

NO. 39810-9-II

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

STATE OF WASHINGTON, Respondent

v.

SAMUEL EUGENE FERGUSON III, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-00818-5

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court improperly instructed the jury on the question of accomplice liability. The necessary instructions are: The multiple trials Court's Instructions to the Jury (CP 78); Defense Proposed Instructions to the Jury (CP 133A); Court's Instructions to the Jury (CP 134B). These instructions are attached hereto and incorporated by reference herein.

The instruction that the defendant complains of is Instruction No. 9 (first trial) and Instruction No. 8 (second trial). The claim is that they are fatally flawed. Those instructions read as follows:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

-(Court's Instructions to the Jury (first trial): Instruction
No. 9, CP 78)

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that

a person present is an accomplice. A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

-(Court's Instructions to the Jury (second trial): Instruction No. 8, CP 133B)

Also included is the proposed defense instructions to the jury:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime originally charged: robbery in the first degree, kidnapping in the first degree and attempting to elude a pursuing police vehicle or, the lesser included crimes of robbery in the second degree, theft in the third degree, unlawful display of a weapon; kidnapping in the second degree; unlawful imprisonment; reckless driving, he or she either:

1. solicits, commands, encourages, or requests another person to commit the original crimes or the lesser included crimes; or
2. aids or agrees to aid another person in planning or committing the crimes.

The word aid means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.

However, more than mere presence and knowledge of the criminal activity of another person must be shown to establish that a person present is an accomplice.

-(Defense Proposed Instructions to the Jury, CP 133A)

The State submits that the defense is submitting in part the identical instruction as the jury heard. The State submits that this is a clear example of invited error on the part of a defendant and has not been properly preserved for purposes of appeal.

The Appellate Court adheres to the invited error doctrine which provides that a party may not request an instruction and then later complain on appeal that the requested instruction was given. State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989); State v. Kincaid, 103 Wn.2d 304, 314, 692 P.2d 823 (1985). Under that doctrine, a defendant may not set up an error at trial and then complain of it on appeal. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). Thus, a defendant may not challenge on appeal a jury instruction that he proposed at trial. Studd, 137 Wn.2d at 546. This is true even if the defendant proposed a pattern jury instruction. Studd, 137 Wn.2d at 546-47; State v. Summers, 107 Wn. App. 373, 381, 28 P.3d 780 (2001).

The rule is spelled out in Seattle v Patu, 147 Wn.2d 717, 721-722, 58 P.3d 273 (2002):

The original goal of the invited error doctrine was to "prohibit a party from setting up an error at trial and then complaining of it on appeal." State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). In Pam, the State intentionally set up an error in order to

create a test case for appeal. Pam, 101 Wn.2d at 511. Since then, the doctrine has been applied even in cases where the error resulted from neither negligence nor bad faith. See, e.g., State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). In Studd, a consolidated case, the six defendants all proposed instructions that erroneously stated the law of self-defense. *Id.* at 545. Some, however, also proposed an instruction that effectively remedied the error. While concluding that the error was of constitutional magnitude and therefore presumed prejudicial, we held that those defendants who had proposed the erroneous instruction without attempting to add a remedial instruction had invited the error and could not therefore complain on appeal. *Id.* at 546-47.

This court has treated missing elements with especial care. Nevertheless, the invited error doctrine has been applied in cases where, as here, the "to convict" instruction omitted an essential element of the crime. See, e.g., State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990) (failing to specify the intended crime in a conviction for attempted burglary); State v. Summers, 107 Wn. App. 373, 380-82, 28 P.3d 780 (2001) (omitting the knowledge element of unlawful possession of a firearm).

We affirm our holding in Studd. " ' "A party may not request an instruction and later complain on appeal that the requested instruction was given." ' " Studd, 137 Wn.2d at 546 (quoting State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted in Studd) (*quoting State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979))). Accordingly, we affirm the Court of Appeals and remand this case to Seattle Municipal Court for reimposition of the sentence.

As indicated in the case law, the defendant cannot complain of an error that he has brought about by his own conduct. This is not a claim by the defense of ineffective assistance of counsel. The defendant maintains

that the onus is on the court for improperly instructing the jury. However, that instruction was offered, accepted, and used by the trial court after being proposed by the defendant himself. It simply has not been preserved for purposes of appeal.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error brought by the defendant is a claim that the accomplice liability statute is overbroad and violates the first and fourteenth amendments. The defendant does not cite any case law to support this proposition, nor is there anything that would indicate that the defendant's conduct was protected speech. Certainly, criminal activity on the part of an accomplice or co-conspirator is not protected speech.

Overbreadth doctrine creates a limited exception to the usual rule that a party "will not be heard to challenge a statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broadrick v Oklahoma, 413 U.S 601, 610, 37 L.Ed. 2d 830, 93 S. Ct. 2908 (1973). Because striking down a statute based on facial overbreadth is exceptionally "strong medicine", the doctrine applies only in the uniquely important realm of First Amendment rights.

Because of the important rights protected by the First Amendment, the overbreadth doctrine allows a litigant to challenge a statute on its face, rather than as applied to his own facts, and have a statute invalidated for overbreadth where it would be unconstitutional as applied to others even if not as applied to him. The doctrine is designed to short circuit the process by which a statute's constitutionality is addressed only on a case-by-case basis, thereby eliminating the chilling effect on legitimate First Amendment activity that would be created by leaving an unconstitutional statute on the books.

-(State v Motherwell, 114 Wn.2d 353, 370-371, 788 P.2d 1066 (1990)).

The State further submits that this issue has not been preserved for purposes of appeal either. Because the spotlighting statute regulates behavior, not speech, we will not overturn it unless the overbreadth is both real and substantial in relation to the ordinance's plainly legitimate sweep. Seattle v. Webster, 115 Wn.2d 635, 802 P.2d 1333, 7 A.L.R.5th 1100 (1990), *cert. denied*, 114 L. Ed. 2d 85 (1991). This is especially true when we look at the discussion among court and counsel relating to these specific jury instructions:

MR. SOWDER (Counsel for Co-Defendant Fitzpatrick): I do take exception.

THE COURT: I think based upon the evidence and that we're basically going to talk about two or three statements of this makes – this is more in conformity with the facts and testimony in this case, and I assume the other defendants are joining in to that exception?

MR. KIRKHAM (Counsel for Co-Defendant Youngblood):
Yes.

MR. KURTZ (Counsel for Defendant): Yes, Your Honor.

THE COURT: Okay. So noted. 8, Defendant is not compelled to testify. 9, a person is guilty – this is the accomplice one.

MR. KURTZ: Your Honor, that's Number 9. It would be my preference to on the second paragraph say, a person is an accomplice in the commission of the crimes.

MR. GOLIK (Deputy Prosecutor): Well –

MR. KURTZ: I understand, it's a WPIC. If with knowledge that it will promote or facilitate commission of the crimes he or she solicits, commands, encourages or commits the crimes. That would be my preference.

THE COURT: Okay. Mr. Golik?

MR. GOLIK: That was the old language of the accom-

MR. KURTZ: No, of a crime. I'm saying the crimes.

MR. GOLIK: Well –

MR. KURTZ: Or the crime or crimes.

MR. SOWDER: This actually looks like your old instruction.

MR. GOLIK: Hold on.

THE COURT: Yeah, I'm kind of thinking.

MR. KURTZ: I want to first –

THE COURT: What's the number?

MR. KIRKHAM: 10.51.

MR. GOLIK: 10.51, you might be right.

MR. SOWDER: Yeah, that's the old one.

MR. GOLIK: Yeah, yeah, it needs to be the crime, not a crime. Sorry, Your Honor, I don't – that's the second one now that – I don't know what's going on with the –

THE COURT: Well –

MR. GOLIK: - our computer system.

THE COURT: - this is the 10.51.

MR. GOLIK: Yeah, it should say that.

THE COURT: Doesn't say that. Says a person is an accomplice if –

MR. GOLIK: Oh, it's the crime in the first paragraph.

MR. KURTZ: It does say the in the first one, but then it says a crime. I prefer the crimes or the crimes charged since that's what that case –

THE COURT: Of the crime, okay.

MR. GOLIK: But this instruction was created after the case that said as the crime instead of a crime, so I think this instruction is appropriate.

MR. KURTZ: I understand. But I think given the number of the Co-Defendants, given the number of counts and given that case, I would prefer the crimes or the crimes charged. I don't see that it hurts anything. I think it makes it more definite and certain.

THE COURT: I think this is consistent with the – like you said, the bracketed material is new, I think.

MR. GOLIK: Yeah, I guess the instruction's fine. It has the crime, it's clear that it has to be the specific crime with this instruction.

MR. KURTZ: Well, check the second paragraph, a person is accomplice in the commission of the crime.

THE COURT: Yeah, that's what it says in the WPIC.

MR. GOLIK: Well, it says a person is an accomplice –

THE COURT: In the commission of a crime.

MR. KURTZ: I think it should be the – at the very least, the crime.

MR. GOLIK: It does have the crime.

MR. KURTZ: No.

MR. GOLIK: - facilitate the commission of the crime.

MR. KURTZ: Second paragraph? Mine says a crime.

THE COURT: Well, and sub – He's referring o parens (1).

MR. KURTZ: I'm talking about the –

THE COURT: I know what you're saying.

MR. KURTZ: - the reference to –

MR. GOLIK: Well, yeah, the second line of the second paragraph has the crime.

MR. KURTZ: Yeah, but in the first line of the second paragraph it says of a crime. Why not just put the for both/ Why are we – why? I mean, yes, WPICs are fully drawn by committees that know what they're talking about, but they change WPICs all the time from case law and other things,

so I would say adding the crimes is not going to be that big of a deal. It clarifies it even further.

MR. SOWDER: Also specifically since you have multiple Defendants and multiple charges, it's probably not –

MR. KURTZ: I said it's –

MR. SOWDER: - it's a good idea.

MR. KURTZ: Yeah.

MR. SOWDER: I would join his objection.

MR. GOLIK: I think the instruction's fine. I think it's clear saying accomplice to the crime, any crime.

THE COURT: I understand what you're saying, but it seems to me that the first paragraph talks about the crime and the last paragraph, again, talks about a crime. In between it's the and a. And I thought that the changes they made in the WPIC reflected the case law on that and that's why they put in that first paragraph, I think. That's my understanding. So I'll take your exceptions – understand that.

MR. KURTZ: Okay. I accept to that, thank you, Your Honor.

THE COURT: We'll keep it as is. That's Number 9. Number 10 –

MR. KURTZ: And I guess I'll stop right there. Mr. Golik had first person commits a crime of Robbery in the First Degree next, and then he had to convict on that next and then he had the general definition of a person commits the crime of Robbery. I prefer to put that first before as Number 10. It makes sense, it's a general definition.

-(RP 1141-1145)

As the State has previously maintained there is absolutely nothing that the defendant has produced that would demonstrate that accomplice liability statutes are unconstitutional. Nor has there been any showing that this was something that was specifically brought and argued forcefully before the trial court. In fact, the argument would seem to be in favor of the statutory scheme, but the defendant's claim is that they just do not apply in his circumstance.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim that the trial court erred when it failed to sever the defendant's trial from the trial of his co-conspirators. The primary claim here is that the defendant's rights to speedy trial have been violated because the defendants had maintained, as a group, that they were not ready to proceed to trial and needed additional time. The State submits that this is a discretionary call with the trial court and that the trial court was properly within its authority to proceed in the manner that it did.

The decision to proceed with joint or separate trials is entrusted to the trial court's sound discretion; the Appellate Court will not disturb the decision absent manifest abuse of discretion. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). Washington law disfavors separate trials.

Grisby, 97 Wn.2d at 506. The trial court should sever defendants' trials at any point in the trial whenever, "upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." CrR 4.4(c)(2)(ii). Trial courts properly grant such severance motions only if a defendant demonstrates that a joint trial would be "so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991); State v. Johnson, 147 Wn. App. 276, 194 P.3d 1009 (2008). Separate trials are not favored in Washington. State v. Dent, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). To show that the trial court abused its discretion in denying a motion to sever, the defendant must demonstrate specific prejudice arising from the joint trial. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). "Specific prejudice may be demonstrated by showing 'antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive.'" State v. Medina, 112 Wn. App. 40, 48 P.3d 1005 (2002) (*quoting* State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995)).

But "the mere existence of mutually antagonistic defenses does not require severance." State v. McKinzy, 72 Wn. App. 85, 89, 863 P.2d 594 (1993). "Rather, it must be demonstrated that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that

this conflict alone demonstrates that both are guilty.” Medina, 112 Wn. App. at 53 (*quoting State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)). The defenses must be “mutually exclusive to the extent that one must be believed if the other is disbelieved.” McKinzy, 72 Wn. App. 85, 90, 863 P.2d 594 (1993). The joint trial must be so manifestly prejudicial as to outweigh the concern for judicial economy. Hoffman, 116 Wn.2d at 74.

As indicated, there is nothing mutually antagonistic involved in these defenses, nor is there a conflict that is so prejudicial that it would prevent the defendant from receiving a fair trial. With that in mind, the trial court was properly within its bounds to maintain this as a joint trial. The court may have used as its reasoning the question of judicial economy, but as case law has indicated, that is perfectly acceptable.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error raised by the defendant is that the kidnapping charges are incidental to the robbery and therefore should merge or one be dismissed on grounds of double jeopardy or straight merger. The State submits that recent case law has made it quite clear that this is inaccurate. The rule is that the defendant may be punished separately for robbery and kidnapping.

Because the State's evidentiary burden was to prove all elements of a crime beyond a reasonable doubt, we must first look to what elements the State had to prove in order to determine if the evidence is sufficient.

We review statutory interpretation questions de novo. State v. Swecker, 154 Wn.2d 665, 115 P.3d 297 (2005). When interpreting a statute, our primary objective is to carry out the legislature's intent. State v. Young, 125 Wn.2d 688, 694, 888 P.2d 142 (1995). To determine intent, we first look to the statute's language. Young, 125 Wn.2d at 694. While the court may not look beyond unambiguous statutory language, the court must read the statute as a whole and harmonize each provision. State v. Thorne, 129 Wn.2d 736, 761, 921 P.2d 514 (1996). In harmonizing provisions, the Court gives meaning to every word the legislature includes in a statute so as to avoid rendering any included words superfluous. State v. Cooper, 156 Wn.2d 475, 483, 128 P.3d 1234 (2006). Under the criminal statutes, a defendant may be found guilty of robbery where the State proves he "takes personal property from the person of another or in [her] presence against [her] will by the use or threatened use of immediate force." RCW 9A.56.190 (emphasis added). The statute thus defines robbery to include two alternatives: taking from a victim's person or taking property in a victim's presence. Personal property is within a victim's presence when it is "within [the victim's] reach, inspection, observation or

control, that [she] could, if not overcome with violence or prevented by fear, retain her possession of it. State v. Manchester, 57 Wn. App. 765, 768-69, 790 P.2d 217 (1990) (*quoting* C. Torcia, Wharton on Criminal Law §473 (14th ed. 1981), review denied, 115 Wn.2d 1019 (1990).

As explained in State v Louis, 155 Wn.2d 563, 570-571, 120 P.3d 936 (2005):

Applying the same evidence test here, we conclude that the robbery and kidnapping charges against Louis are not the same "in law." We reach that conclusion because each offense includes an element not included in the other. As we previously observed in two cases that are similar to the one before us, "[i]n order to prove robbery, the State [is required to] prove a taking of [personal] property, which is not an element of kidnapping," while kidnapping requires the State to prove "the use or threatened use of 'deadly force,'" which is not an element of robbery. State v. Vladovic, 99 Wn.2d 413, 423-24, 662 P.2d 853 (1983); see also In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 50, 776 P.2d 114 (1989) ("[K]idnapping and robbery charges are not the same offense.").

Moreover, we note, as did the Court of Appeals, that Louis's robbery and kidnapping charges were not the same factually: "The robbery necessitated the intentional taking of jewelry at gunpoint, while the kidnapping charge was based on Louis's binding and gagging the victims with duct tape to facilitate commission of the robbery." State v. Louis, noted at 119 Wn. App. 1080 (2004).

Although the result of the same evidence test creates a strong presumption of the legislature's intent, it is "not always dispositive of the question whether two offenses are the same." Calle, 125 Wn.2d at 780. This presumption can "be overcome only by clear evidence of contrary [legislative] intent." *Id.* Louis fails, however, to set forth

any legislative history of the robbery and kidnapping statutes that clearly show the legislature sought to provide a single punishment for violating both statutes. Accordingly, we hold that the charges are not the same in fact or law and that double jeopardy principles do not preclude separate convictions for robbery and kidnapping.

B. Merger Doctrine

Louis argues, alternatively, that his kidnapping charges should merge into his robbery charges. He reasons that a kidnapping will always be simultaneous and incidental to armed robbery. Although he acknowledges that this court has rejected an identical argument in Vladovic, he urges us to overrule that decision and adopt the "kidnapping merger" rule. Suppl. Br. of Pet'r at 16-18.

The merger doctrine is a tool of statutory construction "used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." Vladovic, 99 Wn.2d at 419 n.2 (citing Blockburger, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180). As we noted there, the merger doctrine only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

Id. at 421.

We see no reason to depart from our decisions in Vladovic and Fletcher. In Vladovic, the defendant was convicted of attempted first degree robbery, first degree robbery, and four counts of first degree kidnapping. We concluded that "kidnapping does not merge into first degree robbery" because proof of kidnapping is not necessary in order to prove robbery. Id. at 421. In Fletcher, the defendant pleaded guilty to first degree kidnapping, first degree robbery, and first degree assault. We held there that the

merger doctrine did not apply to first degree kidnapping and first degree robbery because a "person who intentionally abducts another need do so only with the intent to carry out one of the incidents enumerated in RCW 9A.40.020(1)(a) through (e) inclusive;" not that the person actually complete the action. Fletcher, 113 Wn.2d at 53.

As neither statute has been changed in any significant way since we rendered our decisions in Vladovic and Fletcher, we can conclude only that the legislature has not indicated that a defendant must commit kidnapping before he or she can be found guilty of first degree robbery or commit armed robbery before he or she can be convicted of first degree kidnapping. Thus, we adhere to our decisions in Vladovic and Fletcher and hold that Louis may be punished separately for robbery and kidnapping.

The State submits that the crimes involved are not the same "in law" and thus are to be treated as separate and independent.

VI. CONCLUSION

The trial court should be affirmed in all respects.

DATED this _____ day of _____, 2010.

Respectfully submitted:

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DIVISION II

STATE OF WASHINGTON,
Respondent,

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SAMUEL EUGENE FERGUSON III,
Appellant.

No. 39810-9-II

Clark Co. No. 08-1-00818-5

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Aug 9, 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: Anne Mowry Cruser
Attorney at Law
PO Box 1670
Kalama WA 98625-1500

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.

Jennifer Casey
Date: Aug 9, 2010
Place: Vancouver, Washington.

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

STATE OF WASHINGTON,

Plaintiff,

v.

SAMUEL EUGENE FERGUSON III,
and
ALBERT JAMALL YOUNGBLOOD,
and
JOHN LANELL FITZPATRICK,

Defendant.

No. 08-1-00818-5
and 08-1-00819-3
and 08-1-00820-7

COURT'S INSTRUCTIONS TO THE JURY



SUPERIOR COURT JUDGE

February 17, 2009
DATE

78 (RK)

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.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

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. You are also the sole judges 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.

Our state constitution prohibits a trial judge from making a 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 the instructions as a whole.

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

Each 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. Each defendant has no burden of proving that a reasonable doubt exists as to these elements.

Each 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. 4

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

INSTRUCTION NO. 5

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. 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

Certain evidence has been admitted in this case for the limited purpose of impeachment evidence on the credibility of a witness, and that said evidence shall be used for that purpose only.

INSTRUCTION NO. 8

A defendant is not compelled to testify, and the fact that a defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 9

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 10

A person commits the crime of Robbery in the First Degree when in the commission of a robbery or in immediate flight therefrom he is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon.

INSTRUCTION NO. 11

To convict a defendant of the crime of Robbery in the First Degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 21, 2008, a defendant unlawfully took personal property from the person or in the presence of another;
- (2) That a defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by a defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of another;
- (4) That force or fear was used by a defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking;
- (5) That in the commission of these acts or in immediate flight therefrom a defendant was armed with a deadly weapon or a defendant displayed what appeared to be a firearm or other deadly weapon;
- (6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), (5) and (6), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

INSTRUCTION NO. 13

Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

INSTRUCTION NO. 14

A person commits the crime of kidnapping in the first degree when he intentionally abducts another person with intent to facilitate the commission of Robbery or flight thereafter.

INSTRUCTION NO. 15

To convict a defendant of the crime of Kidnapping in the First Degree, as charged in Count 2, each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 21, 2008, a defendant intentionally abducted

Roberta Damewood;

(2) That a defendant abducted that person with intent to facilitate the commission of Robbery or flight thereafter,

and

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

If you find from the evidence that elements (1), (2) and (3), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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

INSTRUCTION NO. 16

To convict a defendant of the crime of Kidnapping in the First Degree, as charged in Count 3, each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 21, 2008, a defendant intentionally abducted

Javier C. Rivera;

(2) That a defendant abducted that person with intent to facilitate the commission of Robbery or flight thereafter,

and

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

If you find from the evidence that elements (1), (2) and (3), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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

JURY INSTRUCTION NO. 17

Abduct means to restrain a person by using or threatening to use deadly force.

Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner that interferes substantially with that person's liberty.

INSTRUCTION NO. 28

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

INSTRUCTION NO. 19

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 20

A person commits the crime of attempting to elude a pursuing police vehicle when he wilfully fails or refuses to bring his vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle he drives his vehicle in a reckless manner.

A signal to stop given by a police officer may be by hand, voice, emergency light, or siren. The police officer giving such a signal must be in uniform and the officer's vehicle must be appropriately marked showing it to be an official police vehicle.

INSTRUCTION NO. 21

To convict a defendant of attempting to elude a pursuing police vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 21st day of May, 2008, a defendant drove a motor vehicle;
- (2) That a defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;
- (3) That the signaling police officer's vehicle was appropriately marked, showing it to be an official police vehicle;
- (4) That a defendant wilfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, a defendant drove his vehicle in a reckless manner; and
- (6) That the acts occurred in the State of Washington.

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

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

INSTRUCTION NO. 22

To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.

INSTRUCTION NO. 23

When you begin deliberating, you should first select a presiding juror. The presiding juror'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 one 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 have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Some exhibits and visual aids may have

been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

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 verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff.

The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 24

You will also be given special verdict forms for the crimes charged. If you find a defendant not guilty of a crime, do not use the special verdict form for that crime. If you find a defendant guilty of a crime, you will then use the special verdict form for that crime and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "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 this question, you must answer "no".

INSTRUCTION NO. 25

For purposes of a special verdict, the State must prove beyond a reasonable doubt that a defendant was armed with a firearm at the time of the commission of a crime.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and a defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

5

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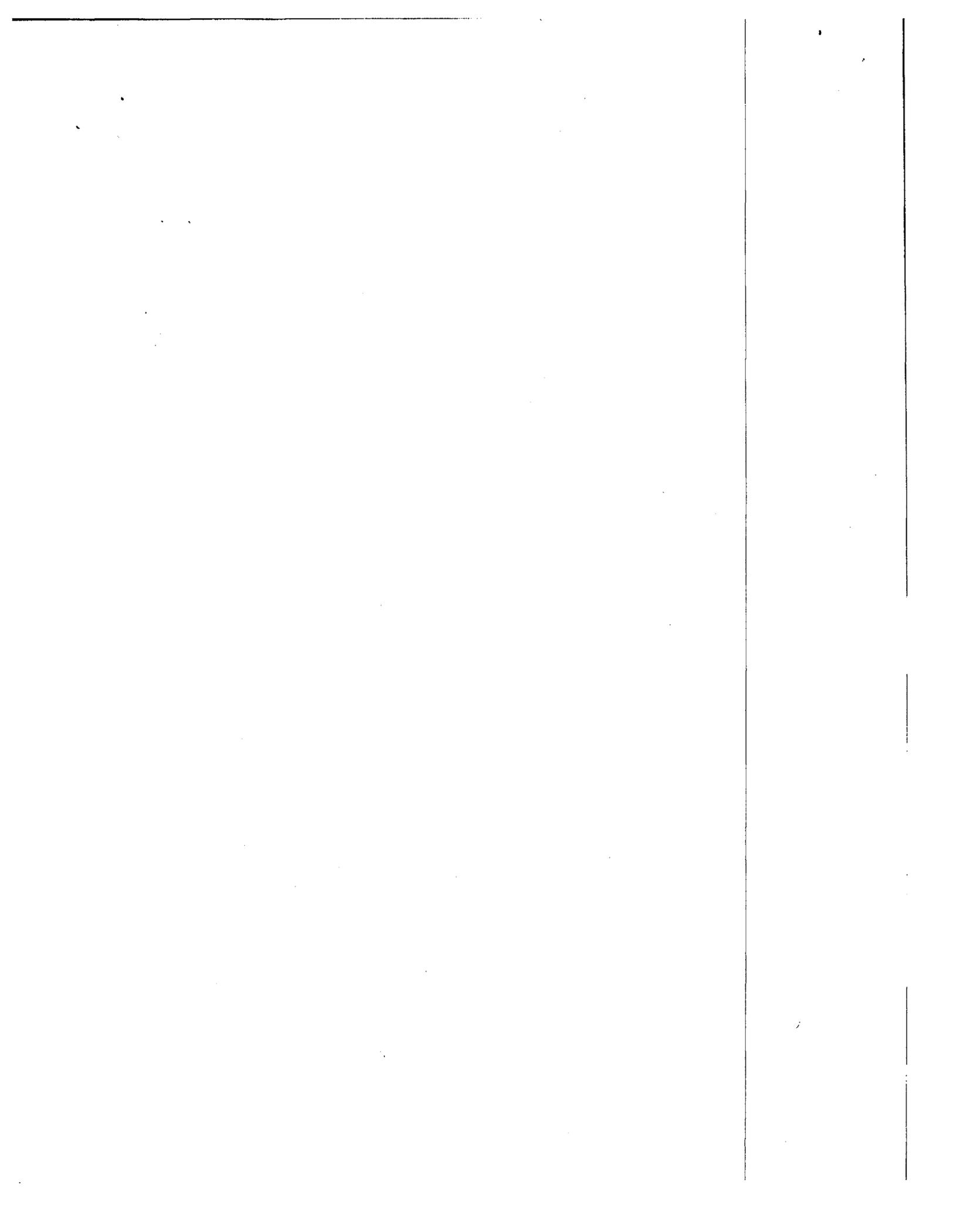
MAY 21 2009
@ 8:55 AM
Sherry W. Parker, Clerk, Clark Co.

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

STATE OF WASHINGTON,
Plaintiff,
vs.
SAMUEL FERGUSON
Defendant

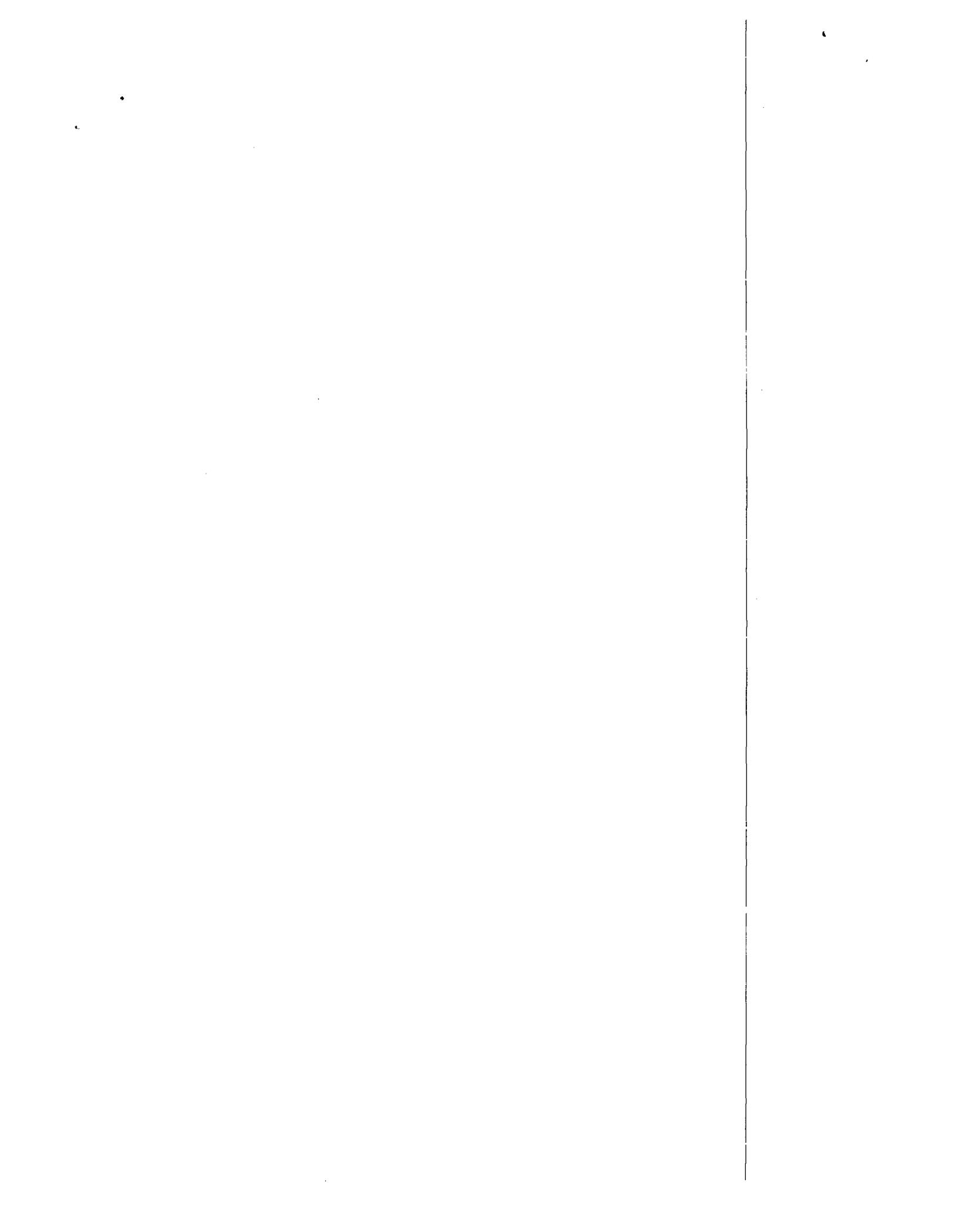
No. 08-1-00818-5
DEFENSE PROPOSED
INSTRUCTIONS TO THE JURY

133 A



INSTRUCTION No. _____

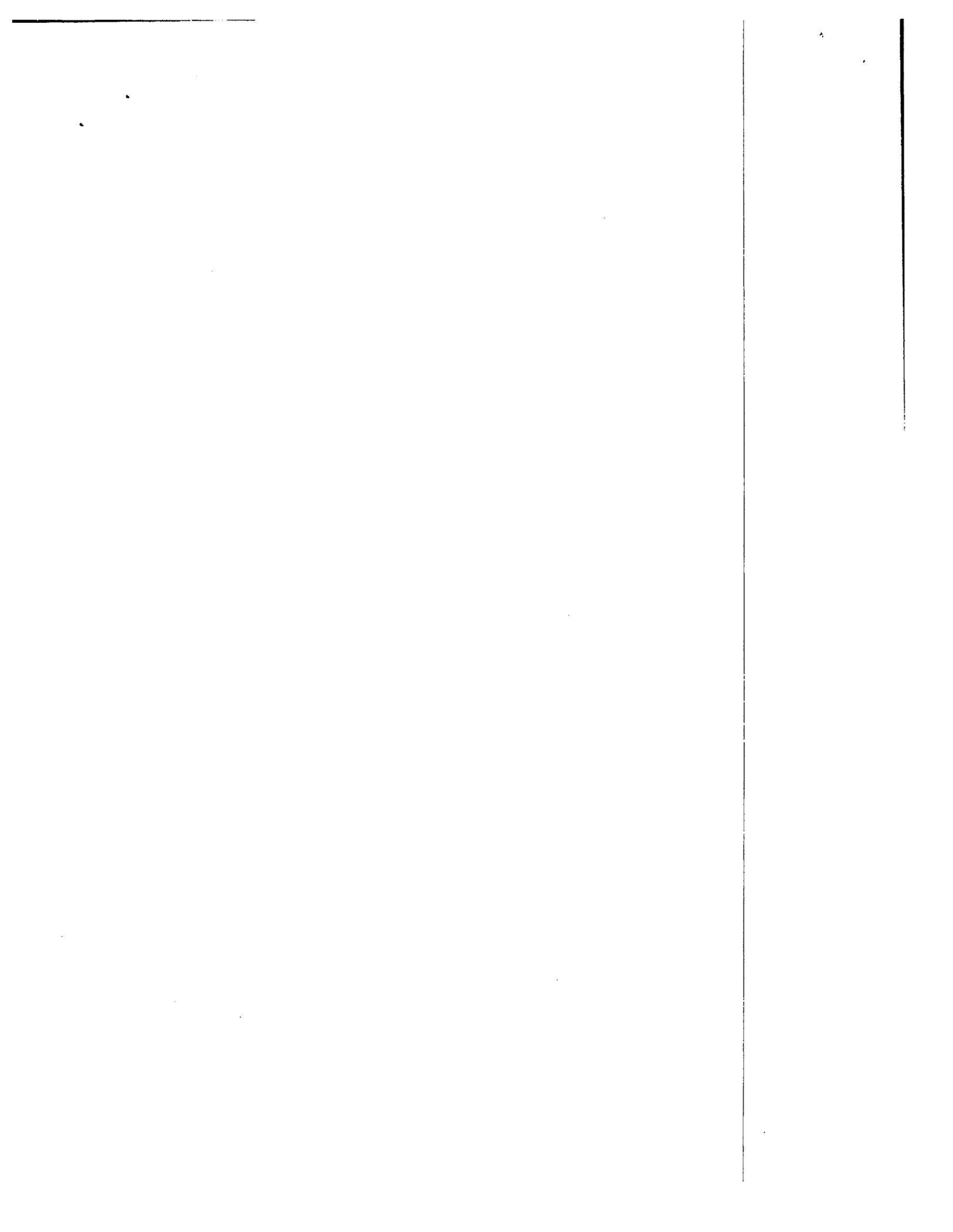
For purposes of the special verdict a firearm is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.



INSTRUCTION No. _____

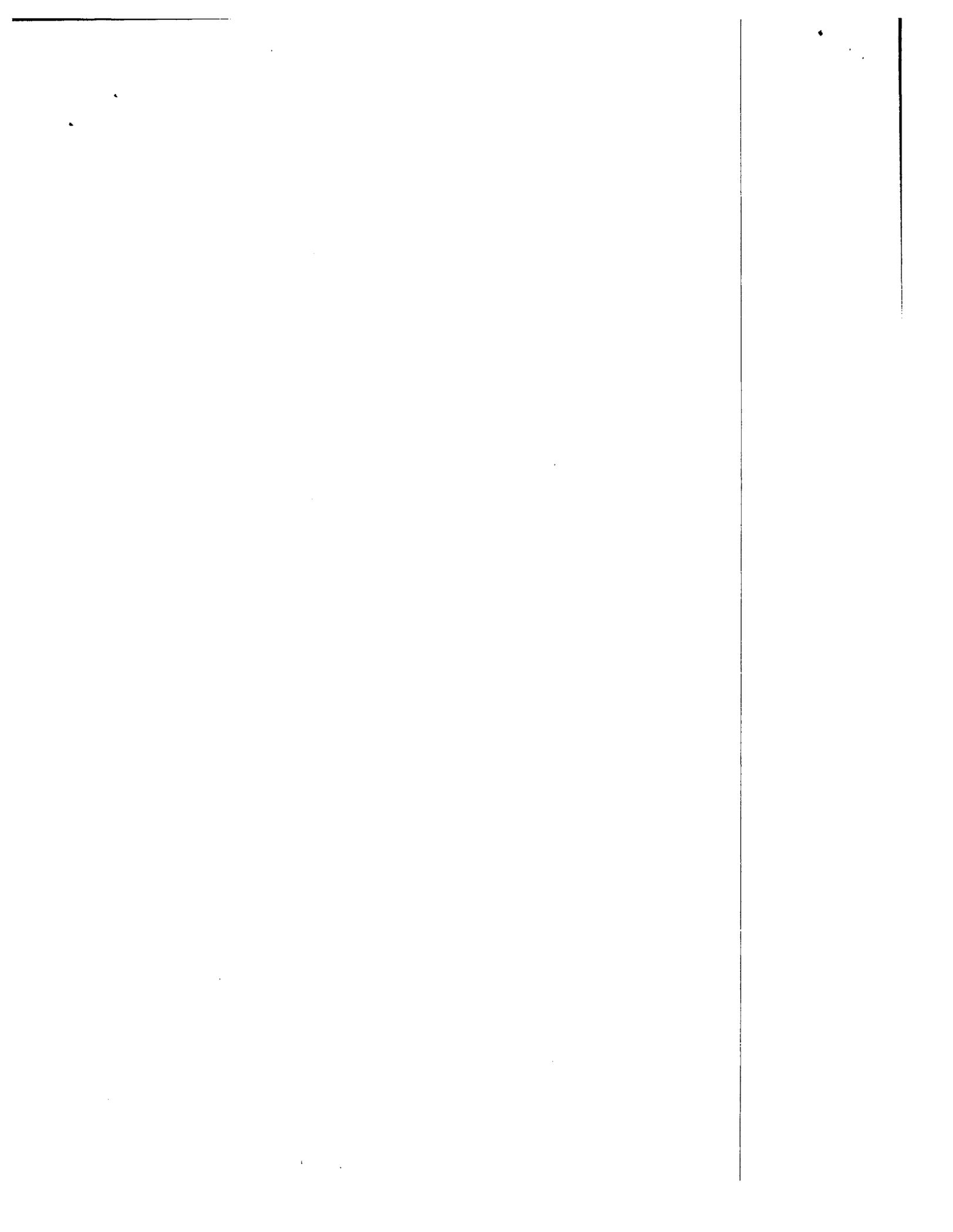
Firearm means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.

RCW 9.41.010 (1)



INSTRUCTION NO. _____

The defendant is not compelled to testify, and the fact the defendant has not testified cannot be used to infer guilt or prejudice him in any way.



INSTRUCTION No. _____

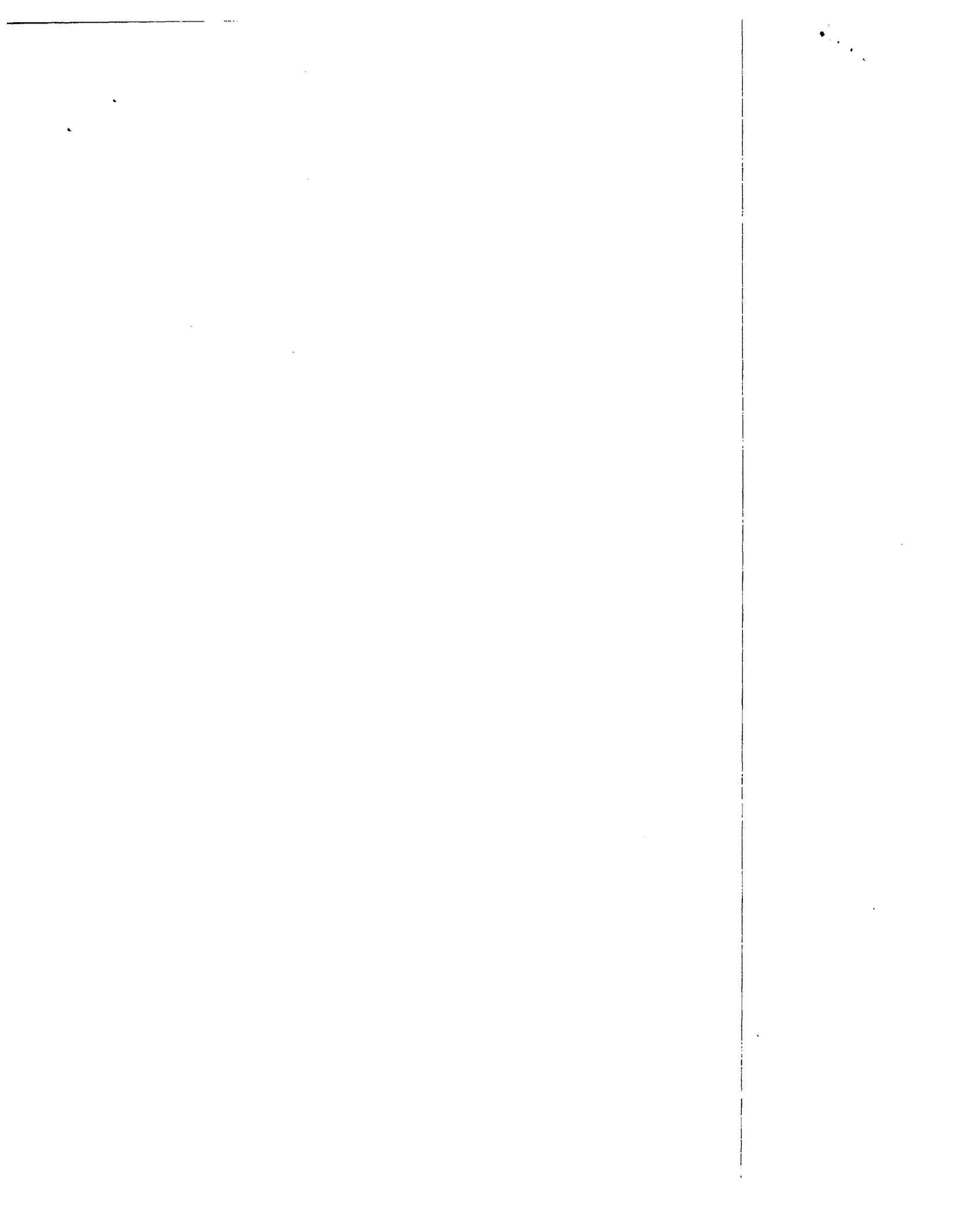
A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crimes originally charged: robbery in the first degree, kidnapping in the first degree and attempting to elude a pursuing police vehicle or, the lesser included crimes of robbery in the second degree, theft in the third degree, unlawful display of a weapon; kidnapping in the second degree, unlawful imprisonment; reckless driving, he or she either:

1. solicits, commands, encourages, or requests another person to commit the original crimes or the lesser included crimes; or

2. aids or agrees to aid another person in planning or committing the crimes.

The word aid means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.

However, more than mere presence and knowledge of the criminal activity of another person must be shown to establish that a person present is an accomplice.



22

FILED
2:00pm
MAY 21 2009
Heather Hunt
Sherry W. Parker, Clerk, Clark Co. Deputy

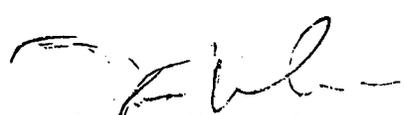
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND
FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,
vs.

SAMUEL EUGENE FERGUSON III
ALBERT JAMAAL YOUNGBLOOD
Defendant

No. 08-1-00818-5
No. 08-1-00819-3

COURT'S INSTRUCTIONS TO THE JURY


Superior Court Judge

Date: May 21, 2009

133 B
WF

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.

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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. You are also the sole judges 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.

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Each 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. Each defendant has no burden of proving that a reasonable doubt exists as to these elements.

Each 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.

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A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

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A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 9

A person commits the crime of kidnapping in the first degree when he intentionally abducts another person with intent to facilitate the commission of Robbery or flight thereafter.

INSTRUCTION NO. 10

To convict a defendant of the crime of Kidnapping in the First Degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 21, 2008, a defendant intentionally abducted

Roberta Damewood;

(2) That a defendant abducted that person with intent to facilitate the commission of Robbery or flight thereafter,

and

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

If you find from the evidence that elements (1), (2) and (3), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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

INSTRUCTION NO. 11

To convict a defendant of the crime of Kidnapping in the First Degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 21, 2008, a defendant intentionally abducted

Javier C. Rivera;

(2) That a defendant abducted that person with intent to facilitate the commission of Robbery or flight thereafter,

and

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

If you find from the evidence that elements (1), (2) and (3), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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

INSTRUCTION NO. 15

When you begin deliberating, you should first select a presiding juror. The presiding juror'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 one 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 have been allowed to take notes to assist you in remembering clearly; not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Some exhibits and visual aids may have

been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

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 verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff.

The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 16

You will also be given special verdict forms for the crimes charged. If you find a defendant not guilty of a crime, do not use the special verdict form for that crime. If you find a defendant guilty of a crime, you will then use the special verdict form for that crime and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "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 this question, you must answer "no".

INSTRUCTION NO. 17

For purposes of a special verdict, the State must prove beyond a reasonable doubt that a defendant was armed with a firearm at the time of the commission of a crime.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and a defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 18

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.