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STATE OF WASHINGTON

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No. 39610-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID F. GAUL,

Appellant.

Clark County Superior Court

No. 08-1-00026-5

The Honorable Roger Bennett, Judge

Appellant's Opening Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred during voir dire when it told the jury this was not a death penalty case.

2. Defense counsel's failure to move to strike the jury after the court told the jurors this was not a death penalty case deprived Mr. Gaul constitutionally guaranteed effective counsel.

3. The trial court erred in denying Mr. Gaul's motion for a new trial based on the prejudice created by the death penalty discussion in voir dire.

4. The trial court's emphasis on punishment throughout the trial denied Mr. Gaul a fair trial.

5. Defense counsel was ineffective when he failed to object to the characterization of intentional second degree murder, and first and second degree manslaughter as "lesser" offenses than premeditated first degree murder.

6. The evidence was insufficient to prove first degree intentional murder.

7. The prosecutor committed misconduct by telling the jury that Mr. Gaul would "walk out" if they found his capacity to form intent was diminished.

8. The trial court erred in refusing to grant Mr. Gaul's motion for a mistrial based on the prosecutor's "walk out" statement.

9. The trial court erred in instructing the jury on an uncharged alternative of attempted tampering with physical evidence.

10. The instructional error on the attempted tampering with physical evidence was not harmless.

11. The trial court violated double jeopardy when it sentenced Mr. Gaul for both first degree intentional murder and second degree felony murder.

12. The trial court erred when it imposed a conviction and sentence on second degree felony murder.

13. During the post-trial motion on the death penalty discussion, it was error to ask each juror how their knowledge that this was not a death penalty case affected deliberations.

14. Defense counsel was ineffective counsel when he did not object, and participated in, questioning the jury about their deliberation.

15. Cumulative error denied Mr. Gaul his constitutional due process right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court deny Mr. Gaul a fair trial when it told the jury during deliberations that Mr. Gaul's first degree murder charge was not subject to the death penalty?

2. Did defense counsel's failure to make a timely objection to the death penalty conversation and make a motion to strike the jury panel deny Mr. Gaul effective assistance of counsel?

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12. Was defense counsel ineffective counsel when he did not object, and participated in, questioning the jurors about their deliberation?

13. Has the cumulative error in Mr. Gaul's case denied him his constitutional due process right to a fair trial?

C. STATEMENT OF THE CASE

a. The Charges And The Outcome.

David Gaul was tried to a jury on a second amended information. CP 8-10. That information charged him with premeditated murder in the first degree (count 1), intentional murder in the second degree (count 2), felony murder in the second degree (count 3), tampering with a witness (counts 4 and 5), and tampering with physical evidence (count 6). CP 8-10. Mr. Gaul presented a diminished capacity defense, asserting mental incapacity based upon alcohol abuse and post-traumatic stress disorder. X RP at 951 – XI, RP at 1341; XII-A RP at 1341.

Based upon the evidence presented at trial, the court also instructed the jury on manslaughter in the first and second degree. CP 54, 55. The jury was instructed, without objection, that the intentional second degree murder, and both manslaughters were lesser crimes than the first degree murder. CP 51; RP XIII-B at 1911.

The jury found Mr. Gaul guilty of premeditated first degree murder, second degree felony murder, both counts of tampering with a witness, and attempting to tamper with physical evidence. CP 73, 77, 78, 79, 81. The jury left blank the verdict forms for intentional second degree murder and both manslaughters. CP 74, 75, 76. The jury also found by special verdict that the deceased was particularly vulnerable. CP 80.

On a defense motion, the court later dismissed both witness tampering convictions for instructional error. XVII RP at 2131-34.

At sentencing, the State asked the court to find that the first degree murder and the second degree felony murder were same criminal conduct and to impose sentence on both charges. XVIII RP at 2207-08. The court did not explicitly find that they were same criminal conduct but did impose a sentence on both charges. CP 163; XVIII RP at 2219. Defense counsel did not object. XVIII RP at 2209. The court imposed the maximum sentence on the simple misdemeanor evidence tampering. CP 159.

b. Trial Testimony.

David Gaul is a retired Portland Fire lieutenant. XIII RP at 1751. During his many years with the fire service, he witnessed awful things. XIII RP at 1758-71. And he suffered mentally because of it. He developed post traumatic stress disorder. XI-B RP at 1174; XII-A at 1414. Starting in his mid-40's, he began to self-medicate with alcohol. XIII-A RP at 1758. Even though the alcohol jeopardized his job, he kept drinking. IX-A RP at 645. No number of inpatient treatments and lengthy periods of sobriety could keep him from returning to drink. IX-A RP at 645. He retired from the fire department in 2007. XIII-A at 1744.

Over the years, Mr. Gaul had been arrested and prosecuted a number of times for driving under the influence of alcohol. XIII-A RP at 1775. Starting in the spring of 2007, he did nine months in an Oregon jail on a violation related to his drinking and driving. VIII-A RP at 359; XI-A RP at 1126.

While he was incarcerated, Mr. Gaul gave a power of attorney to his niece, Rosilee ("Rosilee") Smith. VII-A RP at 360, 362. Mr. Gaul was behind on the mortgage on his Gresham, Oregon, home. Foreclosure was looming. VIII-A RP at 361. Rosilee, who was a licensed real estate agent in Washington, agreed to help Mr. Gaul sell his home. VIII-A RP at 362, 365. Mr. Gaul indicated to Rosilee that when he was released from

jail, he would like to be debt-free. VIII-A RP at 367. Rosilee took that to mean that Mr. Gaul wanted her to use the proceeds from the house sale to pay off any liens and other monies he owed. VIII-A RP at 375.

The house sold. VIII-A RP at 367. Two of the debts Rosilee paid off were a debt to Mr. Gaul's mother, Junette Gaul, and a debt to Mr. Gaul's sister, Sue ("Sue") Smith. VIII-A RP at 375. Rosilee testified that she paid Junette about \$18,000 and Sue about \$2,500. VIII-A RP at 375-76.

Mr. Gaul was released from jail on December 27, 2007. XI-A RP at 1124-27. It was a happy day for his two daughters, Katie Gaul and Jennifer Gaul, and for his mother. The four of them were very close. They had a nice dinner out that evening. XI-A RP at 1117-1124.

The next day, Mr. Gaul wanted to go to the bank and check out his financial situation. VII- RP at 188;XI-A RP at 1129. He was aware that Rosilee had paid monies to Junette and Sue. He was not happy about that. VII P at 190-192. That morning, he met Katie's boyfriend, Gary Wallesen, for the first time. VII RP at 185-86. He drove Mr. Gaul to the bank. VII RP at 188. Katie and Junette went with them. VII P at 188. Mr. Wallesen testified that on the way to the bank, Mr. Gaul had a very angry conversation with Junette in the back seat. VII RP at 192. Once at the

bank, Mr. Gaul continued to be visibly upset. VII RP at 193-98. Mr. Wallesen testified that Mr. Gaul was so angry at times that it scared him. VII RP at 194.

After visiting the bank, Mr. Gaul returned home. VII RP at 203. He was staying with Junette at her Vancouver home. Sue arrived while he was there. VII RP at 203-07. He angrily approached her and they engaged in a heated exchange. VII P at 203-07. Katie got between them and got Mr. Gaul out of the house and into a car. VII RP at 209. She and Mr. Wallesen drove around with Mr. Gaul for a time trying to get him to calm down. VII RP at 209. They eventually dropped him off at a movie theatre so he could watch a movie and calm down. VII RP at 210-11.

Mr. Gaul has a good friend named Colleen ("Colleen") Puderbaugh. III-A RP at 272-75. She often spoke with Mr. Gaul over the phone and occasionally saw him. VIII-A RP at 272-75. After his release from jail, she both talked to Mr. Gaul over the phone and saw him. VIII-A RP at 286-88. She testified that Mr. Gaul was very upset about his money situation. He thought that Rosilee, Junette, and Sue had stolen from him. VIII-A RP at 286-90.

It is not perfectly clear from the record, on either the morning of December 28 or 29, Junette left the home to go and stay with her daughters. VIII-A RP at 384-85. One lived in Longview and the other in

Ridgefield. She left because she was uncomfortable about being in the house with him. VIII-A RP at 289.

On the evening of December 31, Sue and/or Junette called the police and told them that Mr. Gaul was making suicidal statements. IX-B RP at 780, 782. The police found Mr. Gaul at the Vancouver home. He was extremely intoxicated. IX-B RP at 782. He was taken involuntarily to the hospital for an evaluation. IX-B RP at 783.

On January 2, Junette went to the Clark County courthouse. VIII-A RP at 386. Junette wanted to get some sort of order that would cause Mr. Gaul to have to leave her house. VIII-A RP at 386. She arrived too late in the day to have her request for what was ultimately an anti-harassment order processed the same day. XII-A RP at 1346, 1350.

Junette returned home. VIII-A RP at 296. Colleen was talking on the phone with Mr. Gaul when she heard Junette enter the home and call out to Mr. Gaul that she was there. VIII-A RP at 296. This was at 1:50 p.m. VIII-A RP at 294-96. Mr. Gaul called Colleen back at 3:24. VIII-A RP at 297. Colleen asked to speak to Junette so she could wish her a happy New Year. VIII-A RP at 299. Mr. Gaul told Colleen that Junette was in the bathroom. VIII-A RP at 299. She heard what she thought was Mr. Gaul walk down the hall and knock on a door. VIII-A RP at 300. He

called out to Junette but Colleen did not hear an answer. VIII-A RP at 300-01. She told Mr. Gaul that she would drive over to the house and wish Junette a happy New Year in person. VIII-A RP at 301. During the conversation, Mr. Gaul got angry and asked, "Do you think I would do something to hurt my mom?" VIII-A RP at 301.

When Colleen got to the house, no one answered her knock at the door or answered her phone call. The house doors were locked. VIII-A RP at 304. She called Rosilee who told her where to look for a hide-a-key. VIII-A RP at 303-04. Colleen used the hide-a-key to get into the house. VIII-A RP at 306. She found Junette, age 90, dead, lying on a hallway floor in Mr. Gaul's embrace. VIII-A RP at 309, 358. Mr. Gaul did not seem to notice that Colleen was there. VIII-A RP at 318, 340.

Colleen called the police who arrived shortly thereafter. VII RP at 217. Mr. Gaul, highly intoxicated, was arrested. X-A RP at 814-17. The police found no evidence of forced entry or anybody else in the home. VIII-B RP at 485. Mr. Gaul was taken to the hospital for observation. VII RP at 238. After a couple of hours there, he was released. X-A RP at 816. He was taken by the police to an interview room. X-A RP at 820. Detectives advised Mr. Gaul of his rights. X-A RP at 811. Mr. Gaul agreed to waive his rights and talk to the detectives. X-A RP at 821. Although Mr. Gaul's blood alcohol level was high, the police testified that

he was coherent and had no problem asking and answering questions. 1X RP at 821. Mr. Gaul denied having seen his mother since December 27. X-A RP at 868.

Mr. Gaul was placed in custody at the Clark County Jail. VIII-B RP at 464. Because of the nature of the charge, he was placed on suicide watch and isolated from other inmates. VIII-B RP at 470. On January 13, he was given his first opportunity to write a letter. VIII-B RP at 464. He wrote a letter to his daughters Katie and Jennifer. Ex. 82 (Supplemental Designation of Clerk's Papers). A corrections officer later opened the sealed letter per jail policy. XIII-B RP at 467. He seized the letter based upon its content. The letter was turned over to the police. XIII-B RP at 467. (The prosecutor added the tampering with witnesses and evidence charge against Mr. Gaul based upon the content of the letter.) The letter seemed to suggest to Katie and Jennifer that they were to buy two bottles of alcohol, empty out 90% of the contents, wipe any fingerprints from the bottles, place the bottles below a window and near a ladder at his mother's house, and then take pictures of the bottles. Exhibit 82.

c. Motions And The Bases For The Motions.

During voir dire, a prospective juror asked the judge if this was a death penalty case. XVI RP at 2094-97. The court told the jury something to the effect that, "If it was, you would know that." XVI RP at 2095-97.

Defense counsel did not object to this discussion. XVI RP at 2094-97; CP 98-157. After the case was over, he raised this discussion in a motion for a new trial. CP 82-97. The court responded to the motion by summoning the twelve jurors back into the court for a hearing. XVI RP 2089-97; CP 98-157. The judge, the prosecutor, and the defense attorney collectively asked each of the jurors if they had heard the death penalty discussion and how that impacted their verdict. CP 98-157. Six of the jurors has heard the discussion. CP 121-154. One of those jurors said that she might have deliberated longer had it been a death penalty case. CP 134. The rest of the jurors who were aware of the discussion, denied that the discussion had any impact on their deliberations. CP 121-54. Although defense counsel did not object to this procedure at the time, he later advised the court that asking the jury about their deliberation was inappropriate. CP 98-154; XVIII RP at 7152.

The court denied the motion for a mistrial. XVIII RP at 7197-99.

During the trial, while cross-examining one of the two defense expert psychologists, the prosecutor told the jury through his questions that if they were to find that Mr. Gaul's ability to form intent was diminished, Mr. Gaul would just "walk out." XII-B RP at 1578. Defense counsel objected, the witness did not confirm that this was true, and the court told the jury to disregard the question. XII-B RP at 1578. While the

trial was still in progress, defense counsel made a motion for a mistrial, arguing that the prosecutor's statement was so inflammatory and unforgettable, that a mistrial was necessary. XIII-A RP at 1693-95. The trial court denied that motion as well. XIII-A RP at 1697-98.

D. ARGUMENT

1. THE TRIAL COURT'S UNDUE EMPHASIS ON PUNISHMENT COUPLED WITH DEFENSE COUNSEL'S FAILURE TO OBJECT TO IT, DEPRIVED MR. GAUL A FAIR TRIAL AND EFFECTIVE REPRESENTATION OF COUNSEL.

In Mr. Gaul's case, the trial court improperly gave the jury too much information about punishment which, in turn, likely influenced the jury verdict. The trial court improperly gave punishment information to the jury in three ways. First, the court told the jury during voir dire that this was not a death penalty case. Second, the court refused to grant a mistrial after the prosecutor told the jury that if they found Mr. Gaul had diminished capacity, Mr. Gaul "walks out." And third, the court instructed the jury that the various other methods of homicide charged were "lesser" offenses than first degree murder. Defense counsel compounded the trial court's errors by not objecting to the death penalty information or the "lesser offense" instruction. Consequently, Mr. Gaul did not receive a fair trial and was ineffectively represented by counsel. His convictions should be reversed.

a. It Is Error To Inject Punishment Considerations Into The Jury's Deliberation.

As the United States Supreme Court has noted, "It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'"¹ Shannon v. United States, 512 U.S. 573, 579, 114 S.Ct. 2419, 2424, 129 L.Ed.2d 459 (1994) (quoting Rogers v. United States, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975)). Other than in a death case where the death penalty is sought, a Washington jury has no sentencing function. State v. Murphy, 86 Wn.App. 667, 669-670, 937 P.2d 1173 (1997). In other words, Washington courts follow the view that punishment is irrelevant to the jury's task. Murphy, 86 Wn. App. at 670. Because punishment is irrelevant, the jury should not be invited to consider it during its deliberation.

(i) The jury was told – in error – that Mr. Gaul's charges were not subject to the death penalty.

During voir dire, an unnamed prospective juror told the court that she would be uncomfortable if the murder charged in Mr. Gaul's case

¹ The jury was instructed that punishment may be imposed and that they were only to consider punishment insofar as it may make them careful. CP 39 (Instruction 1).

could result in the death penalty.² XVI RP at 2095-97. The court told the juror something to the effect of “if this was a death penalty case, you would know it.” XVI RP at 2095-97. Defense counsel did not object to this exchange. XVI RP at 2095-97. No other discussion about the death penalty occurred during voir dire. XVI RP at 2095-97.

When defense counsel challenged the death penalty explanation in a post-trial motion for a new trial, the trial court summoned all twelve jurors back to court for a hearing. At the hearing, the judge, defense counsel, and the prosecutor questioned each juror individually about whether they had heard the exchange about the applicability of the death penalty to Mr. Gaul’s case. CP 98-157.³ Six of the jurors had heard the court’s comment about the case not being subject to the death penalty. CP 121, 127, 133, 143, 149, 154.

Per the state supreme court, it is improper for a trial judge to tell a jury being selected for a murder trial that the death penalty is not a

² Because of the lack of microphone placement near the juror, the juror’s statement was not recorded. Instead, at a post trial motion, the parties agreed on an approximate version of what the juror said and how the judge responded. XVI RP at 2095-97.

³ The individual questioning of the jurors was transcribed and designated as a clerk’s paper. CP 98-157. Appellate counsel did specifically have this portion of the record also transcribed as part of the Statement of Arrangements. See Statement of Arrangements (9).

possible punishment. State v. Townsend, 142 Wn.2d 838, 840, 15 P.3d 145 (2001). The reason that telling a jury the death penalty is not a possible punishment is error arises from the fear that jurors may take the case less seriously. Id. at 846-847.

This strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury's deliberations. The only exception that allows juries to know about sentencing consequences is in a death penalty trial, and even then the jury is to consider the penalty only after a determination of guilt.

The State argues, however, that a failure to inform the jury that the death penalty is not involved will unfairly prejudice the prosecution since some jurors may always vote to acquit or opt out if they fear the death penalty may be involved. The converse could also be argued just as well: if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility. Rather than giving jurors information about the penalty in a noncapital case, we believe that voir dire should be used to screen out jurors who would allow punishment to influence their determination of guilt or innocence and then, through instructions, jurors should be advised that they are to disregard punishment. This process should satisfy the concerns raised by the State. We see no reason to create an exception for noncapital murder cases.

Townsend, 142 Wn.2d at 846-847.

(ii) The prosecutor committed misconduct by telling the jury that Mr. Gaul would just “walk out” if it found Mr. Gaul’s ability to form intent diminished.⁴

In his defense, Mr. Gaul presented testimony from two doctorate level psychologists. X-B RP at 952-1341; XII-A RP at 1402-1667. The second to testify was Dr. Ray Hendrickson from Western State Hospital. XII-A RP at 1402-1667. It was Dr. Hendrickson’s opinion that Mr. Gaul’s mental function impaired his ability to form various criminal intents to include the ability to deliberate. In cross-examination, the prosecutor sought to not only undermine the doctor’s opinion, but to also scare the jury and encourage them to associate their deliberation with punishment.

PROSECUTOR: All right. So – all right. When you evaluated this case for diminished capacity, when you were being asked to look at whether this defendant was able to act intentionally – I mean, if he couldn’t act intentionally, he’s not guilty; right? Walks out –

DR. HENDRICKSON: I – I can’t say –

PROSECUTOR: -- right?

DR. HENDRICKSON: -- that. I don’t know that.

PROSECUTOR: That’s the finding.

DR. HENDRICKSON: Well, I can’t – I don’t
RP XII-B at 1577-78.

⁴ This issue is also addressed under Issue ___ under a different assignment of error. That assignment of error argues that the trial court erred in refusing to grant Mr. Gaul’s motion for a mistrial based on the prosecutor’s statement..

Defense counsel objected to the question. The court sustained the objection and told the jury to “Disregard the last question,” – but not to disregard the last answer. RP XII-B at 1578. Defense counsel later brought a motion for a mistrial based on the prosecutor’s flagrantly improper questions. RP XIII-A at 1693-98. Counsel argued that the prosecutor indelibly and improperly infused the jury’s role in affecting punishment into their collective mind. XIII-A RP at 1693-95.

MR. WALKER: The – the case law is – is real clear on this, we even have an instruction in – in the jury instructions that says the fact that – that punishment may follow just makes you careful, don’t – but you’re not to consider it.

We want to basically free them up from thinking that the punishment would be too heavy and - - and therefore make them reluctant to impose a finding of guilt. We want to – we want – we don’t want to tell them, Look, the guy gets off and goes home, because we don’t want them to – to be too free to impose guilt.

So Mr. Golik bringing that up basically violated that rule. It – it’s a – it’s a – a fair trial, which is a constitutional right.

I – I can’t imagine a good faith basis for asking that question, I think it – it -- it includes a certain amount of misconduct. It’s – it’s not something that just sort of flies out of your mouth ‘cause you’re not thinking about it. The intent there was to convey to the jury that, Look, if you find him not guilty, this guy walks. And that’s – that’s simply – you know, the jury could be thinking, Well, it’s a diminished capacity, could be like insanity maybe the guy goes to an institution. We don’t know what they’re thinking.

But we’re supposed to take jurors the way we find them and they’re supposed to use only the instructions to guide them in their – in their deliberation process.

So I think what we – what we have here is – is some – and I understand, I objected and – and you struck it and told them to disregard, and I – and I appreciate that.

But it's – the – the cat is way out of the bag. The – there's no way to get it back in by telling them to strike it. Jurors don't know what to do with that kind of information. They're still gonna use it for that purpose.

And I'm not quite sure how – how good a further limiting instruction would be, I think it probably constitutes grounds for a mistrial at this point.

XIII-A RP at 1694-95.

Although it agreed that the prosecutor's questions and argument was improper, the court denied the mistrial motion. XIII-A RP at 1697-98. The court felt that it had cured any error by telling the jury to disregard the prosecutor's question. XIII-A RP at 1697-98.

(iii) The trial court's instruction that all of the homicide alternative charges were "lesser" charges improperly invited the jury to factor consequences into its deliberation.

In instructing the jury, the court gave, without objection, the following instruction:

INSTRUCTION NO. 13

The defendant is charged in Count I with Premeditated, Intentional Murder in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty of that crime or, if you are unable to reach a unanimous verdict as to that crime, then you will consider whether the defendant is guilty of the *lesser included crime* of Intentional Murder in the Second Degree, as charged in Count II.

If, after full and careful deliberation, you are not satisfied beyond a reasonable doubt that the defendant it guilty of Intentional Murder in the Second Degree, as charged in Count II, or, if you are unable to reach a unanimous verdict as to that crime,

then you will consider whether the defendant is guilty of *the lesser included crime*, under count II, of Manslaughter in the First Degree.

If, after full and careful deliberation, you are not satisfied beyond a reasonable doubt that the defendant is guilty of Manslaughter in the First Degree, under Count II, or, if you are unable to reach a unanimous verdict as to that crime, then you will consider whether the defendant is guilty of the *lesser included crime*, under count II, of Manslaughter in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the *lowest crime*.

CP 51 (emphasis added).

The verdict forms for both murder in the first and second degree even reiterated the “lesser” status in their respective captions.

VERDICT FORM C AS TO *LESSER INCLUDED* CRIME OF MANSLAUGHTER IN THE FIRST DEGREE, UNDER COUNT II,

and

VERDICT FORM D AS TO *LESSER INCLUDED* CRIME OF MANSLAUGHTER IN THE SECOND DEGREE, UNDER COUNT II.

CP 75, 76. It is no coincidence that the jury found Mr. Gaul guilty of the two murder charges that were not identified as lesser offenses: premeditated intentional murder in the first degree and felony murder in the second degree. CP 73, 81.

In State v. Todd, the trial judge instructed the jury that if it did not impose the death sentence, the court would give a life sentence under

which the defendant could be paroled in 13 and 2/3 years. State v. Todd, 78 Wn.2d 362, 474 P.2d 542 (1970). The jury imposed the death penalty, and the Supreme Court reversed. Where the trial judge places emphasis upon sentencing considerations the jury, “whether or not it should do so,” is likely to take them into account. Todd, 78 Wn.2d at 376.

Mr. Gaul was sentenced to standard range sentences of 300 months on the first degree murder and 220 months on the second degree felony murder. CP 166, 167. Had the jury found guilt on the *lesser* included offenses of either first degree manslaughter or second degree manslaughter, his standard ranges were significantly less, 78-102 months and 21-27 months, respectively. RCW 9.94A.510 and RCW 9.94A.515.

b. Defense Counsel’s Inaction Fell Below That Of A Reasonable Attorney.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, § 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have

the right to appear and defend in person, or by counsel....” Wash. Const. Article I, § 22. The right to counsel is the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing Strickland); see also, State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate

tactic explaining counsel's performance." Reichenbach, 153 Wn.2d at 130. Any trial strategy "must be based on reasoned decision-making..." In re Hubert, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the State's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.")

(i) Defense counsel's failure to make a timely objection to the death penalty discussion in voir dire denied Mr. Gaul effective counsel.

As noted above, under State v. Townsend, 142 Wn.2d 838, it is error to give a jury knowledge that a first degree murder conviction is not subject to the death penalty. But that is what the court did here when, during voir dire, a prospective juror expressed concern about the death penalty. XVI RP at 2094-97. Defense counsel did not object to the court's explanation. XVI RP at 2094-97. Neither did defense counsel move to strike the tainted jury panel and start anew with an untainted panel.

Defense counsel delayed taking any action until a post-trial motion for a new trial, obviously well after the jury convicted Mr. Gaul. CP 82-97. And well after the trial judge was inclined to do anything about the error. Defense counsel's action was too little, too late.

As an excuse, defense counsel said that the juror's question about the death penalty took him by surprise. XVIII RP at 2150-51. And that he assumed the trial court must have known something he did not know about the case law because the court told the jury that the death penalty did not apply. XVIII RP at 2150-51. But defense counsel should have known better. The law has not changed: it was and still is error to inject any question about the applicability of the death penalty into a non-death penalty case. State v. Hicks, 163 Wn.2d 477, 181 P.3d 831 (2008). A reasonably competent attorney is one who is aware of legal principles. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) (defense counsel ineffective for failing to propose appropriate jury instruction); In re Hubert, 138 Wn.App. 924, 930, 158 P.3d 1282 (2007) (defense counsel ineffective for failure to adequately investigate statutory defense.)

(ii) Defense counsel's failure to challenge the "lesser included" instruction denied Mr. Gaul effective counsel.

Failure to object to a jury instruction does not preclude appellate review. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A

claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

The instruction that defense counsel should have objected to is Instruction No. 13. (Full text above, also see CP 51.) Instruction 13 is a standard WPIC instruction tailored to the specific charges in this case. WPIC 155.00 (Washington Pattern Instructions, Criminal, 3rd Edition, pages 626-629). Even though it is a standard WPIC instruction, the context in which it was given in this case created error. To properly instruct the jury, there was no need to characterize second degree intentional murder, or first or second degree manslaughter as “lesser included crimes.” That language could have been struck altogether and the jury would not have lost any understanding of its duty to consider guilt on other charges if it found Mr. Gaul not guilty of first degree murder or could not reach a verdict on that charge. The error, particularly in the context of Mr. Gaul’s case, is in telling the jury that other charges are “lesser” crimes. To a reasonable person, presumptively a juror, “lesser” crime equals a lesser penalty. That knowledge improperly told the jury that they had the ability to influence the punishment by finding guilt on the greater crime.

c. Mr. Gaul Incurred Prejudice Because Of Defense Counsel's Failures.

The jury was likely persuaded to convict Mr. Gaul of premeditated first degree murder because of two things. First, the details of Junette Gaul's death were particularly sad. Junette Gaul was a sympathetic victim. She was loved by her family members, particularly her granddaughters Katie and Jennifer Gaul. X-A RP at 909. At age 90, she lived by herself in the family home. VIII-A RP at 358; X-A RP at 933. She was active. She owned a car and still drove. She dressed up to look her best. She wore lipstick and accessorized with earrings. Although family would often hold onto her and support her when she walked, she was in overall good health. VIII-B RP at 428. Yet, at 90, her bones were fragile. The defense pathologist summed up Junette's injuries: "This poor soul was badly beaten." RP XIII-A. The jury found by a special verdict that she was particularly vulnerable. CP 80.

And second, the jury knew much more about the possible consequences of the various verdicts than it should have. While defense counsel could do nothing to prevent the jury from hearing specific details about Mrs. Gaul's death, he certainly could have prevented the jury from hearing about possible penalties. It was not appropriate for the jury to be told that this was not a death penalty case. It was not appropriate for the

jury to be told via the jury instructions that all the other homicide charges were of lesser legal significance than premeditated first degree murder.

“The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximum denunciation, to cry out murder ‘in the first degree.’” State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986). Defense counsel’s failures permitted the jury to factor penalty into its deliberation thereby encouraging the jury to cry out murder “in the first degree.” As Mr. Gaul was denied a fair trial and effective counsel, his murder convictions should be reversed.

2. THE FACTS WERE INSUFFICIENT TO PROVE PREMEDITATED FIRST DEGREE MURDER.

The evidence was insufficient to prove that Mr. Gaul premeditated the murder of Junette Gaul. Because the evidence of premeditation was insufficient, Mr. Gaul’s first degree murder conviction should be reversed.

The Due Process Clause of the Fourteenth Amendment requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Evidence is insufficient unless, when viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Colquitt, 133 Wn.App. 789, 796, 137 P.3d 892 (2006). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. DeVries, at 849. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); Colquitt, 133 Wn.App. at 796.

Although a claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. DeVries, 149 Wn.2d at 849. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. Rogers Potato v. Countrywide Potato, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); State v. Carlson, 130 Wn.App. 589, 592, 123 P.3d 891 (2005). The evidence must also be more

than clear, cogent and convincing evidence, which is described as evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” In re A.V.D., 62 Wn.App. 562, 568, 815 P.2d 277 (1991).

Mr. Gaul was charged and found guilty of first degree premeditated murder. RCW 9A.32.030(1)(a). The jury was instructed on the elements of the charge:

To convict the defendant of the crime of Premeditated Intentional Murder in the First Degree as charged in count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 2nd day of January, 2008, the defendant acted with intent to cause the death of Junette Gaul;
- (2) That the intent to cause the death was premeditated;
- (3) That Junette Gaul died as a result of the defendant’s acts; and
- (4) That the acts occurred in the State of Washington.

CP 52 (Instruction 14).

Premeditation was defined for the jury as:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 47 (Instruction 9).

State v. Gentry gives a good overview of factual scenarios supporting premeditation to kill. State v. Gentry, 125 Wn.2d 570, 598-599, 888 P.2d 1105 (1995).

Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial. A number of appellate cases have considered the sufficiency of evidence with respect to premeditation and demonstrate that a wide range of proven facts will support an inference of premeditation. For example, State v. Rehak, 67 Wn.App. 157, 834 P.2d 651 (1992) held that evidence showing the victim was shot three times in the head, two times after he had fallen on the floor, was sufficient to establish premeditation. State v. Massey, 60 Wn.App. 131, 803 P.2d 340 (1990), cert. denied, 499 U.S. 960, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991) held evidence that defendant brought a gun to the murder site supported finding of premeditation. State v. Woldegiorgis, 53 Wn.App. 92, 765 P.2d 920 (1988), review denied, 112 Wn.2d 1012 (1989), held that evidence supported a finding of premeditation where the victim had gone to bed prior to the attack, was stabbed multiple times, had defensive wounds and there was longstanding animosity between the victim and Defendant. State v. Longworth, 52 Wn.App. 453, 761 P.2d 67 (1988), review denied, 112 Wn.2d 1006 (1989), held evidence that a weapon had been procured, and that the victim was stabbed in the back while being held by another and was killed to keep her from reporting a burglary was sufficient to support a finding of premeditation. State v. Gibson, 47 Wn.App. 309, 734 P.2d 32 (1987) held evidence that there was a sufficient lapse of time between beating and strangling the victim was sufficient to support finding of premeditation. State v. Bushey, 46 Wn.App. 579, 731 P.2d 553 (1987) held that evidence that the victim had been strangled, that she had received blunt injuries to her face, and that her hands had been tied was sufficient to support finding of premeditation. State v. Giffing, 45 Wn.App. 369, 725 P.2d 445 (1986) held that evidence the victim was transported some distance to an isolated spot and killed, when the attacker approached her from behind and slit her throat after stabilizing her, supported a

finding of premeditation. State v. Sargent, 40 Wn.App. 340, 698 P.2d 598 (1985) held evidence that victim was struck by two blows to the head, with some interval passing between the blows, while she was lying face down, supported a finding of premeditation.

Gentry, 125 Wn.2d at 598-599.

None of these scenarios are present in Mr. Gaul's case. Instead, there was evidence that Mr. Gaul was very mad at his mother because he believed that she stole \$40,000 from him while he was in jail. Nothing about Mr. Gaul's anger suggested that he was so angry he thought about killing his mother. There was no information that he took any preliminary steps in preparation for killing her. He did not lay in wait or lure her to the home they shared. There was no information that Mr. Gaul even knew she was coming home. Mr. Gaul did not acquire a weapon.

Instead, what the evidence shows, in the light most favorable to the State, is that Mrs. Gaul came home early on the afternoon of January 2, 2008. She had been staying with her daughters in Longview and Ridgefield for a few days because she was afraid of her son. Once she was home, there was a struggle. VIII-A RP at 341. Tufts of her hair were found on the floor and a chair was overturned. VIII-A RP at 341. Within about three hours of Mrs. Gaul returning home, she was found deceased on a hallway floor with a very intoxicated Mr. Gaul lying next to her. The cause of death was blunt force injuries to her head and chest and

strangulation. VIII-B RP at 405. The ligature on the strangulation was something broad and could have been a hand. VIII-B RP at 408. Her nose was fractured and there was significant bruising from behind her hairline to her neck. VIII-B RP at 409-10. There was too much damage to her face to say how many blows had been struck. VIII-B RP at 413. Many of her ribs were fractured, so much so that she would likely not have been able to breathe and would have suffocated. VIII-B RP at 422. The chest injury was more of a compression injury as if Mrs. Gaul had been compressed between two objects or thrown against a wall. VIII-B RP at 424.

This evidence interpreted in the light most favorable to the State suggests that Mr. Gaul acted at some point with the intent to kill his mother. But was there sufficient evidence of deliberation? Mere evidence of the “opportunity to deliberate [a murder] is not sufficient.” State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986). Here the evidence proves only that: the opportunity but not the actual deliberation.

The evidence that Mr. Gaul’s committed premeditated first degree murder is insufficient. His conviction should be reversed.

3. THE TRIAL COURT SHOULD HAVE GRANTED MR. GAUL’S MOTION FOR A MISTRIAL BECAUSE THE PROSECUTOR’S OUTRAGEOUS QUESTION TO DR. HENDRICKSON DEPRIVED MR. GAUL A FAIR TRIAL.

As noted under Issue 1, the prosecutor asked an outrageously inappropriate question of defense expert Dr. Hendrickson. The question was not so much a question. It was really a statement of fact that the prosecutor wanted Dr. Hendrickson to validate. Although Dr. Hendrickson never replied to the prosecutor's question, the question alone told the jury the answer. The prosecutor's statement of fact in the guise of a question inappropriately struck right at the heart of the defense's diminished capacity defense. The damage was done with the question alone. It was an error that could not be undone simply by the trial court telling the jury to, "Disregard the last question." The only appropriate remedy was to grant Mr. Gaul's motion for a mistrial. The trial court erred in refusing to do so. The refusal denied Mr. Gaul a fair trial.

Even though the exchange is provided in full under Issue 1, it is sufficiently outrageous that it bears repeating here.

PROSECUTOR: All right. So – all right. When you evaluated this case for diminished capacity, when you were being asked to look at whether this defendant was able to act intentionally – I mean, if he couldn't act intentionally, he's not guilty; right? Walks out –

DR. HENDRICKSON: I – I can't say –

PROSECUTOR: -- right?

DR. HENDRICKSON: -- that. I don't know that.

PROSECUTOR: That's the finding.

DR. HENDRICKSON: Well, I can't – I don't --

XII-B RP at 1577-78.

Review of a denial of a motion for mistrial is governed under the abuse of discretion standard. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). The test is not whether the remark was deliberate or inadvertent but whether the defendant was denied a fair trial. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (citing State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)).

In determining whether a trial irregularity prejudiced the jury so as to deny the defendant his right to a fair trial, the reviewing court will consider: (1) the seriousness of the irregularity; (2) whether the statement at issue was cumulative evidence; (3) whether the jurors were properly instructed to disregard the remarks of counsel not supported by the evidence; and (4) whether the prejudice was so grievous that nothing short of a new trial could remedy the error. State v. Essex, 57 Wn.App. 411, 415-416, 788 P.2d 589, 592 (1990).

The prosecutor's statement was a serious irregularity. It was made for one purpose only: to tell the jury that if they bought into Mr. Gaul's diminished capacity defense, then Mr. Gaul would walk free. That

statement would likely create great concern for the jurors as there was no evidence presented at trial that anyone other than Mr. Gaul killed Junette Gaul. Had the prosecutor not made the outrageous statement, the jurors could easily have thought that someone with a mental disability who commits a crime would be institutionalized at a psychiatric facility rather than being sent home. The prosecutor's statement assured the jury that Mr. Gaul would be sent home.

Under the second prong, the prosecutor's statement was neither, fortunately, cumulative nor evidence. It was outrageous enough to stand on its own, however, and have a lasting impact on the jurors. And although it was not evidence, it is essentially worse than evidence. It was the prosecutor, a government official, a person generally deemed to be a good guy, who assured the jury that he knew the truth of the matter. He told the jury in no uncertain terms that if you find diminished capacity, Mr. Gaul will go home. The prosecutor's statement was made with the single-minded intent to completely undermine the defense case. If the prosecutor could undermine the defense case with legitimate admissible evidence, that would be fair. But the prosecutor chose to be unfair. The prosecutor should not benefit from his misconduct.

Defense counsel objected to the question. The court sustained the objection and told the jury to "Disregard the last question." But the

problem is not the asking of the question, but the prosecutor telling the jury that a finding of diminished capacity sends Mr. Gaul home.

The prejudice was so grievous that nothing short of a new trial could remedy the error. The bell, once rung, could not simply be unring. The prosecutor knew that. Mr. Gaul's trial was unfair. The trial court abused its discretion when it failed to grant Mr. Gaul's motion for a mistrial.

4. THE TRIAL COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING ATTEMPTED TAMPERING WITH PHYSICAL EVIDENCE.

The second amended information under which Mr. Gaul was tried charged only one means of committing the crime of attempted tampering with physical evidence, i.e., altering physical evidence with the intent to impair its appearance, character, or availability. CP 10; RCW 9A.72.150 and RCW 9A.28.020(1). Yet, the jury instructions allowed the jury to consider another alternative means, i.e., knowingly presenting or offering any false physical evidence. CP 66 (Instruction 28). Reversal is required because the jury was allowed to convict Mr. Gaul on an uncharged alternative means.

a. The State Charged Mr. Gaul With Committing The Crime By Altering Physical Evidence But The Jury Was Allowed To Convict Him For Committing The Crime Under An Alternative State Of Mind.

The State charged Mr. Gaul by a second amended information with a single count of attempting to tamper with physical evidence as follows:

COUNT 06 – ATTEMPTED TAMPERING WITH PHYSICAL EVIDENCE – 9A.72.150(1)(a)/9A.28.020(3)(e)

That he, DAVID FRANCIS GAUL, in the County of Clark, State of Washington, on or about January 13, 2008, with intent to commit the crime of Tampering with Physical Evidence, did an act which was a substantial step toward commission of that crime, to wit: having reason to believe that an official proceeding is pending or about to be instituted and acting without legal right or authority, did attempt to alter physical evidence, with intent to impair its appearance, character, or availability in such pending or prospective official proceeding, contrary to Revised Code of Washington 9A.28.020(1), (3)(c) and Revised Code of Washington 9A.72.150(1) and (2).

CP 10.

RCW 9A.28.020(1) defines criminal attempt as follows:

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.72.150 sets forth the elements of tampering with physical evidence as follows:

(1) A person is guilty of tampering with physical evidence if, having reason to believe that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:

- (a) Destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its appearance, character, or availability in such pending or prospective official proceedings; or
 - (b) Knowingly presents or offers any false physical evidence.
- (2) "Physical evidence" as used in the section includes any article, object, document, record, or other thing of physical substance.

The to-convict instruction and its supporting definition instructions provided in pertinent part:

INSTRUCTION NO. 26

To convict the defendant of the crime of Attempted Tampering with Physical Evidence, as charged in Count VI, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 13th day of January, 2008, the defendant did an act which was a substantial step toward the commission of Tampering with Physical Evidence;
- (2) That the act was done with the intent to commit Tampering with Physical Evidence; and
- (3) That the acts occurred in the State of Washington.

CP 64.

INSTRUCTION NO. 27

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

CP 65.

INSTRUCTION NO. 28

A person commits the crime of Tampering with Physical Evidence when, having reason to believe that an official proceeding is pending or about to be instituted, he alters physical evidence with intent to impair its appearance or knowingly presents or offers any false physical evidence.

CP 66 (Instruction 28).

There are no standardized WPIC instructions for tampering with physical evidence.

“Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed.” State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). RCW 9A.72.150 articulates a single criminal offense: tampering with physical evidence. Subsections (1)(a) and (1)(b) represent alternative means of committing the offense. See Smith, 159 Wn.2d at 784-85 (in construing assault statute, recognizing separate subsections within a statutory section proscribing an offense represent alternative ways to commit the same offense.) Succinctly, to convict Mr. Gaul, the State needed to prove that he attempted to destroy, mutilate, conceal, remove, or alter physical evidence with intent to impair its appearance, character, or availability under (1)(a) or, in the alternative under (1)(b), that he knowingly attempted to present or offer any false physical evidence.

b. It Is Error To Instruct The Jury On Uncharged Alternative Means Of Committing The Offense.

“When a statute provides that a crime may not be committed in alternative ways or by alternative means, the information may charge one

or all of the alternatives, provided the alternatives are not repugnant to each other.” State v. Bray, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988). An accused must be informed of the criminal charges against him, and he cannot be tried for an offense not charged. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); State v. Perez, 130 Wn.App. 505, 507, 123 P.3d 135(2005). An attempt to convict a defendant under an uncharged statutory alternative violates the defendant’s right to notice of the crime charged. State v. Doogan, 82 Wn.App. 185, 188, 917 P.2d 155 (1996).

When an information charges one of several alternative means, it is error to instruct the jury on the uncharged alternatives, regardless of the strength of the evidence presented at trial. Bray, 52 Wn. App. at 34 (citing State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (reversible error to instruct the jury on alternative means of committing rape when only one alternative charged)); accord State v. Williamson, 84 Wn.App. 37, 42, 924 P.2d 960 (1996). Such an error is presumed prejudicial unless it affirmatively appears that the error was harmless. Perez, 130 Wn.App. at 507.

In Mr. Gaul’s case, the error was not harmless. The second amended information only charged Mr. Gaul with tampering by attempting to alter evidence by impairing its appearance, character, or

availability. CP 10. Yet, the jury was instructed that tampering with evidence also included acts in the uncharged alternative of attempting to present or offer false physical evidence. CP 66. The facts in Mr. Gaul's case are the acts prohibited in the uncharged alternative. After having been in custody for 11 days, Mr. Gaul tried to send a letter to his daughters from the Clark County Jail. The letter was intercepted by jail staff and collected as evidence. In the letter, Mr. Gaul directs his daughters to buy two bottles of alcohol, empty out 90% of the contents, wipe any fingerprints from the bottles, place the bottles below a window and near a ladder at his mother's house, and then take pictures of the bottles. Exhibit 82 (Supplemental Designation of Clerk's Papers). Presumably, Mr. Gaul would then offer the pictures, the false physical evidence, to support his theory of the case: that an intruder forced him to drink a large quantity of alcohol before knocking him out and killing his mother. Ex. 82 (Supplemental Designation of Clerk's Papers).

Because the error in instructing on the uncharged alternative means was not charged and was prejudicial, the conviction should be reversed.

5. THE TRIAL COURT VIOLATED DOUBLE JEOPARDY WHEN IT IMPOSED SENTENCES ON BOTH

FIRST DEGREE INTENTIONAL MURDER AND SECOND DEGREE FELONY MURDER.

Mr. Gaul was convicted of both first degree intentional murder, count one, and second degree felony murder, count three, both relating to the same act, causing the death of Junette Gaul. CP 8-10, 73, 81. The State acknowledged at sentencing the crimes were the same act. The prosecutor characterized the two convictions as “same criminal conduct.” While the trial court did not explicitly find that the acts were same criminal conduct,⁵ the court did abide by the State’s request that Mr. Gaul be sentenced on both counts. The court imposed 300 months on count one and 220 months on count three to run concurrent. But the court erred in doing so because two sentences for the same offense charged as separate counts runs afoul of double jeopardy prohibitions. The sentence on count three should be vacated.

The double jeopardy provisions of Article I § 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution prohibit multiple punishments for the same offense imposed in the same proceedings. State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). Although Mr. Gaul did not raise the issue at sentencing, his

⁵ The court did not say anything about same criminal conduct or specify on the judgment and sentence that the crimes were same criminal conduct. CP 163.

double jeopardy claim is a manifest error affecting a constitutional right. State v. Brewer, 148 Wn.App. 666, 673, 205 P.3d 900, 903 (2009). Interpreting and applying the double jeopardy clause is a question of law, subject to de novo review. State v. Knight, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008).

In Womac, the defendant was charged in three separate counts and convicted of three crimes: homicide by abuse, felony murder based on criminal mistreatment, and first degree assault. State v. Womac, 160 Wn.2d 643, 647, 160 P.3d 40 (2007). All three of the charges related to a single incident with a single victim, Womac's young son. Id. The trial court entered judgment on all three convictions, but imposed sentence only on the homicide by abuse. Id. On appeal, the court of appeals remanded the case for resentencing on the homicide by abuse and conditionally dismissed the felony murder and assault convictions so long as the homicide by abuse conviction withstood further appeal. Id.

The State Supreme Court took matters further. It vacated the felony murder and assault convictions on double jeopardy grounds holding that Womac had in actuality committed a single offense against a single victim yet was held accountable for three crimes in violation of the double jeopardy prohibition against multiple punishments for a single offense. Womac, 160 Wn.2d at 658-60. In doing so, the court determined that

double jeopardy was violated even though Womac received no sentence on the felony murder and assault convictions. The court noted that a conviction, even without imposition of sentence, carries an unmistakable onus which has a punitive effect. In sum, the court held:

As this court noted in Calle,⁶ “[i]t is important to distinguish between charges and convictions - the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, even though convictions may not stand for all offenses where double jeopardy protections are violated.”

(Citations omitted). Womac, 160 Wn.2d at 657-58.

The facts of Mr. Gaul’s case are remarkably similar. The State filed multiple charges for the same death: premeditated first degree murder, second degree intentional murder, and second degree felony murder based on a second degree assault. CP 8-9. The jury returned guilty verdicts on the first degree murder and the felony murder. CP 73, 74. Like Womac, the trial court entered convictions for both counts. But here the trial court also took it one step further by actually imposing a sentence on both counts. Under Womac, the lesser charge, the felony murder, must be vacated. Womac, 160 Wn.2d at 660 (remedy for double jeopardy violation is to vacate lesser offense (citing State v. Weber, 159 Wn.2d 252, 265-66, 149 P.3d 646 (2006))).

⁶ State v. Calle, 125 Wn.2d 769, 777 n. 3, 888 P.2d 155 (1995)

6. IT WAS ERROR FOR THE TRIAL COURT TO CONSIDER THE JURY DELIBERATIONS IN DECIDING THE POST-TRIAL MOTION ON THE DEATH PENALTY.

Post-trial, defense counsel made a motion for a new trial based, in part, on the death penalty discussion during voir dire. The court responded by summoning the twelve jurors for a hearing to determine (1) what each juror had heard, and (2) how what they heard impacted their deliberation. Defense counsel participated in the hearing and asked the jurors questions. Defense counsel did not object to the format of the hearing. It was only after the hearing, when defense counsel was arguing his mistrial motion, that he challenged the format. Defense counsel argued that the court could not consider how the death penalty knowledge impacted the deliberation. In denying the mistrial motion, the trial court did rely on how the knowledge impacted the deliberation.

Trial counsel was correct in objecting - albeit very late - to the trial court's considering what happened in deliberation. It was error for the trial court. It was also error for defense counsel to fail to make this challenge before the hearing with the 12 jurors. To the end that defense counsel failed to challenge the hearing before it happened, defense counsel was ineffective. The standard for ineffective assistance of counsel is spelled out under Issue I. Under that standard, counsel representation fell below that of a reasonable attorney. He should have researched the case

law before, rather than after, the hearing. There is certainly no tactical reason to be unaware of case law. And Mr. Gaul was prejudiced by his attorney's failure to do his job. Had he done so, the jurors likely would not have been asked about the impact of the death penalty discussion on their deliberations, and the outcome of the motion for a new trial would have presumably been in Mr. Gaul's favor.

The following is a long quote from State v. Linton explaining that the jury deliberation process is not open for inquiry.

Neither parties nor judges may inquire into the internal processes through which the jury reaches its verdict. See Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 204, 75 P.3d 944 (2003).

The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself.

Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967); see also State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) ("The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict." (quoting State v. Crowell, 92 Wn.2d 143, 146, 594 P.2d 905 (1979))). Considerations that "inhere" in the jury's verdict may not be considered by the court or the parties.

Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn.2d 747, 768-70, 818 P.2d 1337 (1991); State v. Marks, 90 Wn.App. 980, 986, 955 P.2d 406 (1998) ("Matters that inhere in the verdict are beyond inquiry."). The trial judge's inquiry into the verdict is

limited to polling members of the jury to ensure that the verdict read is the actual verdict of each individual. *See* 13 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4614, at 320-21 (2004); see also WASHINGTON PRACTICE § 4617, at 324 (“Public policy forbids inquiring into the privacy of the jury’s deliberations.”). Furthermore, “ ‘[Q]uestions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict.’ ” Ng, 110 Wn.2d at 43, 750 P.2d 632 (quoting State v. Miller, 40 Wn.App. 483, 489, 698 P.2d 1123 (1985)). “[J]urors’ post-verdict statements regarding matters which inhere in the verdict cannot be used to attack the jury’s verdict.” Ng, 110 Wn.2d at 44, 750 P.2d 632.

State v. Linton, 156 Wn.2d 777, 787-788, 132 P.3d 127 (2006).

As the above makes clear, neither the trial court, the prosecutor, or defense counsel had any business in inquiring of the jury how they reached their verdict.

The case should be remanded for the trial court to reconsider the motion for a mistrial without any consideration given to the jury’s deliberation.

7. CUMULATIVE ERROR VIOLATED MR. GAUL’S CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984); U.S. Const. Amend. V and XIV; Wash. Const. art 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible

error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even when some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denied the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

As discussed above, an accumulation of errors resulted in an unfair trial. These errors include: (1) the trial court telling the jury that this was not a death penalty case; (2) defense counsel's failure to move to strike the jury after the court told the jury this was not a death penalty case; (3) the trial court's refusal to grant Mr. Gaul a new trial because of the voir dire death penalty discussion; (4) the trial court's inordinate and inappropriate emphasis on penalty throughout the trial; (5) defense counsel's failure to challenge the jury being told that a conviction for first degree murder would give Mr. Gaul the stiffest penalty; (6) that the evidence was not sufficient to prove first degree premeditated murder; (7) the prosecutorial misconduct committed when the prosecutor told the jury that Mr. Gaul would just "walk out" if they found his capacity to form intent was diminished; (8) the trial court refusing to grant a mistrial based on the taint caused by the prosecutor's ill-intentioned "walk out" statement; (9) the jury being instructed on an uncharged alternative to tampering with

physical evidence; (11) the questioning of the jurors about the impact of the death penalty discussion with the court during its deliberation; (12) the trial court's consideration of that testimony when it denied Mr. Gaul's motion for a mistrial; and finally (13) defense counsel's ineffectiveness for failing to make a timely objection to, and participating in, the questioning of the jurors about their deliberation.

E. CONCLUSION

First and foremost, Mr. Gaul asks this court to reverse the premeditated first degree murder conviction for insufficient evidence. Second, and in the alternative, Mr. Gaul requests that his convictions be reversed and his case remanded because he did not receive effective assistance of counsel at trial and because of the cumulative error at trial. Third, and in the alternative, Mr. Gaul asks that his case be remanded to the trial court for reconsideration of his motion to dismiss because of the death penalty conversation. At that hearing, the trial court should not consider anything said by the jurors about their deliberation process. Fourth, and in the alternative, this court should vacate Mr. Gaul's second degree felony murder conviction because it violates double jeopardy and reverse his attempted tampering with physical evidence conviction because of the instructional error.

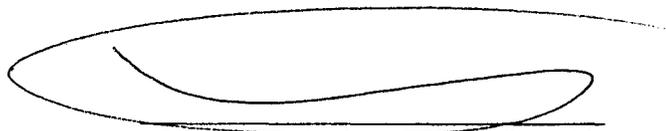
Respectfully submitted this 19th day of May 2010.



LISA E. TABBUT/WSBA #21344
Attorney for David Gaul

CERTIFICATE OF MAILING

I certify that on May 19, 2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Michael Kinnie, Clark County Prosecutor's Office, P.O. Box 5000, Vancouver, WA, 98666-5000; and (2) David Gaul, DOC# 332186, Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362.



LISA E. TABBUT, WSBA #21344

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