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NO. 67227-4-1

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

REC'D  
DEC 13 2012  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MYRON WYNN,

Appellant.

REC'D  
DEC 13 2012  
King County Prosecutor  
Appellate Unit

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

The Honorable Susan J. Craighead, Judge  
The Honorable Jeffrey Ramsdell, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE FAILED TO PROVE WYKEL'S DEATH OCCURRED IN THE COURSE OF OR IN FURTHERANCE OF A ROBBERY.

As discussed in Wynn's opening brief, the felony murder conviction must be reversed because the State failed to prove a robbery. Even assuming that Wynn used force to kill Wykel, the State failed to present evidence from which jurors could reasonably conclude the killing was done to obtain or retain possession of Wykel's property. See Brief of Appellant, at 30-39.

In response, the State contends – as it did below – that jurors could have found a robbery based on Wynn's theft of Wykel's diamond ring and cash or his resistance to Wykel's demand that Wynn reimburse him for the thousand dollar deposit he previously paid for the Thunderbird. Brief of Respondent, at 32-37. There is no witness who claims to have seen what the State suggests. Nor was there a confession to robbery.

The State's own theory at trial was not a planned robbery, but a panicked killing. RP (4/4/11 p.m.) 89. Assuming the truth of that theory, the taking of the diamond ring and cash from Wykel's dead body – without proof the killing was done for that purpose – is not robbery. See State v. Allen, 159 Wn.2d 1, 10 n.4, 147 P.3d 581

(2006); State v. Larson, 60 Wn.2d 833, 835, 376 P.2d 537 (1962).

Moreover, the State's theory that Wynn committed robbery by refusing to reimburse Wykel the money he had spent on the down payment – equally lacking in evidentiary support – also fails under Washington law. Washington has adopted the transactional view of robbery, meaning the use of force can occur during the taking or thereafter to retain possession of the property. State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992). Under this view, the transaction is not complete “until the assailant has effected his escape.” Id. at 290 (quoting State v. Manchester, 57 Wn. App. 765, 769, 790 P.2d 217, review denied, 115 Wn.2d 1019, 802 P.2d 126 (1999)); see also State v. Truong, 168 Wn. App. 529, 277 P.3d 74, 77 (2012) (“The taking is ongoing until the assailant has effected an escape.”).

Even assuming the State's factual theories are true, Wynn “effected his escape” once he successfully obtained the down payment on the car and well before Wykel asked for reimbursement. The two events were not part of the same transaction. In addition, the State's theory does not seem to be that Wynn killed Wykel to retain money in his possession. Rather, the State's theory seems to be that Wynn no longer had the money and killed Wykel to hide the

successful theft of \$1,000.00. See Brief of Respondent, at 36 (“desperate because he no longer had the thousand dollars that Wykel was demanding he return, Wynn killed Wykel”). This is not robbery. This is an attempted cover up of a completed theft by deception committed well in the past. See RCW 9A.56.020(1)(b) (“theft” includes “[b]y color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.”).

Because the State failed to prove a robbery, and therefore failed to prove Wykel’s death occurred in the course of that crime, the felony murder conviction must be reversed.

2. THE ERRONEOUS ROBBERY INSTRUCTION ALSO REQUIRES REVERSAL.

Jury instructions must not be misleading. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). An instruction that can be construed to relieve the State of its constitutional burden to prove every element of a crime is a manifest error of constitutional magnitude and can be raised for the first time on appeal. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). Moreover, it is the State’s burden to demonstrate, beyond any reasonable doubt, that such an error did not contribute to the jury’s verdict. State v. Brown,

147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Instruction 9 reads:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person 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 that person's property. 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.

The taking constitutes robbery, even if death precedes the taking, whenever the taking and a homicide are part of the same transaction.

CP 106 (emphasis added).

The State argues the highlighted single-sentence paragraph is error only if read in isolation from the rest of the instruction. Properly read, argues the State, jurors would have interpreted the language at issue as addressing only the timing of a taking and nothing more. Brief of Respondent, at 42. The language does indeed address timing, but it is not limited in the manner the State implies. Rather, it expressly told Wynn's jury that a taking is robbery "whenever the taking and a homicide are part of the same transaction."

Any reasonable juror would have interpreted the entire instruction to mean that force must be used to obtain or retain

property (first paragraph) and, as a matter of law, that standard is met whenever a taking and a homicide are part of the same transaction (second paragraph). There is no other reasonable interpretation. It is the State's interpretation that is strained.

The State also argues this error is not manifest because there "was simply *no evidence to support any other purpose* for Wynn to kill Bob Wykel, other than to retain or obtain Wykel's property." Brief of Respondent, at 44. The State makes the same argument as to why, even if the error is properly raised, there was no prejudice. Brief of Respondent, at 47-48.

The State's arguments overlook the obvious consequence of instruction 9. Under instruction 9, jurors were required to find (erroneously) that Wynn committed robbery – and therefore killed Wykel during a robbery – even if Wynn decided to take Wykel's ring and money only as an afterthought following the killing. The State cannot demonstrate jurors did not do so when convicting Wynn of murder, particularly in light of the deputy prosecutor's repeated focus on instruction 9's second paragraph. See Brief of Appellant, at 45-46.

Finally, the State argues that instruction 9 was harmless because it did not result in a conviction at Wynn's first trial. Brief of Respondent, at 48 n.42. This interpretation is extremely generous to

the State. In light of the weak evidence supporting robbery (so weak it was insufficient), a more accurate interpretation is that instruction 9 caused seven jurors at the first trial and twelve jurors at the second trial to vote in error for Wynn's conviction without the State proving all elements of criminal liability.

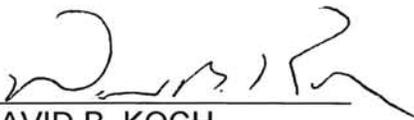
B. CONCLUSION

This Court should reverse Wynn's felony murder conviction.

DATED this 13<sup>th</sup> day of December, 2012.

Respectfully submitted,

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Respondent,	)	
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v.	)	COA NO. 67227-4-1
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MYRON WYNN,	)	
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Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13<sup>TH</sup> DAY OF DECEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **RELY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MYRON WYNN  
DOC NO. 349713  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF DECEMBER 2012.

x *Patrick Mayovsky*