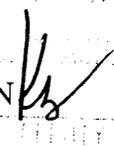


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STATE OF WASHINGTON



NO. 39610-6-II

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

STATE OF WASHINGTON, Respondent

v.

DAVID FRANCIS GAUL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROGER A. BENNETT
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-00026-5

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant. Where additional information is needed, it will be supplied in the argument sections.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court, by telling one of the prospective jurors that this was not a death penalty case, violated the defendant's rights. Coupled with that is a claim of defense counsel's ineffective assistance in not only failing to move to strike the jury, but also in participating in a post trial motion in which jurors were questioned concerning whether or not this had any impact on deliberations.

The issues were spelled out by the court in the post trial motion. As the record demonstrates there is not a lot of information that was garnered by anyone, nor was it clear that this was a question being asked specifically. The discussion among court and counsel concerning this at the time of the post trial motions, is as follows:

THE COURT: I'll commence with asking questions. I'll then allow either attorney to ask questions. I'll start with the defense because they're the moving party.

Here's the record we have of the proceedings. I – I don't know if you'll be able to hear it or not. We'll find out here in a minute. And this is at 11:15 on – 11:15 a.m. on March 31st, 2009.

That – the jury who asked about the death penalty was way in the back, it was a lady, who did not get on the jury, I know that.

MR. GOLIK (Deputy Prosecutor): I thought it was a male, I thought it was the high school civics teacher in the back.

THE COURT: No, no.

MR. WALKER (Defense counsel): It was a woman back there –

THE COURT: It was a woman.

MR. WALKER: I – I was – And, Judge, I thought a couple people had referenced it earlier but not as strongly, because she just wouldn't let go. That was –

THE COURT: I – I never heard – I don't recall ever even having the issue come up, because I – when it did, I was – I took note of it mentally. So I know it was a woman in the back, a dark-haired woman who did not get on the jury.

You won't be able to hear her 'cause she didn't have a microphone anywhere near her. You'll just hear the colloquy that the lawyers and I had. Hopefully. Let's find out.

(DVD played; not audible on this record.)

THE COURT: Well, you can't hear at all. I – I assume that if somebody had this right up in front of them they would be able to hear it.

Now, let me –let me tell you what I can hear. You’re not gonna be able to hear it. Mr. Walker is up, he’s nowhere near a microphone and he’s talking to the people in the back.

I’ve got it cranked up all the way. (And there is nothing at all this transcriber can hear.)

Mr. Walker is saying:

“It’s something to keep in mind, but we’re not actually supposed to be considering what may happen.”

I said:

“I wasn’t able to quite hear. Was she talking about capital punishment?”

Mr. Walker says:

“No.”

Mr. Golik says:

“I think she might have been talking about it.”

I ask the juror:

“Do you have a concern that this might be a capital case?”

Can’t hear what the juror said, but then I said:

“You would if it was.”

That’s it. Sorry, that’s – that’s all you can hear on this.

MR. GOLIK: So, Your Honor, are you saying that the record is that a juror was asking about, you know, something to do with whether this was a capital case and Mr. Walker’s response was something along the lines of,

You should only consider that in that you should be careful? How did that go?

THE COURT: I really couldn't tell exactly what he was saying, he – the – I can't tell. My recollection was that he – he actually fended off the question rather skillfully and sort of, We don't – we're not gonna talk about that, or, You don't have to be concerned about that.

And then I said, Was she talking about whether it's a capital case? I think Mr. Walker said, No, I don't think so, and then you said, I think she was, and then I asked whether that's what she was asking. Can't hear what she said. But I think she said yes.

And I said, again, If it was, we would. Or something like, Can you tell me if – is it a capital case? If it was, we would.

Okay. Sorry, the record isn't very good, but –

MR. GOLIK: So that – so that's it, then, for your comment, is just, If it was, we would.

THE COURT: If it was, we would.

MR. GOLIK: So you didn't – sounds like you didn't even specifically tell the juror that this isn't a capital case –

THE COURT: Well, the inference is that since we're not telling her it is, that it isn't, so clearly there's an inference there.

-(RP Vol. XV – XVIII, 2093, L 23 – 2097, L15)

A couple of matters come to mind in reviewing this. First of all, it's obvious from the comments by the court and counsel that the woman who asked the question from way in the back of the courtroom never got onto the jury so any tainting would have only occurred at the time of asking some type of question and some type of response was given by the court. In that regard, then, the trial court is indicating that there's some issue as to whether or not it was even responded to or that it was taken as a question concerning capital punishment. Even the attorneys, in part of the long quote above, were unclear as to what the person was asking, who responded to what, or any of the other matters that came to mind. But certainly, after the post trial motions there was no indication that it had any impact whatsoever on the jury or the jury deliberations. This is brought out in more detail when the court ultimately makes its determination and denies the defense motion concerning this issue. That reads as follows:

THE COURT: ... On the issue of advice to the jury of the nature of the penalty. We have a very poor record of this, and I did try to listen to the record and state into the microphone what I was barely hearing over the – the player. And so that's going to be a challenge, I guess, if the matter goes up on appeal as to what exactly was said, but, you know, it was pretty – actually, one of the jurors, I think, had it just about right, and that is that a juror in the back said something about, I can't sit on a death penalty case, or, I don't want to be on a death penalty case.

And I couldn't quite hear what she said. And Mr. Walker said something about, Well, you're not supposed to consider punishment. And then I asked, "Did she ask about capital punishment?" And – and Mr. Golik said, "I think she did."

And then my response to the very best of my recollections was, "If it was, we'd tell you." Six words, "If it was, we would –" seven words, "—we would tell you. And that's it.

-(RP 2197, L13 – 2198, L8)

Evidence is sufficient to 'support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (*quoting State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)), *cert. denied*, 127 S. Ct. 440 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. Luther, 157 Wn.2d at 77-78 (*citing State v. Alvarez*, 105 Wn. App. 215, 223, 19 P.3d 485 (2001)).

In considering the sufficiency of evidence, the Appellate Court gives equal weight to circumstantial and direct evidence. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the

persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (*citing* State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). It does not substitute its judgment for that of the jury on factual issues. State v. Israel, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002) (*citing* State v. Farmer, 116 Wn.2d 414, 425, 805 P.2d 200, 812 P.2d 858 (1991)), *review denied*, 149 Wn.2d 1013 (2003). "In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case." State v. Jones, 93 Wn. App. 166, 176, 968 P.2d 888 (1998), *review denied*, 138 Wn.2d 1003 (1999).

In Washington, the question of the sentence to be imposed is never a proper issue for the jury's deliberation, except in capital cases. State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001). The defendant argues that the jury should not have been told that this was not a death penalty case, citing Townsend, 142 Wn.2d at 840. In Townsend our Supreme Court ruled that a jury is not to be informed that the case at issue is not a death penalty case. The State notes, however, that the jury was instructed, "The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful." (Court's Instructions to the Jury, CP 103) It is presumed the jury followed

this instruction. State v. Pastrana, 94 Wn. App. 463, 480, 972 P.2d 557, review denied, 138 Wn.2d 1007, 984 P.2d 1035 (1999). Therefore the error was harmless. State v. Murphy, 86 Wn. App. 667, 671-72, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002, 953 P.2d 95 (1998).

The federal and state constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail in an ineffective assistance of counsel claim, the defendant must show that (1) his trial counsel's performance was deficient and (2) this deficiency prejudiced him. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). To demonstrate prejudice, he must show that his trial counsel's performance was so inadequate that he was deprived of his right to counsel and that there is a reasonable probability that the trial result would have been different, thereby undermining our confidence in the outcome. Strickland, 466 U.S. at 694; In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If the defendant fails to establish either deficient performance or prejudice, the Appellate Court needs not address the other element because an

ineffective assistance of counsel claim requires proof of both elements. In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

This test was applied in State v. Townsend, 142 Wn.2d 838, 848-849, 15 P.3d 145 (2001):

The first prong of the Strickland test is not satisfied, however, if counsel's performance is the result of legitimate trial strategies or tactics. State v. McDonald, 138 Wn.2d 680, 697, 981 P.2d 443 (1999); McFarland, 127 Wn.2d at 336. There was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner. Petitioner has carried his burden of establishing deficient performance. We next consider the second prong of the Strickland test: whether the error was prejudicial.

Under the second prong, a defendant must demonstrate that the deficient performance prejudiced the defense such that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting Strickland, 466 U.S. at 694). In Murphy, the court stated:

We are, however, persuaded that the erroneous instruction did not prejudicially affect the jury's deliberations in this case, only because the jury acquitted Murphy on the charge of first degree murder. The danger presented by the instruction was its tendency to influence deliberations on the first degree murder charge.

Murphy, 86 Wn. App. at 672-73. The petitioner reasons that since, unlike in Murphy, he was convicted of the greater of the two charges, prejudice is established.

Counsel's deficient performance is the failure to object to erroneous oral instructions to the jury. Under Washington

law, when assessing the impact of an instructional error, reversal is automatic unless the error is "is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970) (*quoting State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)); *accord State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997).

The trial court made it abundantly clear that there was a very poor record and the review of the areas in question don't really help satisfy or resolve any of these potential issues. Clearly, it is a question of harmless error. There is absolutely no showing in any way that this impacted or had an effect on this jury. Even the fact of the trial court holding the unusual review of the actual jurors in a post trial motion, which clearly would be something to impeach a verdict with, didn't demonstrate that this had any impact on their deliberations. The State further submits that there's been no showing of ineffective assistance of counsel in this particular area. There has been no ability to show that any harm was caused to the defendant or that he was put in a position where he could not raise an adequate defense. Also, the extensive review of transcript put forth here by the State would indicate that it wasn't really clearly understood by anyone in the courtroom at the time that it occurred that this was truly a question concerning capital punishment, or that anyone answered a

potential question. The woman who asked it didn't make it onto the jury panel and there was nothing that indicated that the jury panel was swayed in any way or prevented from performing its duties and following the jury's instructions given to them by the court.

This also could be reviewed as a trial irregularity. The Appellate Court may review an alleged error raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). To raise such an issue on appeal, the defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). This showing of actual prejudice makes the error “manifest,” allowing appellate review. Kirkman, 159 Wn.2d at 927.

Because the trial court is in the best position to determine if an irregularity at trial caused prejudice, the Appellate Court reviews the decision to grant or to deny a mistrial for an abuse of discretion. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). An irregularity at trial is not prejudicial unless there is a reasonable probability that the trial's outcome would have differed if the error had not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). In determining the effect of an irregularity at trial, the Appeal Court examines (1) its

seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. State v. Bourgeois, 133 Wn.2d 389, 409, 945 P.2d 1120 (1997). The Appellate Court must decide whether the record reveals a substantial likelihood that the trial irregularity affected the jury verdict, thereby denying the defendant a fair trial. State v. Hicks, 41 Wn. App. 303, 313, 704 P.2d 1206 (1985) (*citing State v. Davenport*, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984)). A “strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994).

The State submits that there has been no showing here by the defense of ineffective assistance of counsel nor any issue that would cause concern that the trial court had violated the defendant’s rights.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defense is again ineffective assistance of counsel because he failed to object to characterizations of some of the potential murder charges and that there was insufficient evidence to prove First Degree Intentional Murder. A

copy of the trial court's jury instructions (CP 103) are attached hereto and by this reference incorporated herein. Discussion of the second assignment of error is the claim that in the jury instructions there was no differentiation made between lesser offenses. The specific claim appears to be Instruction No. 13 and the fact that the language was not proper as the defense wanted it to be characterized. On page 24 of their brief the defendant indicates, "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 defendant then claims that this was some type of error that has impacted the jury. He gives no case law concerning this specific area but just claims that it is prejudice and defense counsel should have picked it up.

An instruction on a lesser included offense is warranted when (1) each of the elements of the lesser offense are a necessary element of the offense charged and (2) the evidence in the case supports an inference that the lesser crime was committed. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (citing State v. Workman, 90 Wn.2d 443,

447-48, 584 P.2d 382 (1978)) . The first prong is the legal prong and the second the factual prong.

Similarly, an inferior degree offense instruction is appropriate when: (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. Fernandez-Medina, 141 Wn.2d at 454 (*citing* State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). The first two requirements are the legal prongs and the last the factual prong.

Even if there is a claim of impact on the defendant, it has not been shown. Nor has there been any showing that this would have affected the outcome of the trial and prevented him from arguing his idea of the case or receiving a fair trial. In this record there is nothing to substantiate that there was any misconduct or ineffectiveness as it relates to these jury instructions.

The other part of this was a claim that there was no evidence to support a concept of premeditated murder.

As the Appellate Court has stated, "[i]f the evidence indicates that the defendant is a murderer or killer, it is not prejudicial to so designate

him." State v. Buttry, 199 Wash. 228, 250, 90 P.2d 1026 (1939); see also State v. Hunter, 35 Wn. App. 708, 715, 669 P.2d 489 (determining that prosecutor's use of the word "pimp" was reasonable inference from evidence), *review denied*, 100 Wn.2d 1030 (1983).

Premeditation is the deliberate formation of and reflection on the intent to take a human life and involves the mental process of thinking beforehand, deliberating on, or weighing the contemplated act; for a period of time, however short. State v Allen, 159 Wn.2d 1, 7-8, 147 P.3d 581 (2006). Premeditation must involve more than a moment in time. RCW 9A.32.020(1); Allen, 159 Wn.2d at 8. The State can prove premeditation by circumstantial evidence where the inferences argued are reasonable and the evidence supporting them is substantial. Clark, 143 Wn.2d at 769. Examples of circumstances supporting a finding of premeditation include motive, prior threats, multiple wounds inflicted or multiple shots, striking the victim from behind, assault with multiple means or a weapon not readily available, and the planned presence of a weapon at the scene. *See Allen*, 159 Wn.2d at 8; Clark, 143 Wn.2d at 769; State v. Pirtle, 127 Wn.2d 628, 644-45, 904 P.2d 245 (1995); State v. Hoffman, 116 Wn.2d 51, 83, 804 P.2d 577 (1991). "[T]he jury is presumed to follow the court's instructions." State v. Pastrana, 94 Wn.

App. 463, 480, 972 P.2d 557 (1999) (*citing* State v. Guizzotti, 60 Wn.

App. 289, 296, 803 P.2d 808 (1991)).

State v Elmi, 138 Wn. App. 306, 313-314, 156 P.3d 281 (2007),

discusses many of the concepts found in our case:

Elmi first contends that his attempted murder conviction is not supported by sufficient evidence. Evidence is sufficient if, after reviewing it 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. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A sufficiency claim admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. Salinas, 119 Wn.2d at 201. Intent may be inferred from conduct, State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004), and this court must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The crime of attempted murder requires specific intent to cause the death of another person. State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). Elmi asserts there was insufficient evidence for the jury to find that he intended to kill Aden. He argues that “[w]ithout evidence of some unusually serious prior altercation or a threat to kill, [there] was insufficient evidence of intent to kill [Aden.]” Br. of Appellant at 17.

But it is not necessary for the State to show that Elmi verbalized or acted out his intent beforehand. *See* State v. Gallo, 20 Wn. App. 717, 729, 582 P.2d 558 (1978). Rather, intent to kill may be inferred from all the circumstances surrounding the event. Gallo, 20 Wn. App. at 729. Proof that a defendant fired a weapon at a victim is a sufficient basis for finding an intent to kill. State v. Hoffman, 116 Wn.2d 51, 84-85, 804 P.2d 577 (1991) (“Proof that a defendant fired a weapon at a victim is, of course, sufficient

to justify a finding of intent to kill.”). Viewed in a light most favorable to the State, the location and number of the bullet holes, the timing of the shots in relation to Aden's appearance at the window, the proximity of the shell casings to the living room window, and the heated argument earlier in the day strongly support an inference of intent to kill.

Elmi also argues that there was insufficient evidence of premeditation. This argument is meritless. Premeditation is “the deliberate formation of and reflection upon the intent to take a human life.” State v. Robtoy, 98 Wn.2d 30, 43, 653 P.2d 284 (1982). It involves some degree of thinking beforehand and “weighing or reasoning for a period of time, however short.” State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987) (*quoting State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982)). While premeditation cannot be inferred from intent to kill, State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984), it can be inferred from circumstantial evidence, including evidence of motive, procurement of a weapon, stealth, and the method of killing. State v. Gentry, 125 Wn.2d 570, 598-99, 888 P.2d 1105 (1995); State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). In this case, the protection order, the heated argument, the transportation of a weapon to the scene, the evidence of people attempting to restrain the shooter, and the number of shots provide sufficient evidence for a rational trier of fact to find premeditation beyond a reasonable doubt.

The evidence in this case that the jury had the opportunity to hear demonstrated an intense hatred by the defendant towards the victim. He felt that a large sum of money was taken from him by the victim and that this was causing him to become extremely upset about the money situation.

QUESTION: Okay. And what was going on on the day that you saw him?

ANSWER: Well, we went for a drive, and I was talking to him about, you know, maybe going down to the beach house or getting a place so Jeanette can come back home.

That didn't go over very well. And we just drove around and talked, did our talking, and then we went out to breakfast and then I took him back to Jeanette's house.

QUESTION: Okay. Were you – were you aware of a situation where – or did the defendant tell you about a situation where he thought that his family members had taken money from him?

ANSWER: Yes.

QUESTION: Okay. And how – how did he make you aware of that, how did he tell you about that?

ANSWER: He told me.

QUESTION: All right.

ANSWER: He told me that. He – he was down \$100,000 or something to that effect.

QUESTION: Okay. And was that when you went out to breakfast with him or was that in a phone conversation?

ANSWER: No – well, both.

QUESTION: Okay.

ANSWER: We did have a discussion in the car when we were driving around about that also.

QUESTION: All right. So when you went for the drive with him and – and went to breakfast, he was talking about that – that perceived theft of money from him?

ANSWER: (No audible response).

QUESTION: Did he – did he indicate how that made him felt – how that made him feel?

ANSWER: Yeah.

QUESTION: What'd he say?

ANSWER: Well, I don't know the exact words, but he – he made it feel like (sic) he was robbed by his family, you know, betrayed.

QUESTION: Okay. Now, is that something that he just kinda said in passing or is that something that he talked about quite a bit with you?

ANSWER: He – he mentioned it several times.

QUESTION: Okay. And what – what was his – what was his demeanor like when he would talk about that?

ANSWER: Agitated, upset and angry.

QUESTION: Okay. And did he say who in particular had taken money?

ANSWER: Jeanette and one of his sisters.

QUESTION: Okay. You don't know her name?

ANSWER: Well, I'm rusty in that area.

QUESTION: Okay.

THE COURT: Would you speak up a little bit louder, ma'am.

THE WITNESS: Okay.

BY MR. GOLIK: (Continuing)

QUESTION: All right, so he – he was saying that his mother, Jeanette, and one of his sisters had taken money?

ANSWER: Yes.

QUESTION: Did he say how much?

ANSWER: 100,000 is what's stickin' in my head.

QUESTION: Okay. Did he say how they took the money?

ANSWER: Through the sale of the house.

QUESTION: Okay.

ANSWER: That –

QUESTION: All right.

ANSWER: - he should have gotten more.

QUESTION: All right. All right, let – are you aware of the date that he got out of jail?

ANSWER: Yes.

QUESTION: Okay. And then you know the date that this actual incident happened on – on January 2nd, right?

ANSWER: Correct.

QUESTION: Okay. So can you estimate how many days before January 2nd you went out to breakfast with the defendant?

ANSWER: I would say three –

QUESTION: Okay.

ANSWER: -- to four days.

QUESTION: Three or four days before?

ANSWER: Correct.

-(RP 285, L14 – 288, L18)

The trial court also makes mention of the information that the jury heard when it ruled post trial on the premeditation issue and sufficiency of the evidence to support it. As the trial court indicates:

I know that we have to take all reasonable inferences in favor of the State, the nonmoving party. Factors that are apparent in this case, well, the parties knew each other, so this wasn't a chance meeting on the street as in the Bingham case, where people had no animosity whatsoever toward each other, just no fathomable reason why one person would kill another. Here they knew each other. So there's something going on between them.

Well, we know what that is, it's anger. Among other things, the defendant expressed extreme anger toward his mother and – and also toward his niece based upon what he felt was taking advantage of him while he was in jail and stealing his money, essentially.

The jury could concede that – could construe that as an irrational belief, but they could also determine that this animosity rather than being the product of diminished capacity was the product of diminished inhibitions.

The nature and extent of the beating, there was evidence of strangulation, it was disputed, but I have to make all reasonable inferences in favor of the State. There was

evidence of a beating of the victim's head and face severely. There was evidence of crushing of the victim's chest. Three separate, although related, types or mechanisms of injury. A jury could conclude that this went far, far beyond just a momentary loss of inhibition or a striking out at someone because you're mad at them. It was – the jury could consider – the jury could believe that it was systematic, although drunken, and from that, given the other factors, including the anger and the monetary belief of theft, a jury could reasonably believe beyond a reasonable doubt that some degree of premeditation, even for a moment in time, had occurred.

-(RP 2196, L1 – 2197, L12)

The State submits that there was adequate information here to allow the question of premeditated first degree murder to go to the jury.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error is a claim of prosecutorial misconduct. Specifically, during cross-examination of a defense expert, the Deputy Prosecutor referred to the fact of diminished capacity allowing the person to “walk out” if they found his capacity to form intent was diminished. At the time an object was made and the objection was sustained and further the jury was told to disregard. (RP 1578 – 1579). The Appellate Court has stated on other occasions, a case will not be reversed for improper argument by counsel unless such error is prejudicial to the accused and only those errors which may have affected the outcome

of the trial are prejudicial. State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial. State v. Wheeler, 95 Wn.2d 799, 807, 631 P.2d 376 (1981); State v. Music, 79 Wn.2d 699, 489 P.2d 159 (1971), vacated, 408 U.S. 940 (1972); State v. Martin, 73 Wn.2d 616, 440 P.2d 429 (1968), cert. denied, 393 U.S. 1081 (1969).

This matter was again raised later with the trial court as a motion for a mistrial brought by the defense because of this questioning. The trial court denied the motion and responded as follows:

THE COURT: All right. The – the questioning related to other cases and where the witness had testified that a person had diminished capacity and the question related to the result if a jury found there to be – I've got to make this clear. We're talking about diminished capacity. Nobody has testified that he was incapable of forming intent. Is that right? They said his capacity –

MR. WALKER (Defense counsel): No, I mean –

THE COURT: -- to do so was –

MR. WALKER: Right.

THE COURT: -- diminished.

MR. WALKER: Well --

MR. GOLIK (Deputy Prosecutor): Right.

MR. WALKER: Right, Judge, that's correct.

THE COURT: And the jury's question isn't was his capacity diminished, the jury's question is did he intend, did he form intent, did he premeditate, which they certainly can find even in the presence of diminished capacity to do so. They could find that he, in fact, did intend based on other conduct, other acts, other evidence.

But, again, the questioning was whether or not -- something about, well, these other cases that if the jury found lack of intent, let's say, defendant would have walked or -- or been released or been acquitted or --.

And there was an objection and I sustained it. It was a -- a short, very limited inquiry. I sustained the objection. I didn't see any reaction by the jury. Of course, they never do, they're -- they're stone faced.

And my assessment of that situation is that by sustaining the objection, which never was answered, by the way, we eliminated the need for a mistrial, we eliminated any prejudicial effect of the question, the unanswered question.

I agree it's an improper question, it would be improper testimony, it's an improper argument. But I deny your motion for mistrial.

-(RP 1696, L15 -- 1698, L5)

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (*citing* State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. Carver, 122 Wn. App. at 306 (*quoting* Dhaliwal, 150 Wn.2d at 578). The defendant bears the burden of establishing both the impropriety and the prejudicial effect of the prosecutor's comments. State v. Perkins, 97 Wn. App. 453, 457, 983 P.2d 1177 (1999) (*quoting* State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995)), *review denied*, 140 Wn.2d 1006 (2000).

Because the defendant objected to the statement, the Appellate Court "will examine whether there is a substantial likelihood that those comments affected the jury's verdict." State v. Barrow, 60 Wn. App. 869, 877, 809 P.2d 209, *review denied*, 118 Wn.2d 1007, 822 P.2d 288 (1991). "Their prejudicial or inflammatory effect must be viewed in context with the earlier evidence and the circumstances of the trial in which they were made." Barrow, 60 Wn. App. at 877 (*quoting* State v. Green, 71 Wn.2d 372, 381 428 P.2d 540 (1967)). Applying this standard here, the State submits the defendant has failed to show that there is a substantial

likelihood that these comments affected the verdict or that the remarks would have created such a prejudicial or inflammatory effect in the context of the evidence presented as to deprive him of a fair trial.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error raised by the defendant is a claim of instructional error dealing with attempted tampering with physical evidence.

The State submits that there is no error in the instruction provided. This was an attempt to commit a crime and therefore the rules about attempt are properly placed before the jury and the definitions of the type of activity that would lead to tampering with physical evidence is also demonstrated in the instructions. (CP 103).

Generally, an attempt conviction does not rely upon the ultimate harm achieved or whether the crime was actually committed. Rather, the crime of attempt relies upon the defendant's bad intent to commit the crime and the fact that the defendant would have committed the crime had the facts been as she or he perceived them to be. State v. Wojtyna, 70 Wn. App. 689, 696-97, 855 P.2d 315 (1993). In order to be found guilty of an attempt to commit a crime, the defendant must take a substantial step toward commission of that crime. RCW 9A.28.020(1). A substantial step

is conduct “strongly corroborative of the actor's criminal purpose.” State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995). “Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime.” State v. Price, 103 Wn. App. 845, 852, 14 P.3d 841 (2000).

“Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.” State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim that evidence is insufficient “‘admits the truth of the State's evidence’ and all reasonable inferences.” State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007) (*quoting State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). The Court views both circumstantial and direct evidence as equally reliable and we “defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence.” Thomas, 150 Wn.2d at 874-75.

“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.28.020(1). The trier of fact may infer the intent to commit a crime “from all the facts and circumstances.” State v Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832

(1999). “A ‘substantial step’ is conduct strongly corroborative of the actor's criminal purpose.” In re Pers. Restraint of Borrero, 161 Wn.2d 532, 539, 167 P.3d 1106 (2007) (*quoting* State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)), *cert. denied* ___ U.S. ___, 128 S. Ct. 1098, 169 L. Ed. 2d 832 (2008).

The State submits that there was no instructional error demonstrated in this record.

VI. RESPONSE TO ASSIGNMENT OF ERROR NO. 5

The fifth assignment of error is a claim that the trial court violated double jeopardy when it sentenced Mr. Gaul to both First Degree Intentional Murder and Second Degree Felony Murder.

It was noted that at the time of sentencing the State had asked the court to find the convictions for First Degree Murder and Second Degree Felony Murder to be the same criminal conduct, but to impose sentence on both charges. (RP 2207-2208). The State agrees with the defense argument concerning double jeopardy that the rule is that both convictions cannot stand. The remedy in this situation is to dismiss the lesser of the two and to continue the conviction on the greater. The State agrees that this matter needs to be adjusted by the trial court. It is unclear as to whether or not this needs to be an actual resentencing or can just be done with

modification of the paperwork. State v. Hughes, 166 Wn.2d 675, 212 P.3d 558 (2009).

VII. RESPONSE TO ASSIGNMENT OF ERROR NO. 6

The sixth assignment of error brought by the defendant is a claim of cumulative error denying him a fair trial.

A defendant may be entitled to a new trial when errors cumulatively produced at trial were fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified by, 123 Wn.2d 737, 870 P.2d 964 (1994) (*citing* Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983)). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332. The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

The State submits that there has been no showing on the part of the defendant in this case of cumulative error that deprived him of a fair trial.

VIII. CONCLUSION

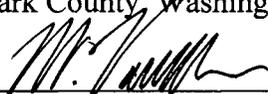
The State agrees that the double jeopardy issue needs to be clarified, but that the defendant received a fair trial and all areas of the trial and trial court's decision should be affirmed.

DATED this 22 day of July, 2010.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:

 27145 For:
MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

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Original with Verdict Forms

FILED

APR 10 2009
10:26 am
Sherry W. Parker, Clerk, Clark Co.
Heather Hunt
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

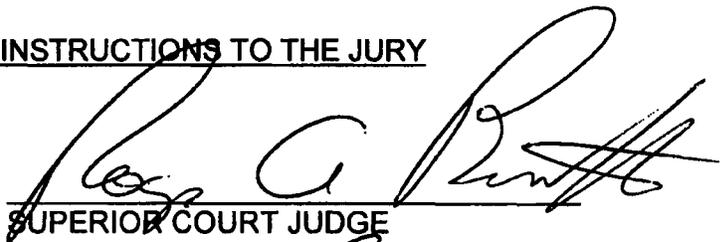
v.

DAVID FRANCIS GAUL,

Defendant.

No. 08-1-00026-5

COURT'S INSTRUCTIONS TO THE JURY


SUPERIOR COURT JUDGE

DATE

April 9, 2009

103
X

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness, and of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

A trial judge may not comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to

you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider all the instructions.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 5

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 6

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion.

In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 8

The defendant is charged with the following crimes:

- Count I: Premeditated Intentional Murder in the First Degree
- Count II: Intentional Murder in the Second Degree
- Count III: Felony Murder in the Second Degree
- Count IV: Tampering with a Witness
- Count V: Tampering with a Witness
- Count VI: Attempted Tampering with Physical Evidence

In addition, the jury may consider the following lesser included offenses under Count II:

- Manslaughter in the First Degree; and
- Manslaughter in the Second Degree

INSTRUCTION NO. 9

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.

INSTRUCTION NO. 10

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

A person knows or acts knowingly or with knowledge with respect to a fact, when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable man to believe that a fact exists, the jury is permitted, but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if the person acts intentionally as to that fact.

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act of homicide may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular result is required to establish an element of a crime, the element is also established if the person acts intentionally or knowingly as to that result.

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act of homicide may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

When criminal negligence as to a particular fact is required to establish an element of a particular crime, the element is also established if the person acts intentionally, knowingly, or recklessly as to that fact.

For purpose of this instruction, the term "homicide" means the killing of a human being by another human being.

INSTRUCTION NO. 11

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant acted with premeditation, intent, knowledge, or recklessness.

INSTRUCTION NO. 12

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with premeditation, intentionally, knowingly, or recklessly.

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 is 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 degree.

INSTRUCTION NO. 17

To convict the defendant of the crime of Premeditated Intentional Murder in the First Degree as charged in count I, 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.

INSTRUCTION NO. 15

To convict the defendant of the crime of Intentional Murder in the Second Degree as charged in count II, 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 Junette Gaul died as a result of defendant's acts: and
- (3) That the acts occurred in the State of Washington.

INSTRUCTION NO. 16

To convict the defendant of the lesser included of the crime of Manslaughter in the First Degree, under Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 2, 2008, the defendant engaged in reckless conduct;
- (2) That Junette Gaul died as a result of the defendant's reckless acts;
and
- (3) That any of these acts occurred in the State of Washington.

INSTRUCTION NO. 17

To convict the defendant of the lesser included crime of ~~M~~anslaughter in the Second Degree under Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 2, 2008, the defendant engaged in conduct with criminal negligence;
- (2) That Junette Gaul died as a result of the defendant's negligent acts;
and
- (3) That any of these acts occurred in the State of Washington.

INSTRUCTION NO. 18

To convict the defendant of the crime of Felony Murder in the Second Degree as charged in count III, 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 committed Assault in the Second Degree;

(2) That the defendant caused the death of Junette Gaul in the course of and in furtherance of such crime;

(3) That Junette Gaul was not a participant in the crime of Assault in the Second Degree; and

(4) That the acts occurred in the State of Washington.

INSTRUCTION NO. 19

A person commits the crime of assault in the second degree when he intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

INSTRUCTION NO. 20

An assault is an intentional touching or striking of another person, that is harmful or offensive.

INSTRUCTION NO. 21

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. 22

A participant in a crime is a person who is involved in committing that crime. A victim of a crime is not a participant in that crime.

INSTRUCTION NO. 23

To constitute murder or manslaughter, there must be a causal connection between the criminal conduct of a defendant and the death of a human being such that the defendant's act was a proximate cause of the resulting death.

The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.

INSTRUCTION NO. 24

To convict the defendant of the crime of Tampering With A Witness, as charged in count 4, 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 attempted to induce a person, Jennifer Gaul, to testify falsely or withhold any testimony or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and

(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and

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

INSTRUCTION NO. 25

To convict the defendant of the crime of Tampering With A Witness, as charged in count 5, 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 attempted to induce a person, Katie Gaul, to testify falsely or withhold any testimony or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and

(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and

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

INSTRUCTION NO. 26

To convict the defendant of the crime of Attempted Tampering with Physical Evidence, as charged in County 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.

INSTRUCTION NO. 27

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

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.

INSTRUCTION NO. 29

Official proceeding means a proceeding heard before any judicial official authorized to hear evidence under oath.

INSTRUCTION NO. 30

Physical Evidence means any article, object or other thing of physical substance.

INSTRUCTION NO. 31

As to any of the crimes listed on Instruction No. 8 and the
elements of said charges listed in Instructions 14, 15,
16, 17, 18, 24, 25, and 26,

If you find from the evidence that each of the required elements for a particular crime has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty on that crime.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of the elements of a particular crime, then it will your duty to return a verdict of not guilty for that crime.

INSTRUCTION NO. 32

When you begin deliberating, you should first select a foreman. The foreman's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will not be repeated for you during your deliberations.

You will be given exhibits admitted into evidence, these instructions, and eight verdict forms, A, B, C, D, E, F, G, and H. The exhibits that have been admitted into evidence will be available to you in the jury room.

You will also be given a special verdict form for the crimes charged in Counts I, II, and III, and the lesser included crimes under Count II. If you find the defendant guilty of any of these crimes, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to the answer, you must answer "no".

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decisions. The foreman must sign the verdict forms and notify the bailiff, who will bring you into court to declare your verdicts.

INSTRUCTION NO. 33

If you find the defendant guilty of Premeditated Intentional Murder in the First Degree as charged in Count I, or guilty of the crime of Intentional Murder in the Second Degree as charged in Count II, or guilty of either lesser included crimes of Manslaughter in the First Degree or Manslaughter in the Second Degree under Count II, or guilty of the crime of Murder in the Second Degree as charged in Count III, then you must determine if the following aggravating circumstance exists:

Whether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance.

The State has the burden of proving the existence of the aggravating circumstance beyond a reasonable doubt. In order for you to find the existence of an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

When you have made a decision on this question, fill in the Special Verdict Form to reflect your decision.

INSTRUCTION NO. 34

A victim is "particularly vulnerable" if he or she is more vulnerable to the commission of the crime than a typical person. The victim's vulnerability must also be a substantial factor in the commission of the crime.

FILED
COURT OF APPEALS

19 JUL 26 PM 1:00

STATE OF WASHINGTON

BY _____
CLERK

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

STATE OF WASHINGTON,
Respondent,

v.

DAVID FRANCIS GAUL,
Appellant.

No. 39610-6-II

Clark Co. No. 08-1-00026-5

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On July 22, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

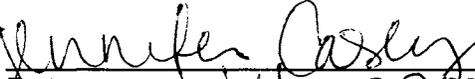
TO: David Ponzoha, Clerk
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Tacoma, WA 98402-4454

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DAVID FRANCIS GAUL
DOC # 332186
Washington State Penitentiary
1313 N 13th Avenue
Walla Walla, WA 99362-1065

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Date: July 22, 2010.

Place: Vancouver, Washington.