

FILED
COURT OF APPEALS

NO. 39510-0

NOV 11 PM 3:23

STATE OF WASHINGTON

BY: *[Signature]*

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DOUGLAS CHANTHABOULY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 07-1-00116-8

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Should this Court affirm the trial court's denial of defendant's motion for acquittal by reason of insanity when the trial court's decision is supported by substantial evidence? 1

2. Has defendant failed to show that the trial court imposed any limitations on the topics that could be addressed on voir dire and further failed to show any abuse of discretion as to the limitation the court placed on its length? 1

3. Has defendant failed to show either deficient performance or resulting prejudice necessary to succeed on his claim of ineffective assistance of counsel?..... 1

4. Did the State adduce sufficient evidence to support the jury's verdict finding defendant guilty of murder in the second degree?..... 1

5. Should this Court uphold the jury's rejection of defendant's insanity defense?..... 1

6. Should this Court dismiss defendant's constitutional challenge to RCW 9.94A.535(3)(r) under controlling authority that holds a sentencing provision is not subject to a vagueness challenge?..... 1

7. Should this Court uphold the jury's factual determination that defendant's crime had a destructive and foreseeable impact on persons other than the victim when this special verdict was supported by substantial evidence?2

8. Should this Court reject defendant's claim of cumulative error when he has failed to show the existence of any error, much less an accumulation of prejudicial error?2

B.	<u>STATEMENT OF THE CASE</u>	2
1.	Procedure	2
2.	Facts.....	4
C.	<u>ARGUMENT</u>	11
1.	THE TRIALS COURT’S DENIAL OF DEFENDANT’S MOTION FOR ACQUITTAL BY REASON OF INSANITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.	11
2.	DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT IMPOSED ANY LIMITATIONS AS TO THE TOPICS THAT COULD BE ADDRESSED ON VOIR DIRE AND HAS FAILED TO SHOW ANY ERROR AS TO THE TRIAL COURT’S LIMITATION AS TO ITS LENGTH.....	21
3.	DEFENDANT HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE HIS COUNSEL’S FAILURE TO PROPOSE A DEFINITIONAL INSTRUCTION OF “RIGHT FROM WRONG” WHEN HE DOES NOT ARTICULATE THE WORDING OF SUCH AN INSTRUCTION AND WHEN UNDER CONTROLLING AUTHORITY SUCH A DEFINITION SHOULD NOT BE GIVEN.....	27
4.	THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY’S VERDICT FINDING DEFENDANT GUILTY OF MURDER IN THE SECOND DEGREE	36
5.	THIS COURT SHOULD UPHOLD THE JURY’S REJECTION OF DEFENDANT’S INSANITY DEFENSE.....	39

6.	THE TRIAL COURT PROPERLY DISMISSED DEFENDANT’S CONSTITUTIONAL CHALLENGE TO RCW 9.94A.535(3)(r) AS UNDER STATE V. BALDWIN THIS SENTENCING PROVISION IS NOT SUBJECT TO A VAGUENESS CHALLENGE.	47
7.	THE TRIAL COURT AGREED WITH THE JURY THAT THERE WAS SUFFICIENT EVIDENCE ADDUCED TO SHOW THAT DEFENDANT’S CRIME HAD A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM AND IMPOSED AN EXCEPTIONAL TERM OF COMMUNITY CUSTODY BASED ON THAT FINDING; THIS COURT SHOULD UPHOLD THOSE FINDINGS OF THE AGGRAVATING FACTOR	50
8.	DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE	55
D.	<u>CONCLUSION</u>	59

Table of Authorities

State Cases

<i>City of Seattle v. Eze</i> , 111 Wn.2d 22, 26, 759 P.2d 366 (1988).....	47
<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 178, 795 P.2d 693 (1990)	48
<i>Haley v. Med. Disciplinary Bd.</i> , 117 Wn.2d 720, 739, 818 P.2d 1062 (1991)	47
<i>In re Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994)	56
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	36
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	58
<i>State v. Applin</i> , 116 Wn.App. 818, 67 P.3d 1152 (2003).....	34
<i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963).....	58
<i>State v. Baldwin</i> , 150 Wn.2d 448, 458, 78 P.3d 1005 (2003)	47, 48, 49, 50
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988)	36
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	29
<i>State v. Box</i> , 109 Wn.2d 320, 322, 745 P.2d 23 (1987).....	12
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).....	28
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	37
<i>State v. Cameron</i> , 100 Wn.2d 520, 674 P.2d 650 (1983)	34
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	29
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987).....	37

<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	29
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984)	56, 58
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985)	15, 37, 43
<i>State v. Crediford</i> , 130 Wn.2d 747, 766, 927 P.2d 1129 (1996).....	47
<i>State v. Crenshaw</i> , 98 Wn.2d 789, 792, 659 P.2d 488 (1983)	12, 14, 16, 20, 21, 31, 33
<i>State v. Cuevas-Diaz</i> , 61 Wn. App. 902, 812 P.2d 883 (1991).....	52
<i>State v. Davis</i> , 141 Wn.2d 798, 825, 10 P.3d 977 (2000)	21, 22
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	37
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	41
<i>State v. Groom</i> , 133 Wn.2d 679, 691, 947 P.2d 240 (1997).....	48
<i>State v. Halstien</i> , 122 Wn.2d 109, 122, 857 P.2d 270 (1993).....	47
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	36
<i>State v. Hunter</i> , 183 Wash. 143, 153, 48 P.2d 262 (1935)	22
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003).....	51, 52, 55
<i>State v. Johnson</i> , 124 Wn.2d 57, 73-76, 873 P.2d 514 (1994).....	50, 51, 55
<i>State v. Johnson</i> , 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)	57
<i>State v. Jones</i> , 84 Wn.2d 823, 832, 529 P.2d 1040 (1974).....	12, 14
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	36
<i>State v. Kinard</i> , 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979)	58
<i>State v. Kitchen</i> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988).....	56
<i>State v. Laureano</i> , 101 Wn.2d 745, 757, 682 P.2d 889 (1984)	21
<i>State v. Lively</i> , 130 Wn.2d 1, 921 P.2d 1035 (1996)	40, 41, 42, 43, 44, 45

<i>State v. Longuskie</i> , 59 Wn. App. 838, 844, 801 P.2d 1004 (1990)	43
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	36
<i>State v. Matthews</i> , 132 Wn. App. 936, 941 135 P.3d 495 (2006), <i>review denied</i> , 160 Wn.2d 1004 (2007)	40, 44
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	36
<i>State v. McDonald</i> , 89 Wn.2d 256, 273, 571 P.2d 930 (1977).....	14
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)	28, 29, 32
<i>State v. Pennington</i> , 112 Wn.2d 606, 610, 772 P.2d 1009 (1989)	52
<i>State v. Robinson</i> , 75 Wn.2d 230, 231, 450 P.2d 180 (1969).....	22
<i>State v. Roswell</i> , 165 Wn.2d 186, 194, 196 P.3d 705 (2008).....	49
<i>State v. Russell</i> , 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994), <i>cert. denied</i> , 574 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).....	57
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	37, 41
<i>State v. Sommerville</i> , 111 Wn.2d 524, 529-31, 60 P.2d 932 (1988)...	14, 15
<i>State v. Stevens</i> , 58 Wn. App. 478, 498, 795 P.2d 38, <i>rev. denied</i> , 115 Wn.2d 1025, 802 P.2d 38 (1990).....	57, 59
<i>State v. Tharp</i> , 42 Wn.2d 494, 499, 256 P.2d 482 (1953)	22
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	28, 31
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	14, 43
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976).....	59
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	36
<i>State v. Wall</i> , 52 Wn. App. 665, 679, 763 P.2d 462 (1988).....	58
<i>State v. Way</i> , 88 Wn. App. 830, 946 P.2d 1209 (1997)	52

<i>State v. Whalon</i> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970).....	58
<i>State v. White</i> , 60 Wn.2d 551, 374 P.2d (1962).....	12, 13, 14
<i>State v. Williams</i> , 93 Wn.App. 340, 344, 968 P.2d 106 (1988).....	50

Federal and Other Jurisdictions

<i>Allen v. Redman</i> , 858 F.2d 1194, 1196-98 (6 th Cir. 1988)	42
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000).....	49
<i>Blakely v. Washington</i> , 542 U.S. 286, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	49
<i>Bouie v. City of Columbia</i> , 378 U.S. 347, 350, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964).....	47
<i>Brown v. United States</i> , 411 U.S. 223, 232 (1973).....	56
<i>Caldwell v. Russell</i> , 181 F.3d 731, 740 (6 th Cir. 1999).....	42, 43
<i>Campbell v. Knicheloe</i> , 829 F.2d 1453, 1462 (9th Cir. 1987), <i>cert. denied</i> , 488 U.S. 948 (1988)	30
<i>Cuffle v. Goldsmith</i> , 906 F.2d 385, 388 (9th Cir. 1990).....	31
<i>Dhillon v. State</i> , 138 S.W.3d 583 (Tex. App. 2004).....	26
<i>Grayned v. City of Rockford</i> , 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972).....	47
<i>Harris v. Dugger</i> , 874 F.2d 756, 761 n.4 (11th Cir. 1989).....	30
<i>Hart v. State</i> , 352 N.E. 2d 712, 716-717, 265 Ind. 145 (1976).....	26
<i>Hendricks v. Calderon</i> , 70 F.3d 1032, 1040 (9th Cir. 1995).....	29
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).....	41, 42

<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	28, 30
<i>Kolender v. Lawson</i> , 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).....	48
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).....	30
<i>M’Naghten’s Case</i> , 10 Clark & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843)	12, 13, 20, 21
<i>Neder v. United States</i> , 119 S. Ct. 1827, 1838, 144 L.Ed.2d 35 (1999).....	56
<i>Roberts v. State</i> , 373 N.E. 2d 1103, 268 Ind. 127, 130 (1978)	26
<i>Rose v. Clark</i> , 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).....	56
<i>State v. Flake</i> , 88 S.W.3d 540, 552-4 (Tenn. 2002)	42
<i>State v. Martinez</i> , 131 N.M. 746, 42 P.3d 851 (Ct.App.2002)	26
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	28, 29, 30, 31, 34, 36
<i>United States v. Barton</i> , 992 F.2d 66, 68-69 (5th Cir.1993).....	42
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	27
<i>United States v. Layton</i> , 855 F.2d 1388, 1419-20 (9th Cir. 1988), <i>cert. denied</i> , 489 U.S. 1046 (1989).....	30
<i>United States v. Molina</i> , 934 F.2d 1440, 1447-48 (9th Cir. 1991)	31
<i>United States v. Wivell</i> , 893 F.2d 156, 159 (8th Cir.1990)	48
<i>Yarborough v. Gentry</i> , 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).....	29
<i>York v. El-Ganzouri</i> , 817 N.E.2d 1179, 1190-1191, 353 Ill. App.3d 1, (2004)	26

Constitutional Provisions

Fourteenth Amendment47
Sixth Amendment28, 29, 49, 50

Statutes

RCW 10.7711
RCW 10.77.04011
RCW 10.77.08011
RCW 9.94A.535(3)(r).....1, 47, 48, 49, 50, 53
RCW 9A.12.010(2).....12
Title 28 U.S.C. §226142

Rules and Regulations

CrR 4.2(a)11
CrR 4.2(c)11

Other Authorities

WPIC 20.0132, 33, 34

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this Court affirm the trial court's denial of defendant's motion for acquittal by reason of insanity when the trial court's decision is supported by substantial evidence?
2. Has defendant failed to show that the trial court imposed any limitations on the topics that could be addressed on voir dire and further failed to show any abuse of discretion as to the limitation the court placed on its length?
3. Has defendant failed to show either deficient performance or resulting prejudice necessary to succeed on his claim of ineffective assistance of counsel?
4. Did the State adduce sufficient evidence to support the jury's verdict finding defendant guilty of murder in the second degree?
5. Should this Court uphold the jury's rejection of defendant's insanity defense?
6. Should this Court dismiss defendant's constitutional challenge to RCW 9.94A.535(3)(r) under controlling authority that holds a sentencing provision is not subject to a vagueness challenge?

7. Should this Court uphold the jury's factual determination that defendant's crime had a destructive and foreseeable impact on persons other than the victim when this special verdict was supported by substantial evidence?

8. Should this Court reject defendant's claim of cumulative error when he has failed to show the existence of any error, much less an accumulation of prejudicial error?

B. STATEMENT OF THE CASE.

1. Procedure

On January 4, 2007, the Pierce County Prosecutor's Office charged appellant, Douglas Chanthabouly ("defendant") with one count of murder in the first degree in Pierce County Cause No. 07-1-00116-8. CP 1-2. The State also alleged a firearm enhancement and an aggravating factor – that the crime had a destructive and foreseeable impact on persons other than the victim. *Id.*

The case was assigned to the Honorable Ronald Culpepper for trial. CP 182. Defendant had a history of mental illness, having been previously diagnosed with paranoid schizophrenia; the court sent him for competency restoration at Western State Hospital on more than one occasion. CP 3-20, 21-22.

Defendant ultimately asserted an insanity defense and brought a motion for acquittal by reason of insanity. CP 25-26. After a hearing on this matter, the court denied the motion. CP 121-122.

The matter proceeded to trial. After hearing the evidence at trial, the jury rejected the defense of insanity and convicted defendant of the lesser degree offense of murder in the second degree; it also found the firearm enhancement and found the alleged aggravating circumstance applicable to defendant's crime. RP 1835-1841¹; CP 118, 119, 120.

At the sentencing hearing on June 5, 2009, the State asked the court to impose an exceptional sentence upward of 360 months confinement. 6/5/09 RP 5-7. Defense counsel asked the court to impose an exceptional sentence below the standard range. 6/5/09 RP 11-14. In the end, the court imposed standard range confinement time of 220 months, plus an additional 60 months for the firearm enhancement, for a total period of confinement of 280 months. 6/5/09 RP 20-22; CP 136-149. The court did impose an exceptional sentence regarding the term of community custody, making it for life rather than the standard range of 24-48 months. 6/5/09 RP 20-21; CP 171-174, 175-176.

Defendant filed a timely notice of appeal from entry of this judgment. CP 150-167.

¹ The verbatim report of proceedings consists of 19 volumes. Slightly over half comprised the trial proceedings, beginning on March 9, 2009. These 11 consecutively numbered volumes shall be referred to as RP. All other transcripts shall be referred to by the date of the hearing, followed by an RP. i.e. "6/5/09 RP".

2. Facts

On the morning of January 3, 2007, the staff and students of Foss High School, Tacoma, Washington, were returning after being out on winter break. RP 609-611, 670-671. Prior to the start of the first period, defendant, who was a student at the school, approached fellow student Samnang Kok, in the hallway of the school and shot him three times. RP 607-609, 613-617, 658, 673-677, 826-834, 849, 913-920, 959-964, 1036-1045. The victim had been walking down the hall and turned toward the defendant when defendant said “Now what, fool.” RP 1047. The victim did not say or do anything prior to the defendant shooting him. RP 1047. After the first shot, the victim dropped to the ground and the defendant said “Boom motherfucker,” then fired again. RP 917. Two of the shots were as the victim slid to the ground. RP 675-676, 917-918, 1043-1044. Defendant then left through a nearby set of doors, “walking like nothing happened.” RP 880-882, 1044. At the time of the shooting the hallway was filled with other students, teachers, and school administrators. RP 607-617, 835-838, 879-882, 896, 913-915, 948, 1041. An assistant principal, the school nurse and a security guard were soon with the victim trying to save his life; the victim was bleeding profusely from a shot in the head; when his heart stopped beating they started CPR. RP 617-18, 658-664, 811, 951-952, 979. Fire Department paramedics arrived and took over the medical assistance, but the victim was later pronounced dead at the scene. RP 744, 811-813, 988-989.

Within minutes of the shooting, law enforcement and medical aid were arriving at the high school. RP 633-634, 641-642. One officer described the scene as being chaotic, with numerous students running out of the building, yelling and screaming that people were shooting and killing people inside. RP 632-636. The school went on lockdown, with students locked into school rooms until the police could clear the hallways and escort them safely to the gymnasium. RP 622-23, 645-646, 657. A teacher gave one of the responding officers the names of the victim and the suspected shooter, as she had gotten this information from witnesses. RP 643-645. Other witnesses went to the principal's office as they recognized the shooter as a student in their class; using this information, the principal obtained a photograph of the defendant and showed it to them for confirmation of their identification. RP 895-897, 1045-1046. This information, including the photograph, was given to the police. RP 898. One officer broadcast a description of the suspect to the other responding officers. RP 644-645. Three shell casings and one bullet fragment were found near the victim. RP 981, 995-999.

The defendant apparently left the school grounds, then hid in the yard of a nearby house. RP 1112-1123. The owner of the house called 9-1-1 twice about the suspect in her back yard; the calls were about two hours apart. *Id.* Officer Budinich responded to a call regarding the possible location of the suspect in the Foss shooting; this brought him into contact with the defendant about two hours after the shooting. RP 788-

791, 1112-1123. He arrested defendant as he matched the description and name that had been broadcast over the radio. RP 788-793. He found a semi-automatic pistol in the defendant's front pants pocket. RP 794. The officer then transported defendant to the police station; during this fifteen minute time frame, the defendant asked the officer questions about his employment as a police officer; the defendant's demeanor was calm and polite. RP 796-797. Defendant did not ask why he was under arrest. RP 797. Officer Budinich released defendant to a detective at the station. RP 796.

Detective DeVault testified that he came into contact with the defendant at the police station interview room approximately two hours and twenty minutes after the shooting. RP 746-748. The detective asked him a series of questions about whether he: 1) had been arrested before; 2) been read his rights before; 3) had seen someone being read his rights in the movies; and 4) could he read and write the English language. RP 749-750. When the detective was reading the Miranda rights form to defendant and came to a section that applied to juveniles, the defendant interrupted to indicate that he was 18 years old so that wouldn't apply. RP 752-753. Detective DeVault testified that when he first asked defendant to tell him about "what happened at the school," the defendant replied that he didn't know anything about a murder because that morning he had been on the Hilltop "looking for his homies." RP 754-755. When asked about the gun found in his possession, defendant indicated that he always carried a

gun to school for protection. RP 754. When the detective continued to press him about the shooting, defendant eventually acknowledged he had done it, but would not tell the detective why. RP 754-760. The defendant told the officer that the victim was not armed with any weapon and, also, that he didn't have a choice - he had to do it -but would not explain why. RP 760-761. When informed that the victim had died, the defendant indicated that he was not upset by this news. RP 763. The defendant also asked the detectives during the interview about the death penalty in this state, but then indicated that it didn't matter as he would probably get killed in prison anyway. RP 763. The detective testified that all of the defendant's answers were responsive and tracked the questions being asked; that defendant would answer with no delay, and that the defendant denied that he was hearing any voices at the time of the shooting. RP 765-767.

The medical examiner who performed the autopsy of the victim's body testified that he died from three gunshot wounds. RP 1137-1147, 1155-1178. One bullet entered the victim's face to the left of his nose; from gunpowder stippling, the doctor could conclude that the end of the muzzle of the gun was a foot or less away in distance at the time it was fired. RP 1155- 1162. The bullet passed through the skull and brain, then exited through the scalp and the back of the head. RP 1163-11165. The effect of this gunshot would cause the individual to go limp and collapse; it was a fatal injury. RP 1165. The second gunshot wound entered on the

victim's lower back on the left side and traveled across the body coming to rest on the right side of the back. RP 1167. The doctor recovered the bullet from this wound. 1167-1168. This wound would impair the individual's ability to move the muscles of the back and would be life-threatening without medical intervention. RP 1170. The third gunshot wound entered the victim's left buttock, passed through the pelvic area and abdominal cavity and came to rest in the abdominal wall on the front right side. RP 1171. The bullet perforated the colon in two places, spilling bowel contents into the body, which greatly increases the chances of a fatal infection; this bullet also produced a life threatening injury. RP 1172-1175. The doctor recovered the bullet from this wound as well. RP 1173. The two bullets recovered from the victim's body were given to law enforcement. RP 1005.

The casings and bullet recovered at the crime scene and the gun recovered from the defendant were sent to the Washington State Patrol crime Lab for analysis. RP 797-799, 981, 1005-1006, 1021- 1026, 1059-1065, 1176-1178. The bullet and casings had been fired from the gun found in defendant's possession. RP 1281-1283.

The defendant called several witnesses. Defendant established that the school nurse was aware that he was on medication, which he would take at home. RP 1284-1287. The nurse had the list of the medications, but did not know what condition such medication was for. RP 1287-1289.

Defendant called the Foss school psychologist to establish that the school was aware that he had been diagnosed as a paranoid schizophrenic. RP 1445-1453. Defendant's mother testified that defendant's mental health problems were diagnosed in 2005 after his son tried to kill himself, and that he was still receiving care for these issues in January 2007. RP 1467-1472, 1482. His mother did not notice any unusual behavior in her son around the time of the shooting, and did not have any concern that he was not taking his medication. RP 1484. Defendant's sister gave similar testimony about the history of her brother's mental health issues and his behavior in December 2006. RP 1498-1506. Defendant's aunt testified that she became concerned that defendant might have mental health issues when he was in middle school. RP 1532.

Defendant called Dr. Julie Gallagher,² a clinical psychologist who examined defendant several times at Western State Hospital; she testified that while defendant suffered from paranoid schizophrenia, in her expert opinion he could perceive the nature and quality of the act with which he was charged, and that he was able to tell right from wrong at the time he fired the shots that killed Samnang Kok. RP 1319-1405. Dr. Gallagher indicated that the defendant acknowledged to her that he knew what he

² Dr Gallagher had testified for the State in the hearing on the motion for acquittal by reason of insanity. Presumably, the defense decided to call her in its case so as to lessen the impact her testimony would have if it was presented by the State in rebuttal.

was doing was against the law, and that he “knew he was going to get caught” because there were so many witnesses. RP 1403. Defendant’s statements to her that he knew he was going to prison for what he did was evidence that he understood the legal consequences for his actions and, therefore, understood that his actions were wrong. RP 1403.

Defendant called Dr. Paul Leung, a clinical psychiatrist, who was hired by the defense to examine the defendant and give an opinion as to whether he was legally insane at the time of the offense. RP 1604-1615. Dr. Leung testified that in his expert opinion the defendant is a paranoid schizophrenic, who at the time of the offense could perceive the nature and quality of the act with which he was charged, but that he was unable to tell right from wrong at the time he fired the shots that killed Samnang Kok. RP 1636-1638, 1667-1674. Dr. Leung acknowledged that defendant’s statement to Dr. Gallagher that he knew his conduct was against the law was evidence that defendant was capable of telling right from wrong at the time of the crime. RP 1674. Dr. Leung further acknowledged that the defendant’s actions after the shooting, as well as many of his statements, showed consciousness of guilt and awareness that what he had done was wrong. RP 1677-1682.

C. ARGUMENT.

1. THE TRIALS COURT'S DENIAL OF
DEFENDANT'S MOTION FOR ACQUITTAL BY
REASON OF INSANITY IS SUPPORTED BY
SUBSTANTIAL EVIDENCE.

A person arraigned on criminal charges has the options of entering a plea of not guilty, not guilty by reason of insanity or guilty. CrR 4.2(a). A person who intends to rely on an insanity defense must file a written notice; the procedures concerning the defense of insanity are set forth in RCW 10.77. CrR 4.2(c). A defendant may ask the court to enter a judgment acquitting him on the basis of insanity. RCW 10.77.080. That statute provides:

The defendant may move the court for a judgment of acquittal on the grounds of insanity: PROVIDED, That a defendant so acquitted may not later contest the validity of his or her detention on the grounds that he or she did not commit the acts charged. At the hearing upon the motion the defendant shall have the burden of proving by a preponderance of the evidence that he or she was insane at the time of the offense or offenses with which he or she is charged. If the court finds that the defendant should be acquitted by reason of insanity, it shall enter specific findings in substantially the same form as set forth in RCW 10.77.040. If the motion is denied, the question may be submitted to the trier of fact in the same manner as other issues of fact.

This statutory procedure has been described as a “statutory alternative to a jury trial, available to the defendant at his own election.”

State v. Jones, 84 Wn.2d 823, 832, 529 P.2d 1040 (1974). This decision makes it clear that by filing the motion for acquittal by reason of insanity, the defendant admits – for the purpose of the motion -that he committed the acts in question and asks the court to make the necessary findings to acquit him on the grounds of mental disease or defect excluding responsibility. In so doing, the defendant waives the right to have a jury decide whether he committed the acts charged, provided the court should find that he was not responsible by reason of his mental condition. While the court is not required to grant the motion, the court may not enter any *judgment* other than acquittal. *Jones, supra* at 832-833 (emphasis added).

The law presumes that a defendant is sane at the time an alleged offense was committed. *State v. Box*, 109 Wn.2d 320, 322, 745 P.2d 23 (1987). Consequently, insanity is an affirmative defense which the defendant must prove by a preponderance of the evidence. RCW 9A.12.010(2); *State v. Crenshaw*, 98 Wn.2d 789, 792, 659 P.2d 488 (1983).

Washington follows the *M’Naghten* test for insanity. *State v. White*, 60 Wn.2d 551, 374 P.2d (1962); *see also, M’Naghten’s Case*, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843). The test has been codified at RCW 9A.12.010(2), which states:

To establish the defense of insanity, it must be shown that:
(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:

- (a) He was unable to perceive the nature and quality of the act with which he is charged; or
 - (b) He was unable to tell right from wrong with reference to the particular act charged.
- (2) The defense of insanity must be established by a preponderance of the evidence.

The Washington Supreme Court rejected arguments that a more lenient standard to assess insanity should be adopted and reiterated that the *M'Naghten* rule is the established rule in this state, and that the insanity defense should be strictly limited in its application. *White*, 60 Wn.2d at 589-593. The Court noted that at one point the legislature tried to eliminate the defense completely, but that the complete elimination of the defense was held to be unconstitutional; it went on to state:

Since insanity is available as a complete defense only because it has been held to be a constitutional right, we cannot extend that defense beyond the minimum which is constitutionally required. Therefore, the defense is available only to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law.

White, at 589-590. The court reiterated that the legal definition of insanity is distinct from the medical definition of insanity, and there was no reason why the former had to track or keep current with the latter. *White*, at 589. The court specifically rejected the argument that the legal definition of insanity should include persons who, although capable of understanding the nature and quality of the acts and having the ability to distinguish between right and wrong, were unable to control their own behavior as a

result of mental disease or defect. *White*, 60 Wn.2d at 589-593.

The legal insanity test is very rigorous; the “insanity defense is not available to all who are mentally deficient or deranged.” *Crenshaw*, 98 Wn.2d at 793. Many, if not most, mentally ill persons would not meet the test for legal insanity. *State v. McDonald*, 89 Wn.2d 256, 273, 571 P.2d 930 (1977).

When confronted with a motion for acquittal, the trial judge is to weigh the evidence presented and make a determination as to whether the defendant has proven insanity by a preponderance. *State v. Sommerville*, 111 Wn.2d 524, 529-31, 60 P.2d 932 (1988). The State cannot, as in a summary judgment motion, prevent the grant of the motion by presenting some conflicting evidence; the statute requires the court to weigh the evidence before it. *Id.*

When a defendant brings a motion for a judgment of acquittal by reason of insanity, and the court is not satisfied that such a judgment should be entered, then the question must be submitted to the trier of fact at a regular trial. *Jones, supra* at 832-833.

Defendant asserts that the trial erred in not granting his motion for acquittal by reason of insanity. The first issue to be addressed is what aspects of this ruling are reviewable. It is well settled that an appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004); *State v. Cord*, 103 Wn.2d

361, 367, 693 P.2d 81 (1985). Thus, an appellate court cannot review the evidence and come to its own conclusion as to whether the defendant met his burden of proof, as to do so would be to reweigh the evidence presented at trial and disregard the trial court's determinations on credibility, persuasiveness and the resolution of conflicts. Because the denial of a motion to acquit on insanity grounds is a factual determination, the appellate court considers only whether substantial evidence supports the trial court's determination. *Sommerville*, 111 Wn.2d at 533-34. Substantial evidence exists if there is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Sommerville*, 111 Wn.2d at 534.

The hearing on the motion for acquittal covered several days.³ At the conclusion, the trial court found that defendant had not met his burden of proof and denied the motion; the court entered a written order but did not enter findings of fact regarding this ruling. CP 121-122, 3/4/09 RP 84-90. The court's oral ruling, however, explains its reasons for denying the motion. 3/4/09 RP 84-90. The court started by identifying the facts that were not in dispute: 1) defendant suffered from a mental disease or defect – paranoid schizophrenia; and 2) defendant was able to perceive the nature and quality of his acts in that he knew he was shooting a human being with a loaded gun. 3/4/09 RP 85. The court found that the issue in

³ The hearing occurred on February 17, 18, and March 4, 2009. 2/17 RP 4; 2/18 RP 4, 3/4 - 5 RP 4.

dispute was whether the defendant was able to tell right from wrong with reference to the shooting of the victim. *Id.*

In making his ruling, the court specifically rejected the defense contention that the “unable to tell right from wrong with reference to the particular acts charged” should have a subjective standard such that if the defendant is acting on delusions that cause him to believe that his actions are morally justified, that this should meet the definition of insanity.

3/4/09 RP 86. The court found that this was not a correct statement of the law in Washington as articulated by *State v. Crenshaw*, *supra*, which employs a societal definition of right from wrong. *Id.*

The court weighed heavily the observations of the police officers who interviewed defendant shortly after the shooting, as well the statements defendant made close to the time of the shooting. 3/5/09 RP 88-89. The court found that defendant was calm, cooperative, and that his answers tracked the questions being put to him with no indication that he was suffering from “thought blocking.” *Id.* at 88. Dr. Gallagher, a psychologist from Western State Hospital who examined defendant to assess both his competency to stand trial, and later with regards to insanity at the time of the offense, testified that “thought blocking” referred to how a person who is in acute symptoms of psychosis would have his thinking or thought processes slowed down significantly when trying to answer a question; she indicated that this is sometimes, but not always, due to the person being distracted by voices in his head. 2/16/09 RP 49-

57, 66-67, 133. In the course of her numerous interviews with defendant, including those done when assessing competency, she had seen evidence of thought blocking when his psychosis was most acute; at these times, it might take the defendant 30 to 60 seconds to respond to a question.

2/18/09 RP 79-81.

There was substantial evidence to support the court's finding. Officer Budinich came in contact with the defendant about two hours after the shooting. 2/17/09 RP 31-34, 36. He arrested him, placed him in the patrol car and transported him to the police station; during this fifteen minute time frame, the defendant asked the officer questions about his employment as a police officer; the defendant's demeanor was calm and quiet. 2/17/09 RP 40. Defendant did not ask why he was under arrest. 2/17/09 41. Officer Budinich released defendant to Detective Graham at the station. 2/17/09 RP 40. Detective Graham took the defendant to an interview room and got him some water to drink. 2/17/09 RP 48-49. The detective asked defendant if he was hurt or needed any medical attention; the defendant responded that he wasn't hurt and did not need medical attention, that he just wanted water. 2/17/09 RP 49-50. The detective spent about ten minutes with the defendant and described him as "quiet," "cooperative," and a "little dejected." *Id.* The detective testified that the defendant's answers tracked the questions being asked of him. 2/17/09. RP 50. Detective DeVault testified that he came into contact with the defendant at the police station interview room approximately two hours

and twenty minutes after the shooting. 2/18/09 RP 10-11. The detective testified that when he introduced himself to the defendant, the defendant looked him in the eye and that his hands were shaking. 2/18/09 RP 11. The detective asked him a series of questions about whether: he had been arrested before; been read his rights or had seen someone being read his rights in the movies; and could he read and write English; the defendant answered these questions appropriately. When the detective was reading the *Miranda* rights form to defendant and came to a section that applied to juveniles, the defendant interrupted to indicate that he was 18 years old so that wouldn't apply. 2/18/09 RP 14. The detective noted that this was one of two times in the hour and fifteen minute interview that the defendant corrected him about some detail. 2/18/09 RP 32-33. The detective testified that all of the defendant's answers were responsive and tracked the questions being asked; that he would answer with no delay, and that the defendant denied that he was hearing any voices at the time of the shooting. 2/18/09 RP 25, 32-33. The detective saw nothing in defendant's behavior that gave him any concern that defendant was responding to any internal stimulus, such as voices, at the time of the interview. 2/18/09 RP 33-35. Detective Yerbury, who observed the interview with Detective DeVault, described defendant as calm, soft spoken, engaged in the interview, tracking the questions and slightly evasive in his answers. 2/18/09 RP138-139. He did not recall there being any long pauses between the questions and defendant's answers. 2/18/09

RP 139-140. As can be seen from the above citations to the record, the court's finding was based on substantial evidence.

The court also was persuaded by the fact that defendant "did a number of things to try to conceal his involvement or hide ...the extent [of] his involvement, which is consistent with him knowing he's in trouble for breaking the law, that he did something wrong." 3/5/09 RP 88. Detective DeVault testified that when he first asked defendant to tell him about "what happened at the school," the defendant replied that he didn't know anything about a murder because that morning he had been on the Hilltop "looking for his homies." 2/18/09 RP 17-18. When the detective continued to press him about whether he had been at school, defendant changed his story to say that he had been there, but just to drop off his books; he continued to deny any knowledge of the shooting. 2/18/09 RP 18. Again, there is substantial evidence supporting the court's finding.

The court noted that defendant knew police were interviewing him "about the murder", as opposed to talking to him "about the shooting" or his acting in self-defense. 3/5/09 89. Detective DeVault testified that he asked the defendant if he knew why he was there, and the defendant replied "Yeah, about the murder." 2/18/09 RP 13. The defendant also asked the detectives during the interview about the death penalty and whether that was an issue, but then indicated that it didn't matter as he would probably die in prison or get killed in prison anyway. 2/18/09 RP 30. The court noted that defendant told Dr. Gallagher that if he stayed at

the scene, the police might shoot him. *See*, 2/18/09 RP 68, 71. The court viewed this as evidence of defendant recognizing that he had done something wrong for which the police might pursue him. 3/5/09 89.

Defendant admitted to Dr. Gallagher that he knew what he had done was against the law. 2/18/09 RP 69, 75, 77. 3/5/09 90. Defendant also knew that his mother would have a negative reaction if she found out he had a gun, stating that she would have slapped him. 2/18/09 RP 74-75. These statements carried great weight with the court. 3/5/09 90.

For all of these reasons, the court concluded that defendant was able to tell right from wrong with reference to the shooting of the victim Mr. Kok, that defendant had not met his evidentiary burden and denied the motion for acquittal by reason of insanity. As each of these reasons is supported by substantial evidence, this Court should uphold the decision of the trial court.

Defendant does not challenge the factual underpinnings of the trial court's ruling, but argues that the trial court was applying the wrong legal standard. Defendant contends that since society does not believe that it is morally wrong to act in defense of your life, that what he did could not be considered morally wrong because his mental illness caused him to believe that he needed to shoot Mr. Kok in order to protect his life. But as pointed out in *Crenshaw*, in *M'Naghten's* case the justices were asked about an accused who knew he was acting contrary to law, but acted under a partial insane delusion that he was redressing or revenging some

supposed grievance or injury, to which the justices replied that such a person was punishable if he knew at the time of committing such crime that he was acting contrary to law. *Crenshaw*, 98 Wn.2d at 794-95. This describes the defendant's acts. He had a delusional belief that his life was in danger and he responded to it, but he knew that what he was doing was against the law as evidenced by his flight from the scene, his efforts to mislead the police during his interrogation, his description of what occurred as being a "murder," his own admissions, and his recognition that the death penalty and prison were possible punishments for his act. Defendant's life was not in danger at the time he shot his victim. The law and society find it wrong to shoot an unarmed person for no reason. Defendant's proposed interpretation of the *M'Naghten* test conflicts with that set forth by the Supreme Court in *Crenshaw* and should be rejected.

2. DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT IMPOSED ANY LIMITATIONS AS TO THE TOPICS THAT COULD BE ADDRESSED ON VOIR DIRE AND HAS FAILED TO SHOW ANY ERROR AS TO THE TRIAL COURT'S LIMITATION AS TO ITS LENGTH.

The limits and extent of voir dire examination lie within the discretion of the trial court, and it is given considerable latitude. *State v. Davis*, 141 Wn.2d 798, 825, 10 P.3d 977 (2000). *State v. Laureano*, 101 Wn.2d 745, 757, 682 P.2d 889 (1984); *State v. Robinson*, 75 Wn.2d 230,

231, 450 P.2d 180 (1969). A criminal defendant should be permitted to examine prospective jurors carefully, “and to an extent which will afford him every reasonable protection.” *State v. Tharp*, 42 Wn.2d 494, 499, 256 P.2d 482 (1953). As the court noted in *Tharp*, the scope of voir dire should be coextensive with its purpose.

The purpose of the inquiry is to enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause, and determine the advisability of interposing their peremptory challenges.

42 Wn.2d at 499-500, 256 P.2d 482; *State v. Hunter*, 183 Wash. 143, 153, 48 P.2d 262 (1935). ‘Absent an abuse of discretion and a showing that the rights of an accused have been substantially prejudiced, a trial court's ruling on the scope and content of voir dire will not be disturbed on appeal.’ *Davis*, 141 Wn.2d at 826.

Defendant asserts that the trial court erred by “denying [him] the right to inquire into potential prejudice in the areas of self defense, race and gangs.” Appellant’s Brief at p.1, (Assignment of error #6). Although the voir proceedings have been fully transcribed, defendant does not refer in his brief to a single portion of these transcripts to show any ruling by the trial court which prevented him from inquiring into these areas. *See* Appellant’ brief at pp 25-28. Rather, defendant’s claim is that he was

deprived of his right to a fair and impartial jury “when the judge cut off voir dire unexpectedly”, indicating that this occurred at page 533 of the trial record. Appellant’s brief at p.25.

This portion of the record shows that when the parties returned to exercise peremptory challenges on the fourth day of jury selection, the defense brought a motion for mistrial, alleging that the trial court had not allowed the defense to inquire regarding race and gangs. RP 533. Upon questioning by the court as to how the defense had been prohibited into inquiring into these areas, the defense acknowledged that the court had not forbidden it. Defense argued that he was denied this ability because the court had indicated that questioning would end at the close of the previous day, and the defense had not yet inquired into these areas by the end of the day. RP 533-537. In response to the motion for mistrial, the State responded that the court had allowed ample opportunity for questioning, and had forewarned the parties as to the relevant time frame, thus the defense had chosen not to use the available time to address these issues. RP 535-536. The court could not recall a single ruling which placed any limits on the topics that could be raised, although it had sustained a couple of objections to specific questions. RP 536-537. The court made the following ruling denying the motion for mistrial:

With respect to the motion for mistrial over perceived limitations on jury questioning, I'm going to deny the motion for mistrial. The issue of gangs, there were motions in limine,⁴ and I think gangs is pretty much not going to be a major issue in the trial. And [defense counsel] indicated he wanted to ask if jurors didn't like Asians or something to that effect. He was not limited in the questions he could ask. The defense, in fact, had more time yesterday than the State did. The State passed on a couple rounds [of questioning].

So I'm going to deny the motion for mistrial.

RP 549. The record does not reveal the court abused its discretion in limiting the length of voir dire.⁵

The record in the instant case shows that the venire in defendant's case was given a juror questionnaire and that the voir dire process included several phases, including screening the venire for those with hardship issues; holding individualized voir dire for those who knew about the case or who wanted more private questioning as to certain issues, followed by more generalized questioning. RP 7-35, 81-83, 86-360, 364-527. Juror questioning occurred over three court days. RP 7, 86, 366. Two of these days were essentially devoted to juror questioning. RP 86-

⁴ The defense brought a motion to exclude reference to two blue bandannas found in the defendant's bedroom, arguing that everyone was in agreement that this crime was "not a gang-related incident." RP 41-42, 45-46. The prosecutor agreed that there was no evidence that either the victim or defendant were involved with gangs. RP 43. The court granted the defense motion. RP 46.

⁵ Defendant does not assign error or argue that the court erred in denying the motion for mistrial, but only in limiting the scope of voir dire.

360, 364-527.⁶ The parties returned on the fourth day to exercise peremptory challenges, which is when the motion for mistrial was raised. RP 526-27, 532-33.

Defendant's claim that the termination of juror questioning was "unexpected" is not supported by the record; the defense was on notice about the court's expectation as to the length of voir dire. At the close of the second day of jury selection, the court indicated that it hoped that jury selection would be completed the following day, and that opening statements would occur the day after that. RP 361. On the third day of jury selection, when the entire remaining venire was brought back for general questioning, the court announced that it hoped that the jury would be selected that day. RP 378. His comments throughout the day were consistent with his expectation that questioning would be completed that day. RP 374-375, 404, 454-455, 463, 484, 508, 526. Thus, the court put defense counsel on ample notice as to its expectations that the questioning of jurors would be completed by the end of the third day of jury selection. Defendant had an entire day to ask any questions he considered critical to the selection of a fair and impartial jury. The record shows that there was nothing "unexpected" about the court's limitation of time to question jurors. It should also be noted that the defense *never* asked the court for

⁶ The morning session on the third day was cut short when there arose a concern about whether defendant had taken his medication that morning. RP 393-400.

additional time in which to question jurors; it simply brought a motion for mistrial claiming that it had been improperly limited.

The majority of the cases addressing whether a trial court abused its discretion in limiting the scope of voir dire concern whether the court improperly limited the defendant from inquiring into a particular area, as opposed to imposing limits on the length of voir dire. The State can find no published Washington cases, nor United States Supreme Court cases that address limitations on the length of voir dire as opposed to those limiting inquiry into a particular area.

Indiana courts have upheld a twenty minute limitation upon oral examination by the parties when this follows the trial court's voir dire examination using both its own questions and those submitted by the parties. *Roberts v. State*, 373 N.E. 2d 1103, 1105-1106, 268 Ind. 127, 130 (1978); *Hart v. State*, 352 N.E. 2d 712, 716-717, 265 Ind. 145, 151-152 (1976). Other courts have found similarly short time frames, under similar circumstances, not to be improper. *York v. El-Ganzouri*, 817 N.E.2d 1179, 1190-1191, 353 Ill. App.3d 1, 13-14 (2004)(10 minutes for each panel of 14 jurors after court's inquiry and not including time necessary to follow up with any juror who indicated any bias); *See Dhillon v. State*, 138 S.W.3d 583 (Tex. App. 2004) (15 minutes after court's questioning and follow-up questioning as to court's inquiry); *State v. Martinez*, 131 N.M. 746, 42 P.3d 851 (Ct.App.2002) (20 minutes).

In the case before the court, the defendant had the opportunity to inquire into areas of concern in the jury questionnaire, during the individual questioning of some 50 jurors, and during the final day of questioning to the remaining venire. The prosecution reached a point where it had no further questions, and the defense was given the remainder of the day to ask additional questions. RP 484, 508-527. The record shows defendant was given ample opportunity to inquire into whatever topic he thought important over the course of three days of jury selection. Defendant has failed to demonstrate an abuse of the trial court's discretion.

3. DEFENDANT HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE HIS COUNSEL'S FAILURE TO PROPOSE A DEFINITIONAL INSTRUCTION OF "RIGHT FROM WRONG" WHEN HE DOES NOT ARTICULATE THE WORDING OF SUCH AN INSTRUCTION AND WHEN UNDER CONTROLLING AUTHORITY SUCH A DEFINITION SHOULD NOT BE GIVEN.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United

States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d.816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of

demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and “so admissions of deficient performance by attorneys are not decisive.” *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934

F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant seeks to show ineffective assistance of his trial counsel for a single claimed deficiency; he asserts that his trial counsel were ineffective for failing to propose an instruction defining the “right and wrong” element of the insanity test. Appellant’s brief at p. 21.

First, it must be noted that defendant does not articulate the wording of the instruction that he asserts should have been proposed by his trial counsel. There is considerable reason to conclude from his brief that his proposed definition of “right from wrong” is not consistent with Washington law. *See, supra*, at pp 13-14. On appeal defendant argues, as he did in the trial court, that the insanity should have a subjective standard such that if the defendant is acting on delusions that cause him to believe that his actions are in self defense, that this should meet the definition of insanity. *See* 3/4/09 RP 72-75. The trial court found that this was not a correct statement of the law in Washington as articulated by *State v. Crenshaw*, *supra*, which employs a societal definition of right from wrong. 3/4/09 RP 86. Thus, it is impossible for defendant to show that he was prejudiced by any failure to propose an instruction that in all

likelihood would have been rejected by the trial court as an incorrect statement of the law. Nor is it possible for this Court to assess the impact of any such instruction on the trial below without being able to analyze the wording. Defendant has the burden of showing that the instruction would have been given if proposed, and that the outcome of the trial would have been different if the instruction had been based upon the record that is before this court. *See, State v. McFarland*, 127 Wn.2d 322, 335, 337, 899 P.2d 1251 (1995). This is impossible in the present case as the court is working in a vacuum of information as to the nature of the instruction that defendant asserts should have been proposed. For this reason alone, the claim of ineffective assistance of counsel should be dismissed as meritless.

Moreover, petitioner cannot show deficient performance.

Performance is deficient if, considering all of the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. Washington's pattern instruction defining the insanity defense does not define the term "right from wrong", and there is no further definitional instruction among the pattern instructions. *See*, 11

Washington Practice: Washington Pattern Jury Instructions: Criminal 20.01, at 336, et. seq (2008) (WPIC). That instruction provides:

In addition to the plea of not guilty, the defendant has entered a plea of insanity existing at the time of the act charged.

Insanity existing at the time of the commission of the act charged is a defense.

For a defendant to be found not guilty by reason of insanity

you must find that, as a result of mental disease or defect, the defendant's mind was affected to such an extent that the defendant was unable to perceive the nature and quality of the acts with which the defendant is charged or was unable to tell right from wrong with reference to the particular acts with which the defendant is charged.

WPIC 20.01. The jury instruction given in defendant's case mirrored this pattern instruction. *See*, CP 92-116, Instruction No 3.

Defendant fails to explain why it was objectively unreasonable for defendant's attorneys to use only standard WPIC instructions defining the defense of insanity at defendant's trial. Any attorney looking at the comments of the pattern instruction would have found the following:

In State v. Crenshaw, 98 Wn.2d 789, 659 P.2d 488 (1983), the trial court instructed in the language of WPIC 20.01 (the statutory language), but added a paragraph to the end of the instruction stating that the terms "right and wrong" refer "to knowledge of a person at the time of committing an act that he was acting contrary to the law." Although the Supreme Court found that the instruction was not reversible error on three alternative grounds, *it emphasized that in the future only the statutory definition of insanity should be given and that the trial court should not attempt to add an explanation of whether the phrase "right or wrong" means right or wrong in the moral sense or in the legal sense to the instruction.*

Comment to WPIC 20.01, 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 20.01, at 336 (2008)(emphasis added).

Moreover, *Crenshaw* is not the only Washington Supreme Court case to have addressed whether the jury should be given a further definition of

“right from wrong.” The comments go on to address the impact of *State v. Cameron*, 100 Wn.2d 520, 674 P.2d 650 (1983) which involved a defendant preoccupied with the delusional belief that the murder victim was an agent of Satan, and that he was being directed by God to kill her. The court in *Cameron* held that where the defendant produces evidence that, because of a mental defect, the act was committed because of a direct command from God, and the defendant's free will was subsumed by a belief in the deific decree, that WPIC 20.01 is the proper instruction and it should be given without alteration. *Cameron*, 100 Wn.2d at 526-527; *see also*, Comment to WPIC 20.01, 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 20.01, at 337 (2008); *State v. Applin*, 116 Wn. App. 818, 67 P.3d 1152 (2003) (court need not define “right from wrong”). Thus, any reasonably competent attorney researching whether an additional instruction defining “right from wrong” would be viewed favorably by a trial court would come to the conclusion that such an instruction was contrary to controlling Washington authority. It is not deficient for an attorney to forgo proposing an instruction that is contrary to controlling authority.

But to focus on this single alleged complaint of deficient performance is to ignore the standard of assessing deficient performance set forth in *Strickland*, which requires the court to look at the entirety of the record. The record shows that defendant's two trial counsel took many efforts to challenge the State's case and seek the best possible result for

their client. Defendant's attorneys sought a motion for acquittal by reason of insanity. 3/4/09 RP 66-81; CP 25-26. They sought dismissal of an aggravating factor that the State had alleged was applicable to defendant's crime. RP 48-70; CP 36-46. They brought motions in limine. RP 37-47, 823-825, 1181-1193; CP 58-59. They cross examined the State's witnesses. RP 626-631, 647-649, 685-692, 694-695, 773-785, 799-804, 849-850, 865-868, 885, 902-909, 921-923, 953-954, 969-971, 1006-1018, 1048-1051, 1057-1059, 1080-1082, 1102-1111, 1123-1124, 1179-1180, 1202-1204, 1213-1220. They presented numerous witnesses on defendant's behalf. RP 1284-1286, 1319-1374, 1445-1452, 1458-1459, 1460-1483, 1498-1505, 1514-1518, 1521-1526, 1532-1539, 1604-1645, 1725-1733. They made numerous objections. RP 619, 621, 624-25, 667, 671, 678, 683-85, 755-757, 762, 767-768, 811, 817-819, 832, 837, 839, 841, 842, 843, 844, 845-849, 850, 859, 862-864, 878-879, 882, 884, 895-902, 916, 918-920, 952, 965-969, 976, 1005, 1054, 1071-1073, 1095-1099, 1115, 1122, 1147-1152, 1156, 1165, 1170, 1174, 1224, 1231-1235, 1256-1257, 1266-1267, 1271, 1770. They made opening and closing statements, and proposed relevant jury instructions. RP 591-596, 1790-1812; CP 67-83, 84-88. Ultimately, the jury rejected the proffered defense of insanity, and convicted defendant, but they convicted him of a lesser included offense. RP 1835-1841; CP 118. Defendant's attorney argued against the prosecution's recommendation for imposition of an exceptional sentence upward and argued for imposition of an exceptional sentence

downward. 6/5/09 RP 11-14; CP 132-135. Looking at the record as a whole, as is required by *Strickland*, it cannot be said that defendant's counsel were so deficient so as to leave him essentially without representation. Defendant has failed to meet his burden under the *Strickland* standard and this claim should be dismissed.

4. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF MURDER IN THE SECOND DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing 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. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the

evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case, defendant challenges the sufficiency of evidence to support his conviction for murder in the second degree.⁷ The jury was instructed that it had to find the following elements:

- (1) That on or about the 3rd day of January, 2007, the defendant acted with intent to cause the death of Samnang Kok;
- (2) That Samnang Kok died as a result of the defendant's acts; and
- (3) That any of these acts occurred in the State of Washington.

CP 92-116. Instruction No. 12.

There were several eyewitnesses to this crime; the evidence is undisputed that on January 3, 2007, defendant was in the hallway of Foss High School in Tacoma, Washington, and when he saw fellow student Samnang Kok, he shot him three times at close range, then calmly walked out of the school. RP 607-609, 613-617, 658, 673-677, 826-834, 849, 913-920, 959-964, 1036-1045. The victim did not say or do anything prior to the defendant shooting him. RP 1047. After the first shot, the victim dropped to the ground and the defendant said "Boom motherfucker," then fired again. RP 917. The first shot was to the victim's head, and caused him to collapse; the second two shots were fired as the victim slid to the

⁷ While this claim is not discussed in much detail, defendant assigned error to the jury convicting him of murder in the second degree; Assignment of Error 4 discusses it briefly. Appellants brief at p. 21.

floor. RP 675-676, 917-918, 1043-1044. The victim died from these gunshot wounds. RP 744, 811-813, 988-989, 1137-1147, 1155-1178. Defendant was arrested with the murder weapon in his possession, and later admitted that he had shot the victim. RP 754-761, 794, 1281-1283.

From these facts, it was reasonable to infer that the defendant was waiting for the victim in the hallway, and that he had brought a gun to school for the purpose of shooting the victim. From the proximity, number of shots, and the location of the bullet wounds on the victim's body, it was reasonable to infer that defendant was intending to kill Samnang Kok when he fired the gun.

There was more than sufficient evidence from which the jury could find defendant guilty of murder in the second degree. Its verdict should be upheld.

5. THIS COURT SHOULD UPHOLD THE JURY'S REJECTION OF DEFENDANT'S INSANITY DEFENSE.

- a. This Court Should Not Follow The Standard Of Review Used By Division I In Assessing Whether A Jury Properly Rejected An Insanity Affirmative Defense Since It Creates An Anomaly In The Law And Invites An Appellate To Reweigh The Evidence Presented At Trial.

Defendant asserts that the proper standard of review for evaluating whether a jury properly rejected a defendant's insanity defense is set forth in Division I's decision in *State v. Matthews*, 132 Wn. App. 936, 941 135

P.3d 495 (2006), *review denied*, 160 Wn.2d 1004 (2007). In *Matthews*, the court held that the standard of review to apply when a defendant alleges that the jury improperly rejected his insanity defense is “whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderant of the evidence.” In reaching its conclusion, Division I relied upon the Supreme Court’s decision in *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996).

In *Lively*, the issues before the Supreme Court were: 1) who had the burden of proof when a defendant raised a claim of entrapment; and, 2) whether the evidence supported a finding, as a matter of law, that the defendant had been entrapped. 130 Wn.2d at 1. The Supreme Court noted that while other jurisdiction treated the defense of entrapment differently, under Washington law, the trial court had properly instructed the jury that the defendant had the burden of proving the affirmative defense of entrapment by a preponderance of the evidence. *Id.* at 13. In addressing *Lively*’s claim that “her conviction should be reversed because the evidence presented was insufficient to support a finding that she was not entrapped,” the Court analyzed what the appropriate standard of review should be. The State argued that the appropriate standard of review was to apply the same standard of review applicable to challenges to the sufficiency of the substantive offense which is to view the evidence in the light most favorable to the prosecution and determine whether “any

rational trier of fact could have found guilt beyond a reasonable doubt” citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), and *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). The decision in *Green* was the first time the Washington Supreme Court used the new standard set forth by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979), to analyze a challenge to the sufficiency of the evidence. In the *Lively* decision, the Supreme Court, agreed that if the State had the burden of proving the *absence* of the defense of entrapment beyond a reasonable doubt that this would be the proper standard of review, but questioned whether it was proper when the defendant had the burden of proving the defense by a preponderance of the evidence. *Lively*, at 17. The Court then looked to decisions from Georgia and Louisiana to conclude that the appropriate standard of review was “whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense [of entrapment] by a preponderance of the evidence.” *Id.*

The Washington Supreme Court has not held that the standard set forth in *Lively* is applicable to the affirmative defense of insanity. While Division I applied this standard to insanity defenses, the State can find no published case from either Division III or this court adopting the *Lively* standard when a defendant alleges that the court or the jury improperly rejected his insanity defense.

The appropriate standard of review to apply when a defendant asserts that a jury improperly rejected his affirmative defense has been the subject of much debate among appellate courts. See *State v. Flake*, 88 S.W.3d 540, 552-4 (Tenn. 2002)(summarizing the different standards that have been employed). The Fifth Circuit of the United States Court of Appeals adopted a standard similar to the one set forth in *Lively. United States v. Barton*, 992 F.2d 66, 68-69 (5th Cir.1993)(adopting a “reasonableness” standard that requires an appellate court to view the evidence in the light most favorable to the prosecution and reverse a jury verdict rejecting the insanity defense “only if no reasonable trier of fact could have failed to find that the defendant's criminal insanity at the time of the offense was established by clear and convincing evidence.”). The Fifth Circuit does not, in its opinion, articulate the legal rationale behind this standard.

The Sixth Circuit reached a different conclusion than the Fifth Circuit. *Caldwell v. Russell*, 181 F.3d 731, 740 (6th Cir. 1999), *abrogated on other grounds* by the Antiterrorism and Effective Death penalty Act, Title 28 U.S.C. §2261 et seq.. In *Caldwell*, the Court relied upon the due process principles set forth in *Jackson v. Virginia*, *supra* as well as its own prior decision in *Allen v. Redman*, 858 F.2d 1194, 1196-98 (6th Cir. 1988), which held that due process requires only proof beyond a reasonable doubt of the elements of the crime. The *Caldwell* court reasoned that the due process “sufficient evidence” guarantee does not

implicate the affirmative defense of insanity because “proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed a crime.” *Caldwell*, 181 F.3d at 740.

Caldwell presents the better approach. First, a claim that a jury improperly rejected the defendant’s affirmative defense invites the appellate court to re-weigh the evidence presented at the trial court contrary to well established authority that such re-weighing is improper. As assessing discrepancies in trial testimony and weighing the evidence are within the *sole* province of the fact finder, an appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004); *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); *State v. Longuskie*, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). A defendant alleging that the jury improperly rejected his affirmative defense, is inherently asking the appellate court to review the evidence presented at trial and to re-weigh it in his favor.

Moreover, use of the standard of review set forth in *Lively*, creates an anomaly in the law. Under *Lively*, the defendant who unsuccessfully raised a defense of entrapment at trial, where the defendant has the burden of proof, could challenge the jury’s failure to find his affirmative defense, as well as whether there was sufficient evidence to support his conviction. Such a defendant would be entitled to have the appellate court review the

sufficiency of the evidence twice: once to assess whether the State had adduced sufficient evidence to support the elements of the crime, and a second review to assess whether a rational jury could be unconvinced by the defendant's evidence of entrapment. In contrast, under *Lively*, a defendant raising a claim of self defense, where the prosecution has the burden of proving the absence of the defense, would be entitled only to a single review of the evidence which would assess whether there was sufficient evidence to support each elements of the crime. It is illogical that the defendant who carries a burden of proof at the trial level should have a more favorable standard of review than the defendant who carries no burden of proof at trial. As mentioned earlier, the Washington Supreme Court has not held that the standard set forth in *Lively* is also applicable to situations where a defendant is challenging the jury's failure to accept his affirmative defense of insanity. This court should not follow Division I's opinion in *Matthews*, but hold that once the appellate court has determined that there is sufficient evidence supporting the elements of the crime that due process has been satisfied and the defendant's conviction may be upheld without any further evaluation of reasons behind the jury's rejection of evidence supporting the affirmative defense.

The State had previously addressed the sufficiency of the evidence supporting the jury verdict of guilt. As there is sufficient evidence supporting the conviction, this court should not engage in any

reweighing of the evidence to assess whether the jury could rationally reject defendant's affirmative defense.

- b. Even Applying The *Lively* Standard, This Court Should Find That The Jury Was Free To Reject One Expert's Opinion, in Favor of Another Expert's Opinion Which Was Supported by Lay Testimony Showing Defendant Understood Right From Wrong.

The jury heard testimony from Dr. Julie Gallagher, a clinical psychologist who examined defendant several times at Western State Hospital; she testified that while defendant suffered from paranoid schizophrenia, in her expert opinion he could perceive the nature and quality of the act with which he was charged, and that he was able to tell right from wrong at the time he fired the shots that killed Samnang Kok. RP 1319-1405. Dr. Gallagher indicated that the defendant acknowledged to her that he knew what he was doing was against the law, and that he "knew he was going to get caught" because there were so many witnesses. RP 1403. Defendant's statements to her that he knew he was going to prison for what he did was evidence that he understood the legal consequences for his actions and, therefore, understood that his actions were wrong. RP 1403. Dr. Gallagher indicated that the legal standard of insanity requires a person be unable to tell the difference between right and wrong, with "unable" being the equivalent of "incapable", as opposed to having a reduced, lessened, or diminished capacity to tell right from wrong. RP 1402. In her opinion, defendant was not unable to understand

the difference between right and wrong at the time he shot the victim. RP 1405.

The jury also heard lay testimony that supported the expert opinion that defendant was able to tell right from wrong at the time he shot the victim. The evidence leads to a reasonable conclusion that after the shooting, the defendant left the school grounds and hid in the yard of a nearby residence until the helicopters stopped flying overhead. RP 1112-1123. From this, the jury could reasonably infer that defendant recognized what he had done was wrong, and was trying to hide so he wouldn't get caught by the police. After his arrest, the defendant initially lied to the police officers about his involvement in the shooting, which is indicative of consciousness of guilt and awareness that what he did was wrong. RP 754-755. His questions to the detectives about the death penalty, and his comments about going to prison, again reflect his understanding that society would view his actions as wrong and punish it. RP 763. These actions and statements were made very close in time to the shooting; the jury was free to view this evidence as providing the best and most reliable evidence as to the status of defendant's mind at the time of the shooting.

While defendant presented competing expert testimony regarding whether he was legally insane at the time of the shooting, the jury was free to reject such testimony, as it assessed the weight to give to conflicting testimony. An appellate court cannot substitute its judgment for that of

the jury in the resolution of such conflicts. Therefore, this Court should uphold the jury's rejection of the insanity defense.

6. THE TRIAL COURT PROPERLY DISMISSED DEFENDANT'S CONSTITUTIONAL CHALLENGE TO RCW 9.94A.535(3)(r) AS UNDER *STATE V. BALDWIN* THIS SENTENCING PROVISION IS NOT SUBJECT TO A VAGUENESS CHALLENGE.

A statute is presumed constitutional, and the burden is on the party challenging it to prove it is unconstitutionally vague beyond a reasonable doubt. *State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993);

Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991); *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988).

The fundamental purpose of the vagueness doctrine is to give persons who want to comply with the law fair warning of what is prohibited so that vague laws do not "trap the innocent." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972); *see also*, *State v. Crediford*, 130 Wn.2d 747, 766, 927 P.2d 1129 (1996) (J. Sanders, concurring) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 350, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964)).

A statute is void for vagueness under the Fourteenth Amendment if it either 1) does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited, or 2) if it fails to provide ascertainable standards of guilt to

protect against arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); *State v. Groom*, 133 Wn.2d 679, 691, 947 P.2d 240 (1997); *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). “Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct.” *State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003), citing *United States v. Wivell*, 893 F.2d 156, 159 (8th Cir.1990).

The Washington Supreme Court addressed whether a vagueness challenge could be brought against sentencing guidelines statutes when these statutes: 1) do not define conduct; 2) do not allow for arbitrary arrest and criminal prosecution by the State, 3) do not inform the public of the penalties attached to criminal conduct; or 4) do not vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature. *State v. Baldwin*, 150 Wn.2d at 549. The court held that laws that dictate particular decisions given particular facts can create a liberty interest, but laws granting a significant degree of discretion cannot. *Baldwin*, 150 Wn.2d at 460. Consequently, the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines. *Baldwin*, 150 Wn.2d at 459.

In this case, defendant challenges RCW 9.94A.535(3)(r) on void for vagueness grounds. Defendant brought a constitutional challenge in the trial court which the State opposed and the court denied. RP 48-70;

CP 36-46, 52-57. Defendant renews his constitutional claim on appeal.

RCW 9.94A.535(3)(r) is a statutory aggravating factor that provides a basis for the discretionary imposition of an exceptional sentence provided that its factual basis is found by a jury; it provides:

The offense involved a destructive and foreseeable impact on persons other than the victim.

Under *Baldwin*, the sentencing factor outlined in RCW 9.94A.535(3)(r) does not create a liberty interest subject to a void-for-vagueness review. In light of *Blakely*, the trial court still maintains discretion to impose – or not to impose - an exceptional sentence. Because nothing in the challenged guideline requires a certain outcome, it does not create a protected liberty interest. Void-for-vagueness review, consequently, does not apply to it and defendant’s argument fails.

Defendant argues that *Baldwin* should not be followed in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 286, 124 S. Ct. 2531, 159 L.ed.2d 403 (2004). He argues that after these cases, aggravating factors are essentially elements of the crime⁸, so “[t]herefore *Baldwin* must be reconsidered in light of *Apprendi* and *Blakely*, and the protections of the Sixth Amendment, including protection against vagueness.” Defendant

⁸ The Washington Supreme Court stated while “an aggravating factor must be treated like an element for purposes of the Sixth Amendment to the United States Constitution, it is decidedly not an element needed to convict the defendant of the charged crime.” *State v. Roswell*, 165 Wn.2d 186, 194, 196 P.3d 705 (2008).

does not explain how cases concerning the Sixth Amendment right to a jury trial on any fact that increases the statutory maximum of a crime undermines decisions holding that due process principles are not implicated by sentencing schemes that do not create a protected liberty interest. Defendant cites to no cases that hold the Sixth Amendment right to a jury trial implicates due process concerns regarding vague laws. Regardless, this Court is bound by the holdings of our State Supreme Court and must apply such controlling authority. *State v. Williams*, 93 Wn. App. 340, 344, 968 P.2d 106 (1988). Under *Baldwin*, defendant may not raise a void for vagueness challenge against RCW 9.94A.535(3)(r).

7. THE TRIAL COURT AGREED WITH THE JURY THAT THERE WAS SUFFICIENT EVIDENCE ADDUCED TO SHOW THAT DEFENDANT'S CRIME HAD A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM AND IMPOSED AN EXCEPTIONAL TERM OF COMMUNITY CUSTODY BASED ON THAT FINDING; THIS COURT SHOULD UPHOLD THOSE FINDINGS OF THE AGGRAVATING FACTOR.

The Washington Supreme Court has upheld community impact reasonably foreseeable to the defendant as an aggravator justifying an exceptional sentence, but held that the impact on others must be of a destructive nature not normally associated with the commission of the offense in question. *State v. Johnson*, 124 Wn.2d 57, 73-76, 873 P.2d 514 (1994). Johnson was involved in a "gang" drive-by shooting that occurred

in the immediate vicinity of a public elementary school that was in session. There was testimony that witnesses to the shooting included children about to be released from school, and their parents, and there was evidence that after the shooting children were afraid to attend school, and parents feared for the safety of their children while at school. *Johnson*, 124 Wn.2d at 74-75. The court concluded that it was reasonably foreseeable to the defendant, who lived across the street from the school, that the children and their parents, who were not the intended victims of his acts, would be traumatized by them, and that this resulting trauma distinguished the case from other assaults. 124 Wn.2d at 75-76.

In *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003), the Supreme Court upheld a challenge to the imposition of an exceptional sentence when Jackson alleged that the community impact aggravating factor was not supported by the facts and was legally insufficient to justify an exceptional sentence. Jackson was convicted of the murder of his nine year old daughter, Valiree; he had reported that he last saw her in the front yard of the home heading to school. At sentencing, the court made the following finding:

The students, parents and staff of McDonald Elementary, where Valiree Jackson attended the third grade, were tremendously impacted. Parents would no longer allow children to walk to and from school alone for fear that they to [sic] might be abducted. Children had nightmares and their schoolwork was affected. The principal, Jan Lenhart, would personally follow children home to make sure they arrived safely.

The Supreme Court held that this finding regarding the impact on the children at Valiree's school, which was supported by the testimony of Valiree's teacher, principal, and school counselor, justified the exceptional sentence. 150 Wn.2d at 275-276.

In *State v. Cuevas-Diaz*, 61 Wn. App. 902, 812 P.2d 883 (1991), the court upheld an exceptional sentence based upon the emotional trauma caused to third parties, namely - children who were in their home and who were traumatized after witnessing an attack on their mother. Under these facts, the court rejected impact on the community as an aggravator, reasoning that while a community suffers from criminal acts, this is always the case. 61 Wn. App. at 905; *see also, State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989) (an exceptional sentence is only appropriate where the circumstances of the crime distinguish it from others of the same category). Finally, in *State v. Way*, 88 Wn. App. 830, 946 P.2d 1209 (1997), the court also rejected the impact on the community factor where Way shot his estranged wife on a community college campus, and shot at a student arriving in a car; many other students heard or saw the shooting and took cover. The court reasoned that while the record showed psychological impact on students, and this was foreseeable to the defendant, the circumstances of the crime did not set it apart from any other murder committed in a public place where adults might witness it. 88 Wn. App. at 834.

In this case, defendant challenges the evidence supporting the jury's finding of an aggravating factor. He does not challenge the legal sufficiency of the court reasons for imposing an exceptional sentence, but only the factual underpinnings supporting the jury's factual finding. The law governing challenges to the sufficiency of the evidence has been more fully set forth above, *supra*, at pp. 36-39. Here the jury answered affirmatively the following question:

Did the crime involve a destructive and foreseeable impact on persons other than the victim?

CP 119; RCW 9.94A.535(3)(r). The court used this jury finding to impose an exceptional sentence so that defendant would be on community custody for life, instead of the standard range community custody period of 24- 48 months. CP 171-174. In finding that an exceptional sentence was justified, the court articulated the trial evidence that it thought supported the jury's finding of a destructive and foreseeable impact on persons other than the victim. CP 171-174. Defendant has not assigned error to any of the court's findings. As both the jury and the court thought that there was sufficient evidence supporting this aggravating factor, the State will use the court's findings as a frame work for citations to the relevant portions of the trial record.

B. The shooting was witnessed by multiple students, teachers, the principal and one of the assistant principals.

RP 607-617, 835-838, 879-882, 896, 913-915, 948, 1041; CP 171-174.

C. Witnesses testified to the gunpowder in the air after the shooting and one student within several feet of the shooting received medical treatment for irritation to her eyes.

RP 616, 899, 919, 948; CP 171-174.

D. The first representative from law enforcement on the scene testified seeing countless students running out of the school, yelling about the shooting and the killing of people.

RP 632-636, 856-859, 975; CP 171-174.

E. The school was immediately placed into lockdown, with students and staff confined to classrooms and ultimately secured in the gymnasium as active shooter teams from Tacoma Police Department searched the school.

RP 622-23, 645-46, 891-893, 1196; CP 171-174.

G. Staff members testified about the trauma they suffered personally as a result of witnessing this event and how more than two years later, those negative thoughts and emotions still exist.

RP 623-25, 667-668, 847, 952-953, 969; CP 171-174.

H. There was testimony how staff and students took advantage of counselors provided at Foss High School following this event, in an effort to help them deal with their grief and other emotions.

RP 665, 683-684, 694, 901; CP 171-174.

I. The jury heard testimony about how open enrollment at the school decreased significantly as a result of the impact on the community.

RP 847-849; CP 171-174. The jury's determination that defendant's crime involved a destructive and foreseeable impact on persons other than the victim should be upheld as it is supported by the evidence adduced at trial. As mentioned previously, defendant makes no other challenge to the imposition of his exceptional term of community custody.

Defendant argues that if the testimony came from an adult or from someone who did not see the shooting, even if they were in the same hallway and heard the shots, that it should not be considered. Such an argument completely ignores the impact on staff of having a student die while you are desperately trying to save his life. The witnesses who were school staff and administration also indicated a sense of failed responsibility to keep the students in their care safe, and a lingering unease in working in a place where such a traumatic event occurred. Moreover, the legislature did not limit the foreseeable impact on persons other than the victim to persons under the age of eighteen, and neither did the Supreme Court in *Johnson* or *Jackson*. The jury's finding is supported by substantial evidence and should be upheld.

8. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR DOCTRINE.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional

error was harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L.Ed.2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 232 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also*

State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...").

The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L.Ed.2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See, Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See, Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *rev. denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that *no* prejudicial error occurred.") (emphasis added).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of state witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was

cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated, some so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

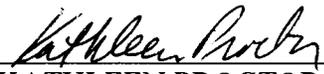
In the instant case, for the reasons set forth above, defendant has failed to establish that any prejudicial error occurred at his trial, much less that there was an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons this Court should affirm the judgment entered below.

DATED: August 11, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney

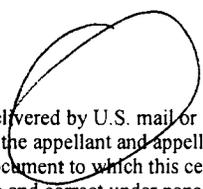


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below:

5-11-10 _____
Date Signature



FILED
COURT OF APPEALS

10:45:11 PM 5-23

CITY OF TACOMA

CLERK