

NO. 45391-6

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

STATE OF WASHINGTON, RESPONDENT

v.

MARCUS LANGFORD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 12-1-04425-4

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

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

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

1. Was Tajanae Williams' testimony that Stimson told her that he and defendant attempted to rob the victim admissible where defendant adopted the statement as his own?
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B. STATEMENT OF THE CASE.

1. Procedure

On November 28, 2012, the State charged MARCUS RILEY LANGFORD, hereinafter “defendant,” with one count of felony murder in the first degree with the predicate crime of robbery, and one count of unlawful possession of a firearm in the second degree. CP 1-2. Defendant was charged together with codefendant J.J. Stimson. CP 3-4.

On July 18, 2013, in open court, the State filed an amended information adding a firearm sentencing enhancement to the charge of felony murder. CP 8-9; RP 3-4. The parties also discussed the fact that Stimson entered a guilty plea. RP 3.

On July 22, 2013, the parties held a CrR 3.5 hearing to determine whether defendant’s statements to law enforcement were admissible. RP 31-86. The court concluded that defendant’s statements were admissible. RP 85-86.

Jury trial commenced July 23, 2013, before the Honorable John A. McCarthy. RP 89. During trial, Stimson’s girlfriend, Tajanae Williams, testified that Stimson told her that he and defendant had tried to rob a man and take his truck. RP 481. Defendant did not object to this statement, but later moved to strike the testimony. RP 552, 609-10. The court

denied the motion to strike, noting that the State sought admission under ER 801(d)(2), making the statement not hearsay. RP 651.

At the close of the State's case, defendant moved to dismiss both counts. RP 619. The State conceded that Count II, unlawful possession of a firearm in the second degree, should be dismissed. RP 621-22. The court accepted the State's concession as proper and dismissed Count II. RP 623. The court denied defendant's motion to dismiss Count I, finding that, in the light most favorable to the State, there was sufficient evidence for the case to go to the jury. RP 623-24.

On July 30, 2013, the case went to the jury. RP 720. On August 1, 2013, the jury gave the court a note that indicated the jurors could not reach "consensus." CP 44-45; RP 730. The jury foreman informed the court that there was no reasonable probability of the jury reaching a verdict within a reasonable time. RP 733. The court ordered the jury to continue deliberations. RP 733. Later that day, the jury sent another note to the court asking for clarification of an instruction. CP 46-47; RP 735. The court directed the jury to read the instructions given. RP 735-36.

On August 5, 2013, the jury found defendant guilty. CP 73; RP 739-43. The jury also found that defendant or an accomplice was armed with a firearm during the commission of the crime. CP 48; RP 739-43.

On September 20, 2013, the court sentenced defendant to a mid-point, standard-range¹ sentence of 280 months in custody, together with a 60 month firearm sentence enhancement. CP 88-100; RP 31.

Defendant filed a timely notice of appeal. CP 101.

2. Facts

On November 18, 2012, at approximately 3:00 a.m., Tacoma Police Lieutenant Jewell Lerum was on his way to work when he received a dispatch to a one car accident near South 56th and Lawrence in Tacoma, Washington. RP 101. When Lt. Lerum arrived, he noticed a small red pickup truck that had driven off the roadway and into a small park. RP 102.

Lt. Lerum contacted three civilians who were standing at the driver's side door of the truck. RP 102. One of the civilians was Matthew Torres, a former army emergency medical technician. RP 102, 114. Mr. Torres was reaching through the partially open driver's side window in order to secure the driver's neck. RP 102. The driver, later identified as David Watson, was unresponsive. RP 104, 107.

Mr. Watson had minor abrasions to his face, his breathing was shallow and irregular. RP 104. Lt. Lerum did not believe the injuries

¹ Defendant had an offender score of zero, giving him a standard range of 240-320 months. RP 88-100.

were consistent with a traffic accident and suspected that Mr. Watson was having a seizure. RP 104.

Additional officers arrived on the scene and were able to remove Mr. Watson from the truck. RP 107-08. Once Mr. Watson was out of the truck, Lt. Lerum saw what he believed to be a bullet wound in his chest. RP 108. Mr. Watson was immediately taken to the hospital, where he died from a gunshot wound to the torso. RP 108, 267. The medical examiner who performed the autopsy recovered a bullet from Mr. Watson's body. RP 264, 513.

Once Mr. Watson was taken to the hospital, law enforcement began investigating the scene, as well as canvassing the surroundings for information. RP 109, 167, 189. One witness, Jason Beldon, remembered seeing the red truck at a nearby Chevron gas station shortly before the incident. RP 403.

Tacoma Police Detectives Steven Reopelle and Daniel Davis went to the Chevron station to secure any surveillance video footage that might have been captured. RP 402, 808-09. The surveillance video showed the red truck parked on the north side of the station and two men approach and attempt to rob, but ultimately shoot, Mr. Watson. Exhibit 69; RP 402.

The detectives issued a bulletin with a description of the suspects based on the clothing they were wearing. RP 351. Tacoma Police Officer

Jared Williams saw the bulletin and recognized a hat one of the suspects was wearing as something he had seen recently. RP 351, 360.

In an unrelated incident on November 18, 2012, Officer Williams responded to a report of a fraudulently used credit card. RP 352. He spoke to Regina Stephens about her credit card, and also two firearms that were missing from her safe. RP 283, 287, 353. The firearms had belonged to her deceased husband and were registered in his name. RP 281. Ms. Stephens was living with her great-nephew, J.J. Stimson. RP 280.

On the morning of the 19th, Ms. Stephens' great-nephew, J.J. Stimson, returned one of the guns to her. RP 289, 353. Ms. Stephens immediately called Officer Williams to report the return of the gun. RP 291, 353. Officer Williams went back to Ms. Stephens' house and, with her permission, took the rest of her guns for safekeeping. RP 356. The gun Stimson had returned was a .38 revolver. RP 355. The still-missing firearm was a Bryco Arms .380 caliber semiautomatic. RP 357, 406-07. A Bryco Arms .380 caliber semiautomatic was one of the possible types of guns that matched the characteristics of the bullet recovered from Mr. Watson's body. RP 407.

As part of Officer Williams' investigation into Ms. Stephens' credit card and stolen gun, he viewed Stimson's Facebook page. RP 360.

When Officer Williams saw the bulletin released for the homicide, he recognized a hat worn by one of the suspects as identical to one worn by one of Stimson's friends in a Facebook photograph. RP 360. The hat was distinctive as a Chicago Bulls stocking cap with a red pompom and a grey shark tooth pattern on the top. Exhibit 26; Exhibit 35; RP 415. The hat belonged to Stimson, but defendant was the friend wearing the hat in Facebook photographs. Exhibit 26; RP 285-87.

Detective Davis interviewed Tajanae Williams, Stimson's girlfriend. RP 522. Ms. Williams informed him that Stimson and defendant appeared at her door sometime around 3:30 or 4:00 a.m. on November 18. RP 479, 523. Ms. Williams let Stimson and defendant into the apartment and they all went into her bedroom. RP 481. She sat down on her bed and Stimson and defendant sat down on either side of her. RP 481. Stimson told her that "[Stimson] and Marcus were going to rob this guy and take his truck, but they didn't." RP 481. She told them that if they brought a stolen truck to her apartment that they would have to leave. RP 482. Both Stimson and defendant just looked at her when she said this. RP 482. Defendant then asked Ms. Williams to help him download music onto her computer. RP 482. Approximately thirty minutes to an hour later, all three of them fell asleep on her bed. RP 483. Stimson and defendant left the apartment later that morning. RP 484. A few days later,

defendant began calling Ms. Williams, attempting to start a relationship with her. RP 484-85.

Defendant was detained and Detective Reopelle interviewed him on November 27, 2012. RP 408. Defendant initially denied any knowledge of a homicide. RP 449, 452. When confronted about this, defendant altered his story to say that he knew of a homicide, but only because Stimson told him he had shot someone. RP 451. Defendant also stated that Stimson was wearing the Chicago Bulls hat the night of the shooting. RP 451.

When confronted with the surveillance video, defendant again changed his story. Exhibit 75. Defendant identified himself as well as Stimson on the video. RP 411. Defendant was the person wearing the Chicago Bulls hat. RP 415. According to defendant, Mr. Watson made a racial slur as he and Stimson walked past him. RP 417. Stimson had originally wanted to help Mr. Watson, but because of the slur, he was going to “whip his ass,” instead. RP 417. Defendant claimed that he told Stimson to back down and convinced him to help Mr. Watson anyway. RP 417.

Defendant then claimed that Mr. Watson gave Stimson \$5.00 to buy him a beer. RP 419. Defendant said he tried to go into the store, but since it was closed he could not buy Mr. Watson his beer. RP 419. They

gave Mr. Watson his money back, but then Stimson pulled a gun and demanded, “give me everything you got.” RP 419, 426. Defendant stated that he tried to discourage Stimson and told him he was being, “hella dumb.” RP 419, 421. According to defendant, Stimson was just about to back down when Mr. Watson grabbed the barrel of the gun and laughed and then the gun went off. RP 419, 421, 427-28. Then they ran away, but did not actually run. RP 421-22.

According to defendant, Stimson showed him two .38 revolvers earlier in the day, but when he asked Stimson if he was armed that night, Stimson responded, “no.” RP 423.

The surveillance video shows the two men acting in concert in an attempt to rob Mr. Watson. Exhibit 69. It shows both men focusing on the truck as they move throughout the parking lot. Exhibit 69. It shows defendant checking the gas station door to ensure it is locked, then wiping his fingerprints away from where he touched the door. Exhibit 69; Exhibit 69-C. It shows defendant attempting to distract Mr. Watson while Stimson tried to enter the truck through the passenger side door. Exhibit 69. Finally, it shows both men crowding the open driver’s side window when Stimson put his hand with the gun through the window and the muzzle flash when he pulled the trigger. Exhibit 69.

C. ARGUMENT.

1. TAJANAE WILLIAMS' TESTIMONY WAS
ADMISSIBLE AS A STATEMENT AGAINST
INTEREST BY A PARTY-OPPONENT.

ER 801(d)(2)(ii) provides that a statement is not hearsay if “[t]he statement is offered against a party and is ... a statement of which the party has manifested an adoption or belief in its truth ...” A party-opponent can manifest adoption of a statement by words, gestures, or complete silence. *State v. Neslund*, 50 Wn. App. 531, 550–51, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988). Silence will only constitute an adoptive admission if the party-opponent heard the statement, was able to respond, and the circumstances surrounding the statement were such that it is reasonable to conclude that the party-opponent would have responded “had there been no intention to acquiesce.” *Neslund*, 50 Wn. App. at 551. An adoptive admission is attributed to the defendant and becomes the defendant’s own words. *Neslund*, 50 Wn. App. at 554–57. The right of confrontation is not implicated by the admission into evidence of the defendant’s own incriminating out-of-court statements. *Neslund*, 50 Wn. App. at 554.

A trial court makes a threshold decision that there are sufficient facts from which a jury could conclude that the defendant made an adoptive admission, i.e., facts from which a jury could reasonably

conclude that the defendant “actually heard, understood, and acquiesced in the statement.” *Neslund*, 50 Wn. App. at 551 (quoting *United States v. Moore*, 522 F.2d 1068, 1076 (9th Cir. 1975)). The jury ultimately decides the question as the trier of fact. *Neslund*, 50 Wn. App. at 551-52.

Defendant claims that Ms. Williams’ testimony that Stimson “said that [Stimson] and Marcus were going to rob this guy and take his truck, but they didn’t” is inadmissible hearsay. *See* RP 481. Defendant is incorrect as the statement was adopted by defendant.

Ms. Williams testified that defendant was present when Stimson made the statement. RP 481. Both men were inside her bedroom, sitting on her bed. RP 481. When she told them that a stolen truck would not be permitted at her apartment, both men responded by looking at her. RP 482. Defendant’s look was a “blank stare,” while Stimson “just looked at [her].” RP 482. Immediately after, defendant asked Ms. Williams to download music onto her computer. RP 482.

Ms. Williams’ testimony shows that defendant was present when Stimson made the statement, was close enough to have heard the statement, and had the same reaction as Stimson to Ms. Williams’ concern over a stolen truck. Defendant’s subsequent ability to speak to Ms. Williams about music shows that he was able to respond to Stimson’s statement, but that he chose not to.

Moreover, the circumstances surrounding the statement were such that it is reasonable to conclude that defendant would have responded, had there been no intention to acquiesce. In his interview with the police, defendant indicated that he had no idea that Stimson was going to rob Mr. Wilson and, when he saw what was happening, he made several attempts to convince Stimson to leave Mr. Wilson alone. RP 421. As defendant indicated he had no difficulty telling an armed Stimson he was “being dumb” to commit the robbery, he clearly would have had no difficulty denying Stimson’s later statements to Ms. Williams that he was actively involved. Under the circumstances it is reasonable to conclude that defendant would have immediately and vehemently denied involvement in the crime. *See* RP 709.

Finally, the jury was properly instructed regarding whether defendant adopted Stimson’s statement. The court provided the following instruction:

Alleged statements of an accomplice should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such alleged statements alone unless after carefully considering the statements, you are satisfied beyond a reasonable doubt of its truth.

It is for the jury to determine if such statements were made and whether those statements, in light of all the

circumstances, were heard, understood and acquiesced by defendant.

CP 49-72 (Jury Instruction 9). This instruction properly informed the jury what it had to consider in order to determine if defendant adopted the Stimson's statement as his own and whether the statement was truthful.

Defendant adopted Stimson's statement as his own when he heard, understood, was able to respond, and failed to do so. Because an admission by a party-opponent is not hearsay, defendant's remaining hearsay arguments are meritless. Defendant has provided this court with no federal or Washington State case law that would support a need to revisit the *Neslund* decision.

2. DEFENDANT RECEIVED
CONSTITUTIONALLY EFFECTIVE
ASSISTANCE OF COUNSEL WHERE HIS
ATTORNEY'S PERFORMANCE WAS NEITHER
DEFICIENT NOR PREJUDICIAL.

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

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

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

Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

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

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

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

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

Here, defendant alleges ineffective assistance of counsel for his attorney's failure to object to hearsay testimony. Defendant has failed to show deficient performance or prejudice. A review of the record as a whole shows that counsel was an effective advocate for his client as he cross-examined witnesses, made coherent opening and closing arguments, made appropriate motions, proposed jury instructions and objected at appropriate times throughout the trial.

- a. Counsel's performance was not deficient for his failure to object to admissible testimony.

As a threshold matter, the admission of Stimson's statement was not hearsay because it was an adopted admission by defendant. Statements made by a party-opponent are not hearsay. ER 801(d)(2)(ii). Had counsel objected on hearsay grounds, his objection should have been overruled. Counsel did make an untimely motion to strike the testimony as the admission of a nontestifying statement by a codefendant and requested a limiting instruction. RP 552, 609-10. The State informed the court that it had prepared for argument had defendant made a timely objection. RP 553-55, 604-08. While the court noted that an objection should have been made at the time and that incriminating statements by a codefendant are generally not admissible, he indicated that an objection would have assisted with clarifying the language used by Stimson, Ms. Williams' response, and defendant's behavior. RP 610-14. The court also examined the cases provided by the State and concluded that the court makes only a threshold determination of admissibility and it is for the jury to determine whether defendant actually heard, understood, and acquiesced to the statements. RP 614-15. The court never indicated that it would have actually sustained the objection. RP 610-15. During discussion of jury instructions, the court stated:

Really, we are talking about testimony that's admissible by adoption or silence, which is why the State offered it under Rule 801(d)(2) and which is an admission. And that 801(d)(2) is, under the rule, where a statement is not hearsay if it is an admission. So my first thought was to call this hearsay statement, but it's 801(d)(2) evidence, so it's not hearsay.

RP 651. While the court then indicated that it believed that the difficulty in drafting an appropriate jury instruction would not have arisen if defendant had objected, the court had also acknowledged that it could not have sustained a hearsay objection because the statement was not hearsay. *See* RP 651-52.

As argued above, the statement was not hearsay, thus counsel's performance was not deficient due to his failure to object.

- b. Counsel's decision not to request an affirmative defense instruction was a legitimate trial tactic as it would have conflicted with defendant's theory of the case.

A defendant is entitled to have the jury instructed on his theory of the case if evidence supports that theory. *State v. O'Brien*, 164 Wn. App. 924, 931, 267 P.3d 422 (2011). A defendant must establish each element of an affirmative defense by a preponderance of the evidence. *O'Brien*, 164 Wn. App. at 931. For defense counsel's failure to request the reasonable belief instruction to amount to deficient performance, he or she

must show that had counsel requested this instruction, the trial court would have given it. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

A person is guilty of murder in the first degree when:

He or she commits or attempts to commit the crime of either [] robbery in the first or second degree, . . . and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

RCW 9A.32.030(1)(c).

Here, counsel had a tactical reason not to request the affirmative defense instruction. Defendant's statements to law enforcement denied

any knowledge of the robbery, as well as the events leading to the shooting. Hence, defendant's theory of the case at trial was a general denial of *any* wrongdoing. If counsel had requested an affirmative defense instruction, he would have had to argue that defendant was involved in the robbery, but did not expect, and had no reason to expect, Mr. Watson to be killed. As this theory would have contradicted defendant's statements to law enforcement, counsel's decision not to request an affirmative defense instruction was a reasonable trial tactic.

Defendant relies on *Powell*, and *State v. Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007), for his assertion that he was entitled to the affirmative defense instruction. Defendant's reliance on these cases is misplaced.

In *Powell*, the defendant was charged with second degree rape for engaging in sexual intercourse with another person when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated. 150 Wn. App. at 142. In his statements to law enforcement and at trial, Powell claimed that the sex was consensual. *Powell*, 150 Wn. App. at 146, 148-49. Powell's counsel failed to request a statutory affirmative defense instruction of reasonable belief that the victim was not mentally incapacitated or physically helpless. *Powell*, 150 Wn. App. at 153. On appeal, the court held that the evidence presented at trial

supported Powell’s “reasonable belief” defense and that counsel was not an objectively reasonable trial tactic as counsel argued the elements of the statutory defense and it was entirely consistent with the defendant’s theory of the case. *Powell*, 150 Wn. App. at 155.

In *Hubert*, counsel similarly failed to request a “reasonable belief” instruction in defending against a second degree rape charge, even though the evidence supported Hubert’s defense that he reasonably believed the victim was not physically helpless: Hubert testified that the sexual activity was consensual and that he believed the victim was awake during the entire incident. *Hubert*, 138 Wn. App. at 926–27, 929. But Hubert’s counsel neither argued the “reasonable belief” defense nor requested an instruction on that statutory defense (because counsel was unaware of this statutory defense). *Hubert*, 138 Wn. App. at 929. The *Hubert* court held that counsel’s failure to investigate the relevant law could not be characterized as a legitimate tactic and that this failure amounted to deficient performance. *Hubert*, 138 Wn. App. at 929–30.

The present case is easily distinguishable from both *Powell* and *Hubert* as those defendants admitting having sex with the victims. Had they denied intercourse, then the “reasonable belief” affirmative defense would not have been consistent with their theory of the case, nor would it have been supported by the evidence. Unlike the defendants in *Powell*

and *Hubert*, defendant here denied any involvement in the underlying criminal act. To then argue to the jury that he meant to commit robbery but had no reason to believe Stimson was armed, would have undermined his theory of the case and his statements to law enforcement. Counsel had a legitimate basis for failing to request the affirmative defense.

- c. Defendant has failed to show prejudice based on the overwhelming evidence presented at trial.

Even if this court does find that counsel's performance was deficient, defendant has not shown that he was prejudiced due to on the overwhelming untainted evidence presented at trial. Defendant initially denied any knowledge of the shooting, but finally changed his story when confronted with the surveillance video showing that he was present. RP 431, 449, 451-52. The jury saw the surveillance video of defendant's actions during the shooting. *See* Exhibit 69. The jurors saw defendant distract Mr. Watson while Stimson attempted to access the truck from the passenger side. Exhibit 69. They saw him crowd the driver's side window in an effort to intimidate Mr. Watson. Exhibit 69. They also saw defendant check to ensure there were no witnesses inside the Chevron and then wipe his fingerprints off of the doorway. Exhibit 69.

Once defendant appeared at Ms. Williams' apartment, he did not appear upset or worried. *See* RP 480-83. Defendant was quiet while in Ms. Williams' apartment; downloading music and then, within an hour, falling asleep on her bed. RP 483. A few days later, defendant started calling Ms. Williams in an attempt to start a relationship with her. RP 484-85.

The overwhelming evidence in this case shows that defendant assisted Stimson in his attempt to rob Mr. Watson. Defendant's changing story undermined his credibility and the jury was able to compare his version of the event with the video. His demeanor while at Ms. Williams' apartment shows a man who was unconcerned with the fact that a man had just been shot in the chest in front of him. Finally, after he discovered police were looking for him, his attempts to start a relationship with his friend's girlfriend (whom he had only met once before) would suggest that he was attempting to convince Ms. Williams' to withhold her knowledge of his actions from law enforcement. Defendant has failed to show that that outcome of the trial would have been different but for counsel's failure to object to the admission of Stimson's statement to Ms. Williams.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DIRECTED THE JURY TO CONTINUE DELIBERATIONS.

A trial court's decision not to discharge a jury after it reports that it is deadlocked is reviewed for an abuse of discretion. *State v. Jones*, 97 Wn.2d 159, 163, 641 P.2d 708 (1982). To demonstrate judicial coercion a defendant must provide "more than mere speculation" about how the trial court's intervention might have influenced the jury's verdict. *State v. Watkins*, 99 Wn.2d 166, 177-78, 660 P.2d 1117 (1983). The defendant must establish "a reasonably substantial possibility" that the verdict was improperly influenced by the trial court's intervention. *Watkins*, 99 Wn.2d at 178. The jury's own assessment that it is deadlocked is not controlling; the trial judge "is in the best position to determine whether a jury's stalemate is only a temporary step in the deliberation process or the unalterable conclusion to that process." *State v. Taylor*, 109 Wn.2d 438, 442, 745 P.2d 510 (1987), *overruled on other grounds by State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991).

Under the federal and Washington constitutions, a criminal defendant has a right to a jury verdict uninfluenced by factors outside the evidence, the courts proper instructions, and the arguments of counsel. *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978) (citing *State*

v. Ring, 52 Wn.2d 423, 325 P.2d 730 (1958)); *Iverson v. Pacific Am. Fisheries*, 73 Wn.2d 973, 442 P.2d 243 (1968)). A court is prohibited from giving instructions that (1) suggest the need for agreement, (2) the consequences of no agreement, or (3) the length of time a jury will be required to deliberate. CrR 6.15(f)(2); *Boogaard*, 90 Wn.2d at 736; *Watkins*, 99 Wn.2d at 175.

Here, the court did not abuse its discretion when it ordered the jury to continue deliberations. The trial involved a serious crime, it lasted a full week, and involved nineteen witnesses, numerous exhibits, and two surveillance videos. The jury deliberated for less than two hours the day they received the case, one full day, then indicated it was unable to reach “consensus” by noon on the third day. RP 730. Because of the seriousness of the charge and length of the case, the court indicated that he would have the jury continue deliberations even before he inquired. RP 732. When the jury entered, the court admonished the jury to make no extraneous remarks and for the foreman to answer only “yes” or “no” to his questions. RP 732-33. The court asked:

So, I know that’s difficult to do, but I do want to ask you at this point in time if you believe there is a reasonable probability of the jury reaching an agreement within a reasonable time.

RP 733. When the foreman responded “no,” The court stated:

Okay. At this point in time, I am going to ask the jury to continue deliberating at this point in time, and so I am going to excuse you back to the jury room and ask you to continue your discussions and deliberations.

RP 733.

Nothing about this statement suggests the need for agreement, the consequences of no agreement, or the length of time the jury would be required to deliberate. The only information the court gave the jury was that he was sending them back to continue deliberating. Defendant provides nothing more than mere speculation that the court influenced the jury's verdict. The trial court did not abuse its discretion when it asked the jury to continue deliberating.

4. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVINC A RATIONAL FACT FINDER THAT DEFENDANT OR AN ACCOMPLICE WAS ARMED WITH A FIREARM DURING THE COMMISSION OF THE CRIME.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

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

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the

witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

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

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

A person is potentially subject to a deadly weapons enhancement if armed while committing a crime. RCW 9.94A.533(3), (4). "A person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993); *see also*, generally, Jeffrey R. Kesselman, *Excuse Me, Are You "Using" That Gun? The United States Supreme Court Examines 18 U.S.C. § 924(c)(1) in Bailey v. United States*, 30 Creighton L.Rev. 513 (1997) (surveying "use" of a weapon in the context of the federal firearms enhancement). But a person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime. *State v. Barnes*, 153 Wn.2d 383, 103 P.3d 1219 (2005); *Valdobinos*, 122 Wn.2d at 282. Under RCW 9.94A.310(3), additional time is added to a presumptive sentence if the *offender or an accomplice* was armed with a deadly

weapon. An accomplice's knowledge of the presence of the weapon is not an "element" of the firearm sentence enhancement. *Barnes*, 153 Wn.2d at 386. Knowledge is a factor for the jury to consider in deciding whether there is a connection between the defendant, the crime, and the weapon. *Barnes*, 153 Wn.2d at 386.

Here, the jury was instructed:

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant, or an accomplice, was armed with a firearm at the time of the commission of the crime of Murder in the First Degree.

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.

CP 49-72 (Jury Instruction 20). The jury found defendant was armed with a firearm during the commission of the crime. CP 48.

Defendant claims that there was insufficient evidence to prove that defendant knew Stimson was armed with a firearm. *See* Brief of Appellant at 54. Yet it is not required that the State prove knowledge, just that there is a connection between defendant, the crime, and the weapon.

Defendant admitted that he knew Stimson had been carrying firearms earlier that day. RP 422. Defendant claimed that the guns he saw were both revolvers and that he thought it was possible that Stimson had

used “the black one” in the shooting. RP 423. Defendant also claimed to have asked Stimson if he was carrying guns just prior to the attempted robbery, but that Stimson said he was not. RP 423. As Stimson clearly had no issue with showing off guns he carried to defendant, it is not reasonable to conclude that Stimson would have lied about carrying a gun that night. The jury was free to find defendant’s statements not credible.

Not only is it reasonable to infer that defendant was aware that Stimson had been armed, as argued above, the evidence showed that defendant actively engaged in the robbery. The video shows defendant assisting Stimson with the attempted robbery even before the shot goes off. Exhibit 69. When Stimson pulled the gun out, defendant remained standing next to Stimson at the driver’s side window of the truck. Exhibit 69. While defendant is correct that the gun is not visible on the surveillance video, it was clearly present because the video shows the muzzle flash and Mr. Watson died of a gunshot wound to the chest. *See* Exhibit 69; RP 267. That defendant could see the gun at the time Stimson displayed it to Mr. Watson is a reasonable inference based on the evidence presented at trial. The surveillance video shows a nexus between defendant, the murder, and the weapon in his accomplice’s hand.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence presented that defendant knew that Stimson was armed when he attempted to commit robbery.

5. THIS COURT SHOULD DECLINE TO CONSIDER DEFENDANT’S CHALLENGE TO THE SPECIAL VERDICT JURY INSTRUCTION AS HE RAISES IT FOR THE FIRST TIME ON APPEAL AND HAS NOT SHOWN A MANIFEST INJUSTICE AFFECTING A CONSTITUTIONAL RIGHT.

A jury must unanimously find beyond a reasonable doubt any aggravating circumstance that increases the penalty for a crime. *State v. Nunez*, 174 Wn.2d 707, 712, 285 P.3d 21 (2012); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 313–14, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). A jury’s verdict must be unanimous in order to answer “yes” or “no” for a special verdict form. *Nunez*, 174 Wn.2d at 715-19.

RAP 2.5(a)(3) provides, “The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed error[] for the first time in the appellate court: ... manifest error affecting a constitutional right.” *State v. Berlin*, 167 Wn. App. 113, 122, 271 P.3d 400 (2012). For an error to be “manifest,” the defendant must show that the asserted error had practical

and identifiable consequences at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). To ascertain whether the trial court could have corrected the error given its knowledge at the time, the appellate court must place itself in the trial court's shoes when determining if the alleged error had practical and identifiable consequences. *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009).

Here, defendant argues for the first time on appeal that the special verdict instruction was improper because it did not allow for the jury to return a "no" verdict. Jury unanimity in special verdicts is not constitutional in nature. *Berlin*, 167 Wn. App. at 123.

Even if this court does find that this issue is of constitutional magnitude, defendant has not shown that any error is manifest. The jury was instructed that it had to be unanimous in order to answer "yes" to the special verdict. CP 49-72 (Jury Instruction 19). The jury was also instructed that it was not unanimous that "yes" was the correct answer, it must leave the form blank. CP 49-72 (Jury Instruction 19). This instruction is incorrect because a jury could unanimously answer "no." *See Nunez*, 174 Wn.2d at 715-19. However, nothing in the instruction informs the jury that they could only submit a "yes" verdict. Rather, the instruction informs them that they could submit a "yes" or a blank verdict form if "yes" was not the answer.

Moreover, the jury answered “yes” on the special verdict, indicating that it was unanimous that “yes” was the correct answer. CP 48; 740. The court also polled the jury, and each juror stated that the verdicts rendered were both the verdicts of the jury as a whole and the verdicts of the jurors as individuals. RP 741-43. The jury never expressed confusion regarding the instruction and there was no practical or identifiable consequence² in having the jury return a unanimous “yes” special verdict.

² The issue might have been manifest had the jury unanimously decided “no,” but left the form blank pursuant to the court’s instruction. A “no” special verdict may preclude subsequent retrial under double jeopardy grounds, whereas a blank verdict might indicate a hung jury and leave open the possibility of retrial. However, that issue is not before this court and the jury was clearly unanimous when it answered “yes.”

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's conviction for murder in the first degree by extreme indifference.

DATED: JULY 31, 2014

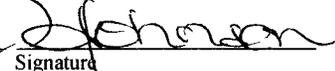
MARK LINDQUIST
Pierce County
Prosecuting Attorney



KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

Certificate of Service:

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

7/31/14 
Date Signature

PIERCE COUNTY PROSECUTOR

July 31, 2014 - 2:34 PM

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