the court, however. But the Order of Commitment does not say they were.

Further, even if the Commitment Order said judgment *was entered* on the dismissed counts, this would not be a double jeopardy violation. This is because the Commitment Order does not *enter the judgments* – the act that violates double jeopardy. The Order, if it had said such a thing, would contain an incorrect statement of fact (and should be corrected as to that point), but would not, of itself, work to violate the prohibition on multiple punishment.

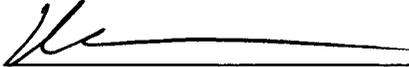
Neither the Judgment and Sentence nor Order of Commitment contains an erroneous statement, nor violates double jeopardy. Given such, there is no cause to remand for entry of a corrected order or for resentencing.

**IV. CONCLUSION**

For the foregoing reasons, defendant's appeal should be dismissed.

Respectfully submitted on March 23, 2010.

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