

FILED
October 25, 2016
Court of Appeals
Division I
State of Washington

NO. 74363-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KARL PIERCE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Michael Bienhoff met Precious Reed and Demetrius Bibb in Woodland Park for a drug transaction. One side attempted to rob the other and Precious Reed ended up dead. This trial was intended to determine who was liable for his death, but the proceedings were faulty and leave much doubt about their fairness and constitutionality.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the requested jury instructions on homicide by accident or mistake (excusable homicide).

2. Karl Pierce's trial lacked the constitutionally required appearance of fairness.

3. The trial court abused its discretion in admitting highly prejudicial and irrelevant evidence of Pierce's violence towards a co-defendant months after Reed's death.

4. The trial court abused its discretion and violated Pierce's right to present a defense by excluding evidence of Reed's financial status as part of Reed's motive to rob Michael Bienhoff.

5. The trial court abused its discretion and violated Pierce's right to present a defense by excluding evidence of Reed's prior robbery to show Reed's motive, plan and intent to rob Michael Bienhoff.

6. The trial court abused its discretion and violated Pierce's right to present a defense by excluding evidence of Demetrius Bibb's gun ownership and experience, which was relevant to whether he had a gun and was the shooter at Woodland Park.

7. The trial court erred in admitting the substance of two alleged conversations through Hiram Warrington where only the fact of the conversations was relevant to impeach Ray Lyons's testimony that the conversations did not occur under ER 613.

8. The prosecutor committed misconduct by instigating a discussion about sentencing and the death penalty during voir dire in this noncapital case.

9. The trial court erred in informing the jury this is a noncapital case.

10. In the alternative, the rule prohibiting informing noncapital juries that the case does not involve the death penalty is incorrect and harmful and should be overruled.

11. The trial court erred in failing to inform jurors, after the issue arose, that they could not rely on knowledge of the law outside the instructions provided by the court in this case.

12. The trial court violated Pierce's right to equal protection by allowing the State to strike one of three African-American members of the venire.

13. Pierce's rights to an impartial jury and a fair trial were violated when the court excused the alternates without admonishing them to remain free from outside influence and one of the alternates was recalled to deliberate.

14. Pierce's rights to an impartial jury, a fair trial, and a unanimous verdict were violated when the court replaced a juror with one of the alternates without instructing the jury to commence deliberations anew.

15. Pierce's rights to an impartial jury, a fair trial, and a unanimous verdict were violated when the alternates were in the jury room after the jury had retired.

16. Cumulatively, the above errors denied Pierce a fair trial.

17. The trial court erred when it counted two prior nonviolent juvenile offenses as one point each, instead of one half of one point each, in Pierce's offender score.

18. The trial court erred in imposing \$600 in legal financial obligations (LFOs).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The defense is entitled to a jury instruction if it supports the theory of defense and is supported by the facts. Did the trial court err when it denied Pierce a jury instruction regarding excusable homicide—homicide by accident or mistake—where the defense was that the firearm discharged during Michael Bienhoff and Precious Reed’s struggle for Reed’s gun and Bienhoff could not say whose actions caused the firing but testified he did not intend to discharge the firearm or kill Reed?

2. The appearance of fairness and impartiality is a critical constitutional right guaranteed by the article I, section 22 and the Sixth and Fourteenth Amendments. This fundamental aspect of a fair trial is viewed objectively to determine whether a reasonable person would question the court’s impartiality. Was Pierce denied a fair trial by the appearance of racial bias when the trial court commented that the sender of a text message might be “some white guy like me” not “somebody who’s actually, you know, more likely to be a gangster”?

3. Evidence of other misconduct is inadmissible to show character or action in conformity. The State bears a substantial burden to demonstrate admissibility for another purpose, and the trial court must analyze the admissibility on the record, resolving doubtful cases in favor of exclusion. In addition, evidence purporting to show a person’s

consciousness of guilt should not be admitted where it has limited probative value but significant prejudicial effect. Did the trial court abuse its discretion in admitting evidence of Pierce's violence towards a third party months after the alleged murder to show consciousness of guilt?

4. Did the trial court's exclusion of evidence showing Reed's compromised financial status and prior robbery conviction deny Pierce his right to present a defense and constitute an abuse of discretion?

5. Did the trial court's exclusion of evidence showing Bibb's prior gun ownership and experience deny Pierce his right to present a defense and constitute an abuse of discretion?

6. Did the admission of the substance of out-of-court statements exceed ER 613 regarding prior statements of a witness where only the existence of the out-of-court conversations, and not their contents, impeaches Lyons's testimony that the statements did not happen?

7. Did the prosecutor commit misconduct in voir dire by asking persistently about the sentencing implications of this murder case where the death penalty was not at issue and the jury is not to consider the sentence?

8. Our Supreme Court has held the jury in a noncapital case cannot be informed that the death penalty is not at issue. Did the trial court err by telling the jury this was a noncapital case?

9. Where the jury must follow the law provided by the trial court, did the court err when it implied jurors could rely on personal knowledge of the law?

10. The Fourteenth Amendment prohibits the State from striking a juror because of his or her race. Where the State offers a facially race-neutral explanation for striking an African-American juror, the court must sensitively and thoroughly review the facts to determine whether the strike is the result of purposeful discrimination. Did the trial court fail to conduct a sensitive and searching inquiry and does such inquiry show purposeful discrimination where the State embarked on a fishing expedition using the improper subject of sentencing, the additional justifications for the strike do not comport with the record, and a comparative juror analysis shows the targeting of this minority juror?

11. Alternatively, should the court adopt a new test whereby striking a minority juror is improper if there is a reasonable probability, or an objective observer could believe, that race or ethnicity was a factor in the strike?

12. An accused has a constitutional right to a unanimous verdict by an impartial jury and to a fair trial. To ensure these rights are protected, alternate jurors must remain free from outside influence in case they need to replace a deliberating juror; when a juror is discharged during

deliberations and replaced with an alternate, the court must instruct the reconstituted jury to disregard all previous deliberations and begin deliberations anew; and no observers may be present during deliberations. Were Pierce's constitutional rights violated when the court discharged the alternates without instructions to remain impartial then sat one of the alternates after the jury had retired to deliberate without instructing the jury to begin deliberations anew and in the interim the alternates were in the jury room as observers?

13. Did the effect of these errors cumulatively deny Pierce a constitutionally fair trial?

14. To calculate an offender score for felony murder, the statute directs prior nonviolent juvenile felonies count as one half point each. Did the court err when it counted Pierce's two prior nonviolent juvenile felony offenses as a whole point each?

15. Should this Court remand with instructions to strike the \$600 in LFOs, which were imposed despite Pierce's indigency and 540-month sentence because the sentencing court believed the costs were mandatory?

D. STATEMENT OF THE CASE

Precious Reed was found dead with over \$1200 divided between his pocket and his wallet.¹ Michael Bienhoff was in Reed's van with him when the single shot that killed Reed was fired and is the only one who can say what happened in the minutes preceding the shot. RP 1134-35.

Bienhoff maintains he went to Woodland Park in Seattle to sell Reed two pounds of marijuana; Reed tried to negotiate a better deal; when Bienhoff declined, Reed pulled out a gun and the two struggled for it; and in the course of the struggle, it discharged.² Bienhoff is not sure whose finger was on the trigger when it discharged. RP 3469. No firearms were recovered.³

Reed brought at least one associate with him to Woodland Park, Demetrius Bibb. Bibb arrived in a white Cadillac, which he backed in parallel to Reed's van in the parking lot near the lawn bowling court. He later confirmed that Reed intentionally brought less money than the full purchase price of \$4400 to the rendezvous; Reed was hoping to work out

¹ RP 1139-42, 1285-86; RP (10/6/15) 121-22, 146. The consecutively paginated trial volumes transcribed by Joanne Leatiota are referred to simply as "RP"; the separately paginated volumes of the verbatim report are referred to by the first date of the first hearing transcribed in each volume, e.g. "RP (4/11/14)", except the proceedings from October 26, 2015, which are referred to as "RP (10/26/15)" for the morning session reported by Kevin Moll and "RP (10/26/15 PM)" for the afternoon session reported by Dolores Rawlins.

² RP 3426, 3449-56, 3469, 3536-37.

³ RP 1189, 1275-76, 1319-20. Reed was shot on February 20, 2012.

“a little bit of a front” with Bienhoff. Bibb planned to split the marijuana purchase with Reed but backed out at the last minute because he thought Bienhoff had other people there with him. Bibb did not stop Reed from going forward with the deal, did not check on Reed or call 911 when he heard gun shots, sped away from the scene—driving “erratically”—after gunshots were fired, and then did not call or attend to Reed.⁴

Earlier that day, Bienhoff had sought Scott Barnes out as his driver and picked up Ramon Lyons, who recruited his friend Karl Pierce at the last minute. *E.g.*, RP 2113-17. Pierce and Bienhoff had not met before. *E.g.*, RP 3228-29.

According to the crime lab, two guns were discharged—the one that killed Reed and another in the parking lot outside Reed’s van where six shell casings were found on the ground to the front and south side of the van—between where Reed’s van and Bibb’s Cadillac would have been.⁵

Witnesses reported seeing an African-American shooter and someone who came from Bibb’s white Cadillac. Ex. 8 at 2:14-3:14 (911 call by Earl Cadaret); Ex. 10 at 1, 2, 4 (Cadaret’s statement indicates shooter was black man who he previously saw get into the Cadillac); Ex.

⁴ RP 1203-05, 1207-09, 1305, 1520-22, 1609-1790, 1804-19, 2966.

⁵ RP 1249-51, 1270-72, 1275-76, 3124, 3206-08.

25 at 10 (Ismail Tetik reported shooter was black); RP 1203-04; *see* RP 1353-61 (Cadaret testifies he saw Cadillac driver out of car, with hand up in front of Reed's van), 1379-85, 1407-13. Bibb is African-American; Pierce and Bienhoff are Caucasian. *See* RP 1020. Another witness reported shots fired by a grunge-looking guy standing in the grass behind the cars, and this witness thought the shots were heading in the direction of the van. Ex. 12 at 5-8; RP 1532-36 (testimony of Mark Howard). When the police checked Bibb's Cadillac at his home the next day, it had bullet holes on the front right side.⁶

The State initially charged Bienhoff, Lyons, Barnes, and Pierce with second degree felony murder based on an assault. CP 1-7. Before trial, the State amended the information, charging first degree felony murder based on robbery with a firearm enhancement. CP 102-03. The State pursued only one line of investigation—ignoring the possibility that Bibb or another African-American associate of Reed's could have fired shots in the parking lot.⁷ The State ultimately theorized Bienhoff tricked Reed into believing Bienhoff had marijuana to sell Reed, but actually

⁶ RP 1650-52; RP (10/7/15) 114-16.

⁷ RP (10/7/15) 63 (Bibb considered secondary victim, not a suspect); RP 1437-38, 1482 (Cadaret told detective "no doubt" it was the Cadillac driver who fired shots), 2895-2900 (in warrant applications, detective did not include witness statement that shooting came from grassy area), 2940, 2944-48; RP (10/26/15) 81-88; RP (10/26/15 PM) 50; *see* RP 3843-44 (codefendant's closing argument that witnesses support Bibb being shooter).

arrived at the park with a decoy backpack facilitated by Pierce, and Bienhoff intended to rob Reed of the purported-purchase money.⁸ Under the State's theory, when the gun went off, Bienhoff ran without taking any money from Reed and Pierce was the second shooter. RP 3761-64. Despite the State's theory, no one could identify Pierce with certainty.⁹

While the primary question was whether Reed tried to rob or cheat Bienhoff or whether Bienhoff was there to rob Reed—as the State contended—a related question remained: who was the second shooter. *See* RP 3739-40, 3743-44, 3871. If Bibb fired shots that day, it was more likely he and Reed intended to rob Bienhoff and that Reed was also armed. *See* RP 3791-96. If one of Bienhoff's associates fired the other gun, it tended to support the State's theory.

Barnes and Lyons pled guilty to more lenient offenses before trial in exchange for their testimony.¹⁰ Barnes told the jury he drove the others to the park, he heard Bienhoff planning a drug transaction that he thought was a setup, and that Bienhoff and Pierce each had guns at the park.¹¹

⁸ RP 3739-40, 3744-55, 3759, 3764-65, 3771-72 (closing argument).

⁹ RP 1547-48, 1655-56, 1683-89, 1718-19, 1810-17; RP (10/7/15) 182-83, 189-91, 2000-01.

¹⁰ RP 2087, 2155-57, 2235-39 (Barnes received 41 months for robbery), 2510, 2610-17 (Lyons pled to manslaughter and a standard range of 102-36 months)

¹¹ RP 2104-05, 2107, 2112, 2123-26, 2287-94 (Barnes's story changed several times regarding guns), 2302.

Lyons testified Bienhoff asked for help getting a ride from Barnes and Lyons arranged that and brought his friend Pierce in at the last minute because things “felt strange” to him.¹² Lyons testified he supplied two guns to Bienhoff when he asked to borrow “a thing.”¹³ Neither Barnes nor Lyons knew what happened inside the van between Reed and Bienhoff, both said they did not know of any plan, and their testimony conflicted at times.¹⁴ Barnes claimed Pierce boasted afterwards that he “was busting at the caddy.”¹⁵ Lyons testified Bienhoff emotionally reported Reed “tried to rob me.”¹⁶ The State asked the jury to disregard most of Lyons’s testimony.¹⁷

To impeach Lyons’s testimony that he did not talk to or in front of Hiram Warrington, a guest in his home, about the incident, the State presented Hiram Warrington’s account of everything Lyons purportedly relayed to him on the night of the incident and a conversation between Lyons and Pierce that Warrington was present for a couple days later.¹⁸

¹² RP 2523-39, 2546.

¹³ RP 2539-46, 2552-55 (gave one to Pierce in the car).

¹⁴ RP 2118-21, 2130-36 (Barnes was with car at another parking lot while transaction occurred), 2175-83, 2275-76, 2546-52, 2562-72 (Lyons could see parking lot and did not see a gun in Pierce’s hands).

¹⁵ RP 2138; *see* 2589; *see also* RP 3268-69 (Pierce testimony he said the “I think the guy in the white Cadillac just lit us up”).

¹⁶ RP 2586-88.

¹⁷ RP 3766-67.

¹⁸ RP 2659-60, 2780-92.

Pierce and Bienhoff each testified at trial. Pierce testified he was taken to Woodland Park with Bienhoff because his friend Lyons asked him.¹⁹ Lyons gave him a gun and told him to back up Bienhoff during his marijuana deal, but Pierce did not fire any shots.²⁰ Pierce watched Bienhoff enter and exit the van from a removed vantage point; Bienhoff said he was being robbed as he ran away and Pierce heard shots as he ran with Bienhoff back to Barnes's car. RP 3257-66. Pierce admitted he did not know what Bienhoff did, but testified he was not aware of any plans to rob and did not participate in any robbery. RP 3283-84.

Bienhoff testified Reed was not willing to pay him the full purchase price they had negotiated for the marijuana (\$4400); Reed pulled out a gun as Bienhoff was making to exit; Bienhoff reached for Reed's hands and wrestled with him over the gun when it discharged. RP 3426, 3449-56, 3469. Bienhoff saw Bibb between the Cadillac and van as Bienhoff was running away. RP 3457. Bienhoff also confirmed that he did not know Pierce and that Lyons had included Pierce that day. RP 3434-38.

The State presented cell phone records that showed contact between Bienhoff and Reed, Reed and Bibb, Bienhoff and Barnes, and

¹⁹ RP 3215-16, 3231-50, 3266-67.

²⁰ *Id.*; RP 3243-50.

Bienhoff and Lyons, as well as cell tower records that the State argued geographically tracked Reed and Bibb into the park where Bienhoff, Lyons and Barnes were and then tracked the codefendants out of the park after the shooting.^{21, 22} The State's records show no calls received by Pierce and no location tracking, but Lyons, who was Pierce's friend, had tried to reach him that day.²³

Pierce was prohibited from admitting evidence showing Reed was having financial hardships in the months preceding the robbery (except for a single pawn slip) and that he had robbed before, each of which would support a motive, intent and plan to rob Bienhoff here.²⁴ Pierce was also prohibited from admitting evidence of Bibb's prior possession of and familiarity with firearms.²⁵ Bibb testified that neither he nor Reed, to his knowledge, had a gun with them that day.²⁶

²¹ RP 1895-1950, 1985; RP (10/6/15) 2-73; RP (10/7/15) 95-110, 120-23, 2003-69, 2363-87.

²² The records contradicted Bibb's testimony that he had not placed any calls to Reed that day. RP (10/26/15) 64-79.

²³ RP 2009-10, 2059-61; RP (10/26/15) 119; RP (10/26/15 PM) 60; *see* RP 3276-78 (Pierce did not have his phone with him).

²⁴ CP 13-16, 88, 120-406; RP 99, 104-38, 243-58, 2892-93; RP (10/26/15 PM) 75-76, 108-11; RP (12/1/15) 3-13; Ex. 115.

²⁵ CP 29-31, 35, 47-49, 90-101, __ (Bienhoff Sub 206); RP 23-29, 204-33, 1585-1609, 1798-1803; RP (12/1/15) 3-13. A supplemental designation of clerk's papers has been filed for the exhibits cited herein and for the documents designated by subfolder number.

²⁶ RP 1648-49, 1805-06.

In ruling midtrial that only some information regarding a debt Reed owed could be admitted, the court stated “we don’t have any information, of course, about Mr. Charisma, so we don’t know whether he’s some white guy like me making a threat or somebody who’s actually, you know, more likely to be a gangster.”²⁷

Meanwhile, over objection, the State was allowed to admit evidence that Pierce assaulted Barnes in jail nearly a year after Reed’s death. The State contended the assault showed Pierce’s consciousness of guilt about the shooting because Pierce called Barnes a “snitch” in a phone call from jail. The court permitted the evidence for the purpose of consciousness of guilt, even though Pierce asserted the motivation was the lies Barnes had been propagating.^{28, 29}

Denying defendants’ proposed instructions, the court did not instruct the jury on excusable homicide—a homicide committed by accident or mistake.³⁰

²⁷ RP 2914; *see* RP 2909-24, 2970-71.

²⁸ CP 23-26, (objecting under ER 401, 402, 403 & 404(b)), 34, 36, 90-101; RP 184-204, 2157-64, 2238-39, 2392-2414, 3225-26, 3317-22, 3325, 3770-71; RP (10/26/15) 29; Ex. 103 (12.25.12, 9.42 (206.478.4266)-0-3.24 at 2:43-55).

²⁹ The State admitted many jail phone calls from Pierce. Ex. 103; RP 2495-2509.

³⁰ CP 117-21, 349-406, ___ (Bienhoff Sub 222 (court’s instructions)); RP 2743-50, 3332-35, 3646-80, 3727-28; RP (10/26/15) 2-10.

Pierce was convicted of first degree felony murder while armed with a firearm.³¹ The court waived all but \$600 in legal financial obligations. CP 194. He is serving a 45-year sentence. CP 195.

Pierce's right to a fair trial was compromised at pretrial hearings, during voir dire, during the evidentiary phase, and during deliberations by multiple errors. The relevant facts are elaborated upon in the argument sections below.

E. ARGUMENT

- 1. The trial court erred when it denied the requested excusable homicide instruction where the defendants contended that, if Bienhoff fired the weapon that killed Reed, the discharge occurred accidentally during a struggle for Reed's gun.**

A defendant is entitled to an instruction on any theory which is supported by evidence, or lack of it. *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980).

The legislature codified the defense of excusable homicide to apply to all homicides.

Homicide—When excusable.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

³¹ CP 180-81, 192-210; RCW 9A.32.030(1)(c); RCW 9.94A.533(3).

RCW 9A.16.030.

Without qualification as to the type of homicide charged, the Washington Pattern Instructions likewise provide that excusable homicide is a defense. WPIC 15.01.³² The Notes on Use make clear the excusable homicide “instruction may be used in any homicide case in which the defense of excusable homicide is an issue supported by the evidence.” WPIC 15.01 (notes on use) (emphasis added).

The defense of excusable homicide, therefore, applies to a charge of felony murder like that brought against Pierce. Our courts’ jurisprudence supports the conclusion that felony murder is subject to an excusable homicide defense.

Our Supreme Court, for example, approved the use of an excusable homicide instruction on remand for felony murder in *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005). The State charged Brightman with

³² WPIC 15.01 provides:

It is a defense to a charge of [*murder*] [*manslaughter*] that the homicide was excusable as defined in this instruction.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

The State has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

felony murder based on robbery in the alternative to premeditated murder. 155 Wn.2d at 511. Brightman requested a justifiable homicide instruction, for intentional self-defense, but did not assert an accidental homicide defense. *Id.* at 511-12. Because the Court reversed on other grounds, it addressed the showing the defendant would need to make for an instruction on justifiable homicide. *Id.* at 518. The Court held the trial court properly denied instructing the jury on justifiable homicide because Brightman “did not show that he *intentionally* used deadly force . . . or that *deadly* force was necessary to defend himself.” *Id.* at 526.

However, the Court approved of the use of an excusable homicide instruction on remand, if the evidence supported an argument that an accidental killing was precipitated by an act of self-defense. *Brightman*, 155 Wn.2d at 526 (noting also that “If the trial court determines on remand that an instruction on excusable homicide is warranted, it may also reconsider whether a related instruction on general self-defense is warranted.”); accord *State v. Harris*, 69 Wn.2d 928, 932, 421 P.2d 662 (1966) (noting felony murder is subject to excusable homicide defense), *abrogated on other grounds as noted in State v. Leonard*, 183 Wn. App. 532, 334 P.3d 81 (2014).

In *State v. Slaughter*, this Court found the trial court properly provided an excusable homicide instruction on the State’s felony murder

charge. 143 Wn. App. 936, 186 P.3d 1084 (2008). There, as here, the defendant argued the fatal injury occurred after the victim wielded the weapon and a struggle for it ensued and resulted in an accidental wounding. *Id.* at 946. “[W]here a defendant does something in self-defense that leads to an accidental homicide, the applicable defense is excusable, not justifiable, homicide.” *Id.* at 942. “Thus, a defendant could argue that his action precipitating an accidental killing amounted to lawful self-defense, even if he could not argue that an accidental killing was a justifiable homicide.” *Id.* Because Slaughter asserted the defense of accidental homicide in the course of self-defense, the trial court appropriately provided WPIC 15.01 at the defendant’s request. *Id.* at 945-46. This Court held the instruction was legally proper and allowed Slaughter to argue his theory of defense. *Id.* at 945-47.

These cases demonstrate the trial court erred when it denied Pierce’s request to instruct the jury on excusable homicide. *See* RP 3646-80; *see also* RP 3727-28 (defendants object to denial of excusable homicide and lawful self-defense instruction to support it); RP 2743-50, 3332-35; RP (10/26/15) 2-10. The court initially believed the jury should be instructed on excusable homicide but was ultimately persuaded by the State’s reliance on *State v. Bolar*, 118 Wn. App. 490, 78 P.3d 1012 (2003), which preceded the Supreme Court’s 2005 *Brightman* decision. In ruling

the instruction would not be provided, the court did not appear to have reviewed *Brightman*, 155 Wn.2d 506, although the Court of Appeals relied on it extensively in *Slaughter*, 143 Wn. App. 936, upon which the defense relied. The State distinguished *Slaughter* by arguing the predicate assault felony allowed for an excusable homicide instruction but a predicate robbery felony does not. RP 3652-60. But *Brightman*, the Supreme Court case upon which *Slaughter* depended, involved a charge of felony murder predicated on robbery and held the excusable homicide instruction should be given. 155 Wn.2d at 511, 526.

The court's failure to instruct on the defense of excusable homicide constitutes reversible error. *See, e.g., State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983) (citing, *inter alia*, *State v. Keller*, 30 Wn. App. 644, 649, 637 P.2d 985 (1981)). Because evidence supported Pierce's theory of defense, that Bienhoff shot Reed accidentally or by mistake, the matter must be remanded for a new trial. *Id.*

2. Pierce was denied a fair trial when the court's racially biased comment compromised the appearance of fairness and impartiality.

Due process guarantees a fair trial free from bias or partiality.³³

Impartial means the absence of bias, either actual or apparent. *State v.*

³³ Const. art. I, § 22; U.S. Const. amends. VI, XIV. A fair trial is the most critical right afforded to criminal defendants. *Press-Enter. Co. v. Superior*

Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). The right to a fair hearing prohibits actual bias and “the probability of unfairness.”

Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)).

“The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). Public confidence in the administration of justice requires the appearance of fairness and actual fairness. *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999). The appearance of impartiality is judged from an objective perspective to determine if the court or system’s impartiality reasonably might be questioned by a reasonable person. *In re Marriage of Davison*, 112 Wn. App. 251, 256, 48 P.3d 358 (2002) (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)).

During argument on the admissibility of text messages from an individual identified as Charisma to Precious Reed, the court inserted the appearance of racial bias into the proceeding.³⁴ Specifically, the

Honorable Douglass North commented “*we don’t have any information,*

Court of Cal., 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (“No right ranks higher than the right of the accused to a fair trial.”).

³⁴ The documentary evidence reflects the spelling, Karisma, but this brief adheres to the spelling in the verbatim report. *See* Ex. 118.

of course, about Mr. Charisma, so we don't know whether he's some white guy like me making a threat or somebody who's actually, you know, more likely to be a gangster." RP 2915. The court's comment appeared to indicate it viewed nonwhites as "more likely" to be gangsters than "white guy[s]" like Judge North.

While the jury was not present, the courtroom was open and, in addition to the defendants and attorneys, spectators were present throughout trial. RP 1511-12; CP 172-79 (noting contact between juror and spectator).

Because a fair trial in a just tribunal is a basic due process right, "every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Murchison*, 349 U.S. at 136 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 71 L. Ed. 749 (1927)). Although this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties[. . .] to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)).

In particular, “[r]ace discrimination in courtrooms ‘raises serious questions as to the fairness of the proceedings conducted there.’” *State v. Saintcalle*, 178 Wn.2d 34, 41, 309 P.3d 326 (2013) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)). “Discrimination ‘mars the integrity of the judicial system and prevents the idea of a democratic government from becoming a reality.’” *Id.*

The court here considered the admissibility of evidence in a racially derogatory manner. As the gatekeeper of evidence, it is critical that a court decide admissibility questions without bias. “The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice.” *Madry*, 8 Wn. App. at 70. The right to an impartial judge is among the “constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.” *Chapman v. California*, 386 U.S. 18, 23 & n. 8, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The racially biased lens through which the court viewed evidence undermines the fairness and integrity of the trial. Reversal is compelled here.

3. Evidentiary rulings erroneously admitted irrelevant and prejudicial evidence against Pierce and improperly precluded Pierce from presenting evidence probative of his defense.

The trial court's evidentiary rulings improperly allowed the jury to consider irrelevant and prejudicial evidence against Pierce and hamstrung his defense.

- a. The jury should not have heard irrelevant and unfairly prejudicial evidence of Pierce's violence towards a co-defendant 10 months after Reed's death.
 - i. *Evidence of uncharged misconduct can only be admitted if the State shows a purpose other than propensity and the probative value of that limited purpose outweighs any unfair prejudice, confusion, or undue delay.*

The State is prohibited from admitting propensity evidence in a criminal trial. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The rule, which has no exceptions, is designed to prevent the State from suggesting once a criminal, always a criminal or one who acts violently once is more likely to have acted violently on the charged occasion. *Id.* at 421; *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

The State bears a "substantial burden" to show admission of a uncharged conduct is appropriate for a purpose other than propensity.

State v. DeVincentis, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003). Evidence of an uncharged act may be admissible for purposes other than propensity, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). But, before a trial court admits evidence of other misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the other misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *E.g.*, *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis*, 150 Wn.2d at 17.

Close cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

This Court reviews evidentiary errors for an abuse of discretion. *Gresham*, 173 Wn.2d at 419. A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds, or if the court fails to adhere to the requirements of an evidentiary rule. *Thang*, 145 Wn.2d at 642; *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

- ii. *The trial court allowed the evidence to show consciousness of guilt, but the State relied on it to claim Pierce has bad character.*

The State moved to admit Pierce's December 2012 in-custody assault of Barnes to show "consciousness of guilt." RP 184-201; CP 23-26, 34, 36, 90-101. Over objection due to lack of probative value, unfair prejudice and confusion, the trial court admitted the evidence. RP 201-04; *see* RP 2157-64, 2238, 2336-38, 2392-2414.

The State's evidence that this act showed "consciousness of guilt" was limited to Pierce's statement in a recorded phone call that he "knocked out" his codefendant because he "snitched on me."³⁵ As a result of the trial court's ruling, however, Barnes and two guards from the King County Courthouse where the assault occurred testified to the assault and its aftermath. RP 2157-64, 2238, 2336-38, 2392-2414. Barnes testified he needed eight stitches below his left eye, was concerned for his safety, and was taken to solitary confinement for his own protection. RP 2161-64. Officer Teeter testified he "heard some loud knocking noises from a holding tank," and when he reached the holding tank "saw defendant Pierce standing over an inmate on the ground, and he said, 'Stay the fuck on the ground.'" RP 2396, 2398, 2403. Officer Teeter did not hear Pierce

³⁵ Ex. 103 (12.25.12, 9.42 (206.478.4266)-0-3.24 at 2:43-55); *see* RP 2396, 2398, 2403-04.

telling the person on the ground to “keep his mouth shut” or anything similar. RP 2403-04.

The prosecutor’s rebuttal argument made apparent the State’s actual purpose for admitting this evidence—to show Pierce was a bad person. The prosecutor did not discuss Pierce’s consciousness of guilt, instead he argued,

[Pierce] bragged about knocking out Scott Barnes, his codefendant, causing Barnes to be wheeled out in a wheelchair, causing him to need eight stitches, causing Pierce to break his own hand.

RP 3776.

Pierce’s “bragging” about committing such a violent act that he broke his hand was used to urge the jury to view Pierce as a violent and dangerous person.

- iii. *The evidence should have been excluded because the probative value of the assault to show consciousness of guilt was minimal and the risk of unfair prejudice, confusion and delay was great.*

Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational decision by the jury. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). Pierce’s unrelated, later-in-time act of violence towards Barnes was likely to arouse an emotional response from the jury. The evidence should have been excluded on this basis.

Unfair prejudice also occurs if the jury makes erroneous inferences from the evidence that undermine the promotion of accurate fact finding and fairness. *Hedlund*, 165 Wn.2d at 654-55.

Intent cannot be inferred from evidence that is “patently equivocal.” *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318 (2013). “Rather, inferences of intent may be drawn only ‘from conduct that plainly indicates such intent as a matter of logical probability.’” *Id.* (quoting *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985)).

Pierce’s assault on Barnes for accusing Pierce of involvement in the charged offense is equally likely to be the result of Pierce’s innocence and his frustration with being framed. Pierce’s conduct equally shows Barnes told the police lies that implicated Pierce as Barnes told law enforcement the truth that implicated Pierce.³⁶ The evidence is equivocal.

Evidence purporting to show a person’s consciousness of guilt should not be admitted where it has limited probative value but significant prejudicial effect. ER 403; *State v. Cohen*, 125 Wn. App. 220, 224-27, 104 P.3d 70 (2005). Even if the assault evidence was relevant, it should have been excluded because close cases under ER 404(b) must be resolved

³⁶ See *State v. Freeburg*, 105 Wn. App. 492, 498-501, 20 P.3d 964 (2001) (discussing the attenuated chain of inferences with consciousness of guilt evidence).

in favor of exclusion. *Thang*, 145 Wn.2d at 642; *Wilson*, 144 Wn. App. at 177.

- b. The trial court improperly restricted the defense's evidence of Precious Reed's motive and plan to rob Michael Bienhoff.

The trial court's exclusion of evidence relating to Precious Reed's compromised financial situation—pawn shop receipts, receipt of financial assistance, a threat from Charisma to enforce a debt Reed owed, and Reed's prior robbery—to demonstrate Reed's motive to rob Michael Bienhoff violated Pierce's right to present a defense.

- i. *The constitutional right to present a defense requires the admission of evidence relevant to and probative of Pierce's defense.*

The Sixth Amendment and article I, section 22 guarantee “a meaningful opportunity to present a complete defense.” U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)); accord *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

The constitutional right to present a complete defense limits the authority to exclude evidence relevant to the defense from criminal trials. *Holmes*, 547 U.S. at 324. Thus, court rules may not be used to prevent a

defendant from presenting relevant, probative evidence. *State v. Jones*, 168 Wn.2d 713, 723-24, 230 P.3d 576 (2010). “If the evidence is of high probative value . . . ‘no state interest can be compelling enough to preclude its introduction constituent with the Sixth Amendment and Const. art. 1, § 22.’” *Id.* at 723-24 (quoting *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

“To be relevant ... evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case.” *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986). This definition includes “facts which offer direct or circumstantial evidence of any element of a claim or defense.” *Id.*

- ii. *The trial court abused its discretion by applying the wrong standard to exclude evidence about Reed’s financial debts.*

Pierce and his codefendant sought to admit evidence that showed Reed was in financial distress and therefore had a motive to rob Michael Bienhoff. CP __ (motion for new trial at 1-4, 6-16 (Bienhoff Sub. 230)); RP 233-59. Although the trial court admitted a pawn shop receipt that was in Reed’s vehicle at the time of his death, the court excluded other receipts showing Reed had pawned items in exchange for cash, which would soon be forfeited if Reed did not pay off the amounts owed. RP (10/26/15 PM)

101-08.³⁷ And while the trial court allowed the defense to show Reed owed a debt to Charisma, the court excluded evidence that Charisma threatened Reed physically if the money was not paid. RP 2969-71. The court also excluded evidence of the Reeds' employment status, income, receipt of public assistance, rent payments and vehicle expenses. RP (10/26/15 PM) 63-67. This excluded evidence is probative of Reed's motive to rob Bienhoff on February 20, 2012.

As even the State acknowledged, the critical question in this case was whether the defendants intended to rob Reed or whether Reed intended to rob Bienhoff. RP 3871 (prosecutor's rebuttal argument). The defense depended on the jury believing Reed planned to or attempted to rob Bienhoff of the marijuana. This financial evidence was critical to that defense.

In excluding the evidence, the trial court required the defense to prove Reed was in "acute financial distress" or "financial crisis" before evidence of his financial motive to rob could be admitted. RP 104-38. In applying this standard, the court heightened the burden beyond that which any court has applied. *See State v. Franklin*, 180 Wn.2d 371, 379, 325

³⁷ The sole admitted pawn shop receipt is at Exhibit 115 for a men's fashion ring; the final due date is February 24, 2012.

P.3d 159 (2014) (trial court acts unconstitutionally by applying heightened burden to admission of defense evidence).

While evidence of an individual's poverty is not admissible to show their character, evidence that an individual is living beyond his or her means or is financially "squeezed" is admissible. *State v. Kennard*, 101 Wn. App. 533, 541-42, 6 P.3d 38 (2000); *State v. Matthews*, 75 Wn. App. 278, 286-87, 877 P.2d 252 (1994); *United States v. Mitchell*, 172 F.3d 1104, 1108 (9th Cir. 1999). For example, in *Matthews*, the State was allowed to admit evidence of the defendant's financial circumstances and recent bankruptcy to support the theory that the defendant had a financial motive to commit a robbery that ended in murder. 75 Wn. App. at 286-87.

If the trial court had applied the proper rule to evaluate the evidence the defense sought to admit, the evidence would have been admitted. The pawn slips that showed upcoming due dates tended to prove that Reed's financial circumstances were so dire that he had to sell off numerous valuable items and he needed money quickly or he would lose them forever. Moreover, the fact that Charisma threatened Reed physically if he did not pay the \$300 owed heightens the significance of Reed's financial debt.

This evidence was relevant to Reed's motive to rob Bienhoff and should have been admitted in support of the defense.

- c. The court abused its discretion in excluding evidence of Reed's prior robbery to show motive, intent and a plan to rob Bienhoff.

Evidence of Reed's motive, intent and plan to rob Bienhoff is probative to the defense that the defendants did not have an intent to rob Reed but Reed, in fact, intended to rob Bienhoff. To support this defense, the defendants sought to admit Reed's prior conviction for robbery, but the trial court excluded it. CP 88, __ (motion for new trial at 1-2, 5-16 (Bienhoff Sub 230)); RP 99, 242-58; RP (12/1/15) 3-13. The prior robbery conviction was of another acquaintance, at gunpoint, making it even more relevant to the defense here. CP __ (Bienhoff Sub 230 at 5); RP 243.

ER 404(b) "is not limited to use by the prosecution and should be equally available to a defendant when used to prove his theory of defense." *State v. Young*, 48 Wn. App. 406, 412-13, 739 P.2d 1170 (1987). ER 403, furthermore, "does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense." *Id.* at 413(citing, *inter alia*, *United States v. Wasman*, 641 F.2d 326 (5th Cir. 1981)).

The court abused its discretion and denied Pierce's right to present a defense when it excluded this probative evidence related to Pierce's defense.

- d. The trial court further hampered the defense by excluding evidence of Demetrius Bibb's gun ownership.

The trial court also improperly limited Pierce's evidence and cross-examination relating to Demetrius Bibb's gun ownership, which was relevant to show Reed's associate Bibb (the driver of the white Cadillac) likely had a firearm with him in Woodland Park on February 20. RP 204-33, 1585-1609, 1798-1803; RP (12/1/15) 3-13); CP __ (Bienhoff Sub 230 at 1-2, 4-16). Pierce moved to admit evidence of Bibb's possession of firearms under ER 608(b) to show specific instances of conduct to attack Bibb's credibility. CP 29-30. The evidence showed Bibb was found with a loaded semiautomatic firearm and a loaded .38-caliber revolver during a 2007 arrest and that just months before the present incident, Bibb reported a theft of a .45 caliber semiautomatic firearm. CP 29-30, 100-01.³⁸ The defendants also argued this evidence was relevant to their defense because .45 caliber shell casings were found at the crime scene. RP 1595-1607.

Under the court's circumscribed ruling, Pierce could only admit testimony that Bibb did not possess a gun at the park that day, did not own or possess a gun at all that day, and knows the difference between a

³⁸ In his defense interview, Bibb denied ever having owned a .45 caliber firearm. Ex. 18 at 48; *see also id.* at 45-49, 113-14 (discussing prior gun ownership and experience). The police report for Bibb's November 21, 2011 report of a stolen .45 caliber firearm is at Exhibit 111. The police report showing Bibb was found with two guns in 2007 is at Exhibit 110.

revolver and a semiautomatic. RP 1607-09, 1805-06. The court held Bibb's knowledge, training and experience with firearms was non-admissible propensity evidence. RP 1606-07.

As argued in the post-trial motion for a new trial, the court should have admitted the evidence because it was relevant to the defense theory that Bibb, not Pierce, fired the shots that hit Bibb's Cadillac and left the casings in the parking lot. CP __ (Bienhoff Sub 230 at 1-2, 6-16).

Because there was no risk of prejudice to the accused in admitting this evidence, relevance was the touchstone for admissibility. *E.g.*, *Jones*, 168 Wn.2d at 723-24; *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984) ("we believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword"); *New Jersey v. Garfole*, 388 A.2d 587, 591 (N.J. 1978). Because the evidence was relevant, it should have been admitted.

- e. Pierce was further prejudiced by the admission of extensive substantive testimony of two out-of-court conversations where their only relevance was to impeach testimony that the conversations did not occur.

During his testimony, Ramon Lyons denied he had a conversation with Hiram Warrington during the evening after the alleged crime or that Warrington was present for a conversation between Lyons and Pierce

during which the crime was discussed. RP 2659-60. The State was allowed to impeach Lyons's testimony with testimony from Hiram Warrington. RP 2696-2708. Warrington's testimony that the conversations occurred was all that should have been admitted under ER 613 to impeach Lyons's testimony that they did not occur. Yet, Warrington testified to the full content of both conversations, causing the admission of not only Pierce's alleged out-of-court statements but also Lyons's out-of-court statements. RP 2780-92.

Warrington's testimony was lengthy and detailed. He claimed Lyons returned home on February 20 or early the next morning and divulged every detail of the drug deal to Warrington. RP 2780-88. Warrington testified Lyons discussed the disposal of evidence as well. RP 2788-89. Two days later, Warrington testified he overheard a conversation between Lyons and Pierce during which the two discussed the details of the disposal of evidence. RP 2789-92.

In admitting the entire substance of both conversations—the alleged conversation between Lyons and Warrington and the alleged conversation between Lyons and Pierce, which Warrington claimed he overheard—the State circumvented the hearsay rules and seemed to introduce substantive evidence under the guise of impeachment.

“Although the State may impeach its own witness, it may not call a

witness for the primary purpose of eliciting testimony in order to impeach the witness with testimony that would be otherwise inadmissible.” *State v. Lavaris*, 106 Wn.2d 340, 721 P.2d 515 (1986).

The jury was instructed it could only consider this evidence for the purpose of impeaching Lyons’s credibility. RP 2783; *see* RP 2713-25 (discussing instruction); CP 115-16 (proposed instruction). However, juries have difficulty making the subtle distinction between impeachment and substantive evidence, particularly when the substantive testimony is far lengthier than the evidence necessary to satisfy the impeachment purpose. *State v. Hancock*, 109 Wn.2d 760, 763-64, 748 P.2d 611 (1988) (citing *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir.1984)).

The content of the conversations was not relevant to impeach Lyons’s testimony that the conversations never occurred. The State should have been limited to simply asking Warrington about the existence of the conversations, not their substance. The distinction prejudiced Pierce because Warrington’s substantive testimony corroborated the State’s theory and the jury cannot be presumed to follow the subtle distinction between impeachment and substantive purposes.

f. The errors require reversal.

An erroneous evidentiary ruling requires reversal if it is reasonably probable that the error affected the outcome. *State v. Gower*, 179 Wn.2d

851, 857, 321 P.3d 1178 (2014). The analysis is concerned with the effect of the erroneously admitted evidence; it “does not turn on whether there is sufficient evidence to convict without the inadmissible evidence.” *Id.* Moreover, where evidence is material to the defendant’s defense, it is “a denial of due process to exclude it.” *State v. Austin*, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (citing *Taylor v. Illinois*, 484 U.S. 400, 406-09, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)).

By admitting evidence of the assault on Barnes, the jury was encouraged to consider Pierce as a person of bad character (as per the State’s rebuttal argument) and a guilty individual even though the evidence just as likely showed Pierce continued to protect his innocence. Further, the evidence portrayed Pierce as a perpetrator of violence, although the assault was separated significantly in time and place from the charged offense. *See* RP 2162-64 (Barnes’s testimony he was helped into a wheelchair, taken to Harborview, received stitches, and was put in solitary confinement for his own protection); RP 2412-13 (sergeant’s testimony that Barnes’s had been hit in the head and was taken to Harborview while Pierce appeared “calm and cheerful”).

The State’s case received a further windfall when the court allowed Hiram Warrington to testify at length to out-of-court conversations he purported to witness.

While boosting the State's case, the improper evidentiary rulings resulted in the exclusion of evidence highly probative of Pierce's defense. As the State emphasized in its rebuttal argument, the fundamental question for the jury was whether Reed was the robber or a victim of a robbery. RP 3871. Evidence of Reed's financial distress and prior robbery of an acquaintance at gunpoint went to the core of this dispute. The trial court also excluded evidence relevant to whether Bibb, Reed's associate, could have fired shots in Woodland Park that evening. The exclusion of the evidence central to Pierce's defense requires reversal.

4. The tainted jury selection requires remand for a new trial.

- a. The prosecutor committed misconduct by inciting a discussion about the death penalty in this noncapital case.

A prosecutor's improper conduct during trial requires reversal if it is prejudicial in light of the record and circumstances at trial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

In a first degree murder case where the State is not seeking the death penalty, it is error to tell jurors the death penalty is not involved. *State v. Townsend*, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001); *State v. Hicks*, 163 Wn.2d 477, 481, 181 P.3d 831 (2008); *State v. Murphy*, 86 Wn. App. 667, 668, 671, 937 P.2d 1173 (1997). "The question of the sentence to be imposed by the court is never a proper issue for the jury's

deliberation, except in capital cases.” *State v. Bowman*, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). “Th[is] strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury’s deliberations.” *Townsend*, 142 Wn.2d at 846.

Despite this “strict prohibition,” the prosecutor queried the jury on the sentencing consequences of a conviction, and pursued the line of questioning until a juror was baited into considering the death penalty. Then a full-blown and lengthy debate ensued. Pierce objected to the discussion. RP 833-34 (court allows State to continue inquiry on the subject), 842-70.

Although voir dire is an opportunity for “the parties to learn the state of mind of the prospective jurors,” it is not a time to embark on fishing expeditions. *State v. Tharp*, 42 Wn.2d 494, 499, 256 P.2d 482 (1953); *Saintcalle*, 178 Wn. 2d at 43. “We do not allow prosecutors to go fishing for race-neutral reasons [to excuse minority jurors] and then hide behind the legitimate reasons they do find [in exercising peremptory challenges].” *Saintcalle*, 178 Wn.2d at 43. Yet, that is precisely what occurred here.

The State extracted reactions to the possibility of capital punishment, a topic with which Pierce’s jury was not to be concerned, and

used the only African-American juror in the box's viewpoint to exercise a peremptory strike against her. RP 853-55, 1013-20, 1028.

The State introduced the topic in its third round of general voir dire. RP 824-25. The prosecutor indicated he was returning to the topic of the "weight of being a juror[;]" and then provided a lead-in prior to asking any question:

Your sole job, if selected as a juror, is to sit here and take in the evidence, right? You listen to testimony. If there are videos that are admitted, you watch the video. If there are photographs that are admitted, you look at the photographs.

And as we talked about, you don't check common sense at the door. You will use your common sense, and you will use the law that the judge gives you at the end, and you and your fellow jurors will go back at the end and decide the case and decide whether or not the State has met its burden in proving the two defendants guilty beyond a reasonable doubt.

That's it. It's a big job. When I say, "That's it," I don't mean -- I don't mean it lightly. But that's it.

RP 824. He then started to ask about punishment,

The judge will instruct you that you have nothing whatsoever to do with punishment or what occurs after that finding. Does that make sense? Do you guys all understand that? Everyone is nodding their head.

RP 824-25. This portion of voir dire may not be improper standing alone, but the prosecutor did not stop there. He continued the questioning until some of the jurors became concerned about the role of the death penalty.

Are you okay with it [having nothing to do with punishment]? Everybody in the jury box seems to be nodding their head. Anybody have a concern about that or think that doesn't make sense? Anybody? No one?

RP 825. The prosecutor continued until he finally received a response.

What about over here? Everyone okay with that? Does that cause you any concern about being a juror in this case where the charge is murder in the first degree? Anybody?

A. (Juror Number 1) Is there a death sentence thing in the state of Washington? That might bother me.

MR. YIP: I will let the judge answer that question.

RP 825 (emphasis added).³⁹

The State seized upon the opportunity to continue the discussion about the death penalty:

Q. So our wise Washington Supreme Court has said that the judge cannot tell you whether or not this is a death penalty case or whether or not that is a potential outcome.

And I will get to the cards that are being raised right now. So the ultimate question that I'm going to ask you is, with that in mind that the judge can't tell you and you won't know, does that

³⁹ As discussed in the section below, the court did not correctly answer this question, which was only asked because the State pushed the issue until an inquiry was made.

cause you any concern about being a juror in this case where the charge is murder in the first degree?

RP 826. Jurors expressed the expected concerns about the possibility of sitting on a case where the ultimate punishment might be imposed, about not knowing whether the death penalty was at issue, and about not understanding the process. RP 826-38.

Juror 6, the only African-American panelist in the jury box at the outset of voir dire, ultimately indicated she would not be able to make a decision in the case “not knowing” “whether the death penalty is on the table.” RP 827-28, 833-34, 854-55, 871-81. The prosecutor’s for cause challenge was denied because Juror 6 stated, in response to defense questioning, “I feel that I am capable of making a fair and impartial decision.” RP 878, 881-82.

Over objection,⁴⁰ the prosecutor ultimately struck Juror 6 and overcame a *Batson* challenge (addressed below) based on the juror’s responses during this discussion. RP 1013-20, 1028. In individual questioning, she admitted she had not thought about these concerns until the prosecutor entered into the discussion. RP 875-76. *Cf.* RP 883-84 (Juror 76 also states in individual questioning that “all the talk today”

⁴⁰ The defense objected to the State’s questioning and the removal of jurors based on this questioning, and moved for the empanelling of a new jury pool. RP 838-39, 843-44, 847, 849-50, 853-5, 868.

made her think about the case differently and made her “feel all this nervousness”).

This questioning elicited other responses that were not germane to juror qualification in this noncapital case.

Juror Number 116.

A. I guess I am just a little confused about the process. But if there is a penalty phase, should they be found guilty and I was a juror in the penalty phase of the case, as a result of my opposition on a philosophical basis, I definitely would not be able to sentence them. If that answers any question.

Q. So if I understand you correctly, not knowing, you would be able to give everyone a fair trial as to whether the defendants are guilty or not guilty.

A. Yes.

RP 831.

Juror Number 128.

A. I was just going to try to get to the death penalty thing in a slightly different way. Is it possible -- are we allowed to research this on our own?

MR. YIP: I will let the judge --

THE COURT: No. I have asked you not to do any research on your own, because we all have to work with the same basic knowledge about the case and the instructions and so on.

JUROR NUMBER 128: Even if I wasn't researching this case in particular?

THE COURT: Yes. As long as it impacts this case, you can't do any research on your own.

BY MR. YIP:

Q. So how does that affect you?

A. I -- I don't think it would be a problem for me. I am not -- I am opposed to the death penalty, but I think I can still render a verdict.

RP 832-33; *see* RP 1025-32 (juror 128 was not reached during selection of jurors).

The State was death-qualifying the jury, even though the death penalty was not at issue here. *State v. Hughes*, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (in a capital case prospective jurors may be questioned about the death penalty and challenged for cause if views would prevent or substantially impair performance of duties as juror in that capital case).

The court agreed that the State was at least eliciting information irrelevant to this case by determining jurors' discomfort with the death penalty, and that it was not appropriate to be asking jurors about whether they could be a participant in a death penalty case where this trial did not involve the death penalty. RP 838-39, 841.

The trial court agreed that the jurors' views on the death penalty were not relevant to their bias or partiality as to this noncapital case and should not be inquired into. RP 838-41, 851. However, the court believed

the “Washington Supreme Court decision” required this sort of inquiry to proceed. RP 839, 841.

The prosecutor’s fishing expedition and elicitation of a subject matter outside the concern of this jury constituted misconduct. Even the prosecutor recognized his questioning was potentially inappropriate. RP 852 (“Whether or not my line of questioning was appropriate or not, I don’t think that’s actually addressed by the Supreme Court.”); RP 864-65 (arguing it is an open question what jurors could be told).

Tellingly, the State did not strike jurors who indicated they were comfortable determining guilt in this case regardless of whether the death penalty was at stake. *Compare* RP 829-30 (Juror 20 is comfortable adjudicating guilt), 835-36 (Juror 39 not concerned once informed their job ends with determination of guilt) *with* RP 1025-32 (State did not peremptorily strike jurors 20, 39).

By essentially death-qualifying the jury in a noncapital case, the State was permitted to obtain a more prosecution-friendly jury. The State struck juror 6, who was both black and a woman. Those two groups both tend to disfavor the death penalty more than white persons and men. Eisenberg, et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, *The Journal of Legal Studies*, Vol. 30,

No. 2 at 277, 279, 284 (Jun. 2001).⁴¹ Moreover, a black juror is more likely to look critically at the State's case than a white juror. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3:1 U. Penn. J. Const. Law 171, 180-82 (Feb. 2001).⁴² At least one study shows that the increased presence of blacks on a jury decreases that jury's confidence in a defendant's guilt, regardless of the strength of the evidence. *Id.* at 187. Finally, individual black jurors are less likely to find guilty a defendant of any race. *Id.* at 187. The excusal of juror 6 prejudiced Pierce by virtually any measure.

In an addition to juror 6, the death penalty qualification led to a for-cause excusal of juror 76. RP 885. Juror 76 felt "nervousness" from all the discussion of the death penalty. RP 883. She said, "I think all the death penalty talk and just kind of not really saying what's really at stake here for me, you know, I don't know, I just don't think I felt the weight of everything before the death—" even though she knew it was first degree murder case. RP 883-84. Because of the death penalty discussion, she did not believe she could sit on this (noncapital) case. *Id.* Juror 76 was an

⁴¹ Available at <http://www.jstor.org/stable/724674>; see *id.* at 286 (white jurors are roughly twice as likely to vote for death than black jurors).

⁴² Available at [https://www.law.upenn.edu/journals/conlaw/articles/volume3/issue1/BowersSteinerSandys3U.Pa.J.Const.L.171\(2001\).pdf](https://www.law.upenn.edu/journals/conlaw/articles/volume3/issue1/BowersSteinerSandys3U.Pa.J.Const.L.171(2001).pdf).

otherwise-qualified juror who was excused from Pierce’s noncapital case because she was arguably not qualified to sit on a capital jury.⁴³

Research indicates that the more a juror supports the death penalty, the more likely she is to find guilty even a noncapital defendant. Eisenberg et al., *supra* at 283-84. By leading to the excusal of jurors who were cautious about the death penalty—such as jurors 6 and 76—the sentencing discussion created a jury that was more prosecution friendly. Where the rule is that a jury is not to consider sentencing, it must be misconduct for the State to lead the venire to consider the death penalty in a noncapital case. The misconduct is reinforced by the plain fact that the jurors excused as a result of the improper questioning were more likely to be cautious about convicting Pierce.

- b. The trial court erred when it informed the jury this is a noncapital case.

“[I]t is error to inform the jury during the voir dire in a noncapital case that the death penalty is not involved.” *Hicks*, 163 Wn.2d at 487; *accord Townsend*, 142 Wn.2d at 840; *State v. Mason*, 160 Wn.2d 910, 929, 930, 162 P.3d 396 (2007); *see* RP 868 (prosecutor recognizes “no one here wants to” be “suggesting to the jury that it is a death penalty case”).

⁴³ The court was clear it was excusing juror 76, not for hardship, but because she was “emotionally unable” to be a juror on this case in light of the death penalty discussion. RP 857-59.

“[I]f jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility.” *Townsend*, 142 Wn.2d at 847.

“[I]n response to any mention of capital punishment, [therefore,] the trial judge should state generally that the jury is not to consider sentencing.” *Hicks*, 163 Wn.2d at 487. The trial court here erred because first Judge North told the jury panel that the Supreme Court has said the court could not inform jurors whether the death penalty is involved. RP 825-26 (“The Washington Supreme Court has said that I can’t tell you whether a death sentence is involved or not.”). Instead, the court should have told the jury they are not to consider sentencing. *Hicks*, 163 Wn.2d at 487.

The error was compounded when, as the conversation about the possibility of the death penalty continued, the court told jurors they would not be included in the sentencing process. This made clear to anyone who knew the death penalty process in Washington that the death penalty was not in fact at issue here.

But your job at this point, if you were selected to be on this jury, would just be to take in the evidence and decide whether or not the State has met its burden, and whether or not these two defendants are guilty beyond a reasonable doubt. That's your job.

RP 835-36. The court reemphasized that this jury was not going to be making a sentencing decision, “Your job is to decide guilty or not guilty.”

RP 835.

The court made the posture even more apparent when it subsequently stated “it’s the court’s job to do the sentencing” in this case.

RP 836-37. Clearly, then, the death penalty was not on the table. The court’s comments were error because they informed the jury that the death penalty is not at involved. *Hicks*, 163 Wn.2d at 487; *accord Townsend*, 142 Wn.2d at 840; *Mason*, 160 Wn.2d at 929, 930.

Although not all jurors were familiar with the procedure for imposing the death penalty, some clearly were. RP 830 (juror asks if prior knowledge regarding death penalty process could be shared with others); *see* RP 844-45 (defense counsel argues same); *see also* Section E.1.c, *infra*.

The court eventually informed the jury:

As I indicated to you, I am not allowed to tell you whether this is a capital case. However, if it is, the question of whether the death penalty would be imposed is a separate proceeding at which there could be additional evidence and would be determined by a jury that follows the trial and any conviction.

RP 887; *accord* RP 871-72, 883 (instructing individual jurors similarly).

But the court did not tell the jury to disregard its prior comments. And the

infection of the death penalty into voir dire was not a bell that could be unrung. RP 844, 868 (defense counsel argues same).

- c. Alternatively, the *Townsend* rule should be replaced in favor of a rule allowing the venire to be told that the death penalty is not at issue.

If the Court does not reverse on the above grounds then the *Townsend* rule is incorrect and harmful and should be replaced. The rule is incorrect because it thwarts the purpose for which it was enacted to serve. *Townsend* created this rule to comply with the “strict prohibition against informing [all but capital juries] of sentencing considerations.” 142 Wn.2d at 846. Yet, here much of voir dire was preoccupied with sentencing considerations. This “strict” rule cannot be correct.

The rule is also harmful.⁴⁴ Here, at least two otherwise qualified jurors, including one African-American woman, were removed from the venire as a result of the court’s inability to tell the venire that the death penalty was not at issue here. These jurors were, in fact, qualified to sit on Pierce’s case. They were removed, however, under the false premise that this could be a death penalty case. The *Townsend* rule harmed Pierce’s right to a fair and impartial jury, violated the jurors’ right to serve, and worked a disservice to our system of justice.

⁴⁴ At Pierce’s trial, the State indicated its dissatisfaction with the current rule and expressed preference for a rule that allows the jury to be informed the death penalty is not at issue. RP 864-65.

Many courts in other jurisdictions allow juries to be informed that the instant case does not implicate the death penalty. *State v. Richardson*, 2014 WL 6491066 (2014);⁴⁵ *Arizona v. Mott*, 931 P.2d 1046, 1057 (Ariz. 1997); *Montana v. Wild*, 880 P.2d 840, 844 (Mont. 1994); *Colorado v. Smith*, 848 P.2d 365, 368-69 (Colo. 1993); *California v. Hyde*, 166 Cal. App. 3d 463, 479-80, 212 Cal. Rptr. 440, 450-51 (Ct. App. 1985); *Stewart v. Georgia*, 326 S.E.2d 763, 764 (Ga. 1985); *New Mexico ex rel. Schiff v. Madrid*, 679 P.2d 821 (N.M. 1984); *Burgess v. Indiana*, 444 N.E.2d 1193, 1195-96 (Ind. 1983); see *Townsend*, 142 Wn.2d at 851 & n.1 (four-justice dissent notes rule in the majority of jurisdictions is to inform venire the death penalty does not apply).⁴⁶

The State endorsed this rule at Pierce's trial, and it is the correct rule to adopt. See RP 864-65. At least in cases where members of the venire express concern about the possibility of the death penalty, such as here, informing the jury that the death penalty is not at issue in this case (and that sentencing is not a concern except to the extent it makes them

⁴⁵ Tenn. Rule 19(4) permits to the citation of unpublished opinions. A copy of this decision is attached as an Appendix.

⁴⁶ In at least two states, courts have found it not to be reversible error to inform the jury in a noncapital case that the death penalty is not at issue. *Dutton v. Delaware*, 452 A.2d 127, 136 (Del. 1982); *Mass. v. Medeiros*, 479 N.E.2d 1371, 1380-81 (Mass. 1985) (not reversible error to instruct jury that Massachusetts does not have a death penalty); *Mass. v. Smallwood*, 401 N.E.2d 802, 805-06 (Mass. 1980).

careful) is the only means of ensuring sentencing does not become a focus of the jury and jury selection.

- d. When the issue arose, the trial court erred by failing to instruct the jury panel that jurors cannot consider or share their understanding of the law, rather they must apply the instructions provided by the court.

Voir dire was also compromised because the court failed to instruct jurors that they could not rely on their prior knowledge of the law. When Juror 20 asked whether jurors who know could tell others how the death penalty works in Washington, the court simply said “I don’t know how to answer that question, because the Washington Supreme Court’s decision I find very difficult, so I can’t – I don’t know what to say about that.” RP 830.

A jury’s consideration of novel or extrinsic evidence is misconduct and can be grounds for a new trial. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994); *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973); *Bouton–Perkins Lumber Co. v. Huston*, 81 Wash. 678, 143 P. 146 (1914). Legal definitions outside the court’s instructions constitute improper extrinsic evidence. *Adkins v. Aluminum Co. of Amer.*, 110 Wn.2d 128, 750 P.2d 1257 (1988) (jury’s consideration of information in a law dictionary that had not been admitted at trial or given

to the jury by the court constitutes the improper consideration of extrinsic evidence).

The record demonstrates the jurors misunderstood this rule. In individual questioning, a juror indicated that if she had known the charge, she would have done research before she started jury duty. RP 873-75. This juror clearly believed that jurors could bring their independent knowledge of the law into deliberations. Although she was ultimately excused, there is no indication her view was an outlier in light of the court's comments.

e. The errors were prejudicial.

“It is well established that when a jury has no sentencing function, it should be admonished to ‘reach its verdict without regard to what sentence might be imposed.’” *Shannon v. United States*, 512 U.S. 573, 579, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994) (quoting *Rogers v. United States*, 422 U.S. 35, 40, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975)). Yet, the lengthy voir dire and inconsistent and evolving instructions from the court did the opposite – it focused the jury on sentencing concerns. There is no “distinction between a court or counsel-initiated and a juror-initiated discussion of the inapplicability of the death penalty.” *Hicks*, 163 Wn.2d at 487; *accord Mason*, 160 Wn.2d at 929.

Pierce’s trial was rendered unfair by these errors. Two members of the venire were excused although they were qualified to serve in this noncapital case. As a result, Pierce was tried by an all-white jury. RP 1040; *Saintcalle*, 178 Wn.2d at 50 (citing “studies [that] confirm what seems obvious from reflection: more diverse juries result in fairer trials”). *Townsend* reasons that jurors who learn the death penalty is not involved “may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility.” 142 Wn.2d at 846-47. Additionally, jurors did not understand that their only source for the law was the trial court’s instructions. RP 873-75. These errors, accordingly, affected the fairness of the jury that judged Pierce, requiring reversal.

- f. By allowing the State to strike an African-American juror for pretextual reasons, the trial court violated Pierce’s right to equal protection.

Voir dire suffered from an additional error of constitutional magnitude: the State was permitted to strike a black juror despite a showing of purposeful discrimination in violation of the Equal Protection Clause. The trial court’s ruling under *Batson* causes particular concern for the impartiality of the trial because the trial court also exhibited at least the appearance racial bias in excluding text messages where the sender “might

actually be a gangster” and not “a white guy like [the court].” *See* Section 2, *supra*.

- i. *Allowing the State to strike juror 6 violated Batson and its progeny.*

Racial discrimination in jury selection harms not only the accused, but also the excluded juror and society as a whole. *Batson v. Kentucky*, 476 U.S. 79, 87, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The Equal Protection Clause thus prohibits purposeful discrimination in the selection of juries, regardless of the race of the defendant. *E.g., Georgia v. McCollum*, 505 U.S. 42, 47-49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).

Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

Miller-El v. Dretke, 545 U.S. 231, 237-38, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). An individual juror has “the right not to be excluded from one [particular jury] on account of race,” and thus “the Equal Protection Clause prohibits a prosecutor from using the State’s peremptory challenges to exclude otherwise qualified and unbiased persons from the

petit jury solely by reason of their race.” *Powers v. Ohio*, 449 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).⁴⁷

Courts employ a three-part test to determine if the State improperly used a peremptory challenge to exclude a potential juror based on race, whether real or perceived. *Saintcalle*, 178 Wn.2d at 42. First, the defendant must demonstrate a prima facie case of purposeful discrimination “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” *Id.* (quoting *Batson*, 476 U.S. at 93-94). Next, the State bears the burden of providing a race-neutral explanation for seeking to remove the juror from the venire. *Id.* The prosecutor must give a “clear and reasonably specific” explanation of his or her reasons for striking the relevant juror. *Miller-El*, 545 U.S. at 239. Third, the trial court must determine whether the defendant established purposeful discrimination. *Saintcalle*, 178 Wn.2d at 42. In deciding whether the exercise of the peremptory challenge violates equal protection, the court should consider all relevant evidence, and not simply accept the State’s race-neutral explanation. *Batson*, 476 U.S. at 97-98;

⁴⁷ “Our democracy is based on respect for the rule of law. When we are unable to resolve our disputes amicably by ourselves, we go to court and accept the judgment of our peers even when we do not like the outcome. This system works only if we all believe it is fair. If people are excluded from jury service because of color or creed, we risk eroding faith in the justice of our democracy.” *State v. Meredith*, 178 Wn.2d 180, 188, 306 P.3d 942 (2013) (González, J. dissenting).

Miller-El, 545 U.S. at 240. If the State proffers pretextual reasons for the excusal, an inference of racial discrimination arises. *Saintcalle*, 178 Wn.2d at 43.

This Court must conduct a comparative juror analysis to ascertain whether the State’s proffered reasons for striking an African-American juror were pretextual. *Saintcalle*, 178 Wn.2d at 43 (citing *Miller-El*, 545 U.S. at 241; *Reed v. Quarterman*, 555 F.3d 364, 379 (5th Cir. 2009)). Our courts “do not allow prosecutors to go fishing for race-neutral reasons” to excuse a juror “and then hide behind the legitimate reasons they do find.” *Saintcalle*, 178 Wn.2d at 43. Such fishing expeditions disproportionately affect minorities. *Id.*

The court allowed the defense to try to rehabilitate juror 6, and then denied the State’s motion for cause. RP 855, 860, 871-81. The defense renewed the equal protection challenge when the State moved to peremptorily strike juror 6. RP 1013-20.

The trial court had predetermined that the State was not acting in a racially discriminatory manner simply because the State could offer a race neutral explanation for excusing juror 6. RP 854-55. In doing so, the court failed to conduct the mandatory third step, looking at all the evidence to determine whether the State’s race-neutral explanation is

pretextual or the defense has otherwise established purposeful discrimination.

The court further indicated its misunderstanding of the equal protection rule when it stated “it takes more than one [strike of a minority juror] to indicate some sort of pattern as opposed to just one.” RP 1015. As the United State Supreme Court held in *Batson* itself, “‘a consistent pattern of official racial discrimination’ is not ‘a necessary predicate to a violation of the Equal Protection Clause’” and that “‘[a] single invidiously discriminatory governmental act’ is not ‘immunized by the absence of such discrimination in the making of other comparable decisions.’” 476 U.S. at 95 (quoting *Arlington Heights v. Metro. Housing Dev’t Corp.*, 429 U.S. 252, 266 n. 14, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)). “[U]nder *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.” *United States v. Battle*, 836 F.2d 1084, 1084 (8th Cir. 1987).

The State believed the court should not move onto the second step in the *Batson* process, but proceeded to provide its race-neutral reasons anyway. RP 1016-17. Tellingly, the court emphasized efficiency, not

thoroughness, by interrupting the State's proffer: "And in the interests of time, I'd appreciate it if you could wrap up you—" RP 1019.

The court then simply ruled, "I will allow the State to exercise its peremptory in that fashion. I find that it's not a violation of *Battson* [sic]. The State clearly has nondiscriminatory reasons for exercising its peremptory challenge against Juror Number 6." RP 1020.

This ruling was a far cry from the thorough inquiry required by *Batson*'s third step. 476 U.S. at 98. At this third stage, a judge must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 93. The trial court must evaluate the "totality of the relevant facts" to decide "whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Ali v. Hickman*, 584 F.3d 1174, 1180 (9th Cir. 2009).

Had the court undertaken the sensitive inquiry into the totality of the relevant facts, it would have found purposeful intent. First, the State conducted a fishing expedition, baiting jurors into a discussion about the implication of the death penalty (or, unknown to the jurors, lack thereof) here. RP 824-26. This questioning was not only improper it targeted the removal of African-American jurors who are generally more averse to the death penalty. *Eisenberg et al., supra*, at 277, 279, 284. The State proffered juror 6's discomfort with not knowing whether the death penalty

applied as the race-neutral basis for the peremptory strike. RP 1017. But where a proffered reason is shown to be pretextual, it “gives rise to an inference of discriminatory intent.” *Snyder v. Louisiana*, 552 U.S. 472, 485, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). Further, the trial court found juror 6 did not provide “a clear statement . . . that she can’t do the job.” RP 882; *see Miller-El*, 545 U.S. at 241 (explanation unworthy of credence is “one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive”). In fact, she provided a clear statement that she could do the job: “I feel that I am capable of making a fair and impartial decision.” RP 878, 881-82.

The State’s additional reasons for striking juror 6 likewise give rise to an inference of discrimination: she had a brother who was convicted of a crime and was assaulted by the police, it “left a bad taste in her mouth” and she had “strong opinions about the system not treating her brother fairly.” RP 1018-20.⁴⁸ The prosecutor’s summary of juror 6 misses the mark. Juror 6 indicated that her experience with her brother did not shape her view of police generally. RP 660. In response to the State’s question whether it left “any bad taste in your mouth,” juror 6 did not respond affirmatively, instead she stated “It was unsettling. It still is. But it

⁴⁸ The prosecutor also expressed indignation for the *Batson* process: “I appreciate the fact that Mr. McGuire has phrased it the way he has and not blatantly called me racist, but still, I mean, that’s really what it comes down to.” RP 1015.

happens.” RP 660. This misrepresentation of the record is significant evidence of improper race-based exclusion. *See Snyder*, 552 U.S. at 485 (noting the “pretextual significance” of a “stated reason [that] does not hold up”); *Miller-El*, 545 U.S. at 241 (explanation unworthy of credence is “one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive”).

The State followed up on this topic with juror 6 in the next round, even though it did not pursue the topic further with other jurors. RP 712-15; *compare* RP 659-64 (addressing jurors, including number 6, regarding experiences with police) *with* RP 710-31 (re-addressing juror 6 in next round but not the other jurors). Discriminatory intent may be found where a comparative juror analysis shows that the prosecutor treated similarly-situated white jurors differently from the struck juror. *Miller-El*, 545 U.S. at 241.

In its first round of voir dire, the State asked about jurors’ negative experiences with police. RP 659. In the second round, the State asked about family members and close friends who had been accused of a crime. RP 710. The State’s third round was predominated by the discussion of the (non-)possibility of the death penalty. RP 824-37. In the State’s final round, it questioned jurors on their view of the criminal justice system. RP 976. Each of these topics was more likely to elicit a response from

racially diverse jurors. *See, e.g.*, Eisenberg, et al., *supra*, at 277, 279, 284; Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington’s Criminal Justice System at 10, 11, 21 (Mar. 2011) (concluding, for example, that “a disproportionate number of people of color in Washington State find themselves incarcerated or otherwise involved with the criminal justice system”).

A sensitive look at the full voir dire shows purposeful discrimination in the State’s strike of juror 6, requiring reversal.

- ii. *Alternatively, this Court should adopt a more protective rule for sustaining a Batson challenge.*

If the Court does not reverse under the current *Batson* framework, a new rule should be adopted to “eliminate [unconscious] bias altogether or at least move us closer to that goal.” *Saintcalle*, 178 Wn.2d at 54; *see also id.* at 51 (“we should strengthen our *Batson* protections, relying both on the Fourteenth Amendment and our state jury trial right”⁴⁹).

Batson’s three-step analysis is not prescriptive. *See id.* at 51 (discussing states’ “flexibility” to formulate procedures to ensure jury selection practices do not violate equal protection); *see also id.* at 72

⁴⁹ Washington’s constitutional right to trial by jury is more protective than the federal constitutional right. *Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982); *State v. Pierce*, 134 Wn. App. 763, 142 P.3d 610 (2006); Const. art. I, §§ 21, 22. This Court has the duty to “ensure that trial procedures in this state promote justice and comply with the federal and state constitutions.” *Saintcalle*, 178 Wn.2d at 71 (González, J., concurring).

(noting Court’s “inherent power to govern court procedures” as a “necessary adjunct of the judicial function”) (González, J., concurring; citation omitted). Other jurisdictions have adapted their procedures in an effort to prevent racial discrimination from tainting jury selection. *See* Equal Justice Initiative, *Illegal Race Discrimination in Jury Selection: A Continuing Legacy* at 23 (Aug. 2010) (hereafter “EJI Report”) (discussing changes in Florida law to protect against racial discrimination in jury selection).⁵⁰

In *Saintcalle* the Court proposed a rule that “would require a *Batson* challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory.” 178 Wn.2d at 54. “[G]ood people often discriminate, and they often discriminate without being aware of it.” *Id.* at 48. The Supreme Court rightly found that the judiciary’s focus should be on “recogniz[ing] the challenge presented by unconscious stereotyping in jury selection and ris[ing] to meet it.” *Id.* at 49.

Because discriminatory jury selection practices harm minority jurors, who are unjustifiably refused the right to participate, and the appearance of fairness in the system as a whole, the new rule should also

⁵⁰ Available at http://racialjusticeproject.weebly.com/uploads/6/9/3/9/6939365/eji_race_and_jury_report.pdf.

account for the observations of an objective observer. *See, e.g., Powers*, 449 U.S. at 411; EJI Report at 28.

The Court should adopt a rule that obligates courts, at *Batson*'s third step, to sustain a challenge to a peremptory strike if there is a reasonable probability or an objective observer could believe that race or ethnicity was a factor in the strike.

5. The process for dismissing and recalling the alternate juror failed to guarantee Pierce a fair trial by an impartial jury and to a unanimous verdict.

When the court excused the alternates, it failed to advise them they could be recalled and needed to continue to abide by all the court's prior instructions, including not researching the law or facts. The court sat an alternate in the place of an excused juror after the jury had spent about two hours together, but the court did not instruct the reconstituted jury to begin deliberations anew. Moreover, both alternate jurors appear to have been in the jury room with the jury during these couple hours. These errors compromised Pierce's right to an impartial jury and a fair trial.

- a. The trial court failed to protect the alternate jurors from outside influence during deliberations, and one was recalled to sit on Pierce's jury.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3 and 22 of the Washington Constitution guarantee a defendant the right to an impartial jury.

Wainwright v. Witt, 469 U.S. 412, 429-30, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961); *State v. Davis*, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). Moreover, article I, section 21 of the Washington Constitution “provides greater protection for jury trials than the federal constitution.” *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.2d 913 (2010). It requires a unanimous verdict in criminal cases. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

After closing argument, the court instructed the two alternate jurors,

Thank you very much for your careful attention to the case. It won't be necessary for you to serve further. Please don't discuss the case with anyone or indicate how you would have voted until the jury returns its verdict.

RP 3898. The court failed to tell the alternates they might be recalled for service. The court did not admonish the alternates not to research the law or the facts until the verdict was reached. Instead, the court's instruction indicates the alternates have been discharged (“It won't be necessary for you to serve further.”) and that the only requirement is they not “discuss the case with anyone or indicate how [they] would have voted” until the deliberating jurors reach their verdict. RP 3898.

This instruction fails to “protect [the] alternate jurors from influence, interference or publicity, which might affect the jurors ability to remain impartial.” CrR 6.5. Whereas throughout trial, the court admonished all the jurors to remain free from outside influence like newspapers, television, and social media, at this stage the trial court simply told the alternates not to discuss the case with other people. The record therefore does not show that juror impartiality was maintained. *See State v. Ashcraft*, 71 Wn. App. 444, 464, 466, 859 P.2d 60 (1993) (preservation of these constitutional rights must be clear from the record).

After three days (a non-court Friday and the weekend), one of the alternates was in fact seated on Pierce’s jury in place of a dismissed juror. This process violated Pierce’s constitutional rights.

- b. A manifest constitutional error occurred when the trial court failed to instruct the reconstituted jury to disregard previous deliberations and begin deliberations anew.

Further error occurred because the trial court failed to instruct the reconstituted jury on the record to disregard previous deliberations and begin deliberations anew. *Ashcraft*, 71 Wn. App. at 463, 467; *State v. Stanley*, 120 Wn. App. 312, 314, 85 P.3d 395 (2004); *State v. Cuzick*, 85 Wn.2d 146, 530 P.2d 288 (1975). To ensure that the right to a unanimous and impartial jury is adequately protected, when a juror is discharged during deliberations and replaced with an alternate, the court must instruct

the reconstituted jury to disregard all previous deliberations and begin deliberations anew. CrR 6.5; *State v. Johnson*, 90 Wn. App. 54, 72-73, 950 P.2d 981 (1998); see *Ashcraft*, 71 Wn. App. at 463 (Juror replacement implicates “a defendant’s constitutional right to a fair trial before an impartial jury and to a unanimous verdict.”).

The twelve jurors that decided Pierce’s case “must reach their consensus through deliberations which are the common experience of all of them.” *State v. Fisch*, 22 Wn. App. 381, 383, 588 P.2d 1389 (1979).

After excusing the alternates on October 29, the Court sent the jury to retire to the jury room together. RP 3898. The court informed the jury the bailiff would bring the exhibits, but that the bailiff would probably do so on Monday. *Id.* The court continued, “and then you will be able to commence your deliberations.” *Id.*

So, ladies and gentlemen, the case is now in your hands. If you will retire to the jury room, the bailiff will bring you the exhibits, though we'll probably do that on Monday because we're at the end of the day today, and I understand you're not coming in tomorrow, and then you will be able to commence your deliberations.

RP 3898. The court did not tell the jurors they could not discuss the case until the exhibits were brought into the jury room, or otherwise admonish the jurors not to begin deliberations.

On Monday morning, November 2, the jurors spent one hour and 40 minutes in the jury room while the court considered a motion to excuse one of the jurors. RP 3900-28; CP 175-79, __ (Sub 100A (trial minutes) at 66). The court did not advise the jurors not to discuss the case during this time period.

At almost ten o'clock, the court summoned the jurors and advised them an alternate would be replacing juror 5:⁵¹

THE COURT: So, ladies and gentlemen, I have decided to excuse Juror Number 5 from further service in this case.

Now, ordinarily that would bring up our first alternate Ms. Swanagan to fill in. However, I understand, Ms. Swanagan, you need to leave on a trip on Thursday? So what I want to do instead is have our second alternative, Mr. Nevegold, fill in on the jury.

Ms. Swanagan, I still want you to not talk about the case with anyone or indicate how you would have voted in case we need to have you as an alternate.

But if the 12 of you, including Mr. Nevegold, would retire to the jury room, then the bailiff will bring you the exhibits, and you can commence your deliberations.

RP 3928-29.

⁵¹ The court excused juror 5 for the appearance of impropriety after defense counsel witnessed the juror spending significant time with a courtroom spectator and appearing to act surreptitiously. CP 175-79; RP 3924.

Presuming the jury had not yet started talking about the case, despite the several hours spent together in the jury room, the court did not advise the jury to disregard their prior discussions and commence deliberations anew with the reconstituted jury. In this manner, the trial court erred. *See State v. Chirinos*, 161 Wn. App. 844, 845, 255 P.3d 809 (2011).

In *Ashcraft*, the trial court replaced a deliberating juror with an alternate juror due to the juror's unavailability without discussing the matter and without any record it reinstructed the jury. 71 Wn. App. at 464-65. This Court held that "it was reversible error of constitutional magnitude to fail to instruct the reconstituted jury on the record that it must disregard all prior deliberations and begin deliberations anew." *Id.* at 464 (emphasis in original). This Court made clear that a reviewing court must be able to tell "from the record" that the reconstituted jury was properly instructed. *Id.* at 464, 466 (emphasis in original).

In reaching its conclusion in *Ashcraft*, this Court noted, "It is not beyond the realm of reasonable possibility that . . . the alternate and the remaining initial 11 jurors could have concluded, in all good faith but erroneously, that they need not deliberate anew as to any counts or issues upon which the initial 12 jurors may have reached agreement." 71 Wn. App. at 466-67; *accord Stanley*, 120 Wn. App. at 313, 316 (court's

preservation of accused's constitutional rights must be clear from the record).

Pierce's trial court did not ensure, on the record, that the jury that eventually decided his case was unanimously deliberating and deciding the case together.

- c. The presence of observers during the start of the jury's deliberations also prejudiced Pierce's right to a fair trial by an impartial jury.

Additional error occurred when the alternate jurors were apparently present with the jury in the jury room for at least one hour and 40 minutes on the morning of November 2.

A jury is "entitled and required to deliberate in private." *State v. Cuzick*, 11 Wn. App. 539, 543, 524 P.2d 457 (1974), *aff'd* by 85 Wn.2d at 150. The presence of a stranger, an individual not a member of the 12 person jury, "operate[s] as a restraint upon the proper freedom of action and expression of the 12 jurors who decide the case." *Id.* at 543-44. "The presence of a person in the room who may not take part in their deliberations is an intrusion upon this privacy and confidentiality and tends to defeat the very purposes of our jury system." *Id.* at 544.

In *Cuzick*, an alternate retired to the jury room with the deliberating jurors and was present during deliberations. 85 Wn.2d at 147. The Supreme Court reversed Cuzick's conviction holding that regardless

of the extent of the alternate juror's participation in deliberations, the alternate juror's presence violated the constitutional concern for jury privacy. *Id.* at 148-49. "However many persons comprise a jury, there can be no question that it must reach its decision in private, free from outside influence." *Id.* at 149. The Court further held that the violation is not waived by a defendant's silence. *Id.* at 149-50. Finally, the Court held that prejudice is presumed "from a substantial intrusion of an unauthorized person into the jury room unless it affirmatively appears that there was not and could not have been any prejudice." *Id.* at 150 (internal quotation omitted).

"[T]here is no way of measuring the impact that an outsider might have upon the jury by influencing them with a casual word, gesture or expression." *Cuzick*, 11 Wn. App. at 544.

In the delicate process of the jury's deliberations, the presence of an outsider or stranger could be an influence upon the jury in manners that would defy our attempts at defining the potential prejudice. Jurors may be inhibited by the fear that they could not freely deliberate, argue and discuss the case in the confidence of their own group of sworn officers of the court. Furthermore, the 12 jurors responsible for the verdict may be inhibited by fear that an outsider, who does not have such responsibility, will publicly ridicule or otherwise impeach the verdict.

Id.

Here, the two alternates were in the courthouse on the morning of November 2, and presumably were in the jury room with the 12 then-deliberating jurors. There is no way to judge what effect the outsiders had on the deliberations, and the court provided no instruction to recommence deliberations when one of the alternates replaced a deliberating juror. *Cuzick*, 85 Wn.2d at 150; *Cuzick*, 11 Wn. App. at 545. As in *Cuzick*, this Court should presume Pierce's right to a fair trial by jury was violated.

Each of these three errors in deliberations compromised Pierce's right to an impartial jury, a unanimous verdict and a fair trial. His conviction should be reversed and the matter remanded.

6. The cumulative effect of the trial errors denied Pierce a constitutionally fair trial and requires remand for a new trial.

Each of the above trial errors independently requires reversal. In the alternative, however, the aggregate effect of these trial court errors denied Pierce a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together, the combined errors denied the defendant a constitutionally fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in

determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

The above errors accumulated to deny Pierce the fair trial to which he was entitled. Bienhoff was the only witness who could attest to what occurred inside Reed’s van before Reed was shot. Circumstantial evidence supported both the State and the defendants’ theories. But the exclusion of much of Reed’s financial picture, his prior robbery, the threats from Charisma, and Bibb’s history with firearms improperly deprived the jury of critical aspects of the defense, discrediting the State’s theory. At the same time, the court allowed in prejudicial evidence that favored the prosecution—Hiram Warrington’s full account of alleged conversations detailing the crime and Pierce’s assault on Barnes for being a “snitch.” The framework of the trial was also compromised—voir dire, the appearance of racial bias, incomplete instructions to alternate jurors

and the reconstituted jury and the denial of an instruction supporting the defense.

If not standing alone, in the aggregate two or more of these errors denied Pierce his right to a fair trial.

7. Pierce’s offender score was improperly calculated when two prior nonviolent juvenile felonies were counted as one point each instead of one half of one point each.

This Court reviews the trial court’s calculation of Pierce’s offender score de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). A sentencing court’s calculation of a standard sentence range is determined by the “seriousness” level of the present offense as well as the court’s calculation of the “offender score.” RCW 9.94A.530(1). Where the current offense is for a serious violent offense like first degree murder, RCW 9.94A.525(9) dictates the value ascribed to each prior offense. RCW 9.94A.030(46) (defining serious violent offense to include first degree murder).

Nonviolent juvenile felony prior offenses count as one half of one point towards the offender score. RCW 9.94A.525(9). Pierce has two prior nonviolent juvenile offenses—for second degree theft and taking a vehicle without permission. CP198. These two prior offenses are nonviolent, and should therefore count as one half point each. RCW 9.94A.030(34), (55).

However, the court counted each of these as a single point towards Pierce's offender score, which totaled a "nine." CP 193, 198. The error requires remand for resentencing under a proper calculation of Pierce's offender score. *State v. Wilson*, 170 Wn.2d 682, 691, 244 P.3d 950 (2010).

8. The \$600 in LFOs should be stricken.

Pierce was appointed counsel for trial and found indigent on appeal. RP (12/5/15) 58; CP __ (Sub 127, 129). He was sentenced to 540 months incarceration. The sentencing court waived all LFOs except a \$500 victim penalty assessment (RCW 7.68.035) and a \$100 DNA collection fee (RCW 43.43.7541), believing imposition of these LFOs was required. RP (12/5/15) 55-56; CP 194: Because these costs are not mandatory as to all indigent defendants, the Court should remand with instructions to strike the \$600 in LFOs.

A sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). This means "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015); *accord, e.g., City of Richland v. Wakefield*, No. 92594-1, 2016 WL 5344247 (Wash. Sept. 22, 2016) (strict enforcement of LFO statutes

violates state and federal law); *State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016) (remanding to trial court for resentencing with “proper consideration” of defendant’s ability to pay). This Court has recognized the equal hardships imposed by “mandatory” and “discretionary” LFOs. *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163 (2016) (upholding imposition of “mandatory” costs); *see also State v. Lewis*, 194 Wn. App. 709, 379 P.3d 129, 131-34 (2016) (same); *State v. Shelton*, 194 Wn. App. 660, 663, 378 P.3d 230 (2016) (same).

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment “shall be imposed”); RCW 36.18.020(2)(h) (convicted criminal defendants “shall be liable” for a \$200 fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant’s financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

The Legislature would have used different language if it intended to obliterate an ability to pay determination. *See* RCW 9.94A.753 (restitution “shall be ordered” for injury or damage absent extraordinary circumstances and “the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.”); *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093, 1097 (2015).⁵²

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) does not hold otherwise because that case examined the constitutionality of the fee, not the statute’s interpretation. Additionally, *Blazina* supersedes *Curry* to the extent they are inconsistent. *See Blazina*, 182 Wn.2d at 830, 839.

Jafar v. Webb, also supports this reading as there the Supreme Court held the trial court was required to waive all fees for indigent litigants under General Rule 34 despite the appearance of mandatory language (“shall”) in applicable statutes. 177 Wn.2d 520, 303 P.3d 1042 (2013); *see* RCW 36.18.020.

Finally, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S.

⁵² The Legislature did amend the DNA statute to remove consideration of “hardship” at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (holding statute violated equal protection by stripping indigent criminal defendants of the protective exemptions applicable to civil judgment debtors).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) (upholding costs statute because it required ability to pay determination and prohibited imposition of costs upon those who would never be able to pay). Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Imposing LFOs on indigent defendants also violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Wash. State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Although the government might have a legitimate interest in collecting recoupable costs, imposing costs and fees on impoverished people like Pierce is not

rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature’s stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because “incarceration would result only if failure to pay was willful” and not due to indigence. *Id.* at 241. This assumption was not borne out.⁵³

The Court should remand with instructions to strike the LFOs.

Finally, in the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5. As set forth above, the imposition of costs on an indigent defendant is contrary to the statutes and

⁵³ *See, e.g., Wakefield*, 2016 WL 5344247; Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm’n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf; *Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).

constitution. The presumption of indigence continues on appeal pursuant to RAP 15.2(f). *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). The law and facts call for an exercise of this Court's discretion not to impose appellate costs against Pierce. RAP 1.2(a), (c); RAP 2.5; *Blazina*, 182 Wn.2d at 835; *id.* at 841 (Fairhurst, J. concurring).

F. CONCLUSION

For the numerous reasons set forth above, Pierce's conviction should be reversed and the matter remanded for a new trial. In the alternative, it should be remanded for resentencing.

DATED this 25th day of October, 2016.

Respectfully submitted,

s/ Marla L. Zink
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Washington Appellate Project
Attorney for Appellant

APPENDIX

2014 WL 6491066

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE
COURT OF CRIMINAL APPEALS RELATING
TO PUBLICATION OF OPINIONS AND
CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
at Jackson.

STATE of Tennessee

v.

David RICHARDSON.

No. W2013-01763-CCA-R3CD.

|
Nov. 20, 2014.

Appeal from the Criminal Court for Shelby County, Nos. 11-02623, 11-07432; Lee V. Coffee, Judge.

Attorneys and Law Firms

Neil Umsted (on appeal) and William D. Massey and Lorna S. McClusky (at trial), Memphis, Tennessee, for the Defendant-Appellant, David Richardson.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel E. Willis, Senior Counsel; Amy P. Weirich, District Attorney General; and Teresa S. McCusker, Assistant District Attorney General, for the Appellee, State of Tennessee.

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., and ROBERT L. HOLLOWAY, JR., SP. J., joined.

OPINION

CAMILLE R. McMULLEN, J.

*1 The Defendant-Appellant, David Richardson, was convicted as charged by a Shelby County Criminal Court jury in case number 11-07432 of first degree premeditated murder and in case number 11-02623 of twelve counts of attempted first degree murder (counts 1-12), twelve counts of aggravated assault (counts 14-25), one count of employment of a firearm during the

attempt to commit a dangerous felony (count 27), and one count of reckless endangerment committed with a deadly weapon (count 30).¹ The trial court sentenced Richardson to life imprisonment for the first degree murder conviction. It also sentenced Richardson to eighteen years at thirty percent release eligibility for each of the attempted first degree murder convictions, five years at thirty percent release eligibility for each of the aggravated assault convictions, six years at one hundred percent release eligibility for the employment of a firearm during the attempt to commit a dangerous felony conviction, and two years at thirty percent release eligibility for the felony reckless endangerment conviction. The court ordered the sentences for the attempted first degree murder convictions served consecutively to one another, consecutively to the sentence of life imprisonment, and consecutively to the sentences in counts 27 and 30 but concurrently with the sentences in counts 14 through 25, for an effective sentence of life imprisonment plus 224 years. On appeal, Richardson argues: (1) the trial court's response to two questions from a juror during trial invaded the province of the jury and improperly commented on the evidence; (2) the trial court committed plain error by informing the jury venire that the State was not seeking the death penalty or a sentence of life imprisonment without parole; (3) the trial court committed plain error in instructing the jury that the testimony of one witness is sufficient to support a conviction; (4) the evidence is insufficient to sustain the first degree premeditated murder conviction, the attempted first degree murder convictions, and the aggravated assault convictions in counts 16, 17, 18 and 20 through 25; and (5) the trial court abused its discretion in imposing partially consecutive sentences resulting in a sentence of life imprisonment plus 224 years. Upon review, we affirm Richardson's convictions but remand the cause to the trial court for a new sentencing hearing. This hearing is limited to consideration of the factors outlined in *State v. Wilkerson*, 905 S.W.2d 933 (Tenn.1995), to determine the propriety of consecutive sentencing in this case.

¹ Prior to trial, the State entered a nolle prosequi as to counts 13 and 26, which charged Richardson with attempted first degree murder and aggravated assault of victim Kimberly Jamerson.

The charges in this case arose when David Richardson, Kenneth Brown, and Devon Brown² fired more than

sixty gunshots at individuals gathered at a party on July 3, 2010. As a result of this shooting incident, Kimberly Jamerson was killed and Lamarcus Moore was injured.

² David Richardson, Kenneth Brown, and Devon Brown were tried separately.

Trial. Willie Brooks–Howze testified that at 10:30 or 10:45 p. m. on July 3, 2010, she dropped off her twenty-four-year-old daughter, Kimberly Jamerson, at the home of her sister, Sonja Watkins, which was located at 2706 Northmeade Avenue in Memphis. She said this was the last time she saw her daughter alive because her daughter was shot and killed later that night.

*² Robrecus Braxton testified that he lived at 2706 Northmeade Avenue, Memphis, Tennessee, in Shelby County, with his mother, Sonja Watkins; his step-father, Felix Williams; his brother, Christopher Braxton; and his two sisters, Amber and Dakarrionah Laury. Robrecus³ said that on July 3, 2010, his family was preparing for a Fourth of July party at their house the next day. His cousins, Chymia Baker, Jalon Baker, Bianca Nevels, Travis Britton, Rodney Davenport, Terriance Webb; and his uncle, Nakia Greer, were also present during the party preparations on July 3, 2010.

³ Because many of the witnesses are family members who share the same last name, we will refer to these witnesses by their first names for clarity. We also acknowledge that, due to the length of this opinion, we do not use titles when referring to every witness. We intend no disrespect by either of these practices. Judge John Everett Williams believes that referring to witnesses by their first names is disrespectful, even though none is intended. He would prefer that every adult witness be referred to as Mr. or Mrs. or by their proper title.

In the afternoon of July 3, 2010, Robrecus observed a green Chevrolet Lumina park in front of his home and saw Richardson and a man later identified as Kenneth Brown, get out of the car. He knew Richardson and Kenneth because they lived nearby and because he had gone to high school with them. Robrecus overheard an argument between Kenneth and his uncle, Nakia Greer, wherein Kenneth claimed that Robrecus's aunt, Dena Watkins, had taken some of his marijuana. During the argument, Felix Williams, told Kenneth and Richardson that Dena Watkins was no longer present at the party. Williams told them to return later, and he would “get

the situation handled.” Kenneth and Richardson left but drove back to the area a few minutes later with a third man, later identified as Devon Brown. All three men exited the car, and Williams gave them \$5.00 to settle Watkins's debt. The three men got back in the Chevrolet Lumina, and as they were leaving the area, their car nearly hit Robrecus, who reacted by throwing a beer can he had been holding into the open window of the car. The Lumina quickly stopped on Ladue Street, and the three men jumped out of the vehicle and began exchanging words with Robrecus. A fistfight eventually broke out with Kenneth Brown, Devon Brown, and Richardson fighting with Robrecus Braxton, Christopher Braxton, and Kenneth Baker. Robrecus stated that neither side had any weapons during the fight and that Williams broke up the fight. As Richardson, Kenneth, and Devon were leaving, one of them said, “All right. That's what's up.”

Approximately two hours later, Robrecus heard what he thought were fireworks and saw green and red lights before realizing that the sounds he was hearing were gunshots. He and his friend Lamarcus Moore ran under the carport toward the backyard. When he got to the backyard, Robrecus stood by a wall trying to take cover as the gunshots continued. He could see down the pathway and observed Mark and Steve Chambers standing on Northmeade Avenue returning fire with their own guns. He said Mark and Steve Chambers were the only two people at the party returning fire. Then Robrecus heard Moore say, “I'm hit, I'm hit hard.” When the gunshots stopped, he heard Rodney Davenport yell, “Kim[s] been hit.” Robrecus ran to the front yard and saw his cousin, Kimberly Jamerson, lying on the sidewalk in front of his house. His friends, Antoine Moore and Rico Chandler, put Robrecus in a car to get help. They found an unmarked police car a short time later and alerted the officer that Kimberly Jamerson had been shot and killed. Robrecus said that at the time the shooting occurred, the following people were in attendance at the party: Antoine Moore; Rico Chandler; Steve Chambers; Mark Chambers; Travis Britton; Kenneth Baker; Jalon Baker; Terriance Webb; Nakia Greer; his mother, Sonja Watkins; his two sisters; his cousin Whitney Henderson; and Lashanna Jones; as well as Jones's children, Shakarla King, Danaria Love, and Danara Love. He said that when he first heard the gunshots, some of the people at the party were inside the house and some were outside under the carport.

*3 Robrecus stated that the gunfire went on for “about ten minutes ... like it wasn't going to stop.” He could tell that the shooters were up the street because of the way the bullets were hitting the cars parked around the Northmeade house. However, he could not see the shooters because it was dark outside. Robrecus said that he was “terrified” and “felt like [his] life was in danger” because the “bullets could have hit anybody.” The day after the shooting, Robrecus talked to police about what had happened and identified Richardson in a photographic lineup as one of the men involved in the fistfight prior to the shooting.

Felix Williams testified that when he arrived home on July 3, 2010, everyone was preparing for the Fourth of July party. He said that in addition to his wife and children, the following individuals were present at the party: Dena Watkins, Veronique Watkins, Kenneth Baker, Chymia Baker, and Jalon Baker. Williams said that he was standing outside his house with his kids, his kids' friends, and several nieces and nephews. He heard Dena Watkins ask Nakia Greer where she could purchase some marijuana, and Nakia Greer stopped Kenneth Brown, who was driving down the street, and asked Kenneth if he had any marijuana for sale. At the time, Richardson was riding in the front passenger seat of Kenneth's car. Williams said he knew Richardson because he lived on Ladue Street, which was nearby. Kenneth got out of his car and approached Dena Watkins. They walked around the side of a van, and approximately five minutes later, they reappeared, and Kenneth got back inside his car, with Richardson still in the front passenger seat, and drove around the corner. A short time later, Kenneth and Richardson returned to the party, and Kenneth stopped his car, got out, and asked Nakia Greer if Dena Watkins was around. When Greer told Kenneth that Watkins had just driven past him, Kenneth informed Greer that Watkins had stolen “like a gram of the marijuana[.]” Williams stopped the argument between Kenneth and Greer by telling Kenneth to return later when Watkins was back from the store. When Watkins returned to the party, she told Williams that she had not taken Kenneth's marijuana and then left the party again. When Kenneth Brown, Devon Brown, and Richardson drove back to the Northmeade house ten to fifteen minutes later, all three of the men got out of the car. Kenneth again asked for Watkins, and when Greer told him that she was not there, Kenneth demanded that Greer pay for the marijuana that Watkins had taken. Williams gave Kenneth \$5.00 to settle

the dispute and told Kenneth, Devon, and Richardson to “[r]oll because we ain't going to need this around here.”

Kenneth, Devon, and Richardson got back into the car. As Kenneth drove away, he nearly pinned Robrecus Braxton between his car and a parked car, and Robrecus reacted by throwing a beer car into Kenneth's car. Kenneth immediately stopped his car on Ladue Street. All three men jumped out of the Lumina, and Kenneth began exchanging words with Robrecus. Robrecus and Kenneth began fistfighting, and when Richardson and Devon tried to jump on Robrecus, Christopher Braxton and Kenneth Baker joined the fight, although neither side displayed any weapons. Williams said he and Greer attempted unsuccessfully to break up the fight. As Williams walked away, he heard glass break when someone threw something at the back window of Kenneth's car. He then heard Kenneth, Devon, or Richardson say, “We'll be back,” before getting into Kenneth's car and driving up Ladue Street. After the fight, Williams, Robrecus Braxton, Christopher Braxton, and the other people involved in the fight returned to the house at 2706 Northmeade Avenue.

*4 Williams said that his niece Kimberly Jamerson got to the party around 9:30 or 10:00 p.m. on July 3, 2010. Sometime between 11:00 p.m. and midnight, Williams walked Jamerson down the driveway to the car driving her home. When he turned and began walking up the driveway, he noticed that someone was shooting bottle rockets at his home. One of the bottle rockets hit his shoulder, and one hit a truck directly in front of him. Around ten seconds later, he heard gunshots, and everyone began “running and screaming for their lif[ves].” Williams said he could tell that the shots were coming from a house on the hill across the street from his home but he could not see who was firing the shots. During the shooting, the majority of Williams's nieces and nephews were able to get inside the house. Williams said he “panicked” because the shots sounded like they “were getting closer and closer.” He ran to the backyard where he saw Lemarcus Moore, who had been shot in the leg. As the shooting continued, Williams helped Moore into the house, where everyone was “hollering and crying.” Williams said that his wife had taken the kids back to the bedroom, where she made them lie down on the floor. Williams said that the shooting seemed to go on “for a long time,” and he felt like he was “in a war zone.” He said he was “[s]cared for [his] life, scared for [his] family”

during the shooting. When the gunshots finally stopped, things at his home were “[c]haotic” because “[p]eople were running around ... trying to make sure everybody was fine.” He said his house and van had bullet holes in them, and his son's car, his wife's truck, and his neighbor's house all had been hit by bullets. Once the shooting finally ended, Williams saw Kimberly Jamerson lying on the sidewalk, and he “knew it didn't look good” because he saw “[n]o body movement.”

Williams said that they put Lemarcus Moore, who had been shot in the leg, into a car and took him to the hospital. Later, Williams's friend told him that the boys who had fired the gunshots were Kenneth and Devon Brown. Williams said he “fell to his knees” because Kenneth and Devon Brown's father had been the mechanic who trained him, and he remembered Kenneth and Devon when they were little kids. Williams later gave a statement to police about the incident and identified Richardson from a photographic lineup as the person who sat in the front passenger seat of Kenneth Brown's car and as the person who was involved in the fistfight with Robrecus. He also identified Kenneth Brown from a second photographic lineup as the person who “killed [his] niece” and was “the driver.”

Mark Chambers testified that he arrived at the party at 2706 Northmeade Avenue just as it was starting to get dark. He drove his nephew, Lemarcus Moore, and another person to the party in his burgundy Buick Roadmaster. Mark stated that he was sitting under the carport eating when he first heard the gunshots. Several people ran by him yelling, “They shooting, they shooting.” Mark saw sparks as the bullets hit the bricks on the home. He ran to the backyard with everyone until someone told him that Lemarcus Moore had been shot. He looked for Moore in the front yard, and when he saw sparks from the bullets hitting the side of the house, he returned fire with his own guns, a 9 millimeter Smith and Wesson and a 9 millimeter Ruger, for which he carried a permit. Mark did not remember how many times he fired his guns but asserted that he was still being fired upon at the time he fired at them. He explained that he had his guns with him that night because he carried them with him wherever he went. He said he was “scared” when the gunshots started and that he could not see who was firing from the top of the hill because it was dark. He finally saw Moore when he “circled around the house ... and came back up under the car[port].” Mark and Cleotha Norwood

picked up Moore, who was bleeding, and put him in his car as the shooting continued, and his brother Steve Chambers drove them to the hospital. Mark said that nearly everyone else at the party had run into the house by the time they carried Moore to the car. He recalled that the shooting went on for “fifteen, twenty minutes.” Mark said he was not at the party when the fistfight between Robrecus Braxton and Kenneth Brown, Devon Brown, and Richardson occurred.

*5 Steve Chambers, who was friends with Robrecus Braxton and Christopher Braxton, arrived at the party at the Northmeade house around 6:00 or 7:00 p.m. on July 3, 2010. He recalled seeing his brother, Mark Chambers, at the party as well as Lemarcus Moore, Robrecus Braxton, Christopher Braxton, and Felix Williams. Just before midnight, Steve was standing under the carport of the Northmeade house with several other people when he heard shots fired. When the bullets began hitting the cars in front of them, everyone “ran to the backyard.” Steve could not see who was shooting but could tell that the gunshots were coming from a house across the street that was on a hill. He heard someone say that Kimberly Jamerson had been shot, and he walked back to the carport as Moore came out of the side door to the house and “just fell face first.” When he saw that Moore's entire pant leg was “full of blood[,]” he realized that Moore also had been shot. At that point, Steve, Mark, and Cleotha Norwood grabbed Moore and ran to the car as the shooting continued. On the way, Steve picked up a gun that Mark had dropped and fired about three times in the direction of the shooters so that they could make it to the car. Steve said that he heard over fifty gunshots, that the shooting lasted “[a] good five, ten minutes,” and that he was afraid. He said he never saw who was firing the shots because it was dark at the time. Steve said he was not present during the fistfight earlier that day.

Lamarcus Moore testified that he attended the party at the Northmeade house with his uncles, Mark and Steve Chambers. He heard people talking about a fistfight that had occurred before they got to the party. When a car drove by, he heard someone say, “That's them, that's them[.]” Later, Moore was standing on the street behind a truck when he saw some fireworks aimed at the house and then saw “bullets flying” toward the house from the same direction. He could not tell who was firing the gunshots because it was dark outside. When Moore realized that he had been shot, he ran toward the backyard and then

went inside the house. He began to feel dizzy, and when he saw that he was bleeding, he fainted near the door. When he regained consciousness, Mark and Steve Chambers said they were going to drive him to the hospital, and Cleotha Norwood carried him to the car as the shooting continued. Moore said that he was “really terrified” when he realized that gunshots were being fired in his direction. Because he was shot in the main artery of his left leg, he underwent two surgeries which caused permanent scars, and the bullet remained in his leg.

Sonja Watkins, Felix Williams's wife and Robrecus Braxton's and Christopher Braxton's mother, testified that she was preparing food the afternoon of July 3, 2010 for the Fourth of July party the next day. In addition to her immediate family being present on July 3, 2010, she recalled that Nakia Greer, Steve Chambers, Mark Chambers, Bianca Nevels, Cleotha Norwood, DeAngelo Stallion, Travis Britton, Chymia Baker, Jalon Baker, Kenneth Baker, Davis Brooks, Whitney Henderson, Danera Love, and Danaria Love were also present. When Watkins heard about the fistfight in the front yard, she went outside to help break up the fight. Several hours later, she heard what she initially thought were fireworks but quickly realized were gunshots. She ran to the bedroom to get the children to a safe place and saw that “one of the boys” had been shot in the leg. She later went outside and saw her niece, Kimberly Jamerson, dying from a gunshot wound. Sonja said that the shooting “seemed like it went on forever” and when it finally stopped, she saw bullet holes throughout the living room of her home, causing drywall dust and shattered glass from the broken windows to be scattered around the room. She also said that there were bullet holes in the cars parked around the house and that bullets had “knocked bricks off the walls [of her home].”

*6 Inga Yancy testified that she lived in the house at 3840 Helmwood Street, which was located at the corner of Helmwood Street and Northmeade Avenue. Between midnight and 12:30 a.m. on July 4, 2010, Yancey said she was awakened by what she thought were fireworks. She checked on her dog at the side door and went back to bed. A short time later, the police knocked on her door and informed her that there had been a shooting. Yancey stated that it took her approximately two minutes to get up, check on her dog, and return to her bed and that the noises that she thought were fireworks continued during the entirety of that time period. However, she

admitted that she did not know how long the noises had been occurring before she was awakened. When the police arrived at her house, Yancy looked outside and saw a large amount of crime scene tape in her front yard.

Demar Wells, a crime scene investigator with the Memphis Police Department, testified that he investigated the two crime scenes in this case. He photographed and collected evidence from 3840 Helmwood Street and at 2706 Northmeade Avenue, where Kimberly Jamerson was killed. Investigator Wells found “a large amount of spent [shell] casings” in the front yard of the house at 3840 Helmwood Street and in the area surrounding the house. He collected numerous spent shell casings from the 3840 Helmwood Street address, including thirty-two .30 carbine casings, eight .45 caliber casings, twenty-five LC-05 casings, and three .20 gauge shot gun shell casings. Investigator Wells and Sergeant Marlon Wright walked down to 2706 Northmeade Avenue and saw several cars with “possible bullet holes in them.” He also saw what appeared to be blood at 2706 Northmeade Avenue where Kimberly Jamerson's body had been lying and what appeared to be blood inside the home at 2706 Northmeade Avenue. He observed damage to the Northmeade home from bullets. In addition, Investigator Wells found the following spent casings in the front yard at 2706 Northmeade Avenue: six 7.62 X 39 casings in the grass just east of where Jamerson's body was lying and nine 9 millimeter casings near the east side of 2706 Northmeade Avenue at the driveway. He stated that the 7.62 X 39 casings were shots from AK-47 or a MAC-90 automatic assault rifle and that the location of these casings meant that someone at the Northmeade location was shooting an automatic assault rifle. He also collected a bullet fragment under a Dodge Durango that was parked in the driveway and another bullet fragment on a window ledge inside the home. Investigator Wells noted that in his ten years with the crime scene investigation unit, this was the largest crime scene involving gunshots that he had ever investigated. Based on the evidence he had seen, he concluded that the shots fired at 2706 Northmeade Avenue came from the east. He noted that the house at 3840 Helmwood Street was three or four houses east of the house at 2706 Northmeade Avenue.

Marlon Wright, a sergeant and a crime scene investigator with the Memphis Police Department, testified that he collected evidence from the two crime scenes at the Northmeade and Helmwood locations for ten to eleven

hours because the crime scenes were so extensive. Sergeant Wright stated that the Mobile Command Unit was called because the crime scene was spread over such a wide area that the officers needed additional light to process the scene. At the 3840 Helmwood Street address, he found “numerous spent casings” in the flower bed, along the wall of the house, along the sidewalk, and in the grass. He said that the house at 3840 Helmwood Street was located on a hill above the house at 2706 Northmeade Avenue. When he stood at the house at 3840 Helmwood Street, he was able to “see everything down the hill” to the Northmeade house. However, visibility from the Northmeade house to the Helmwood house was “limited at best” because of the sharp incline. Sergeant Wright said he and the other officers took photographs of the spent casings, took measurements for the diagrams, and collected evidence from both crime scenes. He prepared several diagrams showing where each of the shell casings were found at the Northmeade and Helmwood locations and where the Northmeade house and cars near the Northmeade house were struck by bullets. Specifically, he saw “four bullet holes in the actual house located at 2706 [Northmeade Avenue] as well as four bullet holes in a vehicle parked in the driveway at 2706 [Northmeade Avenue].” In addition, there was a bullet hole in the left taillight of a vehicle parked in the driveway. Based on Sergeant Wright's measurements, the distance from a tree in front of the Helmwood house to the location where Kimberly Jamerson's body was found was 233 feet and 10 inches while the distance from the tree at the Helmwood house to the driveway of 2706 Northmeade Avenue was 294 feet and 1 inch.

*7 Kevin Lundy, a sergeant with the homicide bureau of the Memphis Police Department, testified that he initially responded to the Northmeade crime scene but left that location to recover a Smith and Wesson silver and black 9 millimeter handgun and a 9 millimeter Ruger handgun that were found inside a burgundy Buick Roadmaster belonging to Steve and Mark Chambers that had been towed to the Memphis Police Department's crime scene tunnel. He photographed and collected the Smith and Wesson pistol from under the front passenger seat of the Buick Roadmaster and the 9 millimeter Ruger pistol from the trunk of the vehicle.

William Merritt, a sergeant and case coordinator for the homicide bureau of the Memphis Police Department, testified that he investigated the case involving the death

of Kimberly Jamerson. Sergeant Merritt stated that although the shell casings found at the Helmwood address were dusted for fingerprints, no fingerprints were found on any of the casings.

Sergeant Merritt interviewed Richardson on the afternoon of July 4, 2010. After advising Richardson of his *Miranda* rights through an Advice of Rights form, Richardson waived his right to remain silent and his right to have an attorney present before answering questions about the incident. Richardson told Sergeant Merritt that he had driven to 2706 Northmeade Avenue with another person, and there had been a dispute over the amount of marijuana. He said that when they returned to the Northmeade address, they got into a fistfight with some individuals at the party there. Richardson claimed that after the fight, he left the scene and went to a female friend's house, where he stayed for a while, and he asserted that he was not present at the time of the shooting. When Sergeant Merritt asked him for the name of this female friend, Richardson changed his story and stated that although he was going to go to his friend's house, he went to his mother's house instead. When Sergeant Merritt informed Richardson that he would have to talk to his mother to verify that he was with her at the time of the shooting, Richardson finally acknowledged that he had played a role in the shooting incident. Richardson then admitted that he had been armed with a revolver and that he had fired six shots in the air.

Following this admission, Sergeant Merritt and a transcriptionist prepared a written statement, which Richardson read and signed after making some corrections. Richardson's statement said that after the fistfight, he went to Kenneth Brown's and Devon Brown's house on Cracklerose Drive. He said that Kenneth “was talking about they was going to go and do something and so when they got strapped up, we went around there and parked around the corner.” He said Kenneth Brown drove him and Devon Brown in Kenneth's blue Chevrolet Lumina to the Helmwood location, which was on the corner on a hill just up the street from 2706 Northmeade Avenue. They “hopped out, walked to the corner, and started shooting.” Richardson admitted that he was present when Kimberly Jamerson was shot. He also admitted that he was armed with a revolver and that he had fired his gun six times in the direction of the people at 2706 Northmeade Avenue, but he claimed he “was pointing [his gun] up above them.” Richardson

said Kenneth and Devon Brown were firing shots during the incident, although he did not know what weapons they were firing and did not know where they had gotten the weapons. After firing the gunshots, they ran back to the car, and Kenneth dropped Richardson off on Coral Street. He then walked around the corner to his home. Richardson said that he left his weapon in the Lumina after the shooting. He claimed that it was not his idea to shoot at the house on Northmeade but that he “just went along with it.” Richardson asserted that he “didn't plan on hurting nobody” and “was just going to shoot up in the air.”

*8 Sergeant Merritt stated that no firearms were recovered from Richardson, Kenneth Brown, or Devon Brown. He also said that no weapons were found at the Browns' house on Cracklerose or in the blue Chevrolet Lumina. Sergeant Merritt identified a photograph showing that Kenneth Brown had a black eye, an abrasion on his nose, an injury to his right knee, and an scrape on his right shoulder at the time of his interview, which was a short time after the incident. He said that Kenneth's Chevrolet Lumina was found at the home of someone related to the Browns and that when it was recovered, the back window was broken, but no bullets were found inside the vehicle. Sergeant Merritt stated that Richardson was cooperative and remorseful at the time he gave his statement. He also said that Richardson did not have a black eye when he was interviewed.

Dr. James Lewis Caruso, an expert in the field of forensic pathology, testified that he performed the autopsy on Kimberly Jamerson. He stated that Jamerson suffered a gunshot wound to the head as well as abrasions to her forehead, the bridge of her nose, and the tip of her nose. She also had a laceration near her mouth. Dr. Caruso said that the bullet entered and exited her head, causing “significant injury to her brain[.]” He explained that the bullet entered the front of Jamerson's head and exited at the back right of her head with very little deviation up or down and that the entrance wound and the exit wound were both around one inch from the top of Jamerson's head. During the autopsy, Dr. Caruso recovered several bullet fragments and pieces of the bullet jacket from Jamerson's head, which he gave to police. Dr. Caruso opined that Jamerson's cause of death was a gunshot wound to the head and that the manner of death was homicide.

Steve Scott, a special agent forensic scientist with the Tennessee Bureau of Investigation, was declared an expert in the field of firearms identification. He testified that he examined and tested the ballistics evidence collected in this case. Agent Scott opined that the six 9 millimeter cartridge cases found in the front yard of the home at 2706 Northmeade Avenue were fired from the Smith and Wesson 9 millimeter semi-automatic pistol recovered from Mark Chambers's vehicle. He also opined that the three 9 millimeter cartridge cases found in the front yard of the home at 2706 Northmeade Avenue were fired from the Ruger 9 millimeter pistol recovered from that same vehicle. In addition, he determined that the six 7.62 X 39 millimeter rifle cartridge cases that were found at the Northmeade location had all been fired from the same rifle, either an AK-47 or Chinese SKS. After examining the whole .30 caliber bullet found at the Northmeade address, Agent Scott determined that the bullet fragments recovered from Kimberly Jamerson's head matched this .30 caliber bullet and were consistent with having been fired from the same weapon, a .30 carbine caliber rifle. He also concluded that a different whole bullet and a bullet fragment collected from the Northmeade location were from the .22 caliber class and were most consistent with being fired from a 223 Remington caliber firearm.

*9 Agent Scott also examined the casings found at the Helmwood address and concluded the following: the three .20 gauge shot shell cases had been fired from the same .20 gauge shotgun, the eight .45 caliber automatic cartridge cases had been fired from the same .45 caliber automatic pistol, the twenty-five LC-05 or 223 Remington caliber cartridge cases had characteristics indicating that they had been fired from the same “military assault-type rifle,” even though he could not conclusively match them with one another, and the thirty-two .30 carbine caliber cartridge cases had been fired from the same .30 carbine military-style rifle. In addition, Agent Scott stated that although there was no way to determine whether a fired bullet came from a cartridge case, the 223 bullet and bullet fragment that were collected from the Northmeade location were of the same type and design as would come from the cartridge cases collected from the Helmwood location. Additionally, he stated that the .30 caliber carbine cases found at the Helmwood location were the same type and caliber as the bullet fragments recovered from Kimberly Jamerson's brain and as the .30 carbine caliber bullet from the Northmeade location. He stated

that he was not given any evidence having to do with a revolver, although cartridge cases have to be manually removed from a revolver and are not ejected. Agent Scott determined that four firearms had been fired from the Helmwood location, although he acknowledged that a person or persons could have been firing more than one firearm. He also noted that the .30 carbine rifle, the 223 Remington rifle, and the .20 gauge shotgun were “long-range firearms” and that while the .45 caliber automatic pistol would “certainly travel as far from the Helmwood location down to the Northmeade location, [it was] not as accurate ... at ... striking the target [from a long distance away].” Agent Scott acknowledged that Felix Williams tested positive for gunshot residue, which indicated that Williams “could have fired, handled, or [been] near a gun when it fired.” He also stated that “any firearm that’s mounted with a laser si [ght] could project a green or red light” and that these sights could be placed on any of the aforementioned rifles or the .45 automatic pistol, although he would not expect to see a laser sight on a .20 gauge shotgun.

ANALYSIS

I. Supplemental Jury Instruction. Richardson argues that the trial court’s supplemental instruction in response to two questions from a juror after the close of the State’s proof invaded the province of the jury and improperly commented on the evidence, thereby violating Article IV, Section 9 of the Tennessee Constitution. As we will explain, the juror’s questions concerned the direction Kimberly Jamerson’s body was lying at the time of her death and whether the house at 2706 Northmeade Avenue was searched for weapons. Richardson claims that both of the juror’s questions focused on whether the victim was killed from the defendants’ bullets from the Helmwood location or “friendly fire” from individuals at the Northmeade location, which were questions not answered by the proof, and that the trial court’s response effectively told the jury to disregard these questions. He asserts that the trial court’s response improperly commented on the evidence by suggesting the factual conclusions to be drawn from the proof. He also asserts the court’s response invaded the province of the jury by precluding the jury from weighing the evidence, determining the inferences that could be drawn from the evidence, and reconciling any conflicts in the proof.

We conclude that the trial court’s response to these two questions was not prejudicially erroneous.

*10 Here, prior to the beginning of trial, the trial court gave the jury the following instruction regarding the proper procedure for submitting questions about a witness’s testimony at trial:

If you have a question about the testimony of a witness, write it down and present it to a Court deputy. Your question shall be anonymous. The deputy will then present the question to me. After discussion with the attorneys, if necessary, I will decide whether to ask the witness all or part of your question. For legal reasons, I might decide not to ask a witness a juror’s question or ask only part of the question. Please do not be offended should this happen. The law is complex and contains many technical rules that the lawyers and I must follow. Please do not hold my decisions against any party in this case.

After the State rested its case-in-chief but before the defense rested its case, the trial court gave the following instruction to the jury: “You can’t discuss the case amongst yourselves, you can’t discuss it with anyone else, and I ask you to retire to your jury room for a few minutes, and we’ll resume.” Once the jury left the courtroom, the defense made its motion for judgment of acquittal, which the court denied. The court then informed the parties, outside the presence of the jury, that an anonymous juror had just submitted the following two questions:

(1) At 2706 [North]mead[e] there was a cas[]ing [7.62 X 39] in the Driveway at what point was the House searched for we[a]pons[?]

(2) Before the Body was moved were photos Taken? Was the Body laying [sic] in the Direction of 2706 [North]mead[e] or was it laying [sic] in the Direction of He[l]mwood?

Because the State had rested its case-in-chief and the defense had indicated that it would not present any proof, the trial court stated that it was going to “refer the jury

to the preliminary instructions ... and tell them that they will receive all the evidence ... and ... that if those questions were answered by the proof, that they may consider the questions and the answers, and if they were not answered by the proof, that they cannot speculate, cannot guess at what the answer might have ... been if it was not, in fact, answered by the proof.” Although the defense did not initially object to the trial court's proposed response, it moved for a mistrial at short time later on the basis that the submitted questions indicated “the jurors [were] already deliberating.” The trial court noted that because the State had rested, there was no way that the questions could be answered. It then determined that there was nothing to indicate that the jury had started deliberating and that it believed the jury had simply “followed the court's instruction [about] put [ting] any questions [it had] in writing.” The court then denied the motion for a mistrial on the basis that it had instructed the jury it could not deliberate or discuss the case until the case had been concluded, the jury had heard all of the court's law and counsels' arguments, and the two alternates had been excused from the jury. The court noted that the jury was presumed to have followed its instructions.

*11 After the jury returned to the courtroom and the defense announced that it would not be presenting any proof, the trial court informed the jury that it had heard all of the proof that would be presented in this case. It then informed the jury about the anonymous juror's questions:

Ladies and gentlemen, you have heard all the proof that you will hear. Now, I have a question from one of the members of your jury, and it's actually a two-part question, that says, “At 2706 Northmeade, there was a casing, a 7.2 36 x 9 in the driveway. At what point was the house searched for weapons?” The second part of the question: “Before the body was moved, were photos taken? Was the body lying in the direction of 2706 Northmeade or was it lying in the direction of Helmwood?”

Ladies and gentlemen, I'm going to have to refer you back to the instructions I gave you before trial, the preliminary instructions on page 6, the second to the last paragraph, that, “During the trial, you will receive all of the evidence you may properly consider to decide the case.”

And I can't answer that question for you, both sides having rested.

If that question was answered by the proof, you may consider the question, you may consider the answer to the question. If it was not answered by the proof, you cannot consider that question, you cannot speculate or guess what the answer might have been if it was not, in fact, answered by the proof; does everyone understand that?

During a bench conference out of the hearing of the jury, the defense objected to the trial court's response to the two questions, asserting that the court's response precluded the jury from “consider[ing] what's not in the evidence as proof, that an element hasn't been proven.” The trial court overruled the objection on the basis that the information the juror sought did not pertain to the elements of the offenses and that although the juror might want the answers to these questions regarding the direction of the body and whether the house was searched for weapons, the jury could not consider those facts “because it would be allowing [it] to guess or speculate on factual issues.” The court then stated:

[The State has] to prove the elements of the case beyond a reasonable doubt; they don't want to prove all the facts or all the facts that a jury may be interested in.

Now, the curiosity as to the questions that were asked, those are not elements and those are not something that the State would have to prove.

You may certainly argue anything that you choose to argue that's raised or not raised by the facts or the inferences ... from the facts.... But the instructions are that the State has to prove the elements beyond a reasonable doubt, and you may certainly argue what the State didn't prove, and the State will probably argue they didn't have to prove it[.]

Richardson argues that the trial court's response to the juror's questions violated Article VI, Section 9 of the Tennessee Constitution, which provides, “Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.” The jury must decide the facts of the case under the supervision of the judge, and the judge must provide the law governing the parties without interfering in finding the facts, *Kanbi v. Sousa*, 26 S.W.3d 495, 498 (Tenn.Ct.App.2000) (*McBride v. Allen*, 720 S.W.2d 459, 463 (Tenn.Ct.App.1979)). A trial court must be “very careful not to give the jury any impression as to [its] feelings” or “make any statement which might

reflect upon the weight or credibility of evidence or which might sway the jury.” *State v. Suttles*, 767 S.W.2d 403, 407 (Tenn.1989). “[I]n order to protect the jury’s fact-finding role, judges must be very careful about expressing or intimating any opinion on any fact at issue.” *Kanbi*, 26 S.W.3d at 498–99 (citing *Graham v. McReynolds*, 18 S.W. 272, 277 (1891)).

*12 We note that trial courts have “the authority to respond to jury questions with a supplemental instruction.” *State v. Forbes*, 918 S.W.2d 431, 451 (Tenn.Crim.App.1995) (citing *State v. Moore*, 751 S.W.2d 464, 467 (Tenn.Crim.App.1988)). The “appropriate course of action” for the trial court in responding to a question from the jury is “to bring the jurors back into open court [and] read the supplemental instruction ... along with a supplemental instruction emphasizing that the jury should not place undue emphasis on the supplemental instructions....” *State v. Bowers*, 77 S.W.3d 776, 791 (Tenn.Crim.App.2001). The failure to follow the proper procedure is subject to harmless error analysis and reversal is not required if the defendant has not been prejudiced. *State v. Tune*, 872 S.W.2d 922, 929 (Tenn.Crim.App.1993). When a trial court repeats instructions or gives supplemental instructions, the instructions must be:

- (1) appropriately indicated by questions or statements from jurors, or from the circumstances surrounding the deliberative and decisional process,
- (2) comprehensively fair to all parties, and
- (3) not unduly emphatic upon certain portions of the law to the exclusion of other parts equally applicable to the area of jury misunderstanding or confusion.

Berry v. Conover, 673 S.W.2d 541, 545 (Tenn.Ct.App.1984).

When reviewing challenged jury instructions, we must look at “the charge as a whole in determining whether prejudicial error has been committed.” *In re Estate of Elam*, 738 S.W.2d 169, 174 (Tenn.1987) (citation omitted); see *State v. Phipps*, 883 S.W.2d 138, 142 (Tenn.Crim.App.1994); Tenn. R.App. P. 36(b) (“A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the

whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.”). “ ‘An instruction should be considered prejudicially erroneous only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law.’ ” *State v. Majors*, 318 S.W.3d 850, 864–65 (Tenn.2010) (quoting *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn.2005)); see *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn.1997) (citing *Forbes*, 918 S.W.2d at 447; *Graham v. State*, 547 S.W.2d 531, 544 (Tenn.1977)). Because a question regarding the propriety of jury instructions is a mixed question of law and fact, the standard of review is de novo with no presumption of correctness. *State v. Smiley*, 38 S.W.3d 521, 524 (Tenn.2001).

We conclude that the trial court’s supplemental instruction in response to the juror’s two questions was not prejudicially erroneous. The trial court’s response merely restated a portion of the preliminary jury instructions, which explained that the jury will receive all the evidence that it may properly consider to decide the case. See 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 1.00 Preliminary Jury Instructions. The response did not comment on particular pieces of evidence or testimony presented at trial, did not indicate that the answers to these two questions were not in the evidence presented at trial, did not show any partiality or bias toward either party, and did not make any statement regarding the weight or credibility of the evidence. While the trial court’s supplemental instruction should have admonished the jury not to place undue emphasis upon the supplemental instruction, the final jury instructions informed the jury that “[t]he order in which these instructions are given is no indication of their relative importance” and that it “should not single out any one or more of them to the exclusion of another or others but should consider each instruction in light of and in harmony with all the others.” See *Forbes*, 918 S.W.2d at 452 (citing *State v. Chance*, 778 S.W.2d 457, 462 (Tenn.Crim.App.1989)); see *Burton v. State*, 394 S.W.2d 873, 876–77 (Tenn.1965).

*13 Despite Richardson’s claims to the contrary, the record does not show that the trial court’s response to these two questions prevented the jury from considering whether the victim was inadvertently killed by “friendly fire” from the Northmeade house rather than by gunfire from Richardson and his co-defendants. Instead, the court’s response instructed the jury that it was not allowed

to speculate about the answer to the juror's questions if there was no evidence presented at trial that provided the answer to those questions. Although Richardson claims that the trial court's response prevented the jury from considering whether an element of the offense had not been proven, the preliminary jury instructions and the final instructions repeatedly emphasized to the jury that the State had the burden of proving each element of the offenses beyond a reasonable doubt. In light of all the instructions given in this case, we agree with the State that the jury was not precluded from considering any choice that the evidence supported, including the possibility that the State failed to prove Richardson's guilt of the offenses beyond a reasonable doubt. Consequently, we conclude that the court's response to these two questions neither invaded the province of the jury nor improperly commented on the evidence. Moreover, we conclude that the jury charge, as a whole, did not fail to fairly submit the legal issues and did not mislead the jury as to the applicable law.

II. Comments to Jury Venire. Richardson contends that the trial court committed plain error when it informed the jury venire that the State was not seeking the death penalty or a sentence of life imprisonment without parole if the jury convicted him of first degree premeditated murder. He claims that the court's comments violated Tennessee Code Annotated section 40–35–201(b) and “misled the venire” because the sentence he actually received, life imprisonment plus 224 years, amounted to a sentence of life imprisonment without the possibility of parole. He also claims that the court's erroneous instruction minimized the seriousness of the dozens of charges against him and “contributed to a lack of serious deliberation” by the jury. We conclude that these comments were not error, much less plain error.

The plain error doctrine states that “[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.” Tenn. R.App. P. 36(b). In order for this court to find plain error,

“(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused

must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is ‘necessary to do substantial justice.’
“

*14 *State v. Smith*, 24 S.W.3d 274, 282 (Tenn.2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641–42 (Tenn.Crim.App.1994)). “[P]lain error must be of such a great magnitude that it probably changed the outcome of the trial.” *Adkisson*, 899 S.W.2d at 642 (citations omitted) (internal quotations marks omitted). Moreover, “[i]t is the accused's burden to persuade an appellate court that the trial court committed plain error.” *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn.2007) (citing *U.S. v. Olano*, 507 U.S. 725, 734 (1993)). “[T]he presence of all five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established.” *Smith*, 24 S.W.3d at 283.

Richardson claims that the court's comments violated Tennessee Code Annotated section 40–35–201(b), which provides:

In all contested criminal cases, except for capital crimes that are governed by the procedures contained in §§ 39–13–204 and 39–13–205, and as necessary to comply with the Tennessee Constitution, article VI, § 14 and § 40–35–301, the judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on possible penalties for the offense charged nor all lesser included offenses.

In short, this code section states that in non-capital cases the trial court may not instruct the jury on the possible penalties for the charged offense or any lesser included offenses. A 1999 Attorney General Opinion outlined the proper jury instruction in a situation where the State has not sought the death penalty or imprisonment for life without the possibility of parole:

In a first degree murder case, where the State has not filed notice of intent to seek the death penalty or imprisonment for life without possibility of parole, Tenn.Code Ann. § 40-35-201(b) precludes instructing the jury as to possible penalties for the crime charged. The trial court should inform the jury that upon a conviction for first degree murder, the trial court will impose the appropriate sentence as provided by the law.

....

... [W]hen a case proceeds under § 39-13-208(c), it is impermissible for a trial court to inform the jury that first degree murder carries a potential penalty of either the death penalty, imprisonment for life without possibility of parole, or life imprisonment....

Tenn. Op. Atty. Gen. No. 99-178, 1999 WL 1012852 (Tenn.A.G. Sept. 17, 1999).

This court has consistently held that it is harmless error for a trial court to instruct the venire or the jury that the State is not seeking the death penalty or a sentence of life imprisonment without parole and that if the defendant is convicted of first degree murder, he will receive an automatic sentence of life imprisonment. *See State v. Ramone Lawson*, No. W2013-00324-CCA-R3-CD, 2014 WL 1153268, at *6 (Tenn.Crim.App. Mar. 19, 2014), *perm. app. denied* (Tenn. Aug. 26, 2014); *State v. Derek Williamson*, No. M2010-01067-CCA-R3-CD, 2011 WL 3557827, at *6 (Tenn.Crim.App. Aug. 12, 2011); *State v. Charles Ray Allen*, No. M1999-00818-CCA-R3-CD, 2000 WL 1649507, at *8 (Tenn.Crim.App. Nov. 3, 2000).

*15 However, in this case, the trial court did not inform the venire that Richardson would receive an automatic life sentence if the jury convicted him of first degree murder. Instead, the court merely commented that the State was not requesting the death penalty or a sentence of life imprisonment without parole and that it would impose the appropriate sentence if Richardson were convicted of first degree premeditated murder. Specifically, the court made the following statement to the jury venire:

This is a case, I told you that Mr. Richardson has two indictments. One indictment charges him with murder in the first degree. And a lot of times, when people hear that term, murder in the first degree, jurors start wondering, "Is this a death penalty case, because, Judge, I can't sit on a death penalty case." This is

not a case where the State of Tennessee has filed any notice asking for any enhanced punishment on this case. If ... Mr. Richardson is found guilty of first-degree murder, I'll sentence him for that and I'll sentence him on anything else that the jury finds him guilty of, if he's found guilty of anything. So it is not a case where the State is asking for the death penalty [], it's not a case where the State is asking for life imprisonment without the possibility of parole. For those jurors that [were] thinking, "I wonder if we have to make a decision as to whether or not Mr. Richardson would be sentenced to life without parole or sentenced to the death penalty," those punishments are not options in this case because the State is not seeking that enhanced punishment; does everyone understand that?

The court made no further comments about Richardson's potential sentence.

In *State v. Billy Gene Debow*, No. M1999-02678-CCA-R3-CD, 2000 WL 1137465, at *7 (Tenn.Crim.App. Aug. 2, 2000), a case most similar to the instant case, the trial court informed the venire, over the defendant's objection that the case was not a death penalty case after two potential jurors indicated their hesitation about sitting on the case because they believed a possible penalty was death. This court held the court's comment in *Debow* was not error:

[Code section 40-35-201(b)] provides that the judge and attorneys may not comment on *possible* penalties. Because this was not a capital case, the death penalty was not a possible penalty. Thus, by instructing the jury that the death penalty was not an option, the trial judge was not violating the language of the statute.

Id. at *8. The court explained the reasoning behind its holding:

Although most potential jurors do not understand the intricacies of the death penalty statutes, they are aware that the death penalty is a possible penalty in Tennessee for first degree murder. Without being informed otherwise, jurors on a

first degree murder case might very well believe that death could be imposed as a result of their verdict, even when the state is not seeking the death penalty. Thus, jurors on such a first degree murder case might be more inclined to find the defendant guilty of a lesser included offense if they do not believe that the defendant's conduct warranted death. By prohibiting the courts from informing Juries that death is not an option, the legislature would in essence be creating the same problem that it had before: Juries might decide the cases based on the potential punishment rather than the defendant's guilt or innocence of the crime charged. We do not believe that this was the intent of the legislature. Accordingly, we conclude that the statute relied upon by the Defendant does not prohibit a trial judge from informing the jury in a non-capital case that the death penalty is not a punishment option.

*16 *Id.* In light of the decision in *Debow*, we conclude that the statute does not prevent a trial court from informing the jury in a non-capital case that the State is not seeking the death penalty or a sentence of life imprisonment without parole. In reaching this decision, we agree with the *Debow* court that juries must decide cases based on the defendant's guilt or innocence of the charged offense rather than any possible punishment the defendant might face. Because the trial court's comments in this case made no mention of Richardson's *possible penalties* if convicted, the comments were not error, and Richardson is not entitled to plain error relief. *See id.* at *8; *Smith*, 24 S.W.3d at 282 (quoting *Adkisson*, 899 S.W.2d at 641–42).

Richardson also contends that the trial court misled the jury by indicating that life without parole was not a sentencing option when he ultimately received a sentence of life imprisonment plus 224 years. Initially, we note that Richardson was not sentenced to life imprisonment without parole for his first degree murder conviction. Sentences of life imprisonment without the possibility of parole are only imposed on first degree murder convictions and are imposed by a jury in a separate

hearing after the State gives appropriate notice to the defendant. *See* T.C.A. § 39–13–207(a), –208(b). The trial court's comments were directed to the first degree murder charge and never mentioned the sentences Richardson might serve if he were found guilty of any of the other charges, as was proper.

We also conclude that Richardson's reliance on *State v. Cook*, 816 S.W.2d 322 (Tenn.1991), and *Dean v. State*, 59 S.W.3d 663 (Tenn.2001) is misplaced. Both *Cook* and *Dean* concerned a trial court's error regarding a prior version of Code section 40–35–201(b) (1997) (repealed 1998), which stated that upon the motion of either party, the trial court was required to instruct the jury on the possible penalties for each of the defendant's charges and all lesser included offenses. This prior version of the statute was repealed in 1998 and the new version of the statute, which is applicable to Richardson's case, precludes a trial court from instructing the jury on the possible penalties in a non-capital case. Despite this, Richardson maintains that *Dean* and *Cook* still entitle him to relief. He claims that in those cases, just as in his case, the defendants were prejudiced by the trial court's comments because they received a sentence that was greater than the range of punishment contemplated by the jury. *See Dean*, 59 S.W.3d at 669 (citing *Cook*, 816 S.W.2d at 327). Richardson asserts that even though the trial court informed the jury that he would not receive a sentence of life imprisonment without parole, he ultimately received “a sentence of life with consecutive time that remove[d] the possibility of parole.” We conclude that *Cook* and *Dean* are inapplicable to Richardson's case for a variety of reasons, most notably because Richardson received a sentence of life imprisonment for his first degree murder conviction, which was not greater than the range of punishment contemplated by the jury on that charge. The fact that Richardson received other sentences for his other convictions that resulted in a lengthy sentence in addition to his sentence of life imprisonment does not entitle him to relief.

*17 **III. Special Instruction.** Richardson argues that the trial court erred by given a special instruction to the jury that the credible testimony of one victim or witness is sufficient to support a conviction. He acknowledges that he did not make a contemporaneous objection to this instruction at trial and did not include this issue in his motion for new trial but asks this court to consider the issue under plain error review. We conclude that although

the trial court's instruction was error, it was harmless beyond a reasonable doubt and does not constitute plain error.

Here, the trial court provided the following instruction on identification that was based on Tennessee Pattern Jury Instruction 42.05:

Identity. One of the issues in this case is the identification of the Defendant as the person who committed the crime. The State has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression of belief or impression by the witness, and its value may depend upon your consideration of several factors. Some of the factors which you may consider are:

- (1) The witness' capacity and opportunity to observe the offender. This includes, among other things, the length of time available for observation, the distance from which the witness observed, the lighting and whether the person who committed the crime was a prior acquaintance of the witness;
- (2) The degree of certainty expressed by the witness regarding the identification and the circumstances, under which it was made, including whether it is the product of the witness' own recollection;
- (3) The occasions, if any, on which the witness failed to make an identification of the Defendant, or made an identification that was inconsistent with the identification at trial; and
- (4) The occasions, if any, on which the witness made an identification that was consistent with the identification at trial, and the circumstances surrounding such identifications.

Again, the State has the burden of proving every element of the crime charged, and this burden specifically includes the identity of the Defendant as the person who committed the crime for which he is on trial. If after considering the identification testimony in light of all the proof you have a reasonable doubt that the Defendant is the person who committed the crime, you must find the Defendant not guilty.

See T.P.I.-Crim. 42.05.

The trial court then added the following special instruction, to which Richardson now objects:

The credible testimony of one identification witness is sufficient to support a conviction if the witness viewed the accused under such circumstances as would permit a positive identification to be made. The Court charges you that the credible testimony of one victim or one witness, standing alone, is sufficient to support a conviction.

Then the court instructed the jury that it was only to convict Richardson if it determined that he committed the offenses in this case beyond a reasonable doubt:

***18** The Court further charges you that if you are satisfied from the whole proof in the case, beyond a reasonable doubt, that the Defendant David Richardson committed the crimes charged against him, and you are satisfied beyond a reasonable doubt that he has been identified as the person who committed the crimes charged, then it would be your duty to convict him.

On the other hand, if you are not satisfied with the identity from the proof, or you have a reasonable doubt as to whether he has been identified from the whole body of the proof in the case, then you must return a verdict of not guilty.

Richardson asserts that the challenged special instruction "polluted the reasonable doubt standard" by including the "appellate standard of review for sufficiency of the evidence challenges." He claims that because the court's initially instructed that "[t]he State has the burden of proving identity beyond a reasonable doubt" and then provided the special instruction that this standard is satisfied with the credible testimony of one witness, the jury could have logically inferred that "proof beyond a reasonable doubt is satisfied with one witness ." He asserts that this non-structural constitutional error was not harmless beyond a reasonable doubt, especially given that Agent Scott's testimony established some of the essential elements of the charged crimes. He claims Agent Scott was the sole witness to connect him to the offenses because he concluded that the bullet fragments removed from Jamerson's head and the whole bullet retrieved from

the crime scene were fired from the same gun and were “most consistent” with a .30 carbine caliber bullet whose casings had been found at the Helmwood location, where Richardson admitting to firing a gun.

Richardson claims the court's special instruction was particularly damaging regarding the attempted first degree murder convictions and the aggravated assault convictions because it allowed the jury to convict him of these offenses based on “the credible testimony of one victim or one witness[.]” He also claims that if the jury was unsure about whether the State established the fear element for the aggravated assault counts in which the victims named in those counts did not testify, then the special instruction erroneously resolved this issue for them by telling them that the credible testimony of one victim or one witness was sufficient to support a conviction. Finally, Richardson asserts that the special instruction prejudiced the judicial process because it told the jury that one witness was enough to disregard the defense's theory of mere recklessness and to convict on the charged offenses.

The State concedes that the court's special instruction was erroneous based on *State v. David Michael Chubb*, No. M2005-01214-CCA-R3-CD, 2007 WL 258429 (Tenn.Crim.App. Jan. 29, 2007), but asserts that the error was harmless beyond a reasonable doubt because the proof of the defendant's identification was largely circumstantial and did not depend on the testimony of a single witness. In *David Michael Chubb*, the defendant was convicted of four counts of aggravated sexual battery, one count of attempted aggravated sexual battery, one count of possession of marijuana, and one count of possession of drug paraphernalia. *Id.* at *1. Most of the proof regarding the sexual battery offenses came from the testimony from the victim and the defendant, and the jury was required to make credibility determinations regarding this evidence. *Id.* at *2-4, *7-8, *16. Over the defendant's objection, the trial court granted the State's request to give the following instruction to the jury because it believed it was a correct statement of the law: “[I]n a sexual abuse case you may convict the defendant on the basis of the victim's testimony alone. Corroboration of the victim's testimony is not necessary.” *Id.* at *16. The court gave the aforementioned instruction based on Tennessee Code Annotated section 40-17-121, which provides:

*19 If the alleged victim of a sexual penetration or sexual contact within the meaning of §

39-13-501 is less than thirteen (13) years of age, such victim shall, regardless of consent, not be considered to be an accomplice to such sexual penetration or sexual contact, and no corroboration of such alleged victim's testimony shall be required to secure a conviction if corroboration is necessary solely because the alleged victim consented.

On direct appeal, this court reversed the defendant's convictions for aggravated sexual battery and attempted aggravated sexual battery on the basis that special instruction could have misled the jury:

We agree with the appellant that the instruction should not have been given. In the context of addressing whether the evidence is sufficient to support the conviction, the testimony of the victim alone could be sufficient. However, the use of the disputed language in the context of instructing the jury regarding the State's burden of proof runs a serious risk of misleading the jury. Moreover, in Tennessee judges are prohibited from commenting on the credibility of witnesses or on the sufficiency of the evidence. Tenn. Const. [a]rt. VI, § 9; *State v. Suttles*, 767 S.W.2d 403, 406-07 (Tenn.1989). The proof in this case essentially presented to the jury a question of credibility between the victim and the appellant. The jury instruction effectively informed the jury that they need look no further than the victim's testimony to convict and thus implied that the jury need not consider all other proof. Accordingly, we conclude that the error merits reversal of the appellant's aggravated sexual battery and attempted aggravated sexual battery convictions. However, we conclude that the instruction had no impact

on the appellant's drug related convictions.

Id. at *16.

In Richardson's case, the language in the special instruction was developed to assist appellate courts in determining whether eyewitness evidence was sufficient to establish the defendant's identity as the perpetrator beyond a reasonable doubt. See *State v. Radley*, 29 S.W.3d 532, 537 (Tenn.Crim.App.1999); *State v. Strickland*, 885 S.W.2d 85, 87–88 (Tenn.Crim.App.1993). “The identity of the perpetrator is an essential element of any crime.” *State v. Rice*, 184 S.W.3d 646, 662 (Tenn.2006) (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn.1975)). Because the challenged special instruction is best categorized as a misstatement of an element of an offense, it is a non-structural constitutional error subject to constitutional harmless error analysis. See *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn.2008); *Faulkner*, 154 S.W.3d at 60; *State v. Hollis*, 342 S.W.3d 43, 51–52 (Tenn.Crim.App.2011); *State v. Paul Wallace Dinwiddie, Jr.*, No. E2009–01752–CCA–R3–CD, 2010 WL 2889098, at *10–11 (Tenn.Crim.App. July 23, 2010); see also *Hedgpeth v. Pulido*, 555 U.S. 57, 60–61 (2008). Such errors require reversal unless the error is deemed “harmless beyond a reasonable doubt.” *Rodriguez*, 254 S.W.3d at 371 (citing *Rice*, 184 S.W.3d at 670; *State v. Powers*, 101 S.W.3d 282, 397 (Tenn.2003)); *Chapman v. California*, 386 U.S. 18, 24 (1967). Consequently, the proper inquiry is not whether a guilty verdict surely would have been rendered in a trial without the error but “whether the guilty verdict actually rendered in this trial was surely unattributable to error.” *Hollis*, 342 S.W.3d at 52 (quoting *Dinwiddie*, 2010 WL 2889098, at *11).

*20 We agree with the State that while this special instruction was error, it was harmless beyond a reasonable doubt because the proof identifying Richardson as the perpetrator did not depend on a single eyewitness's testimony. There were no eyewitnesses who saw Richardson committing the offenses in this case. Although Robrecus Braxton, Felix Williams, Mark Chambers, Steve Chambers, and Lemarcus Moore all testified that the shots were fired from a location up the street, none of these witnesses could identify who was shooting at them because it was dark outside and because the shooters were a long distance away. Instead, Richardson's identification as the perpetrator in the offenses was based on the following: his confession that he participated in the

shooting, the circumstantial evidence of his motive and his proximity to the crime scene, and Agent Scott's ballistics testimony. Although Agent Scott stated that the casings found at the Helmwood location were consistent with the bullets fragments found in Kimberly Jamerson's head and a whole bullet found at the Northmeade location, Agent Scott did not, as stated in the special instruction, “view[] the accused under such circumstances as would permit a positive identification to be made.” When read as a part of the charge as a whole, it is clear that the challenged special instruction referred to eyewitness testimony, despite the fact that there were no eyewitnesses identifying Richardson as the shooter. Moreover, Agent Scott's testimony, which depended on the testimony from Dr. Caruso and the officers who collected the casings from the scene, was not enough to circumstantially connect Richardson to the crime without Richardson's confession that he shot a gun at the Helmwood location at the time of Jamerson's death. Because the proof did not align with the erroneous instruction on identification, we conclude that the error is harmless beyond a reasonable doubt. Accordingly, we conclude that Richardson is not entitled to plain error relief because he has failed to show that a substantial right of the accused was adversely affected and that consideration of the error is necessary to do substantial justice. See *Smith*, 24 S.W.3d at 282 (quoting *Adkisson*, 899 S.W.2d at 641–42).

IV. Sufficiency of the Evidence. Richardson argues that the evidence is insufficient to support his first degree premeditated murder conviction, his attempted premeditated murder convictions, and nine of his aggravated assault convictions. We conclude the evidence is sufficient to support these convictions.

The State, on appeal, is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *State v. Davis*, 354 S.W.3d 718, 729 (Tenn.2011) (citing *Majors*, 318 S.W.3d at 857). When a defendant challenges the sufficiency of the evidence, the standard of review applied by this court is “whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Similarly, Rule 13(e) of the Tennessee Rules of Appellate Procedure states, “Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the

finding by the trier of fact of guilt beyond a reasonable doubt.” Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn.Crim.App.1990) (citing *State v. Brown*, 551 S.W.2d 329, 331 (Tenn.1977); *Farmer v. State*, 343 S.W.2d 895, 897 (Tenn.1961)). The standard of review for sufficiency of the evidence “ ‘is the same whether the conviction is based upon direct or circumstantial evidence.’ ” *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn.2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn.2009)). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses’ testimony, and reconcile all conflicts in the evidence. *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn.2008) (citing *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn.Crim.App.1978)).

*21 “In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence.” *Dorantes*, 331 S.W.3d at 379 (citing *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn.1973); *Marable v. State*, 313 S.W.2d 451, 456–58 (Tenn.1958)). “The jury decides the weight to be given to circumstantial evidence, and [t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.” *Rice*, 184 S.W.3d at 662 (quoting *Marable*, 313 S.W.2d at 457). This court may not substitute its inferences for those drawn by the trier of fact in cases involving circumstantial evidence. *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn.2011) (citing *State v. Lewter*, 313 S.W.3d 745, 748 (Tenn.2010)). The standard of review for sufficiency of the evidence “ ‘is the same whether the conviction is based upon direct or circumstantial evidence.’ ” *Dorantes*, 331 S.W.3d at 379 (quoting *Hanson*, 279 S.W.3d at 275).

Here, the State argued that Richardson was guilty of the charged offenses under a theory of criminal responsibility. An individual is criminally responsible for the conduct of another person if, “[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]” T.C.A. § 39–11–402(2). Criminal responsibility is not a distinct crime but “a theory by which the state may prove the defendant’s guilt based on another person’s conduct.” *State v. Osborne*, 251 S.W.3d

1, 16 (Tenn.Crim.App.2007) (citing *State v. Mickens*, 123 S.W.3d 355, 389–90 (Tenn.Crim.App.2003)). In the theory of criminal responsibility, “an individual’s presence and companionship with the perpetrator of a felony before and after the commission of an offense are circumstances from which his or her participation in the crime can be inferred.” *State v. Watson*, 227 S.W.3d 622, 639 (Tenn.Crim.App.2006) (citing *State v. Ball*, 973 S.W.2d 288, 293 (Tenn.Crim.App.1998)). In this situation, “[n]o particular act need be shown, and the defendant need not have taken a physical part in the crime to be held criminally responsible.” *Id.* (citing *Ball*, 973 S.W.2d at 293)). In order to be held criminally responsible for the acts of another, “there must be proof that the aider and abettor associated himself with the venture, acted with the knowledge that an offense was to be committed, and shared the principal’s criminal intent.” *State v. Hall*, 976 S.W.2d 121, 140 (Tenn.1998) (citing *Hembree v. State*, 546 S.W.2d 235, 239 (Tenn.Crim.App.1976)). There is no requirement that the State “elect between prosecution as a principal actor and prosecution for criminal responsibility[.]” *State v. Hodges*, 7 S.W.3d 609, 625 (Tenn.Crim.App.1998) (citing *State v. Williams*, 920 S.W.2d 247, 257–58 (Tenn.Crim.App.1995)).

*22 A. First Degree Premeditated Murder Conviction.

Richardson argues the evidence was insufficient to show that he intentionally killed Kimberly Jamerson and claims that the proof established, at most, a reckless homicide pursuant to Tennessee Code Annotated section 39–13–215. To support the reckless homicide offense, he claims the proof showed that he and his co-defendants fired several shots toward the Northmeade house in the dark from a distance of three hundred feet away. He asserts that no evidence showed that he or the other defendants saw anyone at the Northmeade house, knew who was present at the time of the shooting, or intended to kill anyone at that address. Richardson asserts that the State never presented any proof contradicting his claim that he shot his gun in the air and never intended to shoot anyone.

First degree murder is the premeditated and intentional killing of another person. T.C.A. § 39–13–202(a)(1). Premeditation is defined as “an act done after the exercise of reflection and judgment.” *Id.* § 39–13–202(d). This section further defines premeditation:

“Premeditation” means that the intent to kill must have been formed prior to the act itself. It is not

necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id. “ ‘Premeditation’ is the process of thinking about a proposed killing before engaging in the homicidal conduct.” *State v. Brown*, 836 S.W.2d 530, 540–41 (Tenn.1992) (quoting C. Torcia, *Wharton's Criminal Law* § 140 (14th ed.1979)). If the proof establishes that the defendant intended to cause the death of a person and that he acted with premeditation and deliberation, then the killing of another, even if it was not the intended victim, is sufficient to sustain a conviction for first degree premeditated murder. *State v. Ely*, 48 S.W.3d 710, 723–24 (Tenn.2001); *Millen v. State*, 988 S.W.2d 164, 168 (Tenn.1999).

The existence of premeditation is a question of fact for the jury to determine and may be inferred from the circumstances surrounding the offense. *State v. Young*, 196 S.W.3d 85, 108 (Tenn.2006); *State v. Suttles*, 30 S.W.3d 252, 261 (Tenn.2000). Factors that may support the existence of premeditation include but are not limited to the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, the infliction of multiple wounds, declarations by the defendant of an intent to kill, lack of provocation by the victim, failure to aid or assist the victim, evidence of procurement of a weapon, preparations before the killing for concealment of the crime, destruction and sequestration of evidence of the killing, and calmness immediately after the killing. *State v. Kiser*, 284 S.W.3d 227, 268 (Tenn.2009); *State v. Leach*, 148 S.W.3d 42, 53–54 (Tenn.2004); *State v. Davidson*, 121 S.W.3d 600, 615 (Tenn.2003); *State v. Bland*, 958 S.W.2d 651, 660 (Tenn.1997). This Court has also noted that the jury may infer premeditation from any planning activity by the defendant before the killing, evidence concerning the defendant's motive, and the nature of the killing. *State v. Bordis*, 905 S.W.2d 214, 222 (Tenn.Crim.App.1995) (citation omitted). As we previously noted, a defendant may be held criminally responsible for a first degree premeditated murder committed by another person if the defendant, “[a]cting with intent to promote or assist the

commission of the offense, or to benefit in the proceeds or results of the offense, ... solicits, directs, aids, or attempts to aid another person to commit the offense.” T.C.A. § 39–11–402(2).

*23 The proof at trial showed that Kenneth Brown was involved in a dispute with Dena Watkins over a small amount of marijuana. After Felix Williams gave Kenneth Brown \$5.00 to settle the dispute, Kenneth nearly hit Robrecus Braxton with his car as he was leaving the party, which ultimately led to a fistfight between Kenneth Brown, Richardson, and Devon Brown, and Robrecus Braxton, Christopher Braxton, and Kenneth Baker. After Richardson, Kenneth Brown, and Devon Brown lost the fight and were leaving the area, one of them said, “We’ll be back.” Richardson later told police that he and the other two men returned to the Browns’ house, where they decided to exact revenge on the individuals attending the party. Then Richardson, Kenneth Brown, and Devon Brown “strapped up,” returned to the area, and parked near 3840 Helmwood Street, where they “hopped out ... and started shooting.” Richardson admitted that he fired a revolver in the direction of the party at the Northmeade house. He also admitted that he was present when Kimberly Jamerson, who was unarmed and uninvolved in the previous dispute, was shot and killed. The bullet fragments removed from Jamerson’s head were consistent with having been fired from a .30 caliber carbine rifle and matched the type and caliber of the thirty-two casings found at the 3840 Helmwood Street. Moreover, the physical evidence established that over sixty shots had been fired from four different weapons toward the Northmeade home where approximately twenty people were gathered for a Fourth of July party. The guns involved in this incident were never recovered.

Although Richardson acknowledges that he and his co-defendants killed Jamerson, he argues that the evidence is insufficient to show that he acted intentionally in causing her death. He claims that because he was shooting in the air and did not intend to kill anyone, his conviction should be reduced to reckless homicide. In response, we note that it was the jury’s prerogative to reject Richardson’s claim that he accidentally shot Jamerson and to accredit the State’s theory that Richardson engaged in a premeditated plan to kill the people at the party and fired his shots at the house in furtherance of that plan. The evidence, at a minimum, showed that Richardson acted with the intent to promote or assist the commission of the first degree

premeditated murder of Kimberly Jamerson by aiding Kenneth Brown or Devon Brown to commit the offense. *See id.* § 39–11–402(2). Accordingly, we conclude that the evidence was sufficient to sustain his conviction for first degree premeditated murder.

B. Attempted First Degree Murder Convictions.

Richardson also contends that the proof failed to show that he had the specific intent to kill any of the twelve victims named in the attempted first degree murder counts. Instead, he argues the evidence only established his guilt of the offense of reckless endangerment because his conduct placed or may have placed “another person in imminent danger of death or serious bodily injury.” *See id.* § 3913–103(a). Richardson notes that most of the victims in the attempted first degree murder counts did not testify. He asserts that although the evidence established that these victims were present at the time of the shooting, the proof did not establish where these victims were located on the property at the time of the shooting, what they were doing, or what reaction they had to the shooting. In addition, he claims that because he and his co-defendants shot toward the Northmeade house from approximately three hundred feet away, no rational juror could have convicted him of attempted first degree murder beyond a reasonable doubt based on this proof. Finally, he reiterates that no evidence established that he or his co-defendants saw anyone at the Northmeade house, knew who was present at the time of the shooting, or intended to kill anyone at that address.

*24 As relevant in this case, a person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense, “[a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.” *Id.* § 39–12–101(a)(3). “Conduct does not constitute a substantial step ... unless the person’s entire course of action is corroborative of the intent to commit the offense.” *Id.* § 39–12–101(b). As we have previously noted, first degree murder is the premeditated and intentional killing of another person. *Id.* § 39–13–202(a)(1).

The evidence presented at trial established that Richardson, Kenneth Brown, and Devon Brown grabbed at least four weapons, went to 3840 Helmwood Street,

and fired more than sixty shots in the direction of the people at the party at 2706 Northmeade Avenue. Richardson admitted that he and his co-defendants were seeking revenge because they had lost the earlier fistfight at the Northmeade home. At the time of the shooting, Richardson knew that there were many people in attendance at the party. During this shooting incident, bullets entered the Northmeade home and damaged several cars parked near the house. Although Richardson claims that he merely shot his revolver in the air, it was the jury’s prerogative to reject this claim. Affording the State the strongest view of the evidence, a rational jury could have found that Richardson intended to kill the victims named in these counts by firing his gun in the direction of them while they attended the party at the Northmeade house.

C. Aggravated Assault Convictions in Counts 16, 17, 18, and 20–25.

Noting that the nine victims in the aforementioned counts did not testify at trial, Richardson contends that although the State presented proof establishing that these victims were present during the shooting, it failed to present circumstantial proof that they reasonably feared imminent bodily injury. He claims the State presented no proof regarding the location of these victims during the shooting or their proximity to the gunfire. He also asserts that the State presented insufficient evidence that the victims in these counts showed a concern for self-defense, an inability to concentrate, a summoning of the police, or a worry about self-preservation. *See State v. Barry Smith*, No.2011–02122–CCA–R3–CD, 2013 WL 6388588, at *14 (Tenn.Crim.App. Dec. 5, 2013). Although the State concedes that the victims named in these counts did not testify at trial, it argues that circumstantial evidence established the element of reasonable fear of imminent bodily injury for these victims. We conclude that the evidence was sufficient to sustain Richardson’s convictions in these counts.

Regarding count 14, the State had to prove beyond a reasonable doubt that Richardson intentionally or knowingly caused bodily injury to Lemarcus Moore and used or displayed a deadly weapon. T.C .A. § 39–13–102(a)(1)(B) (Supp.2012) (amended July 1, 2013). The proof was more than sufficient to establish Richardson’s guilt of the offense in count 14. In counts 15 through 25, the State had to prove beyond a reasonable doubt that Richardson intentionally or knowingly caused the named victims to reasonably fear imminent bodily injury

through the use or display of a deadly weapon. *Id.* Aggravated assault based on fear requires the victim to have a “well-grounded apprehension of personal injury or violence.” *State v. Jones*, 789 S.W.2d 545, 550–551 (Tenn.1990). “The element of ‘fear’ is satisfied if the circumstances of the incident, within reason and common experience, are of such a nature as to cause a person to reasonably fear imminent bodily injury.” *State v. Gregory Whitfield*, No. 02C01–9706–CR00226, 1998 WL 227776, at *2 (Tenn.Crim.App. May 8, 1998) (citing *State v. Jamie Lee Pittman*, No. 03C01–9701–CR–00013, 1998 WL 128801, at *5 (Tenn.Crim.App. Mar. 24, 1998)). Moreover, circumstantial evidence is sufficient to establish a victim's fear of imminent bodily injury. *State v. Jessie James Austin*, No. W2001–00120–CCA–R3–CD, 2002 WL 32755555, at *5 (Tenn.Crim.App. Jan. 25, 2002) (citations omitted).

*25 Viewed in the light most favorable to the State, the evidence established that the victims in counts 16, 17, 18, and 20–25, who were Christopher Braxton, Kenneth Baker, Travis D. Britton, Nakia Greer, Chymia Baker, Jalon Baker, Rodney Davenport, Terriance Webb, and Cleotha Norwood, were either inside or just outside the house at 2706 Northmeade Avenue when the shooting incident occurred. Felix Williams and Robrecus Braxton established that Christopher Braxton and Chymia Baker were present at the time the shots were fired from the Helmwood location. Robrecus Braxton also testified that Kenneth Baker, Travis D. Britton, Nakia Greer, Jalon Baker, Rodney Davenport, and Terriance Webb were present during the shooting. Lemarcus Moore, Mark Chamber, Steve Chambers, and Sonja Watkins testified that Cleotha Norwood was present when the party was fired upon.

It is well-recognized that a victim's fear may be inferred from circumstances surrounding the offense, even if the victim does not testify at trial. *See Barry Smith*, 2013 WL 6388588, at *14 (concluding that the non-testifying victims were in reasonable fear of imminent bodily injury when witnesses testified that these victims were inside the house at the moment the defendants began shooting and that people were “hollering” and “screaming” and were trying to find a place to hide from the “bullets flying from every angle”); *State v. Szumanski Stroud*, No. W2006–01945–CCA–R3–CD, 2007 WL 3171158, at *3 (Tenn.Crim.App. Oct. 29, 2007) (holding that two non-testifying victims were in reasonable fear of imminent bodily injury when

the evidence showed that they had a violent altercation with the defendant at their home, that the defendant pointed a gun at one of the victims, and that the defendant fired four or five shots at the victims inside the car); *State v. Harry Jamieson*, No. W2003–02666–CCA–R3–CD, 2004 WL 2996910, at *8 (Tenn.Crim.App. Dec. 23, 2004) (concluding that the non-testifying victims were in reasonable fear of imminent bodily injury when other witnesses testified that the defendant pointed his gun at the victims and that the victims were “hysterical” and “crying”); *Jessie James Austin*, 2002 WL 32755555, at *6 (finding that the non-testifying victim reasonably feared imminent bodily injury when a witness testified the victim was aware of the defendant's threatening statements and the defendant pointed his gun at the victim).

Richardson argues that the State presented no proof regarding the location of the victims in these counts during the shooting or their proximity to the gunfire. However, Richardson is essentially making a zone of danger argument, which this court has specifically declined to apply in aggravated assault offenses. *State v. Bobby Joe Young, Jr.*, No. M2010–01531–CCA–R3–CD, 2011 WL 6291813, at *8 (Tenn.Crim.App. Dec. 14, 2011) (citing *State v. James Paris Johnson*, No. E2008–02555–CCA–R3–CD, 2010 WL 3565761, at *5–6 (Tenn. Crim.App. Sept. 15, 2010) (noting that the zone of danger approach is applicable to reckless endangerment cases involving victims who are unaware of danger but is not applicable to aggravated assault cases based on fear because the latter offense requires that the victim have a fear or reasonable apprehension of being harmed)). Instead, the proper inquiry is whether these victims, who did not testify, had a reasonable fear of imminent bodily injury. The proof at trial showed that regardless of whether these victims were inside or outside the house at 2706 Northmeade Avenue at the time that Richardson, Kenneth Brown, and Devon Brown fired the gunshots, they reasonably feared imminent bodily injury given the appalling circumstances of this offense.

*26 Robrecus Braxton testified that the gunfire went on for “about ten minutes ... like it wasn't going to stop.” He said that he was “terrified” and “felt like [his] life was in danger” because bullets were hitting the cars parked around the Northmeade house and “could have hit anybody.” Felix Williams stated that when the gunshots began, everyone at the party began “running and screaming for their li[ves].” He said he “panicked”

because the shots sounded like they “were getting closer and closer.” William compared the attack to a “war zone” because the shots went on “for a long time” and because everyone inside the home was “hollering and crying.” He added that he was “[s]cared for [his] life, scared for [his] family” during the incident. Mark Chambers testified that when the shooting began the people at the party ran to the back yard in an attempt to escape the bullets that were creating sparks as they hit the Northmeade house. Steve Chambers testified that shooting lasted “[a] good five, ten minutes” and that he was afraid during the incident. Lemarcus Moore, who was shot in the leg during the incident, testified that he was “really terrified” when he realized that the gunshots were being fired in his direction. Sonja Watkins testified that the shooting “seemed like it went on forever” and that she tried to get the children at the party to a safe place inside the home. Watkins said that she had bullet holes that penetrated the living room of her home, scattering drywall dust and glass from the broken windows. She also said that bullets had “knocked bricks off the walls [of her home].” Officers found evidence that more than sixty shots had been fired at the home at 2706 Northmeade Avenue during the attack and that many of these bullets had hit several cars parked around the home. Given this evidence, we conclude that a rational jury could have found that Richardson intentionally or knowingly caused the victims in these counts to reasonably fear bodily injury by firing gunshots at them. Therefore, the evidence is sufficient to support Richardson’s convictions for aggravated assault in these counts.

V. Consecutive Sentencing. Finally, Richardson asserts that the trial court abused its discretion by finding that he was a dangerous offender before imposing partially consecutive sentences resulting in life imprisonment plus 224 years. He contends that although the court articulated the factors in *State v. Wilkerson*, 905 S.W.2d 933 (Tenn.1995), it failed to determine whether the proof established those factors in his case. Alternatively, he argues that if this court concludes that the trial court implicitly made the two findings under *Wilkerson*, then the court’s finding that the extended sentence was necessary to protect the public from further crimes by him was based on a “clearly erroneous assessment of the evidence.” He claims there was no need to protect the public from him for the following reasons: his criminal history consisted of only a juvenile conviction for criminal trespass that resulted in a warning letter, he graduated high school after completing a drug treatment program, he has a good

relationship with his family, and he expressed remorse in his confession and allocution. Because the trial court articulated but failed to make specific findings required of the dangerous offender classification, we remand the case to the trial court for a new sentencing hearing to consider whether the evidence in this case establishes the factors outlined in *Wilkerson*.

*27 At the April 19, 2013 sentencing hearing, the State entered the presentence investigation report into evidence. Richardson made the following statement of allocution:

Well, I just wanted to say I truly am sorry for the pain that I caused y’all, and I thank you so much more [for] forgiving me. I know I did wrong, and I’ve got to be punished for it. So I mean I found God in my life, and I can take my responsibility. That’s all I want to say.

Although neither the State nor the defense offered any additional evidence at the sentencing hearing, both sides presented arguments regarding whether Richardson’s sentences should be served consecutively. The State argued for consecutive sentencing on the basis that Richardson was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. It asserted that “there were numerous people out there that night when this shooting occurred” and that it was “amazing that no others were killed or harmed other than the ones that were named in the indictment.” The defense argued that the dangerous offender classification should not be applied because all of the conviction offenses were all inherently dangerous crimes. It also argued that the circumstances in this case were not “so spectacularly different” from other cases that it warranted consecutive sentencing. The defense noted that because Richardson was twenty-two years old, the earliest he could be released on his life sentence was when he was seventy-three years old. Defense counsel remarked, “[T]o say that releasing him would be too soon [at the approximate age of seventy-three years old], that [the] population wouldn’t be safe, the public would be at risk, I think that is just a stretch. There is nothing to prove that.” Counsel added that Richardson would have “fifty-one years ... of rehabilitation in the prison environment.” Finally, the defense argued that Richardson was amenable to rehabilitation because he had no further problems with drugs at school after completing an alternative school for a marijuana offense, because he had been able to

admit that he was “almost an alcoholic,” and because he had shown remorse for his actions in his allocution. Finally, the defense recognized that Richardson's mother was present at the sentencing hearing and that Richardson had no prior offenses as an adult, which set him apart from the majority of individuals sentenced by the trial court.

In determining whether the sentences would be served concurrently or consecutively, the trial court made the following findings:

The State is asking the Court to find that Mr. Richardson is a dangerous offender.... As I indicated earlier, the Court has found that Mr. Richardson had no hesitation in committing a crime in which the risk to human life was high, and it is inherent in some of the convictions, but it does not preclude [the court from] considering those factors when the Court makes a determination as to whether or not the sentences shall be ordered to be served consecutively, and the Court does find that he had no hesitation in committing a crime in which the risk to human life was high.

*28 [Under] *State v.[.] Wilkerson*, ..., 905 S.W.2d page 993, ... this Court has to find that the Defendant is a dangerous offender whose behavior indicates little or no regard for human life and that he had no hesitation about committing a crime in which the risk to human life was high, and the Court also has to find that the following factors apply.

That the circumstances surrounding the commission of the offense are aggravated and that the aggregate length of the sentences reasonably relates to the severity of the offense for which the Defendant stands convicted and are necessary in order to protect the public from further criminal acts by the Defendant.

Under ... *State v.[.] Robinson*, ... 930 S.W.2d page 78, ... and the *Robinson* case and other Tennessee cases which have dealt with consecutive sentences indicate the power of the trial court to impose consecutive sentences ensures that Defendants committing separate and distinct violations of the law receive separate and distinct punishment for each ... crime committed. The underlying principle behind consecutive sentences is not whether the sentence is logical based on age ... of the Defendant [being] sentenc[ed] but whether a Defendant should escape the full impact of punishment for one of his offenses.

In the *Robinson* case, Mr. Robinson was convicted of two first-degree murders and was sentenced to life imprisonment without the possibility of parole. And in that case, the court found that Mr. Robinson should be held responsible, should be held accountable, for separate acts committed against separate victims, and the court ordered those sentences to be served consecutively. The argument in the *Robinson* case was that it is a physical, logical, biological impossibility, that Mr. [Robinson] should have to serve one life imprisonment [sentence] without the possibility of parole, be revived, then [have] to serve another life sentence without the possibility of parole, and the argument was that Mr. Robinson would be a very old person by the time, if he ever made parole, which he shouldn't, and that he would have to die twice in order to serve th[ose] sentences, and the Court again made it clear that a person should be held responsible if that person commits separate offenses against separate victims, and this Court will hold Mr. Richardson [responsible] for those separate offenses that he committed against all these victims because all the victim's have a right in order to have Mr. Richardson punished separately for what he did.

Here, Richardson argues that the trial court abused its discretion when it imposed consecutive sentencing on the basis that he was an dangerous offender. In *Pollard*, the Tennessee Supreme Court recently held that “the abuse of discretion standard, accompanied by a presumption of reasonableness, applies to consecutive sentencing determinations.” *State v. Pollard*, 432 S.W.3d 851, 860 (Tenn.2013); see *State v. Bise*, 380 S.W.3d 682,708 (Tenn.2012); *State v. Caudle*, 388 S.W.3d 273, 278–79 (Tenn.2012). The court explained that “the presumption of reasonableness ... giv[es] deference to the trial court's exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40–35–115(b)[.]” *Id.* at 861. It reiterated that “[a]ny one of these grounds is a sufficient basis for the imposition of consecutive sentences.” *Id.* at 862 (citing *State v. Dickson*, 413 S.W.3d 735, 748 (Tenn.2013)). “So long as a trial court properly articulates reasons for ordering consecutive sentences, thereby providing a basis for meaningful appellate review, the sentences will be presumed reasonable and, absent an abuse of discretion, upheld on appeal.” *Id.* (citing Tenn. R.Crim.

P. 32(c)(1); *Bise*, 380 S.W.3d at 705). When imposing consecutive sentences, the court must still consider the general sentencing principles that each sentence imposed shall be “justly deserved in relation to the seriousness of the offense,” “no greater than that deserved for the offense committed,” and “the least severe measure necessary to achieve the purposes for which the sentence is imposed.” T.C.A. §§ 40–35–102(1), –103(2), –103(4); *State v. Imfield*, 70 S.W.3d 698, 708 (Tenn.2002).

*29 In this case, the trial court imposed consecutive sentencing after finding that Richardson was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. See T.C.A. § 40–35–115(b)(4). The *Pollard* court explained that two additional findings must be made when applying the dangerous offender classification:

“Proof that an offender's behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high, is proof that the offender is a dangerous offender, but it may not be sufficient to sustain consecutive sentences. Every offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences; *consequently, the provisions of [s]ection 40–35–115 cannot be read in isolation from the other provisions of the Act. The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender.* In addition, the Sentencing Reform Act [of 1989] requires the application of the sentencing principles set forth in the Act applicable in all cases. The Act requires a principled justification for every sentence, including, of course, consecutive sentences.”

Pollard, 432 S.W.3d at 863 (quoting *Wilkerson*, 905 S.W.2d at 938). Therefore, when imposing

consecutive sentences pursuant to the dangerous offender classification, the trial court must conclude that the proof establishes that the aggregate sentence is “reasonably related to the severity of the offenses” and “necessary in order to protect the public from further criminal acts.” *Id.* (quoting *Wilkerson*, 905 S.W.2d at 938). Unlike the other six subsections, the trial court must make additional findings for the dangerous offender classification because it is “the most subjective and hardest to apply.” *State v. Lane*, 3 S.W.3d 456, 461 (Tenn.1999).

Richardson contends that although the court articulated the *Wilkerson* factors, it failed to consider whether the proof established the factors before imposing consecutive sentences. The record shows the trial court never made findings based on the proof that Richardson's aggregate sentence was “reasonably related to the severity of the offenses” and “necessary in order to protect the public from further criminal acts.” *Wilkerson*, 905 S.W.2d at 938. When faced with a similar situation in *Pollard*, the Tennessee Supreme Court held that the appellate court has two options:

Where, as here, the trial court fails to provide adequate reasons on the record for imposing consecutive sentences, the appellate court should neither presume that the consecutive sentences are reasonable nor defer to the trial court's exercise of its discretionary authority. Faced with this situation, the appellate court has two options: (1) conduct a de novo review to determine whether there is an adequate basis for imposing consecutive sentences; or (2) remand for the trial court to consider the requisite factors in determining whether to impose consecutive sentences. See *Bise*, 380 S.W.3d at 705 & n.41.

*30 *Pollard*, 432 S.W.3d at 863–64. The *Pollard* court concluded that “because the considerations required under *Wilkerson* involve a fact-intensive inquiry ... the better course is to remand to the trial court for consideration of the *Wilkerson* requirements in determining the propriety of consecutive sentencing.” *Id.* at 864. In light of the court's decision in *Pollard*, we remand the case to the trial court for a new sentencing

hearing to consider whether the evidence in this case establishes the *Wilkerson* factors.

CONCLUSION

For the aforementioned reasons, we affirm Richardson's convictions but remand the cause to the trial court for

a new sentencing hearing. This hearing is limited to consideration of the factors outlined in *State v. Wilkerson*, 905 S.W.2d 933 (Tenn.1995), to determine the propriety of consecutive sentencing in this case.

All Citations

Not Reported in S.W.3d, 2014 WL 6491066

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74363-5-I
v.)	
)	
KARL PIERCE,)	
)	
Appellant.)	

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