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Court of Appeals
Division I
State of Washington

No. 70844-9-I

IN THE COURT OF APPEALS THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA LAMBERT,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court deprived Mr. Lambert of due process of law in entering convictions on Counts I, II and IV in the absence of sufficient evidence.

2. The convictions on Counts I, II, IV and VI violated Mr. Lambert's right to a unanimous jury verdict guaranteed by article I, section 21 of the Washington Constitution.

3. Instruction 16 violated Mr. Lambert's right to a unanimous jury.

4. Instruction 17 violated Mr. Lambert's right to a unanimous jury.

5. The trial court violated Mr. Lambert's right under the Sixth and Fourteenth Amendments and article I, §section 22 to have the State prove each element of the offense to a jury beyond a reasonable doubt.

6. Instruction 16 violated Mr. Lambert's right to have the State prove each element of the offense to a jury beyond a reasonable doubt.

7. Instruction 17 violated Mr. Lambert's right to have the State prove each element of the offense to a jury beyond a reasonable doubt.

8. Mr. Lambert's convictions of felony murder and first degree burglary violate the double jeopardy provisions of the Fifth Amendment and article I, section 9.

9. The court denied Mr. Lambert his right to represent himself in violation of the Sixth Amendment and article I, section 22.

10. The prosecutor's questioning and closing argument improperly commented on Mr. Lambert's right to self-representation in violation of the Sixth Amendment and article I, section 22.

11. The trial court erred and violated the plain provisions of RCW 10.77.080 when it failed to hear Mr. Lambert's motion for acquittal by reason of insanity prior to trial.

12. The trial court erred and violated the plain provisions of RCW 10.77.080 when it failed separately weigh the facts supporting Mr. Lambert's motion for acquittal by reason of insanity.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment Due Process clause requires the State prove each element of an offense beyond a reasonable doubt. A conviction of felony murder requires the State prove the defendant intended to commit a felony other than murder and that the predicate felony began before the murder occurred. Where the State did not prove Mr. Lambert was committing first degree burglary prior to either murder did the State present sufficient evidence of each element?

2. As charged in this case, a conviction of first degree burglary required the State prove Mr. Lambert either committed an assault or used a weapon in a manner capable of causing death or serious injury and that he did one of those two acts while entering, inside, or in the flight from a

building. Was the State's evidence on Count VI sufficient to prove either of these elements?

3. Article I, section 21 of the Washington Constitution guarantees the right to a unanimous jury verdict. This right in turn requires that in cases in which the State alleges a single crime may have been committed by alternative means, the jury must unanimously agree upon a single alternative means. Where there is neither a jury instruction nor a particularized expression of jury unanimity and there is insufficient evidence to support at least one of the alternatives means must this Court reverse Mr. Lambert's convictions of Counts I, II and VI?

4. Article I, section 21 of the Washington Constitution guarantees the right to a unanimous jury verdict. Mr. Lambert was charged in Counts I and II with intentional murder and felony murder in the alternative. There was no special verdict form stating which crime the jury found the State proved beyond a reasonable doubt, and Instructions 16 and 17 explicitly told the jury it did not have to agree that the State proved the elements of felony murder or intentional murder, so long as each juror thought the State proved the elements of at least one crime. Do the convictions on Counts IV and VI violate Mr. Lambert's right to a unanimous jury verdict?

5. Article I, section 21 of the Washington Constitution guarantees the right to a unanimous jury verdict. Mr. Lambert was charged in Counts IV and VI with first degree burglary based upon either an assault or being armed with a deadly weapon. There was no special verdict form stating which alternative the jury found the State proved beyond a reasonable doubt. Do the convictions on Counts I and II violate Mr. Lambert's right to a unanimous jury verdict?

6. The Sixth and Fourteenth Amendments along with article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This in turn requires a trial court to instruct the jury on each element of the offense. A conviction of felony murder requires the State prove the murder was committed while the person was committing or attempting to commit the predicate offense. Instructions 16 and 17, the "to convict" instructions, omitted this element. Do the instructions relieve the State of its burden of proof?

7. The Double Jeopardy Clause of the Fifth Amendment prohibits multiple convictions for the same offense. The United States Supreme Court and Washington Supreme Court have each found this provision is violated by a conviction of felony murder and a separate conviction for the predicate felony. Do Mr. Lambert's convictions of first degree murder and first degree burglary violate double jeopardy?

8. The Sixth Amendment and article I, section 22 provide a defendant the right to self-representation. That right may be forfeited only where the defendant is seeking to delay or obstruct the proceedings but not simply because of administrative convenience or a defendant's unfamiliarity with legal rules. Did the trial court deny Mr. Lambert his right to represent himself where it found he forfeited that right midtrial based upon his occasional failure to comply with the rules of evidence and because the court found his exercise of the right resulted in a waste of the court and jury's time?

9. The State may not seek to draw an adverse inference from a person's exercise of a constitutional right. The right to self-representation guaranteed by the Sixth Amendment and article I, section 22 includes the right to engage in meaningful research in preparation for trial. Where the prosecutor in his cross-examination of Mr. Lambert and in closing argument sought to draw adverse inferences from Mr. Lambert's pre-trial research of issues presented at trial, did the prosecutor improperly draw an adverse inference from Mr. Lambert's exercise of his constitutional rights?

10. Where a defendant files a motion to acquit by reason of insanity, RCW 10.77.080 requires the court to conduct a separate proceeding on the motion. If the court denies the motion, the issue can again be raised by the defendant at the subsequent trial. Where the court

refused to consider the motion at a pretrial hearing but instead considered the matter in conjunction with the jury trial, did the court violate the provisions of RCW 10.77.00?

11. In ruling on a motion under RCW 10.77.080, the trial court must independently weigh and resolve factual disputes. Where the trial court deferred to the jury on contested factual matters, did the court violate the provisions of RCW 10.77.080?

C. STATEMENT OF THE CASE

As a child, Joshua Lambert exhibited severe behavioral problems. These issues manifested themselves in school disciplinary issues and early drug and alcohol use. This behavior in turn led his parents to enroll him in a “school” in Samoa which promised a change in behavior by harsh discipline. RP 850-55. To get him to the “school” his parents essentially had their son kidnapped while on a family trip and taken to Samoa. RP 855. The disciplinary measures were such that the school was subsequently the defendant in numerous lawsuits arising from staff abuse of students.

Not surprisingly, upon his return Mr. Lambert’s behaviors worsened and those close to him noticed an increase in his bizarre behaviors. RP 855. By his late teens Mr. Lambert was experiencing hallucinations. RP 1167.

Mr. Lambert moved to Alaska for a period of time. While there he was convicted of an assault stemming from his delusional belief that a neighbor had raped his girlfriend. RP 1169. Reports from jail guards in Alaska indicate Mr. Lambert experienced “command voices” - directing him to engage in certain behaviors - during his incarceration. RP 1053.

Mr. Lambert’s mother, Susan Lambert, described him as “very different” upon his release and return to Washington. RP 879. She explained he could not be around people and spent most his time outside, including sleeping. RP 880. Ms. Lambert explained her son would argue with himself and other times engage in full conversations with himself, his voice changing depending upon the side of the conversation. RP 881-82. Other times, Mr. Lambert would have what appeared to be imaginary phone conversations where she could only hear one side of the conversation. RP 882.

Ultimately, Mr. Lambert’s bizarre behavior escalated to the point where his mother and step-father no longer allowed him to live at their home. RP 226.

One afternoon, Mr. Lambert arrived at the home of his paternal grandfather, George Lambert. His aunt, Kay Gage, who was in the driveway when she saw Mr. Lambert approach, invited him to go inside. RP 279. When Ms. Gage went inside a short while later, Mr. Lambert

grabbed her and pulled her towards the living room saying he wanted her to see something. RP 281-83. In the living room, George Lambert was lying on the floor with a significant amount of blood in the room. RP 284. Ms. Gage noticed Mr. Lambert had blood on his face and hands. *Id.* A subsequent autopsy revealed George Lambert had 27 stab wounds. RP 545

Mr. Lambert pushed Kay Gage to the ground and tightly taped her wrists and ankles. RP 287. Ms. Gage heard Mr. Lambert rummaging through the house and heard him scream “where are the guns.” RP 290. Mr. Lambert ultimately left taking Ms. Gage’s car.

After a period of time, Ms. Gage was able to notify police. While police were at George Lambert’s they received a report that Gene Eisner, Mr. Lambert’s maternal grandfather had been found dead on the driveway of the home he shared with his daughter and her husband a few miles away. RP 363. James Coffin, Mr. Lambert’s step-father, had arrived home and discovered Mr. Eisner’s body. RP 235.

Bloodstains and bloody foot prints were found inside the garage and house of the Coffin-Lambert residence, as well as on Kay Gage’s car. Mr. Eisner had 17 stab wounds, and his time of death was estimated to be shortly after George Lambert’s death. RP 539-52.

Susan Lambert testified that throughout the afternoon she received numerous telephone calls from her son from Kay Gage’s phone. RP 590-

94. In these calls, Mr. Lambert repeatedly asked about the whereabouts of his son, asking to speak to him. RP 594.

Mr. Lambert testified he experienced intense hallucinations involving threats to his son's life in the days preceding the murders. RP 935. Mr. Lambert determined to kill the voice. *Id.* Mr. Lambert heard a voices directing him to acquire guns within a specific period of time in order to kill the source of the threat to his son. RP 939. The voices directed Mr. Lambert not to permit anyone to call the police. RP 940. The voices told Mr. Lambert he had until the end of the school day to acquire the guns lest they would pick his son up from school. *Id.* Under that direction he went to his grandfather George Lambert's house. RP 941.

After killing his grandfather and taping his aunt, Mr. Lambert took what he thought was a firearm only to learn later it was a pellet gun. RP 942. Mr. Lambert then drove to his son's school where he discovered his mistake. *Id.* Mr. Lambert then drove to his mother's house and began looking for a gun. RP 942-43. After he began searching the house, he saw his grandfather on the driveway where he killed him. RP 943. Mr. Lambert left his mother's house without a gun. *Id.*

Mr. Lambert then drove to the apartment of Amber McCabe. RP 943. Ms. McCabe was at a neighbor's when she saw Mr. Lambert outside her apartment carrying her bow. RP 257.

Mr. Lambert was arrested a short time later. RP 405. While being booked into jail, Mr. Lambert grabbed a jail guard demanding “let me see my son or I’ll kill all of you.” RP 463.

The State charged Mr. Lambert with two count of first degree murder, three counts of first degree burglary, one count of first degree kidnapping, one count of taking a motor vehicle and one count of unlawful possession of a firearm. CP 626-635. The State also alleged numerous aggravating factors and deadly weapon enhancements for several of the charges. *Id.*

At his first appearance, Mr. Lambert stated he was representing himself. 10/17/11 RP 2-3. The court conducted a colloquy and granted Mr. Lambert’s motion. *Id.* at 20.

Prior to trial, Mr. Lambert filed a motion to acquit by reason of insanity and, pursuant to RCW 10.77.080, requested a hearing on his motion prior to trial. CP 1337-40. The trial court granted the State’s motion to defer the hearing on the motion and to instead hear the evidence on the motion in conjunction with the jury trial. CP 975-76, 997-1002.

Dr. Robert Deutsch testified that at the time of the offenses Mr. Lambert was suffering from a long-standing psychotic disorder with a pervasive paranoid delusional disorder. RP 1158-59. Specifically, Dr. Deutsch diagnosed Mr. Lambert with paranoid schizophrenia. RP 1185.

Dr. Deutsch offered his opinion that because of this illness Mr. Lambert lacked the ability to appreciate the wrongfulness of his acts – that his actions were moral within his system. RP 1185-86. Dr. Deutsch did allow that while there was some evidence of exaggeration of symptoms, Mr. Lambert was within the normal range on a test for malingering. RP 1174, 1178. In response to the State’s experts claim that Mr. Lambert’s actions were the result of a drug-induced psychosis, Dr. Deustch noted there was no evidence of drug use on the day of the incident. RP 1191. In any event, Dr. Deustch explained, drug use would not cause such a psychotic disorder but merely exacerbate it. RP 1191-92.

Dr. Lawrence Wilson testified a person responding to command voices may not appreciate right and wrong. RP 992. Dr. Wilson confirmed the reports from jail guards in Alaska that Mr. Lambert experienced “command voices” during his incarceration there indicated a history of psychosis. RP 1042, 1053.

After the State had rested its case, and in the middle of Mr. Lambert’s presentation of his case, the trial court determined Mr. Lambert had forfeited his right to represent himself citing his disrespect to court, his failure to comply with the rules of evidence and the resulting “waste of time.” RP 1109-10, 1123-24. The court directed standby counsel to immediately assume the role of attorney. RP 1109-10.

The Court denied Mr. Lambert's motion for acquittal noting there was a difference of opinions among experts which the jury would need to resolve. RP 1558.

A jury convicted Mr. Lambert as charged. CP 267-82.

D. ARGUMENT

1. Counts I, II and IV are not supported by sufficient evidence and must be reversed.

a. *The State must prove each element of the charge beyond reasonable doubt.*

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process "indisputably entitle[s] a criminal defendant to 'a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476-77 (quoting *Gaudin*, 515 U.S. at 510).

b. *There was insufficient evidence to support felony murder as charged in Count I.*

A person is guilty of murder in the first degree when:

He or she commits or attempts to commit the crime of . . . burglary in the first degree . . . and in the course of or in furtherance of such crime or in immediate flight therefrom, he . . . causes the death of a person other than one of the participants. . . .

RCW 9A.32.020(1)(C)

The Supreme Court long ago held

It may be stated generally that a homicide is committed in the perpetration of another crime, when the accused, **intending to commit some crime other than the homicide**, is engaged in the performance of any one of the acts which such intent requires for its full execution, and, while so engaged, and within the res gestae of the intended crime, and in consequence thereof, the killing results. It must appear that there was such actual legal relation between the killing and the crime committed or attempted, that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it. In the usual terse legal phraseology, death must have been the probable consequence of the unlawful act.

State v. Diebold, 152 Wash. 68, 72, 277 P. 394 (1929) (emphasis added); *State v. Golladay*, 78 Wn.2d 121, 131, 470 P.2d 191 (1970), *overruled on other grounds*, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976). The State must present evidence that the death was a probable consequence of the felony and must specifically prove that the felony began before the killing. *State v. Hacheney*, 160 Wn.2d 503, 518, 158 P.3d 1152 (2007).

Following *Golloday* a number of court decisions embraced an analysis that held so long as the felony and the murder were a part of the same transaction or res gestae the crime of felony murder was proved. *Hachenev* 160 Wn.2d at 517-18. *Hachenev* expressly rejected the “res gestae” or “transaction” approach used in those older cases. “It has never been the law - notwithstanding potentially misleading language in older cases . . . - that it is sufficient merely to show the killing and the felony were part of the same transaction.” *State v. Irby*, 187 Wn. App. 183, 202, 347 P.3d 1103 (2015) (citing *Hachenev*, 160 Wn.2d at 518).

Chronology is important in proving that a murder was committed in the course of a felony. *Irby* 187 Wn. App. at 201. For a killing to have occurred in the course of burglary, “logic dictates” that the burglary must have begun before the killing. *Hachenev*, 160 Wn.2d at 518, 158 P.3d 1152. Moreover, as announced in *Diebold*, felony murder cannot be predicated on burglary if the murder is the crime intended to be committed therein, as there was no “inten[t] to commit some crime other than the homicide.” Thus, to prove felony murder here, the State was required to prove Mr. Lambert entered the homes with intent to commit a crime – other than murder – and that after that burglary began he committed murder. The State did not do that.

This case mirrors *Irby*. In that case, the victim was killed in a shop building adjacent to his home. The evidence established that Mr. Irby often was welcomed into that building. There was no evidence of any other crime in the shop. 187 Wn. App. at 201.¹ However, evidence established Mr. Irby subsequently burglarized the house. *Id.* at 202. This Court found, and in fact the State conceded, that felony murder could not be established based upon a first degree burglary of the shop. *Id.* at 201-02. Moreover, the Court found the subsequent burglary of the home was insufficient, because it had not begun prior to the murder. *Id.* at 202 (citing *Hacheny*, 160 Wn.2d at 518).

With respect to the murder of George Lambert, Mr. Lambert was invited by his aunt to enter the house. Washington has rejected a per se rule that any license to enter a building is automatically revoked by the commission of a crime. *State v. Collins*, 110 Wn.2d 253, 258, 751 P.2d 837 (1988); *State v. Davis*, 90 Wn. App. 776, 781 n.6, 954 P.2d 325 (1998) (an implied revocation can only occur where license to enter was

¹ The Court's detailed analysis of the sufficiency of the evidence pertains to proof of the felony murder aggravator for aggravated murder under RCW 10.95.020. The Court subsequently adopts that analysis wholesale for purposes of first degree felony murder noting: "There is no distinction between the analysis of the sufficiency of the evidence to support felony murder and . . . the . . . aggravating circumstance." 187 Wn. App. at 204. In fact, *Hacheny*, an aggravated murder case relied on *Golloday*, a felony murder case, and expressly rejected the lower court's belief that it could not rely on *Golloday* for that reason. *Hacheny*, 160 Wn.2d at 515. The Court said that for purposes of a sufficiency analysis the Court had never "distinguished between the two." *Id.*

for a limited purpose). As in *Irby*, because Mr. Lambert's invitation into his grandfather's home was not limited his lawful entry is not transformed into a burglary simply by his commission of the crime therein. Even if the murder did revoke his license to enter, that, at best, the establishes the burglary began simultaneously with and not before the murder as required by *Hacheney*. Thus, no burglary preceded the murder. In either event, the evidence is insufficient to establish felony murder.

The State offered evidence, that **after** the murder of George Lambert, Mr. Lambert began searching the home for guns. Again, as in *Irby*, such a chronology of events is insufficient to establish felony murder. 187 Wn. App. at 204.

c. There was insufficient evidence to establish first degree burglary as charged in Count IV.

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020

Focusing first upon the assault alternative the statute plainly requires the assault occur (1) during the entry, (2) while inside the building, or (3) in the immediate flight from the building. By the statute's plain terms an assault occurring prior to entry is not sufficient, nor an

assault which occurs during a brief exit of the building prior to reentering. Similarly, the deadly weapon alternative requires he be armed with a deadly weapon at one of the three listed points in time. Neither alternative is satisfied here.

The murder of August Eisner occurred on his driveway and thus could not have occurred during Mr. Lambert's entry or while he was inside the house. Moreover, there was no evidence the murder occurred during Mr. Lambert's flight. Indeed, bloody footprints were found in the garage and inside the house, RP 684, indicating the murder occurred either prior to initial entry or during a brief interlude in the burglary. In fact, the State argued to the jury that Mr. Lambert was already inside the house when he saw Mr. Eisner on the driveway. RP 1623. According to the State, Mr. Lambert exited the house, killed his grandfather and then returned to the house to continue his search for guns. RP 1624. That scenario, however, does not satisfy the requirement that an assault occur during entry, inside the building, or in the flight from the building. Thus, the State did not prove the assault alternative of first degree burglary.

“Deadly weapon” means any explosive or loaded or unloaded firearm, and shall include any other weapon . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm

RCW 9A.04.110(6). This statute

. . . requires more than mere possession where the weapon in question is neither a firearm nor an explosive. In accordance with the plain meaning of this statute, unless a dangerous weapon falls within the narrow category for deadly weapons per se, its status rests on the manner in which it is used, attempted to be used, or threatened to be used.

In re the Personal Restraint of Martinez, 171 Wn.2d 354, 366, 256 P.3d 277 (2011). Based upon that requirement, *Martinez* found evidence which, at best, established only that a defendant possessed a knife during the course of a burglary and flight therefrom was insufficient. *Id.* at 368-69.

Read together, RCW 9A.04.110(6) and RCW 9A.52.020 require that Mr. Lambert used or threatened to use the knife in a manner likely to cause death or serious injury (1) during the entry; (2) while inside the building; or (3) in the immediate flight from the building. The only evidence that he used the knife in a manner likely to cause death is the killing of Mr. Eisner. As discussed, that did not occur during entry, while inside the building, or in the flight from the building. Thus, even if he possessed a knife at those time, there was insufficient evidence that he was armed with a deadly weapon under RCW 9A.04.110(6).

The State did not offer sufficient evidence of first degree burglary.

d. *There was insufficient evidence to support Count II.*

A felony murder conviction must be supported by sufficient evidence of each element of the predicate felony. *Green*, 94 Wn.2d at 224. Because the evidence was insufficient to the establish first degree

burglary, the evidence is by definition insufficient to establish first degree felony murder.

e. *The Court should reverse Mr. Lambert's convictions on Counts I, II, and IV.*

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Green*, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). As set forth above, the State did not prove first degree felony murder in either Count I or II and did not prove first degree burglary in Count IV.

2. The convictions on Counts I, II, and VI violated Mr. Lambert's right to a unanimous jury.

a. *A jury must be unanimous as to the means a crime is committed.*

Article I, section 21 guarantees criminal defendants the right to a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to unanimity on the means by which the defendant committed the crime. *Green*, 94 Wn.2d at 232-33; *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). Where

an alternative means crime is alleged, the preferred practice is to provide a special verdict form and instruct the jury that it must unanimously agree as to which alternative means the State proved. *State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987); *see also Ortega-Martinez*, 124 Wn.2d at 717 n.2 (urging that trial courts instruct on the requirement of unanimity for alternative means crimes). If the jury returns “a particularized expression” as to the means relied upon for the conviction, the unanimity requirement is met. *Ortega-Martinez*, 124 Wn.2d at 707-08. If the jury does not provide a particularized expression of unanimity through a special verdict form, a reviewing court must be able to “infer that the jury rested its decision on a unanimous finding as to the means” in order to affirm. *Id.*, 124 Wn.2d at 707-08.

On appeal, as the law currently exists, “[a] general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means.” *State v. Kintz*, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (citing *Ortega-Martinez*, 124 Wn.2d at 707-08); *Owens*, 180 Wn.2d at 99.

b. In the absence of a particularized statement of unanimity and the lack of sufficient proof of at least one alternative means the convictions on Counts I, II and IV must be reversed.

As discussed previously, the State did not prove the felony murder alternative of either Count I or II. The absence of sufficient evidence of

that alternative requires reversal of the convictions. *Owens*, 180 Wn.2d at 95; *Ortega-Martinez*, 124 Wn.2d at 707-08.

Additionally, the State did not prove either the assault or deadly weapon alternative of first degree burglary in Count IV. Even if the Court finds one of the alternatives proved beyond a reasonable doubt, the count must be reversed for lack of proof of the other. *Owens*, 180 Wn.2d at 95; *Ortega-Martinez*, 124 Wn.2d at 707-08.

Finally, because the felony murder alternative is unsupported by sufficient evidence, the State cannot retry Mr. Lambert on that alternative. *Green*, 94 Wn.2d at 233; *State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997). So too, if the court finds the assault and/or deadly weapon alternatives are not supported by sufficient evidence, the State may not retry Mr. Lambert on those alternatives.

3. Even if the Court finds sufficient evidence supports each alternative, the convictions on Counts I, II, IV and VI violate Mr. Lambert's right to a unanimous verdict.

As outlined previously, the right to unanimity on the means by which the defendant committed the crime requires “a particularized expression” by the jury as to the means relied upon for the conviction or a reviewing court must be able to “infer that the jury rested its decision on a unanimous finding as to the means” in order to affirm. *Green*, 94 Wn.2d at

232-33; *Owens*, 180 Wn.2d at 95; *Ortega-Martinez*, 124 Wn.2d at 707-08.

a. *The jury's verdicts on Counts I and II do not contain a particularized expression of unanimity and there is no way to infer its verdicts were unanimous.*

The jury here did not return a particularized finding of unanimity on either Counts I or II. Further, the Court cannot conclude that the jury rested its decision on a unanimous finding as to the means. Not only did the court fail to provide a special verdict form and fail to instruct the jury that it must unanimously agree as to which alternative means the State proved, it affirmatively told the jury it did not have to be unanimous. CP 198-99.

Counts I and II charged Mr. Lambert with first degree murder under two alternative means: premeditated murder and felony murder based on first degree burglary. CP 627-29. The court instructed the jury on both alternatives. CP 198-99 (Instructions 16 and 17)

Instruction 16 read:

To convict the defendant of the crime of murder in the first degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

Intentional Murder:

- (1) That on or about the 3rd day of October, 2011, the defendant caused the death of George Lambert;
- (2) That the defendant acted by one or more of the following means:

- (a) That the defendant acted with premeditated intent to cause the death of George Lambert;
- OR
- (b) That the defendant caused the death of George Lambert
 - (i) During the course of, in furtherance of, or in immediately [sic] flight from the commission of burglary in the first degree; and
 - (ii) George Lambert was not a participant in the crime of first degree burglary.

AND

- (3) That the acts occurred in the State of Washington.

If you find from the evidence that elements (1) and (3), and either of alternative elements (2)(a) or (2)(b) has [sic] been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty. *To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b), has been proved beyond a reasonable doubt, as long as each juror finds that all of the elements in at least one alternative have been proved beyond a reasonable doubt.*

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements in (1), (2), or (3) then it will be your duty to return a verdict of not guilty.

CP 198 (italics added). A similarly worded Instruction 17 addressed Count II. CP 199. The jury returned general verdicts of guilty on both counts. CP 282-83.

These instructions directly contradict the Supreme Court's repeated urging that trial courts should instruct on the requirement of unanimity for alternative means crimes. *Ortega-Martinez*, 124 Wn.2d 717 n.2 (citing *Whitney*, 108 Wn.2d at 511). Instructions 16 and 17 violate Mr. Lambert's right to unanimity under article I, section 21.

The prosecutor highlighted this language in closing argument telling them a unanimous verdict did not require agreement as to which alternative was proved beyond a reasonable doubt. Regarding the first count, the prosecutor said, “And the [the instruction] goes on to explain you don’t all have to agree on premeditation to make a finding of guilty, And you don’t all have to agree on First Degree Burglary to make a finding of guilty. As long as everyone agrees it’s one way or the other, that constitutes a unanimous verdict. . . .” RP 1622. With respect to the second count the prosecutor repeated this line of argument saying “[s]ome of you can decide it’s premeditated and the rest of you decide it’s committed during the course of First Degree Burglary, you’re still unanimous.” RP 1624.

The instructions, together with the State’s argument, prevent this Court from being able to infer that the jury rested its decision on a unanimous finding as to the means. Accordingly, this Court should reverse the convictions on the murder counts.

b. *Mr. Lambert’s convictions in Counts IV and VI violate Mr. Lambert’s right to a unanimous verdict.*

First degree burglary includes alternative means. RCW 9A.52.020. A person commits the crime when he commits burglary and “(a) is armed with a deadly weapon, or (b) assaults any person.” *Id.*

The to-convict instructions for these two counts do not include the same erroneous statement of the law contained in Instructions 16 and 17. Nor did the prosecutor affirmatively misstate the law as it pertains to these counts. However, the jury was not instructed that it must unanimously agree regarding the alternative means. The jury's verdicts do not contain any particularized expression of unanimity. CP 277-79. There is nothing in the record that permits this court to infer the jury unanimously agreed on one or both alternative means. This Court should reverse the convictions on these counts.

c. Whether or not the State presented sufficient evidence to support a potential verdict on any alternative means does not cure the violation of the right to a unanimous jury.

The State may argue that because it presented sufficient evidence to survive a due process challenge as to alternative means of the four counts this Court should affirm. The State could find support for this argument based upon a misreading of *Ortega-Martinez*, 124 Wn.2d at 707-08. The Court in *Ortega-Martinez* reasoned:

If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary **to affirm** a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. On the other hand, if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction **will not be affirmed**.

Id. (Internal citations omitted, italics in original, bold added.) It is plain from the language in bold the Court was speaking of the standard of harmless error for appellate review: whether the conviction could be affirmed. Thus, whether each alternative is supported by sufficient evidence is an appellate question. It is not proper to tell a jury they need not unanimously agree.

Importantly, prior to 2005, the pattern jury instruction did not specifically advise jurors they need not be unanimous as to the means. The comment to WPIC 4.23, the pattern instruction from which the erroneous language in Instructions 16 and 17 is drawn provides:

The committee based its revision on the holding in *State v. Ortega-Martinez* . . . in which the Supreme Court specifically held that jurors need not be unanimous as to alternative means, as long as sufficient evidence supports each of the means relied on by one or more jurors. 124 Wn.2d at 707–08

11 *Washington Practice, Pattern Jury Instructions Criminal*, WPIC 4.23 (3d ed). That conclusion ignores the actual holding of the Court and conflates the standard of appellate review with the jury’s duty

Beyond that, two problems remain with the presumption that sufficient evidence means the jury was unanimous. First, the presumption makes no sense unless the jury is told that it must be unanimous as to the means. Under such circumstances, a reviewing court could presume that the jury was unanimous as to the means even without a special verdict

form, because juries are presumed to follow instructions.² *See State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). But if the jury is not told it must be unanimous as to the means, then the fact that sufficient evidence is presented as to both means logically makes it less likely that the jury unanimously agreed as to the means.³ Unanimity is certainly unlikely where, as here, the jury is explicitly told it need not be unanimous as to which alternative the State proved.

The second problem with the presumption is that it conflates the due process right to sufficient of the evidence with the separate state constitutional right to a unanimous jury. As separately guaranteed rights, the fact that one right is honored does not mean the other can be ignored. To be sure, a verdict based upon insufficient evidence could not be affirmed simply because it was unanimous. The appellate standard for

² The only problem in such a situation would be that if there were insufficient evidence as to one of the means, and no special verdict form showed that the jury agreed on the means for which there was sufficient evidence. That situation would implicate not only the right to unanimity, but also the right to due process and the right to appeal. But if there were sufficient evidence as to both means, and the jury was instructed that it had to be unanimous as to the means, there would be no reversible error. Thus, in the absence of a special verdict form, a reviewing court may affirm only where (1) the jury is instructed it must be unanimous as to which alternative was committed; and (2) sufficient evidence is presented of both (or all) alternatives.

³ The King County deputy prosecutor arguing before the Supreme Court in *State v. Sandholm*, no. 90246-1, agreed that the presumption discussed in this portion of *Ortega-Martinez* is illogical. http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2014110002 at ~ 38:48-39:00.

sufficiency of the evidence asks merely whether a reasonable juror could have relied on the evidence. *Green*, 94 Wn.2d at 221-22. The fact that a juror could have relied on one alternative or the other does not mean any or all the jurors did. A court can only assure the requirement of unanimity is met by knowing what the jury actually did rather than what they could have done.

The right to a unanimous jury is the right to unanimity on the necessary elements of the offense, and the elements of felony murder are different from the elements of intentional murder. *See State v. Franco*, 96 Wn.2d 816, 830-38, 639 P.2d 1320 (1982) (Utter, J., dissenting). Thus, “unanimity with respect to at least one of the theories by which the crime may be committed remains the minimum constitutional requirement for conviction.” *Id.* at 838 n.4.

Cases from other states are informative. In an Oregon case, a defendant was charged with two alternative means of committing aggravated murder, and, as in Mr. Lambert’s case, the court instructed the jury it did not have to agree on which alternative was committed:

With regard to this charge, it is not necessary for all jurors to agree on the manner in which Aggravated Murder was committed. That is, some jurors may find that it was committed during the course of and in furtherance of Robbery in the First Degree, and others may find it was committed to conceal a crime or its perpetrator. Any combination of twelve jurors

agreeing that one or the other or both occurs is sufficient to establish this offense.

State v. Boots, 308 Or. 371, 374-75, 780 P.2d 725 (1989) (quoting instruction).

The jury convicted the defendant of aggravated murder, but the Oregon Supreme Court reversed, holding the state constitutional guarantee of unanimity was violated. The court explained it is obvious a jury must agree on all of the elements of the crime if only one alternative or the other is charged. *Id.* at 377. Accordingly, it “should be no less obvious when the state charges a defendant both under [one subsection of the statute] and under [another].” *Id.* “In order to convict, the jury must unanimously agree on the facts required by either subsection. Indeed, they may agree on both, if both are proved beyond a reasonable doubt.” *Id.* Because the jury was wrongly told it did not have to be unanimous as to either alternative, reversal and remand for a new trial was required, with no discussion of sufficiency of the evidence. *Boots*, 308 Or. at 381.

The Massachusetts Supreme Court has held its common law provides a right to unanimity on the means of committing an alternative means crime. *Commonwealth v. Berry*, 420 Mass. 95, 112, 648 N.E.2d 732 (1995). *Berry* involved a charge of first-degree murder, where the alternative methods alleged were premeditated murder and felony murder.

Id. at 111-12. Although the trial court did not affirmatively instruct the jury it need not be unanimous (as it did in this case and *Boots*), it denied the defendant's request to instruct the jury that it had to be unanimous as to the means. The state supreme court affirmed not because there was sufficient evidence to satisfy a due process challenge, but because it was clear on the record that, despite the absence of the instruction, the jury was unanimous as to felony murder. *Id.* at 112. Nonetheless, the court instructed "hereafter, as a matter of common law, when requested, a judge should give an instruction to the jury that they must agree unanimously on the theory of culpability where the defendant has been charged with murder in the first degree." *Id.*

A Michigan case is also instructive. In *People v. Olsson*, 56 Mich. App. 500, 224 N.W.2d 691 (1974), the defendant was charged with first degree murder by the alternative means of premeditation and felony murder. The Court of Appeals ruled the evidence of felony murder was insufficient, and that the trial court accordingly erred by instructing the jury on that alternative. *Id.* at 504. Furthermore, because there was only a general verdict form and the jury did not indicate upon which theory it relied, reversal was required because the Court of Appeals could not "conclusively state" the jury relied upon the alternative supported by sufficient evidence. *Id.* at 505. Apart from the insufficiency of the

evidence, the court held the jury instructions “did not adequately inform the jury of their duty to make a unanimous finding as to whether defendant was guilty of premeditated murder or murder in the perpetration of a felony.” *Id.* at 506. This failure to ensure unanimity constituted an independent error:

We agree with defendant that on the basis of these instructions, it is possible that the jury arrived at a compromise verdict, that is, some members may have felt that defendant was guilty beyond a reasonable doubt of murder in the perpetration of a robbery or larceny while the remaining members may have felt that defendant was guilty beyond a reasonable doubt of premeditated murder. Such a verdict would not be unanimous and could not convict defendant.

Olsson, 56 Mich. App. at 506. Other states similarly enforce their unanimity requirements independent of the sufficiency of the evidence. *E.g.*, *State v. Saunders*, 992 P.2d 951, 968 (Utah 1999); *Probst v. State*, 547 A.2d 114, 121 (Del. 1988).

In sum, Mr. Lambert has a constitutional right to a verdict in which all 12 jurors agree on the elements of the crime that were proven beyond a reasonable doubt. The verdicts in this case do not satisfy this constitutional requirement.

d. *The Court must reverse the convictions on Counts I, II, IV, and VI and remand for a new trial.*

Because there was no special verdict form showing all 12 jurors unanimously agreed that the State proved all of the elements of either

felony murder, intentional murder, or both, reversal is required unless this Court can nevertheless infer the jury was unanimous as to the means. The Court cannot make this inference because the jury was specifically instructed it did not have to be unanimous as to whether the State proved the elements of felony murder or the elements of intentional murder. The remedy is reversal and remand for a new trial on Counts I and II.

Similarly, because nothing indicates all 12 jurors agreed on the alternative means of first degree burglary the Court must reverse Count IV and VI.

4. Instructions 16 and 17 omit an essential element of the offense of felony murder

- a. *The state must prove and a jury must find each element of an offense beyond a reasonable doubt.*

“The Sixth Amendment provides that those ‘accused’ of a ‘crime’ have the right to a trial ‘by an impartial jury.’” *Alleyne v. United States*, U.S. ___, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013). This right, together with the Fourteenth Amendment Due Process Clause, requires the State prove each element to a jury beyond a reasonable doubt. *Gaudin*, 515 U.S. at 510; *Winship*, 397 U.S. at 364. A similar requirement flows from the jury-trial guarantee of article I, section 22 and the due process provisions of article I, section 3 of the Washington Constitution. *State v. Mills*, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is

violated where a jury instruction relieves the State of its burden of proving each element of the crime. *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

b. *A to-convict instruction must include each essential element of the offense.*

“A ‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Therefore, “an instruction purporting to list all of the elements of a crime must in fact do so.” *Id.* (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). A reviewing court may not look to other jury instructions to supply a missing element from a “to convict” jury instruction. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (citing *Smith*, 131 Wn.2d at 262-63).

Here the to-convict instructions on each of the first degree murder charges omit an essential element of the offense.

c. *The to-convict instructions omitted essential elements of first degree murder.*

A felony murder conviction must be supported by sufficient evidence of each element of the predicate felony. *Green*, 94 Wn.2d at 224. The State must prove the defendant was committing or attempting to

commit the predicate felony at the time of the murder. *State v. Kosewicz*, 174 Wn.2d 683, 691, 278 P.3d 184 (2012).

This requirement is reflected in the pattern jury instruction for the offense which provides in relevant part:

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) **That on or about (date), the defendant [committed][or] [attempted to commit] (fill in felony);**
 - (2) That [the defendant][or][an accomplice] caused the death of (name of decedent)[in the course of or in furtherance of such crime][or][in immediate flight from such crime];
 - (3) That (name of decedent) was not a participant in the [crime of (fill in felony)] [attempt to commit (fill in felony)]; and
 - (4) That any of these 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.

....

11 *Washington Practice, Pattern Jury Instructions Criminal*, WPIC 26.04 (3d ed) (Brackets and parentheses in original, emphasis added).

However, the instructions in this case omit the above emphasized element. For example, Instruction 16 only required the jury find:

- (b) That the defendant caused the death of George Lambert
 - (i) During the course of, in furtherance of, or in immediately [sic] flight from the commission of burglary in the first degree; and
 - (ii) George Lambert was not a participant in the crime of first degree burglary.

CP 198. Instruction 17 makes the same omission.. CP 199

These instructions do not require the jury to find Mr. Lambert committed the burglary. To the extent they reference the commission of a crime at all, the instructions still do not require the jury to find Mr. Lambert, as opposed to someone else, committed that crime. The jury was not instructed it must find Mr. Lambert was committing or attempting to commit first degree burglary at the time the murders occurred.

d. *This Court must reverse Mr. Lambert's felony murder convictions.*

The Supreme Court has applied a harmless-error test to erroneous jury instructions. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). However, the Court held “an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *Brown*, 147 Wn.2d at 339 (citing *Smith*, 131 Wn.2d at 265). In other instances, an instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. *Mills*, 154 Wn.2d at 15 n.7 (citing *Neder*, 527 U.S. at 1; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The State cannot meet that burden in this case.

6. Convictions of both first degree murder and first degree burglary violate double jeopardy principles.

- a. *A defendant's Fifth Amendment right to be free from double jeopardy is violated by convictions for both felony murder and the predicate felony.*

“No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....” U.S. Const. amend. V. Similarly, the Washington Constitution provides, “No person shall be ... twice put in jeopardy for the same offense.” Const. art. I, § 9. These clauses protect defendants against “prosecution oppression.” *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007).

To determine whether multiple convictions violate double jeopardy, courts apply the “same evidence” test. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306, (1932)). Under that test, absent clear legislative intent to the contrary, a defendant’s double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. *Id.*; *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other.

Freeman, 153 Wn.2d at 772 (citing *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896)).

Prosecutors may not “divide a defendant's conduct into segments in order to obtain multiple convictions.” *State v. Jackman*, 156 Wn.2d 736, 749, 132 P.3d 136 (2007). Furthermore, if the prosecution has to prove one crime in order to prove the other, entering convictions for both crimes violates double jeopardy. *Id.* In other words, entering convictions for two crimes violates double jeopardy if “it was impossible to commit one without also committing the other.” *Id.*

In light of the above rules, both the United States Supreme Court and Washington Supreme Court have recognized that entering convictions for both felony murder and the underlying felony violates double jeopardy principles. *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977); *In re the Personal Restraint of Francis*, 170 Wn.2d 517, 522 n.2, 242 P.3d 866 (2010); *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 818, 100 P.3d 291 (2004) (citing *Harris*, 433 U.S. 682). This is so because “[t]o convict a defendant of felony murder the State is required to prove beyond a reasonable doubt each element of the predicate felony.” *State v. Quillin*, 49 Wn. App. 155, 164, 741 P.2d 589 (1987). It is therefore impossible to commit felony murder without committing the

underlying felony, and entering convictions for both violates double jeopardy. *See Jackman*, 156 Wn.2d at 749.

This Court, the Washington Supreme Court, and the U.S. Supreme Court have all required that convictions be vacated for double-jeopardy violations in similar circumstances.

In *Harris*, the Court held the Fifth Amendment prohibited the defendant's conviction for robbery following a conviction for felony murder predicated on robbery. *Harris*, 433 U.S. 682. The Court articulated the rule “[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one. 433 U.S. at 682-83 (citing *In re Neilsen*, 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889))

The Court similarly vacated a conviction for a predicate felony in *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980). There, the defendant was convicted of both rape and felony murder predicated on rape. *Id.* at 685-86. In vacating the rape conviction, the Court noted:

[R]esort to the *Blockburger* rule leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that “each provision requires proof of a fact which the other does not.” A conviction for killing in the

course of a rape cannot be had without proving all of the elements of the offense of rape.

Id. at 693-94.

This Court reversed an attempted robbery conviction where the defendant had also been convicted of felony murder based on the attempted robbery in *State v. Williams*, 131 Wn. App. 488, 128 P.3d 98 (2006). This Court recognized, “the attempted robbery count merged into the felony murder because it was the predicate offense.” *Id.* at 491-92. In other words, “the essential elements of the homicide include all the elements of the robbery, such that the facts establishing one necessarily also establish the other.” *Id.* at 498.

Similarly in *Womac*, the defendant was convicted of homicide by abuse, felony murder predicated on assault, and assault, but the Washington Supreme Court ordered the latter two convictions vacated. 160 Wn.2d at 647. Only one of the first two convictions could be sustained because there was only one homicide, and the assault conviction could not stand because “Womac could not have committed felony murder in the second degree without committing assault in the first degree.” *Id.* at 656.

b. *Mr. Lambert was convicted of both burglary and felony murder predicated on the burglary.*

In violation of the Fifth Amendment and *Harris*, the trial court here entered convictions for both burglary (Counts IV and VI) and felony murder based on the burglary (Counts I and II). CP 6-7. The remedy is vacation of the burglary convictions and the associated firearm enhancements. *See Womac*, 160 Wn.2d at 656.

c. *RCW 9A.52.050 does not permit a different result.*

Merger is a common-law doctrine which holds that where proof of one crime elevates the degree of another, the crime which is incidental to the other merges. RCW 9A.52.050 creates an exception to this general rule for burglary. The intent of this statute with respect to burglary is to permit separate punishment for the burglary as well as the incidental crimes committed inside the building which transforms a trespass into a burglary, or which elevate the burglary to another degree. Pursuant to the statute, those other offenses “would not merge with the offense of first-degree burglary” *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999). Thus in *Sweet*, the court found that an assault which elevated a burglary to first degree burglary did not merge into the burglary.

That is altogether different than a case where the burglary itself is the incidental crime which forms the element of a larger crime such as

felony murder. It is not a question of whether the other offenses merge into the overarching burglary but rather whether the burglary will merge into the overarching murder of which it is an element. While the intent of RCW 9A.52.050 is clear with respect to the latter, it is not at all clear and does not speak to the former. Instead, the rule must remain the same, that where the burglary is an element of felony murder, double jeopardy principles prevent convictions of both offense. *See Harris*, 433 U.S. at 682-83.

In *State v. Elmore*, the court relied on the anti-merger statute to permit convictions of both felony murder and burglary. 154 Wn. App. 885, 900-01, 228 P.3d 760 (2010). The Court did so without recognizing the question is not whether the murder merges into the burglary but whether the burglary merges into the murder. The court did not address the rule established by cases such as *Harris*. Indeed, *Elmore* does not even cite to *Harris* or other United States Supreme Court cases on point. Thus, its analysis is incomplete at best and ultimately contrary to the established rule.

7. The trial court improperly denied Mr. Lambert of his right to represent himself in violation of the Sixth Amendment and article I, section 22.

a. *The federal and state constitutions guarantee a defendant the right to represent themselves.*

Article I, section 22 of the Washington Constitution explicitly guarantees a defendant the right to “appear and defend in person, or by counsel.” *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); *State v. Rafay*, 167 Wn.2d 644, 649, 222 P.3d 86, 88 (2009). Article I, section 22 provides in part “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel” The United States Supreme Court has recognized the Sixth Amendment implicitly provides a right to self-representation. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

The right may be denied only in limited circumstances. A court may deny a motion to proceed pro se if the request is equivocal, involuntary or unknowing. *Madsen*, 168 Wn.2d at 504-05. Additionally, courts have cautioned:

The right of self-representation is not a license to abuse the dignity of the courtroom. The court may deny pro se status if the defendant is trying to postpone the administration of justice and may terminate pro se status if [he] is sufficiently disruptive or if delay becomes the chief motive.

State v. Thompson, 169 Wn. App. 436, 468, 290 P.3d 996 (2012) (internal quotations omitted, citing *Faretta*, 422 U.S. at 834 n. 46; *Madsen*, 168 Wn.2d at 509). However, such a denial cannot rest upon a defendant's lack of familiarity with the legal rules or even his obnoxious behavior. *Madsen*, 168 Wn.2d. at 509. Further concerns about the efficiency and orderliness of court proceedings are not valid reasons to deny an accused person the right to self-representation. *Madsen*, 168 Wn.2d at 505.

b. *The trial court improperly concluded Mr. Lambert had forfeited his right to represent himself.*

Here, the court concluded that Mr. Lambert had forfeited his right to represent himself because of his “intransigence,” inability to follow the rules of evidence, his disrespect for the court, and “unnecessary and needless waste of time.” RP 1123.

In *Madsen*, the trial court entered a written order denying Mr. Madsen's request to proceed *pro se* which noted that Madsen “had been ‘extremely disruptive,’ ‘repeatedly addressed the court at inopportune times,’ and ‘consistently showed an inability to follow or respect the court's directions.’” *Madsen*, 168 Wn.2d at 502-03. The trial court concluded that granting Mr. Madsen's request would “obstruct the orderly administration of justice.” *Id.* The Court of Appeals found that Madsen's

“persistent disruptions” supported the trial court’s decision. *Id.* at 509 (citation omitted).

The Supreme Court disagreed:

Although the trial court’s duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice.

Id.

On the specific question of Mr. Madsen’s in-court behavior, the Court admonished, “a criminal defendant's right to self-representation cannot be denied simply because affording the right will be a burden on the efficient administration of justice.” *Id.* The Court noted,

Though Madsen did interrupt the trial court on several occasions, Madsen was trying to address substantive issues that the record shows he clearly thought were unresolved and were not addressed by the court. A court may deny pro se status if the defendant is trying to postpone the administration of justice. Madsen never requested a continuance. A court may not deny pro se status merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious. Courts must not sacrifice constitutional rights on the altar of efficiency.

168 Wn.2d at 509.

To the extent Mr. Lambert failed to immediately comply with the evidentiary rulings or the rules of evidence, nothing suggests it was for

purpose of causing delay. Like Mr. Madsen, Mr. Lambert sought to present substantive issues to the jury and court. The court complained that he was not conducting his case neatly in line with the rules of evidence. RP 1077. Again, as in *Madsen*, that is not a sufficient basis to deprive him of his right.

We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

Faretta, 422 U.S. at 836.

The trial court scolded Mr. Lambert saying, “you have to be an attorney. You have to act like an attorney. You have to be an attorney.” RP 1076. One’s ability to behave like an attorney is not the threshold for preserving his right to self-representation. Mr. Lambert’s approach to motion and trial practice may not be described as “lawyerly” but that is not standard. As *Madsen* recognized, a trial involving a pro se litigant will not run as smoothly as a case involving represented parties. A pro se litigant may stumble on procedural hurdles and as a result the trial may proceed in fits and starts. Those inefficiencies, or as the trial court phrased it “waste of time,” are not a basis to “sacrifice [his] constitutional rights on the altar of efficiency.” *Madsen*, 168 Wn.2d at 509.

c. *The court should reverse Mr. Lambert's convictions.*

The trial court deprived Mr. Lambert of his right to represent himself in violation of the Sixth Amendment and article I, section 22. "The right [to self-representation] is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). Mr. Lambert's convictions must be reversed.

8. The prosecutor's questioning of Mr. Lambert drew an impermissible adverse inference from Mr. Lambert's exercise of his right to represent himself.

a. *The prosecutor sought to draw an adverse inference from Mr. Lambert's exercise of his right to represent himself.*

After the court had found Mr. Lambert had forfeited his right to represent himself, the prosecutor questioned Mr. Lambert about his research regarding the insanity defense and his researching mental disorders. RP 1320-21. Mr. Lambert objected, as the court-appointed attorney stood silent. In closing, the prosecutor argued Mr. Lambert's access to research materials allowed him to tailor evidence regarding his symptoms RP 1632-33.

b. *A defendant's right to represent himself includes the right to meaningful access to legal and other materials necessary to prepare for trial.*

As set forth above, article I, section 22 expressly provides for the right to represent oneself. *Rafay*, 167 Wn.2d at 649. This right is broader than the 6th Amendment right, in part because under the federal constitution the right is merely implied while the Washington constitution expressly guarantees it. *State v. Silva*, 107 Wn. App. 605, 618, 27 P.3d 663 (2001) (citing *Faretta*, 422 U.S. at 819). In any event, the Sixth Amendment requires that a pre-trial detainee who has elected to proceed pro se must be afforded reasonable access to relevant legal materials, otherwise *Faretta* is meaningless for a confined defendant. *Milton v. Mercer*, 767 F.2d 1443, 1446-48 (9th Cir.1985). Similarly, in *Silva*, this Court found “article I, section 22 affords a pretrial detainee who has exercised his constitutional right to represent himself, a right of reasonable access to state provided resources that will enable him to prepare a meaningful pro se defense.” 107 Wn. App. at 622. Thus, under either the state or federal constitutions, the right to engage in meaningful and relevant research is part and parcel of the right of self-representation.

Mr. Lambert's research of relevant legal and psychiatric material which bore directly on his defense falls squarely within the right to self-representation.

c. *The State cannot seek to draw an adverse inference from a defendant's exercise of his constitutional rights.*

The State cannot act in way that will unnecessarily “chill” the assertion of a constitutional right and “the State may not draw adverse inferences from the exercise of a constitutional right.” *United States v. Jackson*, 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968); *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). Doing so is not only contrary to the asserted right but contrary to basic notions of due process. *Rupe*, 101 Wn.2d at 707 (citing *Zant v. Stephens*, 462 U.S. 862, 882-83, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)) *see also Griffin v. California*, 380 U.S. 609, 614, 85 S. Ct. 1229, 1232, 14 L.Ed.2d 106 (1965) (drawing adverse inference from defendant's failure to testify unconstitutionally infringed on defendant's Fifth Amendment rights)

By commenting on and seeking an adverse inference from Mr. Lambert's trial preparation and research, the prosecutor was seeking to draw an adverse inference from Mr. Lambert's exercise of his constitutional rights. That is impermissible. *Rupe*, 101 Wn.2d at 707.

“The right [to self-representation] is either respected or denied.” *McKaskle*, 465 U.S. at 177. As detailed above, this right includes the meaningful ability to engage in research and present one's case. It would be a perversion of that right to tell the defendant that while he has the right

to do so, the prosecutor is free to urge the jury to draw adverse inferences from its exercise. Such a practice does not “respect” the right to self-representation. Mr. Lambert’s convictions must be reversed

9. The trial court erred and violated the requirements of RCW 10.77.080 when it refused to consider Mr. Lambert’s pretrial motion for acquittal by reason of insanity.

Prior to trial and pursuant to RCW 10.77.080 Mr. Lambert filed a motion to acquit by reason of insanity. The State filed a motion urging the court to hear the motion to acquit in conjunction with the jury trial, ostensibly to conserve resources. CP 997-1002. Mr. Lambert objected, noting among other things that evidence regarding his sanity, particularly which the State would offer in rebuttal, would not necessarily be otherwise admissible at trial on the question of guilt. 6/28/13 RP 27-28. Concluding that conducting the pretrial hearing which the statute requires would be unnecessarily burdensome, the court granted the States’ motion. CP 975-76.

- a. *Where a defendant files a motion for acquittal based on insanity, the trial court is required to rule on that motion following a pretrial hearing.*

RCW 10.77.080 provides

The defendant may move the court for a judgment of acquittal on the grounds of insanity: PROVIDED, That a defendant so acquitted may not later contest the validity of his or her detention on the grounds that he or she did not commit the acts charged. At the hearing upon the motion the defendant shall

have the burden of proving by a preponderance of the evidence that he or she was insane at the time of the offense or offenses with which he or she is charged. If the court finds that the defendant should be acquitted by reason of insanity, it shall enter specific findings in substantially the same form as set forth in RCW 10.77.040. If the motion is denied, the question may be submitted to the trier of fact in the same manner as other issues of fact.

“Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency.” *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). This is consistent with the rule that “a statute that is clear on its face is not subject to judicial construction.” *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Instead, if the language of a statute is unambiguous, it alone controls. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); *Tommy P. v. Board of County Commissioners*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

In its motion, the State contended the “statute is silent on . . . when such a motion should be heard and ruled upon.” CP 999. But, the statute expressly says the court should hold a “hearing upon the motion” at which “the defendant shall have the burden of proving by a preponderance of the evidence” that he is insane. “Absent ambiguity or a statutory definition, [a

court] gives the words in a statute their common and ordinary meaning. To determine the plain meaning of an undefined term, [a court] may look to the dictionary.” *HomeStreet, Inc. v. State Department of Revenue*, 166 Wn.2d 444, 451-52, 210 P.3d 297 (2009) (quoting *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976)). A “hearing upon [a] motion” is a term of common understanding, courts conduct hearings every day. No one would confuse a motion hearing with a jury trial. The plain language of the statute required the court to consider Mr. Lambert’s motion for acquittal in the course of a hearing separate from and before the jury trial.

In fact, the Supreme Court has long described the motion procedure as “a statutory alternative to a jury trial, available to the defendant at his own election.” *State v. Jones*, 84 Wn.2d 823, 832-33, 529 P.2d 1040 (1974). The Court explained

If [the court] is not satisfied that such a judgment should be entered, the question must be submitted to the trier of the fact at a regular trial. Far from denying the defendant a constitutional right, the statute bestows upon him a new right, not heretofore enjoyed.

Id. More recently this Court described the intent of the statute as “grant[ing] . . . two bites of the proverbial pear.” *State v. West*, 185 Wn. App. 625, 639, 344 P.3d 1233 (2015); *see also*, 12 Wash. Prac., *Criminal Practice & Procedure* § 1011 (3d ed.) (under RCW 10.77.080 “issue of a

defendant's insanity, if not disposed of by *pretrial motion* under, must be raised and determined at the trial"). The motion for acquittal procedure cannot operate as an alternative to a jury trial if it is conducted in conjunction with a jury trial. By its plain language, the statute requires a hearing on a motion for acquittal which is separate from and before a jury trial.

Even if the phrase "hearing upon the motion" is ambiguous, the court must adopt the interpretation most favorable to Mr. Lambert. "[T]he rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary." *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009). Thus, the phrase "hearing upon the motion" must be interpreted to mean a hearing separate from and before the trial.

RCW 10.77.080 entitled Mr. Lambert to a separate pretrial hearing on his motion for acquittal. The trial court erred in denying him that hearing.

b. *The court's refusal to separately consider the motion for acquittal violated the appearance of fairness doctrine.*

The integrity of the fact-finding process is at the heart of the right to a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d

1189 (2002); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21, 22. Trial proceedings must not only be fair, they must “appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954) (“justice must satisfy the appearance of justice”) *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992) (“The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial”). The trial court violated this requirement.

The court’s order denying a separate hearing states “there is a substantial likelihood that holding a separate pretrial hearing on the defendant’s motion would result in two essentially identical trials involving the same expert and law witnesses.” CP 975. That conclusion presupposed the motion for acquittal would be denied. At the time the court denied the motion no party had presented any evidence regarding insanity. Obviously no duplication of testimony and witnesses would occur if the court granted the motion for acquittal following the pretrial hearing. The conclusion that it was likely to occur before a single piece of evidence was submitted is a prejudgment of the merits of Mr. Lambert’s motion. Prejudgment of factual claims is among the core judicial actions at which the appearance of fairness doctrine is aimed. *Organization to*

Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 889-90, 913 P.2d 793 (1996).

The court's order refusing to hear the pretrial motion violated the appearance of fairness doctrine.

c. The trial court's order refusing to consider the motion for acquittal prior to trial denied Mr. Lambert his right to control his own defense at trial.

“[A] defendant has a *constitutional* right to at least broadly control his own defense. *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983) (italics in original). “The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.” *Faretta*, 422 U.S. at 819. Article I, section 22 goes further and expressly ensures the personal nature of the right to control one's defense by guaranteeing “the right to appear and defend in person, or by counsel.” *Rafay*, 167 Wn.2d at 649.

The court's decision required Mr. Lambert to present his insanity defense to the jury. He was denied the ability to present the issue to the court and then to decide not to pursue the defense before the jury. Instead he was forced to submit the defense to the jury. By the court's ruling Mr. Lambert had to admit to the jury he committed the acts. Whether he would have elected to pursue that course is beside the point, it was his choice to make.

Mr. Lambert had the right to determine how he wished to present his defense. *Faretta*, 422 U.S. at 834; *Rafay*, 167 Wn.2d at 650-51. The trial court's ruling denied him that right.

10. The trial court used the incorrect standard in denying Mr. Lambert's motion for acquittal.

- a. *When ruling on a motion for acquittal the trial court must independently weigh the evidence and cannot defer to the jury resolution of factual disputes.*

In *State v. McDonald*, the Court held that in ruling on a motion to acquit a trial court should defer to the jury whenever there is conflicting evidence on the issues of sanity. 89 Wn.2d 256, 267, 571 P.2d 930 (1977). *McDonald* held “[t]he question of sanity is one of fact and should go to the jury when there is conflicting evidence on the issue.” *Id.*

The Court subsequently overturned *McDonald*. *State v. Somerville*, 111 Wn. 2d 524, 530, 760 P.2d 932 (1988). *Somerville* concluded the conflicting-evidence standard was too high a standard and was contrary to the statutory directive of RCW 10.77.080. *Somerville* explained the standard from *McDonald*

is more onerous than the preponderance standard. If the question of sanity on a motion under RCW 10.77.080 is a jury question, as *McDonald* suggests, the judge is prohibited from usurping the jury's function by weighing evidence. Therefore, the defendant's motion will be granted only where the evidence is so overwhelming that no jury could reasonably find in favor of the State, even when all the evidence is construed in its favor. In the context of a motion for acquittal under RCW

10.77.080, this means that the State would only have to come forward with *some* evidence of sanity. However, if the judge considering a motion under RCW 10.77.080 is to weigh evidence and determine whether the defendant has carried his burden by a preponderance, the State would have to do more. It would have to produce evidence which is equal to or greater than the defendant's in probative value.

Sommerville, 111 Wn. 2d at 530. The Court concluded the trial court must “decide the question as a matter of fact, weighing the evidence under a preponderance of the evidence standard.” *Id.* at 531-32. The trial court used the incorrect standard here.

b. *The trial court failed to independently resolve factual disputes.*

The court denied Mr. Lambert’s motion saying only:

There are differing opinions. And Mr. Lambert has not met his burden for the Court to decide this.

It will about a – a issue for the trier of fact, that is, the jury.

The Court denies the motion.

RP 1558

The court plainly confused its role as it, not the jury, was the “trier of fact” on the motion. Yet nowhere in its ruling does the court address, much less weigh, the facts. Instead, the ruling reveals the court believed that the existence of conflicting evidence, regardless of its weight, precluded the court from granting the motion. That is precisely the standard employed in *McDonald* but subsequently rejected by

Sommerville. The trial court did not weigh the evidence as required by RCW 10.77.080.

The Court's order denying the motion to acquit should be reversed.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Lambert's convictions.

Respectfully submitted this 30th day of October, 2015.

s/ Gregory C. Link
GREGORY C. LINK – 25228
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 70844-9-I
)	
JOSHUA LAMBERT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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