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Division II
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NO. 50065-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ODIES D. WALKER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF PIERCE COUNTY

Before the Honorable John R. Hickman, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Odies Walker's conviction for aggravated first-degree murder infringed on his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of premeditation.

2. There is insufficient evidence of premeditation to support the conviction for aggravated first degree murder as charged in Count 1.

3. Defense counsel did not investigate potentially exculpatory testimony of former co-defendant Calvin Finley, thus violating Mr. Walker's constitutional right to effective assistance of counsel.

4. Mr. Walker did not receive the effective assistance of counsel required by the federal and state constitutions because his attorney did not request a jury instruction regarding the definition and use of the term "major participant," contained in the instruction for a finding of the aggravating element required in Count 1.

5. The trial court's statement to the jury during deliberations violated Mr. Walker's constitutional right to a fair and impartial jury trial and improperly coerced the jury into returning a conviction for first degree assault.

6. The trial court's statements to the jury violated CrR 6.15(f)(2).

7. The Court of Appeals should decline to impose appellate costs, should the State substantially prevail and request such costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Absent evidence that Mr. Walker of an accomplice intended to cause the death of Mr. Husted, does the conviction for aggravated first-degree murder violate due process? Assignments of Error No. 1 and 2.

2. Was there sufficient evidence to support a finding of premeditation regarding the charge of aggravated first degree murder? Assignments of Error No. 1 and 2.

3. Mr. Walker's Sixth Amendment right to counsel includes the right to effective assistance of counsel. Defense counsel is required to investigate the facts of the case. The trial court received an affidavit after the jury verdict in which the affiant, reported to signed by Calvin Finley, in which the affiant states that Mr. Walker had no knowledge of the robbery and murder. Nevertheless, defense counsel did not investigate the affidavit and did not bring a motion for new trial based on newly discovered evidence. Must Mr. Walker's convictions be reversed and remanded for a new trial because his constitutional right to effective assistance of counsel was violated? Assignment of Error 3.

4. Was Mr. Walker's constitutional right to effective assistance

of counsel violated when his attorney did not offer an instruction or special verdict form defining the term “major participant,” an element required in the instructions of the jury in order to find the aggravating element in Count 1. Assignment of Error 4.

5. Mr. Walker’s constitutional right to due process and a fair trial includes the requirement that the jury reach its verdict uninfluenced by factors other than the evidence, argument of counsel, and jury instructions. Although Mr. Walker’s jury reached an apparent verdict in Count 3 and returned a signed verdict form convicting him of second degree assault, the court directed that the jury have “a fair opportunity” to make the decision regarding whether the jury intended to fill out Verdict Form D or E, based on the presiding juror’s statement that the verdict form for first degree assault was left blank in “error.” Where jurors could interpret the court’s comment as a suggestion that their verdict was “wrong,” is there a reasonable possibility the verdict in Count 3 for first degree assault was obtained in violation of Mr. Walker’s constitutional right to a fair and impartial jury under the Sixth Amendment and Article I, § 22 and obtained in violation of CrR 6.15(f)? Assignment of Error 5 and 6.

6. If the State substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose

appellate costs because Mr. Walker is indigent, as noted in the Order of Indigency? Assignment or Error 7.

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Odies Walker was charged with aggravated first degree premeditated murder, (2) first degree felony murder aggravated by a high degree of planning and a destructive and foreseeable impact on persons other than the victim, (3) first degree assault, (4) first degree robbery, (5) first degree solicitation to commit robbery, and (6) first degree conspiracy to commit robbery for his alleged role in the murder and robbery of a Loomis armored truck driver inside a Walmart in Lakewood, Washington in June, 2009. Calvin Finley, Marshawn Alex Turpin, and Tonie Williams-Irby were named as codefendants. Prior to trial, the Honorable Bryan E. Chushcoff denied Mr. Walker's motion to suppress evidence and deemed admissible statements he made to law enforcement officers. His former codefendants entered guilty pleas; Ms. Williams-Irby testified on behalf of the prosecution at trial, which was held March 2 through March 22, 2011.

The jury found Mr. Walker guilty of the offenses as charged. In addition, the jury returned special verdicts as to Count 1, finding the crime

was committed in the furtherance of robbery in the first degree; Count 2, finding Mr. Walker used a high degree of sophistication or planning when committing the crime; and in Counts 1-4, finding that Mr. Walker or an accomplice was armed with a firearm at the time of the commission of the crimes. The court granted the request to merge Count 2 (felony murder) with Count 1 (premeditated murder). The trial court sentenced Mr. Walker to life without possibility of release, plus 60 months for the weapon enhancement on Count 1; 123 months on Count 3 plus 60 months for the weapon enhancement, both to run consecutively to the sentence imposed on Count 1; 144 months on Count 4 plus the 60-month weapon enhancement, to run concurrently; and 108 months on Counts 5 and 6, also to run concurrently. Mr. Walker appealed and this Court affirmed the convictions and enhancements. *State v. Walker*, 178 Wash.App. 478, 315 P.3d 562 (2013).

The Supreme Court accepted review and reversed and remanded for a new trial. *State v. Walker*, 182 Wash.2d 463, 341 P.3d 976 (2015). Upon remand, Mr. Walker was retried on following offenses and enhancements: Count 1: aggravated murder in the first degree of Kurt Husted committed as an accomplice with premeditation and in furtherance of the crime of robbery

in the first degree in violation of RCW 10.95.020(1)(a) and 9A.32.030(1)(a); Count 2: murder in the first degree committed while committing or attempting to commit the crime of robbery in the first degree in violation of RCW 9A.32.030(1)(c), additionally alleging the aggravating factors that the offense involved a high degree of sophistication or planning pursuant to RCW 9.94A.535(3)(m); Count 3: assault in the first degree committed as an accomplice with a firearm or deadly weapon against Wilbert Pina in violation of RCW 9A.36.011(1)(a); Count 4: robbery in the first degree committed as an accomplice in violation of RCW 9A.56.190 and 9A.56.200(1)(a)(I). The State alleged firearm enhancements as to each of these crimes. The State also alleged commission of two additional offenses in the period between May 1 and June 2, 2009; Count 5: solicitation to commit robbery in the first degree in violation of RCW 9A.56.190, in violation of RCW 9A.28.030; and Count 6: conspiracy to commit robbery in the first degree, with Calvin Finley, Marshawn Alex Turpin, and/or Tonie Williams-Irby, in violation of RCW 9A.28.040. Clerk's Papers at 1-2.

A second jury trial was held before the Honorable John Hickman on January 17-19, January 23-26, January 30 and 31, February 1, February 2, February 7-9, and February 13, 2017. Report of Proceedings (RP) at 184-

2456.¹

A jury convicted² Mr. Walker a second time of the offenses as charged, including firearm sentencing enhancements and the two aggravating circumstances alleged by the State. CP 1053, 1056, 1057, 1060, 1062, 1063, 1065, 1066. In addition, the jury returned special verdicts as to Count I, finding the crime was committed in the furtherance of robbery in the first degree; Count 2, finding Mr. Walker used a high degree of sophistication or planning when committing the crime and that the crime involved a destructive and foreseeable impact on persons other than the victim; and Counts 1 through 4, finding Mr. Walker was armed with a firearm at the time of the commission of such crimes. CP 1055, 1058, 1059, 1061. The court imposed a sentence of life without possibility of release in Count 1, 160 months in Count 3, 171 months in Count 4, 128.25 months in Count 5, and 128.25 months in Count 6 and firearm enhancement in Counts 1, 3, and 4, for a total of life plus 340 months. 19RP at 2484; CP 1144-1158. As was

¹The record of proceedings consists of the following volumes:

RP (November 13, 2015, December 2, 2015, March 10, 2016, April 28, 2016), 1RP-December 2, 2016, 2RP-January 3, 2017, 3RP-January 5, 2017, 4RP-January 17, 2017, 5RP-January 18, 2017, 6RP-January 19, 2017, 7RP-January 23, 2017, 8RP-January 24, 2017, 9RP-January 25, 2017, 10RP-January 26, 2017, 11RP-January 30, 2017, 12RP-January 31, 2017, 13RP-February 1, 2017, 14RP-February 2, 2017, 15RP-February 7, 2017, 16RP-February 8, 2017, 17RP-February 9, 2017, 18RP-February 13, 2017, and 19RP-March 2, 2017 (sentencing).

²An irregularly involving Count 3, assault in the first degree, is discussed below.

the case in the first trial, the court granted a motion to merge Counts 1 (premeditated murder) and Count 2 (felony murder) and did not include that count in the Judgment and Sentence. 19RP at 2470; CP 1163-65. The court imposed costs, fees, assessments and restitution. 19RP at 2484; CP 1144-1158.

a. Verdict Forms D and E

When announcing the verdicts, the trial court noted that Verdict Form D, regarding first degree assault was signed by the presiding juror but left blank, and the presiding juror stated that was “an error” and said that the jury had reached a unanimous guilty verdict on the charge. 18RP at 2434. Verdict form E, however, stated that the jury found Mr. Walker guilty of second degree assault. 18RP at 2438; CP 1062. The jury was excused while counsel discussed the conflicting verdict forms, and then the court, after stating that it did not believe that it constituted a comment on the evidence and after handing the Verdict Form back to the jury, told the jury that the court was giving “the jury a fair opportunity to make sure whatever decision you did make regarding whether it was Verdict Form D or E, that the correct verdict form is, in fact, filled out.” 18RP at 2447. Seven minutes later the jurors returned to the courtroom after completing Verdict Form D by

entering a finding of guilty. CP 1060. The jury was polled and answered that the jury found Mr. Walker guilty of first degree assault. 18RP at 2451-2455

b. Jury instructions and motion to dismiss Count 1.

The court granted an instruction for second degree murder. CP 1013, 1014. The court also gave the jury the following instruction for premeditated first degree murder as charged in Count 1:

If you find the defendant guilty of premeditated murder in the first degree as charged in Count 1 and as defined in Instruction 13, you must then determine whether the following aggravating circumstances exists:

The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree.

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

For the aggravating circumstances to apply, the defendant must have been a major participant in acts causing the death of Kurt Husted and the aggravating factors must specifically apply to the defendant's actions. The State has the burden of proving this beyond a reasonable doubt. If you have a reasonable doubt whether the defendant was a major participant, you should answer the special verdict "no."

CP 1047. Instruction 46.

The jury was not instructed regarding the definition of "major participant"

nor did the jury receive a special verdict form on the issue. CP 1047.

Following conviction, Mr. Walker moved to dismiss the aggravating factor as to Count 1, arguing that the State failed to prove he was a major participant in the robbery and that the verdict form refers only to a finding of premeditated murder but does not reference the “major participant” aggravator. 19RP at 2462; CP 1118-20. The State argued that the instruction is taken from the pattern instruction with no amendments or modifications. 19RP at 2463; CP 1127-39. The trial court denied the defense motion, noting that defense counsel had not requested a special verdict form or instruction for “major participant,” and that under *State v. Whitaker*,³ there is no requirement to define the phrase nor grant a special verdict form unless requested. 19RP at 2469; CP 1140.

c. 2013 affidavit by Calvin Finley received by the trial court day after the verdict

On March 2, 2017, the State noted that an affidavit from 2013 was received by the Clerk’s Office on February 14, 2017. 19RP at 2471. The affidavit, signed Calvin Finley, denied that Mr. Walker knew about the planning of the robbery and resulting murder and did not participate by supplying weapons or other wrongdoing. The State filed a declaration by

³133 Wash.App. 199, 135 P.3d 923 (2006)

Detective Les Bunton in response to the affidavit. 19RP at 2471; Supp CP ___ . Defense counsel took no action regarding the affidavit. 19RP at 2772.

Timely notice of appeal was filed on March 2, 2017. CP 1166. This appeal follows.

2. **Trial testimony**

On June 2, 2009, Calvin Finley and Marshawn Turpin were accomplices in the armed robbery of Kurt Husted, a security guard for the Tacoma Loomis Armored Car Company, as Mr. Husted was picking up cash receipts from a Walmart store in Lakewood, Washington. The State alleged that former Walmart employee Odies Walker drove a car to the front entrance of the store where the Loomis truck was parked and that Marshawn Turpin and Calvin Finley, both armed with handguns, went inside the Walmart and waited in an arcade area. Mr. Walker, who did not enter the store at that time, was identified as driving a white Buick used to leave the Walmart after the murder. At trial, the court read a stipulation of facts by the defense that on June 2, 2009, Calvin Finley killed Mr. Husted in the Walmart in Lakewood and that Marshawn Turpin was with Mr. Finley in the Walmart at the time that Mr. Husted was killed. 11RP at 1398-99. Ex. 67, 68.

Mr. Husted, an employee of Loomis Armor for sixteen years, arrived

at the Lakewood Walmart on June 2, 2009 to pick up cash and checks from the previous day. 7RP at 655. The deposit consisted of \$143,611 in checks and \$55,185 in currency. 9RP at 1031. He and Loomis driver Gary Shutting arrived at the Walmart at 1:12 p.m., and Mr. Husted got out of the truck with a handcart used to transport money. 7RP at 730. Mr. Turpin and Mr. Finley entered the Walmart and Finley fired a single shot into Mr. Husted's head, causing his death. The bullet passed through Mr. Husted and lodged in the left shoulder of a bystander, Wilbert Pina. Mr. Pina was at the Walmart with his son waiting in line to cash a check at the customer service desk. 7RP at 661. He heard a bang and felt a "push" on his shoulder, and then saw two black men running out of the Walmart, and saw one man carrying a gun and the other carrying a moneybag. 7RP at 660, 661, 662, 663.

After they left, Mr. Pina sat down and felt a burning sensation in his shoulder, and when he touched his shoulder he realized that he had been shot. 7RP at 664. He was transported by ambulance to Tacoma General Hospital. 7RP at 664, 677. The bullet remained lodged in Mr. Pina's shoulder. 7RP at 678-79.

Officers from the Lakewood Police Department recovered a cartridge case at the scene from a 9-mm handgun. 9RP at 1118, 1125.

Video cameras at the Walmart showed persons identified as Mr. Finley and Mr. Turpin entering the store and then showed Mr. Finley shooting Mr. Husted, and then Mr. Turpin carrying the money bag out of the store and both getting into a white Buick that drove up to an entrance of the store and then showed the car exiting onto Bridgeport Way. 9RP at 1145-46.

Jerry Cheatam, a gaming regulator for the Puyallup Tribe, was in Walmart on June 2 at about 1:20 p.m. 7RP at 695. He stated that a man walked up to the Loomis guard, said "excuse me, sir" and that he then heard a "pop" and the guard fell to the ground. 7RP at 696, 697. He recognized Mr. Husted as the same Loomis guard who picked up money from the casino. 7RP at 696.

April Wolfe, a medical assistant at Lakewood Pediatrics, was in the Walmart during her lunch break from work on June 2. 7RP at 711-12. While using the express checkout stand and heard a loud pop behind her, and as she turned around and saw the guard fall to the ground. 7RP at 713. She saw two men run out of the building and then she ran to Mr. Husted, who was on the ground. 7RP at 715. She said both men were black. 7RP at 715. One took the moneybag as he left, and the second man had a gun in his hand. 7RP at 715, 716. She ran to see if she could help the guard and told him that

help was on the way and he said "okay." 7RP at 716. Ms. Wolfe also assisted Mr. Pina, and he gave his son to her to take care of until the child's mother arrived. 7RP at 719.

Tito Brown was at the Walmart on June 2 at the customer service desk to get a money order. 7RP at 740. While standing in line at approximately 1:20 p.m., he heard a gunshot and saw Mr. Husted fall at the same time. 7RP at 741. He saw a black man with shoulder length hair wearing a white shirt and white hat bending down to pick up the money bag. 7RP at 742. Mr. Brown went outside the store and memorized a partial license plate number of a white Buick Skylark after seeing one of the men getting into the car, which he provided to Jeffrey Paynter, a Lakewood police officer who arrived at the scene. 7RP at 742-43, 753.

Lian Roach was operations manager for the cash office at the Lakewood Walmart in 2009. 9RP at 1024. In his role as manager, he would prepare deposits from the previous day for the daily pick up of money by Loomis. 9RP at 1024. He testified that there were usually staff meetings every morning at the Lakewood Walmart where the staff reviewed daily sales and other matters. 9RP at 1021. The meetings were nonmandatory and could be attended by all Walmart "associates." 9RP at 1023. The Loomis driver

would not arrive at the same time each day for pickups. 9RP at 1025. Some drivers would call the cash office several minutes in advance, other drivers did not call before arriving. 9RP at 1025. When the driver arrived, Mr. Roach would give the driver cash, checks, and WIC checks, and coins, which are kept in separate bags. 9RP at 1026, 1031.

On June 2 Mr. Roach received a radio call that the Loomis truck had arrived, and he walked to the cash office where Mr. Husted was standing. 9RP at 1027. Mr. Roach unlocked the door to the cash office where the deposit was stored in a safe, and gave Mr. Husted the deposit, which he put into a canvas bag and then put on a dolly. 9RP at 1027. He stated that the meetings, the managers do not discuss the specific dollar amounts from the previous day, and only discuss sales amounts. 9RP at 1038. Mr. Roach stated that Tuesdays—which was the day of the robbery—at beginning of the month, were likely to have less cash deposits because at the beginning of the month Walmart cashes a lot of paychecks and does not have a lot of cash on hand. 9RP at 1040. Mr. Roach stated that after the shooting, he could hear fire alarms going off due to people leaving the building through fire doors. 9RP at 1043-44.

Tracy Holly, who was parked in the Walmart parking lot with her

husband at the time of the robbery, saw a white Buick driven by a black male wearing a hat with his hair in braids travelling rapidly in the store parking lot. 9RP at 1053, 1055. At trial she identified the driver of the car as Mr. Walker. 9RP at 1055. She noticed the Buick driving rapidly through the parking lot and continued to watch the car because of its speed, and saw the car cut off another car that was pulling out of a stall. 9RP at 1056, 1094. She left the parking lot and when driving to a nearby Fred Meyer she noticed a large amount of police activity in the vicinity of Walmart, and when she and her husband returned home they learned from the news about the shooting at Walmart. 9RP at 1060. Ms. Holly and her husband returned to Walmart and reported the incident to police. 9RP at 1062. In September 2009, Ms. Holly was contacted by police and showed a photomontage. Exhibit 74C. Ms. Holly testified that she recognized a picture marked as “no. 2” as the driver of the Buick, but wrote “I cannot identify anyone” on the photomontage. 9RP at 1074-75. She testified that she was afraid and that if she told police that she could not identify the driver she would “not have to be a part of this.” 9RP at 1075. Ms. Holly stated that the picture in the photomontage marked as No. 2 is a dark-skinned black male and the other photos marked as 4 and 5 are lighter. 9RP at 1081. She also acknowledged that the face of No. 2 is larger

and fills more of the page than the other pictures. 9RP at 1081. She testified that she was certain, however, that Mr. Walker was the driver of the car. 9RP at 1095.

Police received information of a report that the men left the scene of the murder in a Buick Skylark. 10RP at 1287. The Buick was owned by Sartana Williams, Calvin Finley's girlfriend at the time. Mr. Turpin drove a gold Nissan Maxima that belonged to his girlfriend Brittney Baines, to Walmart on June 2. 11RP at 1466.

At the time of the crimes, Mr. Walker lived with codefendants Tonie Williams-Irby, whom he identified as his "common-law" wife, and Calvin Finley, his cousin. Mr. Walker had been Ms. Williams-Irby's boyfriend since 2002, and at the time of the robbery, they were living together in Tacoma, raising five children---three of Mr. Walker's, Alexis, Odies and Jawon, and two of Williams-Irby's---Darrell Parrott, age 21, and China Irby, 17. Tonie Williams-Irby, Mr. Walker's girlfriend, had known him since 2001 when they met in Chicago, and Mr. Walker moved to Tacoma from Chicago in 2004. 8RP at 793, 796. After moving to Tacoma, they moved to 6110 59th Ave. West in University Place in October 2006. 8RP at 798. Their house was located approximately five minutes from the Walmart and

Mr. Walker drove Ms. Williams-Irby to work each day. 8RP at 895. Calvin Finley, Walker's younger cousin, moved in with Mr. Walker and Ms. Williams-Irby on February 20, 2009, sharing a room with Mr. Walker's son, Odies Junior. Mr. Walker and Finley had a difficult relation, and he treated Mr. Finley like "a child." 8RP at 799. Mr. Finley lived with them until the time of the robbery. Mr. Turpin moved into their house for a period of time, but was not living with them in June 2009. 8RP at 819.

Mr. Walker worked at the Lakewood Walmart starting in November 2006, and in February 2007 he left that job and shortly after that Ms. Williams-Irby was hired at the Lakewood Walmart the same month. 8RP at 801. From about the end of February until the robbery, a car belonging to Finley's girlfriend was stored under a tarp at their house. The parties stipulated that Mr. Walker worked at the Lakewood Walmart from November 2006 to February 2007. 8RP at 802, Ex. 245.

Ms. Williams-Irby was promoted to the Walmart Domestic Department manager in March, 2008, a position that she held at the time of the robbery. 8RP at 802-03. As a department manager, Ms. Williams-Irby attended morning staff meetings in which the daily profit from the previous day was announced. 8RP at 803-04. She stated that on same days she would

tell Mr. Walker how much money the armored truck had picked up the previous day, and that this took place about twice a week for months. 8RP at 824.

Ms. Williams-Irby stated the in February 2009, while in Mr. Walker's green Tahoe, she and Mr. Walker, Calvin Finley and a friend of Mr. Walker's named Johnathan discussed the armored truck that picked up money from Walmart. 8RP at 808. She stated that he asked her when the truck arrived and how much money was picked up each day. 8RP at 809. She stated that the amount was between \$100,000 and \$200,000. 8RP at 810. She stated that she heard about the topic of the armored car again about two weeks later in March, 2009, at which time she overheard a conversation involving Mr. Walker, Mr. Finley, and Johnathan at their house in University Place. 8RP at 811. She stated that Mr. Walker said that if they were going to do it, they had to hurry up and if they did it without him, he would kill them. 8RP at 811. She heard discussion of the armored car again when Mr. Walker was angry with Marshawn Turpin and Mr. Finley. 8RP at 813. Johnathan was not involved in the conversation and she stated that in April 2009 Mr. Walker had told Mr. Lewis that he could not go in there drunk because they would get them all caught, and that Mr. Walker would get the most time because he

planned it. 8RP at 814. She stated that Marshawn Turpin is a friend of Ms. William-Irby's twenty-year-old son, and of Mr. Walker's son. 8RP at 815. She stated that after Johnathon was gone, Mr. Turpin came to the house and was talking to Mr. Walker and Mr. Finley in April 2009. 8RP at 815. She stated that she heard Mr. Walker, Mr. Turpin and Mr. Finley discuss the armored truck and that Mr. Walker said that they needed to hurry up but that they could not do it without him. 8RP at 816. She stated that she overheard Mr. Walker say that his role was to be the driver, and that he did not want to go into the Walmart because they would recognize him by his arm, which was disabled. 8RP at 819. She stated that she overheard Mr. Walker stating that Mr. Finley's role was to take the bag, and Johnathan's role, when he was involved, was to watch out and help. 8RP at 820. Ms. Williams-Irby testified that Mr. Walker said to Mr. Finley that he needed to get the bag by any means necessary, and Mr. Finley said that he "couldn't just hit somebody upside his head and take the bag," that he needed more, than asked Mr. Walker for the gun. She said the Mr. Walker agree to give him a 9-mm gun that he had. 8RP at 820, 821. Mr. Walker told Mr. Finley he could use a silver 9-millimeter gun that Mr. Walker had obtained, and that Mr. Walker also obtained a black .45 pistol from a woman named Natalie Brechbeil.

Ms. Williams-Irby testified that Mr. Walker's response to Mr. Finley about killing the guard was to do whatever he had to do. 8RP at 820. She stated that she believed that Mr. Walker had surveilled the store and that he was in the Walmart parking lot and had called her on two previous occasions while she was at work, asking about her activities, leading her to believe that he was observing her at the store. 8RP at 817-18. She stated that the 9-mm gun was kept in a closet in a cereal box in a closet in their bedroom. 8RP at 822. She stated the Mr. Walker also had the .45 caliber handgun in 2009 that he and Mr. Finley bought for \$150.00. 8RP at 843. She stated that she overheard Mr. Walker say that they would use the white Buick belonging to the mother of Calvin Finley's daughter, and that she would report the car as stolen. 8RP at 833. The car was kept under a tarp at their house. 8RP at 834-35.

Sartara Williams, the owner of the Buick Skylark, reported that the car was stolen in April, 2009 at the request of her then- boyfriend, Calvin Finley. 11RP at 1426. She gave the car keys to Mr. Finley about a month prior to his request, and the car was stored at Mr. Walker's and Ms. Williams-Irby's house. 11RP at 1426. She stated that she was to receive another car as a result of the false report. 11RP at 1426. She initially

received \$1652 from her insurance company, which she was required to repay. 11RP at 1427. She was convicted of first degree theft and making a false statement to a public servant, and the amount was added to her restitution as a result of the conviction. 11RP at 1428. After seeing the car on the news following the report, she went to police and told them that it was her car, but initially lied and said that it was the car she previously reported as stolen. 11RP at 1437. She stated that she later admitted that she lied about her car being stolen. 11RP at 1441.

Ms. Williams-Irby stated that Mr. Walker asked her to attend the staff meeting so she would know what the sales were from the previous day and to call him with in the information during her break. 8RP at 846. She stated that she called him using her green Razor cell phone from the smoking area outside the building and told him sales were \$207,000.00, and also asked him to bring money to her for lunch, and that he responded that he was “busy” and would not be able to. 8RP at 847.

Ms. Williams-Irby testified that while working in her department, shortly after 1 p.m. on June 2, 2009, she heard a sound that she thought was someone dropping a pallet, and then realized it was gunshot and saw Mr. Husted’s body when she went to the front of the store. 8RP at 853. She

testified that she was not afraid because she “knew it was them and they had done what they said”, referring to Mr. Walker, Mr. Turpin, and Mr. Finley. 8RP at 853. After approximately thirty minutes, during which time she was directed by her supervisor and stationed in the Infants area of the store to guard the door “to make sure no one took anything out of that door”, she received a call from Mr. Walker to ask if she was okay. 8RP at 854. She stated that three to five minutes later Mr. Walker walked toward her into the garden center, hugged her and told her to “play it off.” 8RP at 857. He said that he was at Walmart to pick up Mr. Turpin’s Maxima because Mr. Turpin got into the Buick when they left after the robbery. 8RP at 858. She did not see him get into the Maxima, but she believed it was in the parking lot. 8RP at 858.

Walmart surveillance video of the parking lot shows a gold Maxima leaving the parking lot 1:58 p.m. 8RP at 860. Ms. Williams-Irby later saw the gold Maxima parked at their house when she got home. 8RP at 861. Mr. Walker was there when she got home, and she told him that “everybody’s looking for Calvin.” 8RP at 861. Police obtained a description and partial license plate number of the Buick Skylark. 14RP at 2063.

On June 2, after picking up their children from school in the Tahoe,

she testified that Mr. Walker drove down a street to look at the white Buick because he “forgot to wipe their fingerprints off.” 8RP at 863. However, he was unable to do so because when they looked down the alley to view the car, it was surrounded by police cars. 8RP at 863-64. Next, they drove to Mr. Finley’s sister Callie’s house. Mr. Walker went inside for 5 to 10 minutes while the others sat in the truck. Next Mr. Walker drove to Al Trevino’s residence and during the drive, Mr. Finley repeatedly called Mr. Walker, who told him to quit calling because he would see him in a minute. Ms. Williams-Irby testified that during the drive he made incriminating statements about his role in the robbery, that he was in the getaway car during the robbery, and that he on the phone with Finley at the time of the robbery, and stated that he said that when Finley asked the guard for the bag of cash, the guard laughed at him and that Mr. Walker told Mr. Finley, “kill the mother f—ker.” 8RP at 869, 11RP at 869.

When they arrived that at Lee Trevino’s house, Mr. Finley and Mr. Turpin were already there, and they went into the bathroom together with the money bag from the robbery. 8RP at 873. Mr. Walker emerged about fifteen minutes later and put a stack of money into Ms. Williams-Irby’s purse and told her it was \$10,000.00. 8RP at 874. She stated that he put the

clothes they had worn and put the Loomis money bag into a plastic garbage bag. Trevino, Finley and Turpin left the house and Mr. Walker and his family remained for about 30 more minutes, during which time he gave her an additional \$10,000 and then another \$2500.00 to \$2600.00, and gave the children \$100.00 each. 8RP at 877. She stated that Mr. Turpin received \$10,000 and Mr. Finley received \$20,000. 8RP at 878.

Mr. Walker drove to a motel in Fife to meet Finley and when Finley arrived with Trevino, Trevino got him a room and Mr. Walker went inside to speak with Mr. Finley. 11RP at 875-76. After that they drove to a Walmart in Federal Way to buy safes to store the cash, and then at the motel in Fife to give Finley one of the safes, before returning home, where they brought the safe into the house and put it in the master bedroom closet. 11RP at 885. Mr. Walker put money and the .45 handgun into the house and put that in the safe. 11RP at 891. Ms. Williams-Irby put the money given to her in an envelope in a dresser. Later the family left the house, brought food to Mr. Finley at the motel and then went to Red Lobster. 11RP at 894, 906. At the Red Lobster, she stated that Mr. Walker said, "[T]his is how you kill n---as and get the money. The next time it will be easier." 11RP at 907.

Following the report of the Buick seen leaving Walmart, a Buick

matching the description of the car seen at Walmart was located police in an alley in Lakewood. 14RP at 2063. Latent fingerprints were obtained from a metal seatbelt of the Buick. 13RP at 2004-06. A fingerprint obtained from the seatbelt buckle was matched to Mr. Walker. 14RP at 2030, 2049. A sample of DNA⁴ from the gearshift knob of the Buick resulted in DNA with a mixed profile, the major component of which likely came from Mr. Walker.

A DNA swab from the .45 pistol recovered from Mr. Walker's safe tested positive for blood and resulted in a DNA profile of at least four different people, from whom Mr. Walker and Mr. Husted could not be excluded. 14RP at 2116, 2120.

Ms. Williams-Irby stated that when arrested on June 2, she denied involvement, that she was later charged with aggravated murder, and entered a plea agreement in July 2011 to second degree murder and first degree robbery with a sentence of twelve to fifteen years in exchange for her testimony. 8RP at 827. She stated that she was actually sentenced to twenty years. 8RP at 827.

Police executed a search of the residence of Mr. Walker and Ms. Williams-Irby in Tacoma on June 3, 2009. 13RP at 1942. In a closet in the master bedroom police found two boxes of nine-millimeter ammunition and a

⁴DNA denotes the molecule Deoxyribonucleic acid. 14RP at 2101.

gun holster in an empty cereal box. 13RP at 1948. Police also found a safe in the closet that contained \$20,000.00. 13RP at 1953. The safe, which was not high quality, was opened by police using a flat-tipped screwdriver. 13RP at 1953.

Mr. Finley was arrested leaving a motel in Fife on June 3, 2009. 14RP at 2089. A small safe in the trunk of his car contained approximately \$21,000.00. 14RP at 2089.

Jessie Lewis, who met Mr. Walker in 2008 after moving to Tacoma, attended a birthday party for Ms. Williams-Irby at Mr. Walker's house in 2009. 10RP at 1202. He stated that a day before the birthday party, Mr. Walker talked to him and Calvin Finlay about committing a robbery. 10RP at 1204. He stated that Mr. Walker wanted him "to be the shooter" and that the robbery would be of an Loomis guard at Walmart. 10RP at 1204, 1205. He stated that Mr. Turpin was going to make a call when he got inside the store to let him know to come inside, and that Mr. Walker's role was going to be to drive the getaway car. 10RP at 1205. Mr. Lewis stated that he was initially willing to participate, but that he changed his mind after "I seen how it was going to play out." 10RP at 1206. The topic was discussed again at the birthday party while standing next to a parked white Buick, which Mr.

Walker stated had been “stolen” from Mr. Finley’s girlfriend. 10RP at 1209.

Mr. Lewis stated that prior to the party, Mr. Finley and Mr. Walker went with him to the Lakewood Walmart. RP at 10RP at 1211. He characterized it as merely a dry run so that Mr. Walker could show him “how it was going to play all out[,]” but also stated that he took a gun with him and that he left the store and went back to the car. 10RP at 1212. He testified that they waited for the armored truck guy to arrive, and stated that Mr. Walker drove the Buick to the store. 10RP at 1211. He stated the Mr. Turpin was already waiting in the store when they arrived. 10RP at 1211. Mr. Lewis stated that he took a 9-millimeter handgun with him and Mr. Finley had a .45 caliber gun, both of which were provided by Mr. Walker. 10RP at 1212. He stated that after the guard came into the store he went to another room in the store and then came out with bags of money, and that Mr. Lewis went back out of store exit and returned to the car because he “knew somebody was going to get hurt.” 10RP at 1214. In the car, he stated that Mr. Walker and Mr. Finley berated him and called him a “bitch.” 10RP at 1215. After that they went to the birthday party and Mr. Walker again asked him to participate in the proposed robbery. 10RP at 1216.

Jordan Lopez testified that at the birthday party, Mr. Walker told Mr.

Lewis that "they needed someone to be a part of a robbery" planned at Walmart. 10RP at 1326-27. Ms. Lopez stated that the same conversation between Mr. Walker, Mr. Finley, and Mr. Lewis about a robbery of Walmart continued inside the house. 10RP at 1331. She stated that Mr. Lewis told her that after that he went to Walmart with Mr. Finley and Mr. Walker and that they had a gun with him and that he left the store. 10RP at 1328-29. Ms. Lopez stated that while at the party, she saw Mr. Walker with a gun that was in a holster on the inside of his pants. 10RP at 1330.

Mr. Lewis and Jordan Lopez were arrested on June 2, 2009 when leaving Timothy Spears' house approximately five hours after the robbery. 10RP at 1219. He testified that he told police after he was arrested that he was going to call them about the robbery. 10RP at 1221. He stated that Mr. Spears told him that police had just left his house and that they were waiting down the road and that he was going to be arrested. 10RP at 1242. Mr. Lewis did not previously tell law enforcement that he took a gun into Walmart when he entered it with Mr. Walker and Mr. Finley. 10RP at 1265. Mr. Spears told police that Lewis and Lopez had information regarding the Walmart murder and robbery and identified Mr. Walker as being involved in

the crimes. 10RP at 1183.5

After questioning Mr. Lewis and Jordan Lopez, police took Mr. Walker and Ms. Williams-Irby into custody on June 2 at approximately 10:30 p.m., and Calvin Finley was arrested the following day. 10RP at 1294, 1295, 1296. Police stopped the Tahoe driven by Mr. Walker and took him and Ms. Williams-Irby into custody using a “high risk traffic stop” procedure. 10RP at 1356, 1374. Mr. Walker had \$322.00 on his person when arrested and was unarmed. 10RP at 1361. Detective Henry Betts testified that Mr. Walker told police the money was from his wife and that she worked. 10RP at 1361.

Mr. Walker was questioned after being administered his Miranda warnings. 10RP at 1385. He denied that he or Ms. Williams-Irby were involved, and stated that a still picture from the Walmart security system showed his cousin Calvin Finley. 10RP at 1385, 1386. He was upset that his children had been removed from the SUV at gunpoint by police. 10RP at 1383.

Police executed a search warrant on June 3, 2009 and impounded the

⁵Defense counsel argued that the testimony regarding Mr. Spear’s purpose for being at the house was not barred by ER 403 and was germane because although they were in the process of buying marijuana, there were both permitted to leave the scene and were not arrested by police, demonstrating that they are “manipulative.” 10RP at 1191, 1194. The trial court granted the State’s motion, finding that the information was not relevant and

Buick. 9RP at 1173-74.

Pursuant to a warrant, Officer Paynter searched the Tahoe on June 9, 2009. 7RP at 755. Police found a Coach purse, and inside the purse police found identification cards issued to Tonie Irby-Williams, a receipt from Walmart and a Walmart pay stub, \$170 in cash, a disposable camera and a red Samsung phone. 7RP at 756, 758. The Samsung phone was found on the front floorboard of the Tahoe, and a blue purse containing a disposable camera was found in the back seat. 7RP at 758. The receipt, dated June 2, 2009 at 5:15 p.m., was for items purchased at Walmart in Federal Way and included an Xbox 360, a Nintendo Wii, a disposable camera, and two safes, for the total amount of \$577.28, paid in cash. 7RP at 763. The State introduced surveillance video from the Walmart in Federal Way showing a person identified as Mr. Walker paying cash for the items at 5:15 p.m. on June 2, 2009. 9RP at 1153.

Detective Les Bunton questioned Mr. Finley, who named Marshawn Turpin as being involved in the robbery. 10RP at 1297. Mr. Turpin was arrested on June 3, 2009 at about 3:00 p.m. 10RP at 1297. The stolen checks and gun used in the murder were not recovered. 10RP at 1305-06.

D. ARGUMENT

denied inquiry into their reason for being at the house. 10RP at 1195.

1. **MR. WALKER'S CONVICTION FOR AGGRAVATED FIRST-DEGREE MURDER VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE**

To convict Mr. Walker of first degree premeditated murder, the State had to prove that he caused the death of Mr. Husted with premeditated intent. RCW 9A.32.030(1)(a).

In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. Amend. 14; *In re Winship*, 397 90 S. Ct. 1068, 25 L. Ed. 2d 435 (2000); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). “The standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.” *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). A claim of insufficient evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). While circumstantial evidence is no less reliable than direct evidence, evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d

646 (1983). “If a reviewing court finds insufficient evidence to prove an element of the crime, reversal is required.” *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

a. The prosecution failed to prove that Mr. Walker premeditated the intent to kill Mr. Husted.

“In order to convict Mr. Walker of aggravated first degree murder, the State had to prove that he, as a principal or accomplice, “[w]ith a premeditated intent to cause the death of another person . . . cause[d] the death of such person or a third person” and a finding of one or more aggravating circumstances. RCW 9A.32.030(1)(a); RCW 10.95.020.

The court gave the following instruction:

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

Instruction 11; CP 1009.

“Premeditation” is “ ‘the deliberate formation of and reflection upon the intent to take a human life’ ” and involves “ ‘the mental process of ... deliberation, reflection, weighing or reasoning for a period of time, however

short.’ ” *State v. Pirtle*, 127 Wash.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wash.2d 570, 597–98, 888 P.2d 1105 (1995)). Premeditation must involve “more than a moment in point of time.” RCW 9A.32.020(1). Premeditation may be proven by circumstantial evidence, but only if “the inferences drawn by the jury are reasonable and the evidence supporting the jury’s finding is substantial.” *State v. Gentry*, 125 Wash.2d 570, 599, 888 P.2d 1105 (1995).

Circumstantial evidence can be used where the inferences drawn by the jury are reasonable and the evidence supporting the jury’s verdict is substantial. *State v. Luoma*, 88 Wash.2d 28, 558 P.2d 756 (1977). In this case, with the exception of the statement that Ms. Williams-Irby to “shoot the mother f—ker” that she claimed that Mr. Walker said to Mr. Finley, the prosecution did not present little direct evidence of premeditated intent. Instead, it relied overwhelmingly on circumstantial evidence that the State characterized Mr. Walker as the mastermind behind the robbery.

First, the statements attributed by others to Mr. Walker, even when considered in a light most favorable to the state, do not establish a premeditated intent to kill. The statements overwhelming show that the plan was developed as an intent to commit armed robbery. The statements relied

upon by the prosecution to show premeditation are largely inferred by the participants to mean that Mr. Finley was directed or expected to kill Mr. Husted.

Second, there is no showing that Mr. Finley was under order or direction by Mr. Walker—or anyone for that matter—to shoot Mr. Husted. Moreover, there is no showing that Mr. Finley heard the statement to “shoot” Mr. Husted that Ms. Williams-Irby claimed that Mr. Walker said. And even assuming such a statement was made by Mr. Walker and heard by Mr. Finley, the near-instantaneous series of events shows an act of impulsiveness or panic by Mr. Finley causing him to shoot Mr. Husted, rather than a premeditated act.

“The existence of a fact cannot rest in guess, speculation, or conjecture.” *State v. Golloday*, 78 Wn.2d 121, 129-30, 470 P.2d 191 (1970), overruled on other grounds, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976), quoting *Home Ins. Co. of New York v. Northern Pac. Ry.*, 18 Wn. App. 798, 140 P.2d 507 (1943). The State’s theory rests on speculation and conjecture, rather than proof beyond a reasonable doubt. The evidence falls far short of establishing that Ms. Walker premeditated the murder.

This Court should reverse the conviction for Count 1 and order the

dismissal of the first degree murder charge due to lack of sufficient evidence of premeditation.

2. **MR. WALKER'S CONVICTIONS MUST BE REVERSED BECAUSE HE DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS.**

The federal and state constitution's guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Defense counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 84-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that

counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. *Strickland*, 466 U.S. at 690. In reviewing the first prong of the Strickland test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. *Strickland*, 466 U.S. at 689-90; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687.

a. Mr. Walker's attorney did not investigate potentially exculpatory testimony provided by former co-defendant Finley

Mr. Walker's trial attorney called only two witnesses; both of whom testified regarding the narrow issue of whether they heard Mr. Walker use

profanity at the Red Lobster, which they both denied.

Following conviction on February 13, 2017, the prosecution informed the court that the clerk's office had received an affidavit from 2013 sent from Georgia, "reportedly by Calvin Finley," that was brought to the State's attention by the court's judicial assistant on February 14, 2017, the day after the jury returned its verdict. 19RP at 2471. The affidavit, signed "Calvin Finley" and dated June 6, 2013, states that Odies Walker did not plan or scheme to rob the Loomis car at the Lakewood Walmart, that he was not present for any of the planning or discussions about the robbery, that he did not furnish the affiant with firearms, that he had no knowledge that a murder or violence would occur, that the affiant told the police that no person was supposed to be hurt in the robbery and the murder was not intentional, and that the affiant pleaded guilty under duress in fear that he would receive the death penalty. The State filed a declaration by Detective Les Bunton in response to the affidavit. 19RP at 2471; SCP _____. Defense counsel had "no comment" regarding the affidavit or the officer's declaration in response. 19RP at 2472.

b. Mr. Walker's attorney's failure to investigate Mr. Finley's potentially exculpatory testimony was deficient performance.

The *Strickland* Court established that defense counsel "has a duty to

make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691.

Defense counsel’s duty to investigate Mr. Walker’s case included contacting Mr. Finley after learning about the existence of the affidavit on or about February 16, 2017. It was defense counsel’s responsibility to interview the former co-defendant and investigate the claim, and then, if warranted, take action including motion for new trial pursuant to CrR 7.5(a)(3). Because the record does not show that counsel took any action whatsoever and did not talk to Mr. Finley, the court was not asked to address the potentially exculpatory aspect of the affidavit, nor was the court presented with a motion for new trial based on newly discovered evidence. This is exculpatory evidence that should have been presented to the court in the form of motion for new trial.

c. Mr. Walker was prejudiced by his attorney’s deficient performance.

When raising ineffective assistance of counsel, the defendant need not show that his attorney’s deficient performance more likely than not altered the outcome of the case. *Strickland*, 466 U.S. at 693.

Instead, he need only show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A “reasonable probability” is one that

“undermine[s] confidence in the outcome.” *Id.* “[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding.” *Id.* at 696.

The failure to investigate Mr. Finley’s potential testimony in light of the affidavit undermines confidence in the verdict because the testimony would have given the jury a reason to doubt the State’s argument, propounded primarily through implication that Mr. Walker was the “mastermind” of the robbery, and that the plan included the murder of the Loomis guard. The State presented scant circumstantial evidence that Mr. Walker intended Mr. Husted to be killed or that he knew that Mr. Finley was going to shoot him. The evidence was based in large part on the testimony of Ms. Williams-Irby, whose credibility was significantly challenged at trial. There is thus a reasonable probability that the jury would not have convicted Mr. Walker of aggravated first-degree murder and felony murder if they heard testimony from a participant that Mr. Walker was not involved.

d. Defense counsel was ineffective for failing to offer an instruction regarding “major participant”

The defendant in a criminal case has the right to a correct statement of the law and to have the jury instructed on a defense that is supported by evidence. *Thomas*, 109 Wn.2d at 228. To determine if defense counsel’s failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily review three questions: (1)

was the defendant entitled to the instruction; (2) was the failure to request the instruction tactical, and (3) did the failure to offer the instruction prejudice the defendant. *State v. Powell*, 150 Wn.App. 139, 154- 58, 206 P.3d 703 (2009).

Defense counsel is ineffective if she fails to propose an instruction that provides the jury with a relevant statutory defense. “Where counsel in a criminal case fails to advance a defense authorized by statute, and there is evidence to support the defense, defense counsel’s performance is deficient.” *In re Personal Restraint of Hubert*, 138 Wn.App. 924, 926, 158 P.3d 1282 (2007). Here, defense was based in part on failure to establish that Mr. Walker was a “major participant” in the robbery. Under dicta in *State v. Whitaker*, 133 Wash.App. 199, 135 P.3d 923 (2006), counsel is not precluded from requesting an instruction regarding the term, but it is incumbent upon counsel to do so and failure to propose a defining instruction that correctly states the law precludes him from arguing on appeal that the absence of such an instruction was error. *Id* at 232.. Given the facts of this case and defense presented, defense counsel’s failure to propose an instruction on the statutory defense was deficient performance

e. Mr. Walker’s convictions should be reversed and remanded for a new trial.

Mr. Walker’s attorney’s performance was deficient because he did not

investigate the potentially exculpatory affidavit and did not propose an instruction or verdict form defining “major participant.” Given the limited circumstantial evidence and shortcomings regarding witness credulity, in particular Ms. Williams-Irby, there is a reasonable probability that, but for counsel’s deficient investigation, the court may have granted an instruction defining “major participant.”

This Court should reverse his conviction and remand for a new trial.

Thomas, 109 Wn.2d at 229, 232.

**3. TRIAL COURT VIOLATED MR. WALKER’S
RIGHT TO A FAIR AN IMPARTIAL JURY AND
CrR 6.15(f)(2) WHEN IT IMPLICITLY COERCED
THE VERDICT FOR FIRST DEGREE ASSAULT**

The state and federal constitutions protect an accused person’s right to a jury trial. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §21 and 22. Among other protections, these provisions secure “the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court’s proper instructions, and the arguments of counsel.” *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789, 791 (1978). A judge presiding over a criminal trial may not interfere in the jury’s deliberative process. *Id.*, at 737. Once deliberations begin, the court may not instruct the jury “in such a way as to suggest the need for agreement.” CrR 6.15(f)(2). Any suggestion that a juror “should abandon his conscientiously held opinion for the sake of

reaching a verdict invades [the jury] right.” *Boogaard*, 90 Wn.2d at 736. The rule is intended “to prevent judicial interference in the deliberative process... [T]he jury should not be pressured by the judge into making a decision.” *Id.*, at 736.

A claim that judicial coercion affected a verdict may be raised for the first time on review. *State v. Ford*, 171 Wn.2d 185, 188, 250 P.3d 97 (2011) (citing RAP 2.5(a)(3)). To prevail, the appellant must show a reasonably substantial possibility that the verdict was improperly influenced. *Id.*

In this case the jury returned the Verdict Form D (first degree assault) as blank, but was signed by the presiding juror. In cases in which a jury considering multiple charges renders a verdict as to one of the charges but is silent on the other charge, such action constitutes an implied acquittal. See *State v. Schoel*, 54 Wash.2d 388, 394, 341 P.2d 481 (1959) (finding that where the jury returned a verdict of guilty for murder in the second degree but left the verdict form blank for murder in the first degree, the jury had implicitly acquitted the defendant of the greater offense). In this case, the court, interpreted the blank Verdict Form D as an error, and after questioning the presiding juror, instructed the jury “make sure” whether they intended to convict for first degree assault or second degree assault. 18RP at 2447.

The appellant submits that this constitutes judicial coercion affecting

the verdict, in violation of CrR 6.15(f)(2). The court rule was adopted to curtail judicial coercion of a deadlocked jury and interference in the jury's deliberative process. *State v. Watkins*, 99 Wn.2d 166, 175, 660 P.2d 1117 (1983); *Boogaard*, 90 Wn.2d at 736. In this case, the jury was not deadlocked, but the court's comment and return of the black verdict form could be seen as signaling the jury to reach a different verdict, and a sign that something was amiss with their prior verdict, thereby constituting interference with the deliberative process. Although the court instructed the jury. The court's comments in this case were no doubt well intentioned, however they telegraphed to the jury that its verdict was "wrong." This inference was borne out when the jury returned a guilty verdict to first degree assault seven minutes later. 18RP at 2450.

The court's direction to the here constituted jury coercion requiring the reversal of Mr. Walker's conviction in Count 3.

E. CONCLUSION

For the foregoing reasons, Mr. Walker's convictions must be reversed. The aggravated first-degree murder charge must be dismissed; the remaining charges in Counts 3, 4, 5, and 6 must be remanded to the trial court for a new trial.

DATED: December 5, 2017.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

PETER B. TILLER-WSBA 20835
Of Attorneys for Odies Walker

CERTIFICATE OF SERVICE

The undersigned certifies that on December 5, 2017, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Michelle Hyer, Pierce County Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

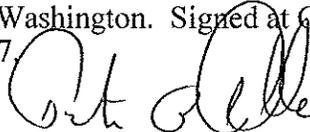
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 5, 2017.



PETER B. TILLER

THE TILLER LAW FIRM

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