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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ODIES WALKER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 09-1-02784-8

Brief of Respondent

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

1. When viewed in the light most favorable to the State, was sufficient evidence presented to establish that the defendant acted with premeditation when he orchestrated the plan to rob and murder the victim, he provided the murder weapon, and he instructed the shooter to shoot the victim during the robbery itself? (Appellant's Assignment of Error No. 1 and No. 2)
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4. Is the defendant's claim that appellate costs be waived moot when the State will not be seeking appellate costs? (Appellant's Assignment of Error No. 7)

B. STATEMENT OF THE CASE.

1. PROCEDURE¹

On February 3, 2011, Odies Delandus Walker, hereinafter "defendant" was charged by third amended information with aggravated murder in the first degree, murder in the first degree, assault in the first degree, robbery in the first degree, solicitation to commit robbery in the first degree, and conspiracy to commit robbery in the first degree. CP 1182-1185. This trial resulted in the defendant being convicted as charged. CP 1053-1066. After the verdicts, an affidavit purporting to be from one of the defendant's accomplices, Calvin Finley, was received in the clerk's office. CP 1278-1283. In response, the lead detective, Les Bunton, also filed an affidavit. CP 1186-1272. The trial court proceeded to sentencing, and the defendant was sentenced to a life sentence without

¹ The defense is alleging judicial coercion in allowing the jury to correct a scrivener's error on verdict forms relating to count III. A detailed factual account of what occurred is contained in the State's argument section below.

the possibility of parole. CP 1144-1158. This timely notice of appeal follows. CP 1166.

2. FACTS

Kurt Husted was an employee of Loomis Armor. 7RP 655. He had been a Loomis employee for 16 years. 14RP 2053. Gary Schuttig was working the armored car with Husted on June 2, 2009. 7RP 723-724. In the two man truck, Husted was the custodian and Schuttig was the driver. 7RP 724. The custodian is the person who works in the back of the truck and handles the money going in or out. 7RP 724; 14RP 2053. A business that has a pickup from Loomis knows that the truck comes to collect the money. 7RP 726.

a. Before the murder and robbery

Tonie Williams-Irby was the defendant's girlfriend. 8RP 794. She worked at the Lakewood Walmart at the time of the murder. 8RP 801, 805. For a period of time, the defendant also worked at the Walmart. *Id.* Williams-Irby worked as a department manager. 8RP 802. She described that the store had daily staff meetings to discuss, among other things, the profits from the day before. 8RP 803. In early 2009, Williams-Irby had a conversation with the defendant, Finley and "Jonathan" about the armored truck that came to pick up the cash that the armored truck would typically

pick up between \$100,000 and \$200,000 in profits. 8RP 809-810.

Approximately two weeks later, Williams-Irby overheard the defendant, Finley and “Jonathan” discussing the Walmart armored truck. 8RP 810-811. The defendant stated “That if they were going to do it, they had to hurry up and get it done. And if they did it without him, he was going to kill them.” 8RP 811. The defendant thought it would be easy to get money from the armored truck. *Id.* The defendant told “Jonathan” that he could not participate because he would be drunk. 8RP 813. “Jonathan” was going to be the lookout. 8RP 820. The defendant stated that if they were to get caught he—the defendant—would get the most time because he planned the robbery. 8RP 814. “Jonathan” was then replaced with Marshawn Turpin. 8RP 814-815. The defendant told the group that he was going to be the getaway driver because if he went into the store they would know it was him. 8RP 819. Finley was going to take the moneybag. 8RP 820. When Finley asked the defendant about the possibility of killing the guard to get the money, the defendant told Finley to “do whatever you have to do.” 8RP 820. Finley asked for a gun and the defendant provided him with a 9mm handgun. 8RP 821.

Williams-Irby’s son Darrell Parrott, indicated that in the spring of 2009, Turpin became involved in a plan to rob an armored truck. 11RP 1468. Parrott witnessed a conversation between Turpin, Finley, and the

defendant. 11RP 1468. At a separate time, the defendant offered Parrott and another person, Jawon, \$5,000 to go with Finley and “watch his back.” 11RP 1474. The defendant told Parrott that a bank truck carrier was going to get robbed and that he was to go in with a gun and watch Finley. 11RP 1475. Parrott declined the offer. 11RP 1475. After the murder Parrott saw the defendant give Williams-Irby a stack of money to put in her purse. 11RP 1494. Parrott accompanied the defendant to the Federal Way Walmart to purchase two safes and a video game system. 11RP 1504. At the time of his arrest, two safe keys were recovered from Finley. 12RP 1809. The defendant, Parrott and others went to Red Lobster for a dinner. 11RP 1511. During the dinner the defendant stated “this is how you rob these motherfuckers.” 11RP 1512.

Before the robbery, the defendant planned to use the Buick that belonged to Sartara Williams, who had a child in common with Finley. 8RP 833; 11RP 1422. The plan was that Williams would report the car stolen after the robbery. 8RP 833. Williams knew that her car was going to be used in a crime and falsely reported it stolen. 11RP 1421. She gave the keys to Finley and the car was stored at the defendant’s home for about a month. 11RP 1426.

In March of 2009, Turpin began coming over to meet with the defendant and Finley about robbing the armored truck. 8RP 815.

The defendant began asking Williams-Irby about the timing and movements of the armored truck. 8RP 817. He asked her every day for months. 8RP 817, 824. Williams-Irby described two occasions when she believed that the defendant was watching from the Walmart parking lot, although the defendant never told her that he was staking out the armored truck. 8RP 817-818. Williams-Irby believed that the defendant was in charge of the plan to rob the armored truck. 8RP 832. She believed that the defendant had made multiple unsuccessful attempts to rob the armored truck at the Walmart. 8RP 832.

Jessie Lewis met the defendant through Lewis's sister. 10RP 1200. The defendant introduced Lewis to Calvin Finley and Tonie Williams-Irby. 10RP 1201-1202. In May of 2009, the defendant talked to Lewis about committing a robbery together. 10RP 1202. At the time of the conversation about a robbery, Finley and Marshawn Turpin were present. 10RP 1204. The defendant told Lewis that he wanted him to be the shooter in a Lakewood Walmart robbery. 10RP 1204, 1206. Lewis understood that the defendant wanted him to shoot the guard. 10RP 1319. The defendant told Lewis that "I'm going to do what I got to do." 10RP 1273. The defendant stated that he was going to drive the getaway car. 10RP 1205. Finley was going to grab the money. 10RP 1206. The defendant indicated that he knew when the armored guard was going to

come to the Walmart. 10RP 1205. The defendant offered Lewis a split of the “hundreds of thousands” of dollars that they were going to get from the robbery. 10RP 1206. The defendant provided Lewis with a 9 mm handgun and told him it would be a “smooth lick.” 10RP 1207, 1209. The defendant wiped Lewis’s fingerprints off of the Buick they were going to be using for the robbery. 10RP 1209.

The defendant showed Lewis the plan at the Lakewood Walmart. 10RP 1211. Turpin and Finley were present as well. *Id.* They went to the Walmart to scope it out with the idea of taking money. 10RP 1232. Lewis went to the Walmart with the 9mm handgun. 10RP 1212. They waited about 20 minutes for the armored truck. 10RP 1213. The defendant said that Williams-Irby would tell him when the truck would get there. 10RP 1214. The armored guard arrived at the Walmart, went into a room and came out with bags of money. *Id.* Lewis decided to back out of the plan. 10RP 1264. Lewis turned and left because he knew somebody was going to get hurt or killed and he did not want anything to do with it. 10RP 1214-1215. Lewis told the police that he had refused to go through with the plan to rob the armored truck. 14RP 2170.

Jordan Lopez is Lewis’s girlfriend. 10RP 1322. Lopez overheard a conversation between Lewis and the defendant where they discussed committing a robbery. 10RP 1325. Lopez heard the defendant state that

they needed someone to be a part of a robbery they had planned to commit at the Walmart. 10RP 1326-1327. The defendant said that he would split the money with Lewis. *Id.* Later, Lewis told Lopez that they had done a “dry run” at the Walmart. 10RP 1328.

At a birthday party for Tonie Williams-Irby, about two weeks after the conversation, Lopez saw the defendant with a gun. 10RP 1330. At the party the defendant and Lewis again discussed committing the robbery. 10RP 1331. The defendant asked Lewis if he was going to go through with it because they were ready to do it. *Id.* During this conversation Finley was also present. *Id.*

Calvin Finley was the defendant’s cousin. 8RP 796. Finley lived in the defendant’s home with Williams-Irby. 8RP 800. On June 2, 2009, Turpin’s girlfriend, Brittney Mass-Baines, dropped him off at the defendant’s house. 12RP 1634. At that time, Finley had a duffel bag with him. *Id.*

b. During and after the murder and robbery

On June 2, 2009, when Husted and Schuttig went to the Lakewood Walmart store for their scheduled pick up, a car was blocking the back entrance to the store, so Husted told Schuttig to park in the front. 7RP 731. When Husted and Schuttig arrived at the Walmart, Husted exited the truck with the hand cart and moneybag. 7RP 730.

Schuttig became aware that Husted had been in the store for an atypically long time. 7RP 732. He then saw people going in and out of the store and someone running. 7RP 732. Schuttig pulled the truck forward and tried calling Husted. 7RP 733.

Multiple witnesses inside the Walmart store testified at trial:

i. Wilbert Pena

Wilbert Pena was in the Lakewood Walmart store cashing his unemployment check. 7RP 660. Pena was there with his 15 month old son. *Id.* When he entered the Walmart, he saw that the Loomis armored car was parked in front of the store. 7RP 661. Inside the store, Pena saw a Loomis guard with a bag in his hands and a cart. 7RP 661-662. He saw two men with guns and heard a bang. *Id.* Pena felt like someone had pushed him, but then felt a burning in his shoulder and realized he had been shot. 7RP 663-664. Pena turned around and saw the Loomis guard on the floor. 7RP 663. He also saw one of the men with guns carry the moneybag out of the store. *Id.* Pena was forced to give his son to another customer, April Wolfe, so that he could receive treatment. 7RP 664. The bullet that struck Pena remains lodged in his underarm area. 7RP 677.

ii. April Wolfe

April Wolfe was working as a medical assistant at Lakewood Pediatrics, which is located across the street from the Walmart. 7RP 712. Wolfe was in the Walmart during her lunch break. 7RP 712. Wolfe was in the checkout line when she heard a loud pop and saw Husted fall to the ground. 7RP 713. She saw two men run out of the store, one carrying a gun and one carrying a moneybag. 7RP 715-716. Husted was bleeding from his head. 7RP 718. Wolfe ran to Husted and told him that help was on the way. 7RP 716. Husted told her “okay.” *Id.* Wolfe took custody of Pena’s child while he was transported to the hospital for his gunshot wound. 7RP 719.

iii. Jerry Cheatam

Jerry Cheatam was in the Walmart store shopping. 7RP 696. He observed a man walk up to the Husted, say “excuse me, sir” and then heard a pop. 7RP 696.

iv. Teri Groenwold

Via prior testimony, Teri Groenwold testified that she was working at the Lakewood Walmart in 2009. 11RP 1402. Groenwold was working at the customer service desk when Husted was killed. *Id.* Groenwold saw

a male come in, put a gun to Husted's head and shoot him. 11RP 1404-1405. Groenwold covered Husted with a blanket. *Id.*

v. Skylar Ford

Skylar Ford was at the vision center of the Walmart. 14RP 2127. Ford was a prior soldier who had been deployed to Iraq and he knew immediately that it was gunshot that rang out. 14RP 2125-2126, 2134. Ford ran toward the shot. 14RP 2127. He ran to Husted, who was trying to say something. 14RP 2128. Ford comforted Husted when he stopped breathing. *Id.* Ford then rendered aid to Pena. 14RP 2130.

vi. Tito Brown

Tito Brown was in the Walmart to get a money order. 7RP 739. He observed Husted come into the Walmart and walk into the back room. 7RP 740. Brown heard a gunshot as Husted came out of the room. 7RP 741. Brown saw the perpetrators getting in a white Buick Skylark. 7RP 742-743. Brown was able to get a partial license plate number of the Buick. *Id.*

Husted died from a single gunshot wound, which traveled through his neck. 13RP 1919. Autopsy revealed stippling on Husted's skin, indicating a close shot of anywhere from six to 24 inches. 13RP 1926-1927. The bullet entered below Husted's nose, perforated his upper jaw

and tongue, and then transected the carotid artery in his neck. 13RP 1930. He would not have immediately lost consciousness, but he did not protect himself when he fell to the ground. *Id.* The bullet did not sever the spinal cord, but it could have caused a disruption in neurologic functioning such that he had temporary loss of motor functioning. 13RP 1932. Husted died from blood loss, which would have occurred within minutes of the shot. 13RP 1933.

Lakewood Police Lieutenant Steven Mauer was on duty at the time of the shooting and responded to the Walmart. 11RP 1409-1410. He determined that Husted was already dead and secured the scene. 11RP 1412-1414.

Detective Les Bunton was assigned as the lead detective on the case. 10 RP 1286. Detective Bunton reviewed the Walmart security footage and determined that a Buick was used as the getaway vehicle after Husted's murder. *Id.* Lieutenant Alwine responded to the area and began to look for the Buick. 14RP 2063-2064. He located the Buick in an alley at 6614 Monroe Street. 14RP 2633-2064, 2072. A fingerprint was recovered from the metal portion of the driver's side seatbelt. 13RP 2004. The fingerprint recovered from the Buick was matched as a fingerprint belonging to the defendant. 14RP 2035, 2049; CP 1101-1117 (exhibit #113A). On the rear side passenger door handle of the Buick, a red stain

was observed. 13RP 1865. The stain tested positive for blood. 13RP 1865-1869; 14RP 2105. The gearshift knob of the Buick was tested for DNA and it was determined that the DNA profile from the gearshift knob matched the defendant with a match of one in 160 quadrillion. 14RP 2112-2115.

Multiple law enforcement officers responded to the scene after the shooting occurred. Among those was Sergeant Jeffrey Paynter. 7RP 748. Sergeant Paynter executed a search warrant on the defendant's vehicle. 7RP 755. Inside the defendant's vehicle were identification cards and Walmart pay stubs in the name of Tonie Irby-Williams, the defendant's girlfriend. 7RP 755-756.

The shooting occurred on June 2, 2009 at approximately 1:12 p.m. 7RP 660, 695, 730. Inside the defendant's vehicle was a Walmart receipt for purchases made approximately four hours after Husted's murder. 7RP 763. The total purchases made were for \$577.28 and paid in cash. *Id.* The receipt was from the Federal Way Walmart. 9RP 1158. The purchase included sunblock, some game accessories, a disposable camera, two safes, and a Wii videogame console. 7RP 763.

A search warrant was done on the defendant's residence. 9RP 1169-1170; 11 RP 1463-1464. In the defendant's closet was 9mm ammunition. 9RP 1169-1179; 11RP 1594; CP 1101-1117 (exhibit 131).

In the master bedroom was a pinstriped suit with \$200 in the breast pocket. 11RP 1594. A gun holster was recovered from an empty cereal box in the closet. 11RP 1599-1600. In the closet was also a pair of black shoes containing two boxes of 9mm ammunition and a loose 9mm bullet. 13RP 1948; CP (exhibits #128, #129).

Also recovered was a Wii video game system and a small safe. 11RP 1596. The safe was opened by the police. 11RP 1602. In the safe was a .45 caliber handgun and \$20,000 in cash. 11RP 1603, 1608; 13RP 1953. The pistol grips from the gun were tested by the crime lab and a DNA profile was obtained of at least four people. 14RP 2106-2107. The defendant and the victim Kurt Husted were included in the mixture profile that was obtained. 14RP 2110. Finley, Williams-Irby and Turpin were all excluded as contributors. 14RP 2109-2110.

On the day of the murder, Lakewood Police Officer Jason Catlett responded to Finley's house. 12RP 1786. While there, he observed the defendant drive to the residence and remained inside for several minutes before leaving. 12RP 1788.

Police released surveillance images of the suspects involved in the murder. 9RP 1162-1163. The shooter was identified as Calvin Finley. 9RP 1163, CP 1101-1117, exhibit 40. The defendant is identified from footage in the Walmart parking lot. 9RP 1164; CP 1101-1117, exhibit 65.

The same day as the murder, the defendant was arrested by police. 10RP 1355. When he was arrested, the defendant had \$322.00 in cash. 10RP 1360-1361. During his interview with police the defendant was angry and confrontational. 10RP 1375. The defendant was told that the police knew he lived within walking distance from the Walmart store, that his wife was the manager of the store and had specific knowledge regarding the armored truck. 10RP 1377. The police also told the defendant that he had been observed walking in the Walmart parking lot a short time after the murder and that they believed his cousin, Finley, was the shooter. 10RP 1377. The defendant confirmed that the person who was on surveillance doing the robbery was Finley. 12RP 1678. The defendant agreed that the information the police knew was suspicious, but that he did not have any involvement in the murder. 10RP 1377-1378; 12RP 1675.

The defendant stipulated that Turpin and Finley were inside the Walmart together and that Finley killed Husted. CP 1101-1117 (exhibits #67 and #68); 11 RP 1398-1399.

Arnoldo Trevino was a friend of Finley's. 12RP 1722-1723. The day of the murder, Finley contacted Trevino and went to Trevino's house. 12RP 1728, 1734. When Finley arrived, Turpin was with him. *Id.* The defendant and Williams-Irby also arrived at Trevino's home. 12RP 1737-1738. The defendant, Finley, and Turpin went into Trevino's bathroom

together. 12RP 1739. At the time, Finley was carrying a duffel bag. *Id.* They remained in the bathroom for approximately 15 minutes. 12RP 1740.

Trevino drove the defendant, Finley, and Turpin away from his house. 12RP 1742. Turpin exited the car first. 12RP 1744-1745. Finley directed Trevino to stop at the Puyallup River and got out with a bag. *Id.* Finley ran away from the car and when he returned, he did not have the bag. 12RP 1746. Finley gave Trevino \$560.00 in cash. 12RP 1749. A safe was later found in Trevino's wife's car trunk. 12RP 1812. The safe was filled with \$21,830 in cash. 12RP 1814; 14RP 2089.

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS PRODUCED AT TRIAL THAT THE DEFENDANT COMMITTED PREMEDIATED MURDER WHEN HE ORCHESTRATED THE PLAN TO ROB AND MURDER HUSTED, PROVIDED THE MURDER WEAPON, INSTRUCTED THE SHOOTER TO KILL HUSTED AND THEN DROVE THE GETAWAY CAR.

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). 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. See *Camarillo, supra*. 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. See *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). 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.

Id. (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.

In this case, defendant challenges the sufficiency of the evidence regarding the premeditation element of murder in the first degree². Br. of Appellant at page 33. He contends that there is insufficient evidence that he acted with premeditated intent to kill the victim. *Id.*

In order to find defendant guilty of murder in the first degree the jury had to find that: 1) on or about the 2nd day of June, 2009, the defendant acted with intent to cause the death of Kurt Husted; 2) that the intent to cause the death was premeditated; 3) that Kurt Husted died as a result of the defendant's acts and; 4) that any of these acts occurred in

² The defendant does not challenge the sufficiency of the evidence regarding any of the other elements of murder in the first degree.

Washington. CP 996-1052 (Instruction No. 13); *see also* RCW 9A.28.020(1); RCW 9A.32.030(1)(a); *State v. Smith*, 115 Wn.2d 775, 782, 801 P.2d 975 (1990).

The jury was also instructed as to the meaning of premeditated:

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

CP 996-1052 (Instruction No 11). Defendant now claims that there was insufficient evidence to support a determination that he was acting with a premeditated intent to kill.

Motive, evidence of planning, and method of killing are all relevant to establish premeditation. *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). In *State v. Condon*, 182 Wn.2d 307, 343 P.3d 357 (2015), the court held that the fact that the defendant committed a robbery with a loaded handgun was sufficient evidence from which a jury could find that he committed premeditated murder, even though the defendant could not have foreseen the exact event that would have caused him to kill. *Id.* at 315. Premeditation requires the mental thought of thinking beforehand, deliberation, reflection, or the weighing of the decision for a period of time, however, short. *State v. Neslund*, 50 Wn. App. 531, 558,

749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987). As the court held in *State v. Hoffman*, 116 Wn.2d 51, 83, 804 P.2d 577 (1991), the planned presence of weapons supports an inference of premeditation. The court also held that a “hide and wait” ambush supports an inference of premeditation. *Id.* Both of those factors, and more, are present in this case. The evidence established that this was a planned, calculated, and premeditated act.

The evidence in this case shows that, when taken in the light most favorable to the State, sufficient evidence was presented to establish premeditation. Ample evidence was presented to establish that the defendant acted with premeditation. The defendant was the common link between all of the individuals involved in the robbery and murder—it was the defendant who recruited Turpin to be the bagman in the robbery. Circumstantial evidence suggests that it was the defendant who supplied the murder weapon. Williams-Irby overheard the defendant tell Finley that he could use a 9mm that he had obtained from “Courtney.” 8RP 821. She indicated that the defendant stored a 9mm handgun in a cereal box in his closet. 8RP 822. During a search of the defendant’s residence, an empty cereal box was found in his closet and an empty holster was inside the cereal box. 11RP 1599-1600. Jessie Lewis then saw the defendant with a 9mm handgun that the defendant gave to Lewis. 10RP 1207.

Jordan Lopez saw the defendant with a chrome gun in May of 2009.

10RP 1330.

Ammunition for a 9mm handgun was found at the murder scene.

9RP 1169. There were two boxes of 9mm ammunition found in the defendant's closet. 11RP 1599. There was 9mm ammunition found in the defendant's shed. 13RP 1957-1958.

The defendant encouraged Finley to commit the murder. He told Finley how easy the job would be and told him "do what you got to do." 8RP 937-938; 10RP 1273. During the robbery and murder, the defendant was on the phone with Finley. 8RP 868. At the time, the defendant was sitting in the car behind the armored truck and listening. 8RP 868-869. Video surveillance images show Finley with a phone to his ear. 9RP 1143. The defendant listened as Finley approached Husted, who would not give him the moneybag. 8RP 869. In response, the defendant told Finley to "shoot the motherfucker and hurry up." *Id.* The defendant's statement alone is proof of a deliberate, premediated act. He had time to weigh his options at multiple points, and instructed Finley to shoot Husted with the very gun he provided. After the murder, the defendant then drove the Buick to the front of the store to pick up Finley and Turpin. 7RP 742-743; 8RP 819. Cell phone evidence indicates that the defendant was on

the phone with Finley as Finley entered the Walmart to rob and murder Husted. 13RP 1971, 1982-1984.

The defendant and Finley began discussing killing the guard in April of 2009. 8RP 815. This was the defendant's plan and he told people that he would get the most severe punishment if they were caught because it was his plan. 8RP 814.

Evidence was also presented that the defendant recruited Turpin for the robbery. 11RP 1468-1469. Darrell Parrott overheard the defendant solicit Turpin for the robbery, telling him how easy it would be to rob a bank truck. *Id.* The defendant also unsuccessfully attempted to recruit Jessie Lewis for the robbery. 10RP 1202-1204. Lewis understood that the defendant wanted him to shoot and kill the armored truck guard. 10RP 1319. In fact, Lewis and the defendant went into the Walmart with a loaded firearm. 10RP 1212.

The defendant also tried to recruit Darrell Parrot to participate in the robbery and offered him \$5,000 to "watch Finley's back." 11RP 1474. The defendant was present when Finley asked Sartara Williams for her car to use as a getaway car. 8RP 833; 11RP 1426. The defendant participated in storing the getaway car in his backyard. 8RP 833. The defendant continued to plan the robbery—observing the armored truck more than 25 times starting in January 2009. 10RP 1379-1379. He started collecting

the store's daily earnings and asked Williams-Irby for the earnings every week. 8RP 809. He and Williams-Irby had a code in which she would report the earnings to him, and she did so on the day of the murder. 8RP 847.

Having given Finley his 9mm handgun for the robbery that was likely disposed of in the Puyallup River, the defendant purchased a .45mm handgun that was later found in his safe. 8RP 842-843; 11RP 1603-1604. The .45 handgun was likely returned to the safe after the robbery, as it had DNA on it that could not be excluded as Husted's.

After the robbery and murder, the defendant, Finley and Turpin divided up the money. 8RP 873. When all of the money from the robbery was recovered and accounted for, it was clear that the defendant's share was \$22,498.53—the largest portion of any of the people involved. 8RP 877-878. This suggests that the defendant received the largest portion of the proceeds because the robbery of the armored truck was his plan. The defendant orchestrated the plan, provided the weapon, and gave instructions to shoot Husted.

The defendant asserts in his opening brief that “there is no showing that Mr. Finley was under order or direction by Mr. Walker—or anyone for that matter—to shoot Mr. Husted.” Brief of Appellant, page 35. Such argument is misplaced. There was testimony from Williams-Irby that the

defendant was on the phone with Finley and specifically directed Finley to shoot Husted. 8RP 868. Clearly, this testimony was found to be credible by the jury and, when viewed in the light most favorable to the State, and in conjunction with all of the other evidence adduced regarding the defendant's conduct before the robbery, established premeditation.

The defendant argues, alternatively, that if the defendant did instruct Finley to shoot Husted, it was a "near-instantaneous series of events" rather than a premeditated act. Brief of Appellant, page 35. Again, such argument ignores the evidence presented. It was the defendant who brought all of the other people involved in the robbery together. It was the defendant who established when and where the robbery would take place it was the defendant who provided the weapon. It was the defendant who orchestrated who was to take which role and it was the defendant who received the largest portion of the proceeds. All of this shows the defendant's deliberate planning and premeditation.

2. THE DEFENDANT CANNOT ESTABLISH
INEFFECTIVE ASSISTANCE OF COUNSEL
WHEN HE CANNOT ESTABLISH ANY ERROR
OCCURRED AND CANNOT ESTABLISH
PREJUDICE.

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). An appellate court is unlikely to

find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (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." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

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).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489.

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).

For a finding of ineffective assistance of counsel, the defendant must demonstrate prejudice. To demonstrate prejudice, the defendant must show that the outcome of the trial would probably have been different if counsel had offered the instruction. *State v. Brett*, 126 Wn.2d 136, 199, 892 P.2d 29 (1995).

- a. The defendant cannot establish that his counsel was ineffective for “failure to investigate potentially exculpatory evidence” relating to a letter purportedly from Finley recanting his testimony when there is no record that his attorney did not investigate such claims and he cannot establish prejudice.

After the defendant was convicted in this case, an anonymous person mailed a declaration purporting to have been signed by Calvin Finley in 2013. 19RP 2471; CP 1278-1283. In response, Detective Les Bunton filed his own declaration contradicting the 2013 declaration that was filed. CP 1186-1272. Defense counsel at the time, stated that he had no comment. 19RP 2471-2472. Now, the defendant asserts that defense counsel’s failure to comment further equates to a failure to investigate the declaration or its claims. Brief of Appellant, page 38.

The defendant's argument is unsupported by the record and is purely speculative. It is just as likely that defense counsel below thoroughly investigated the declaration and found it lacking in credibility or substance. It may be the case that trial counsel's investigation proved more harmful than beneficial to the defendant. The defendant asserts that defense counsel had an obligation to interview Finley regarding these claims. Brief of Appellant, page 39. Again, there is nothing in the record to support that an investigation did not occur. The record is silent as to what actions his attorney took or did not take, as acknowledged by the defendant. *Id.* The defendant is asking this court to imply that "no comment" meant that the information was not investigated. This court should not make such assumptions. If the defendant wishes to pursue this claim further, it would be appropriate as a personal restraint petition, where a statement from trial counsel could be filed. The record before this court is insufficient for the defendant to establish an ineffective assistance of counsel claim and to articulate any resulting prejudice. The defendant's claim should be rejected as being without merit. Moreover, even if error occurred, it would be harmless due to the overwhelming evidence of guilt.

- b. The defendant cannot establish that his counsel was ineffective for failure to request a jury instruction on the definition of "major participant" when definitional instructions

are not constitutionally required and the defendant cannot establish prejudice.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993), *review denied*, 123 Wn.2d 1002 (1994). The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Neher*, 112 Wn.2d 347, 352-353, 771 P.2d 330 (1989).

In *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988), the Washington Supreme Court held that the failure to instruct on a technical term is not a failure to instruct on an essential element and therefore is not constitutionally required. *Id.*, see also *State v. Whitaker*, 133 Wn. App. 199, 135 P.3d 923 (2006). In *Scott*, the court held, “we find nothing in the constitution, as interpreted in cases of this or indeed any court, requiring that the meanings of particular terms used in an instruction be specifically defined.” *Scott*, 110 Wn.2d at 691. In *Whitaker*, the defendant was charged with premeditated murder and failed to request a definitional instruction of “major participant.” *Id.* at 233. The court held that the defense’s “failure to propose a defining instruction that correctly stated the

law precludes him from arguing on appeal that the absence of such an instruction was error.” *Id.* Because defendant did not propose an instruction defining “major participant” at trial, he is precluded from raising the absence of such instruction for the first time on appeal.

While the defendant concedes that a definitional instruction was not offered below, he now asserts that “defense counsel’s failure to propose an instruction on the statutory defense was deficient performance.” Brief of Appellant, page 41. This argument is flawed in several ways. First, the failure to propose and instruct on a definition does not bar any statutory defense. In this case the defense was free to argue their theory of the case and did so. 16RP 2333-2383. The defendant does not articulate how he was barred from presenting his defense theory or argument. The defense argued throughout the case that there was insufficient evidence for a conviction. The absence of a definitional instruction of “major participant” did not preclude any defense argument and defendant cannot show deficient performance for failing to request an instruction that is not legally required. Even if such an instruction would have been given, he cannot establish any resulting prejudice by its absence.

3. WHEN THE TRIAL COURT REALIZED THERE WAS AN INCONSISTENCY BETWEEN THE PRESIDING JUROR'S ASSERTIONS IN COURT AND THE WRITTEN VERDICT FORMS, HE APPROPRIATELY REQUESTED THAT THE JURY CORRECT ANY SCRIVENER'S ERROR AFTER THE DELIBERATIVE PROCESS HAD ENDED.³

A criminal defendant is guaranteed the right to a fair and impartial jury. U.S. Const. amend VI; Wash. Const. Art. 1 § 21, 22. The right to a fair and impartial jury also requires that the trial court not coerce the jury during the deliberation process. *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540 (2016). A claim of judicial coercion may be raised for the first time on appeal. *State v. Ford*, 171 Wn.2d 185, 250 P.3d 97 (2011). In order to be successful in a claim of judicial coercion, the defendant “must establish a reasonably substantial possibility that the verdict was improperly influenced by the trial court’s intervention.” *Ford*, 171 Wn.2d 185 at 188-89, citing *State v. Watkins*, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983). The defendant must make an affirmative showing that the verdict

³ If raised for the first time on appeal, the defendant would also have to establish that the “interference” by the trial court was a manifest error that resulted in actual prejudice. *State v. Ford*, 171 Wn.2d 185, 193, 250 P.3d 97 (2011). In this case, the defendant was not explicit in his objection to the trial court’s conduct. He asserted that “. . . I think we’re kind of left with how the instructions were filled out, at least as of this point.” 18RP 2445. Objections must be specific in order to preserve the record for appellate review. See generally, *State v. Boast*, 87 Wn.2d 447, 553 P.3d 1322 (1976). In this case, the objection was not specific and therefore not preserved. As argued below, the defendant cannot establish that error occurred, and therefore also cannot establish prejudice. If, however, this court were to find that the objection was in proper form and that error occurred, any error was harmless given the evidence in this case.

was improperly influenced. *Watkins*, 99 Wn.2d at 177-78. This court will examine the totality of the circumstances regarding the trial court's actions in determining whether improper influence occurred. *Id.*, *State v.*

Boogaard, 90 Wn.2d 733, 739-40, 585 P.2d 789 (1978). The court in

Ford held:

Judicial coercion must include an instance of actual conduct by the trial judge during jury deliberations that could influence the jury's decision. To make such a claim, a defendant just first make a threshold showing that the jury was still within its deliberative process. Second, though related, the defendant must affirmatively show that the jury was at that point still undecided. Third, the defendant must show judicial action designed to force or compel a decision, and fourth, the impropriety of that conduct. Finally, if raised of the first time on appeal, defendant must show that such interference rises to the level of manifest error, such that it actually prejudiced the constitutional right to a fair trial.

Ford, 171 Wn.2d 185 at 193.

In *State v. Ford, supra*, the defendant was charged with two counts of rape of a child. *Ford*, 171 Wn.2d 185 at 186. The jury retired to begin their deliberations and indicated that they had reached a verdict. *Id.* The jurors appeared in open court and the presiding juror affirmed that they had reached a verdict. *Id.* The trial court then indicated that, while the jury had convicted the defendant of count II, the verdict form for count I had been left completely blank. *Id.* at 187. The trial court stated:

I am sending the jury back to the jury room. Verdict form No. 1 is completely blank. It must be filled in. Please go with Dorothy.

Id.

Approximately four minutes later, the jury returned stating that they had reached a unanimous verdict as to count I. *Id.* The jurors were then polled and affirmed their verdict. *Id.*

The Washington Supreme Court upheld Ford's convictions, holding that Ford had not made the threshold showing that the trial court's intervention improperly influenced the jury. *Id.* at 189. The court held:

There is no room for judicial coercion or influence because, as the record shows, the jurors had reached their verdict. As far as the end result of completing the verdict form, they could have just as conceivably returned a "not guilty" verdict.

Id. The court also held that, unlike *Boogaard*, there was no judicial interruption during deliberations. *Id.* In *Boogaard*, a case cited by the defendant, the trial judge had asked the jurors what the voting had been and how long the vote had stood at each division. *Boogaard*, 90 Wn.2d 733 at 735. In *Boogaard*, deliberations had still been going at the time of the judicial intervention. In *Ford*, as in the present case, deliberations had concluded and the jury had indicated it had reached a verdict. The jury in *Ford* had indicated to the court that it had reached a unanimous verdict. *Ford*, 171 Wn.2d 185 at 191. The Washington Supreme Court also

looked to other factors to conclude that deliberations had already concluded: the four minute time period after being sent back to fill out the form for count I, the fact that the presiding juror had indicated that they had reached a unanimous verdict, and that the jurors were individually polled and affirmed the verdict. *Id.* at 191.

In this case, the verdicts were initially read at 10:38 a.m. on February 13, 2017. CP 1068-1100. The jury found the defendant guilty of premeditated murder in the first degree. 18RP 2433; CP 1053. The jury then found the defendant guilty of murder in the first degree in count II. 18RP 2433; CP 1053. With regard to count III, the court stated that the verdict form was blank. RP 2434. The following exchange then took place:

Court: Verdict Form D, in regards to the crime of assault in the first degree, there is no finding. Is that correct? You did not mark “guilty” or “not guilty” in regards to Verdict Form D?

Juror No. 1: I apologize. That’s an error.

Court: Did you reach a verdict on this particular count or---

Juror No. 1: We did. There were two assault forms. There was . . .

Court: Okay. Ms. Mangus, would you hand this verdict form back to the presiding juror and ask him if that is something that needs to be decided or not or if it’s just a scrivener’s error?

Juror No. 1: On this count we had a unanimous guilty verdict, Your Honor.

18RP 2434.

As the court continued to read the verdict forms, it read verdict form E, which is the lesser charge of count II. 18RP 2438. That verdict form indicated a guilty verdict. *Id.* The court excused the jury to discuss the apparent confusion in that the presiding juror indicated that they had convicted the defendant of assault in the first degree as to count III, but that the verdict form for the lesser charge of assault in the second degree indicated they had convicted him of that as well. 18RP 2439-2440. The defense agreed that that the verbal representations of the presiding juror appeared to be in conflict with the written forms. 18RP 2440. The court called the entire jury out and gave them the following instruction:

Court: When I was reading the verdict forms, Verdict Form D came up first and it was left blank. And I asked the presiding juror if there was a decision on the crime of assault in the first degree. And you indicated yes. You indicated what you found, and you found him guilty and initialed it.

The Court, in reviewing the instructions, found Verdict Form E outside of the original, in-order verdict forms. Verdict Form E says that you found him guilty of the lesser crime of assault in the second degree. And the Court may have put—I don't know if the presiding juror did not have both verdict forms to look at in order to make that decision, but the Court—you

can't—the Court wants one or the other filled out. And I want to give the jury a fair opportunity to make sure that whatever decision you did make regarding whether it was Verdict Form D or E, that the correct verdict form is, in fact, filled out.

And I am instructing all of you to go back and make sure that you fill out the verdict form that reflects your decision, which is either D or E, since the Court didn't have E as part of its original order when I read it to you and found it afterwards.

Does that make sense?

Juror No. 1: Yeah.

Court: So I'm instructing you to go back. I'll give you Verdict Forms D and E, and I would like you to fill in if you—one way or the other, the correct decision of the jury.

Do all the jurors understand this? Would you like all of the other verdict forms or instructions to help you at all?

Juror No. 1: No.

Court: Okay. You can strike and make the corrections on the one that you feel reflects the unanimous decision of the jury, okay?

We're not going to go anywhere, so if you need an extensive period of time, let us know and we can recess. I'm not going to put any time limit on that decision at all. But the Court will remain here, at least for a few minutes, and, again you can take as much time as you want in order to make that decision.

18RP 2448.

The court sent the jury back with the verdict forms at 11:41 a.m. CP 1068-1100. At 11:48 a.m., the jury comes back out with a verdict form convicting the defendant of assault in the first degree for count III. *Id.* Each juror was then polled and affirmed that was the correct verdict with regard to count III specifically and with regard to all of the other verdicts. 18RP 2451-2455.

It is clear when the record is examined that, like the facts of *Ford*, no judicial coercion occurred. The deliberation process had already concluded and—as the presiding juror had indicated—they had unanimously convicted the defendant of assault in the first degree with respect to count III. It appears that it was merely a scrivener's error in that the juror signed the incorrect form. The trial court itself made such a finding:

Because I think the way—I think he made a mistake in the way he filled in the order of the verdict form and put in one that they probably didn't decide and kept out the one they probable did decide.

18RP 2443.

When they were sent back to the jury room to clarify their verdict with respect to count III, they returned seven minutes later with the forms filled out. CP 1068-1100. The short period of time, combined with the presiding juror explicitly stating to the court that the jury had unanimously

convicted the defendant of assault in the first degree, both support that this was merely a scrivener's error on the verdict forms that was quickly corrected.

The defendant bears the burden of establishing that the jury was still undecided at the point when the alleged coercion occurred. *Ford*, 171 Wn.2d 185 at 193. In this case, the record contradicts any such claim, as the presiding juror represented to the court that they had reached a unanimous verdict as to count III. The defendant must also show that judicial action compelled a decision. *Id.* However, the defendant cannot make this showing because the deliberation process had already concluded. Finally, he must show that the conduct was improper. He has failed to do so. The trial court in this case told the jury to take as much time as it needed to complete the forms, offered to send back all of the instructions, and did not suggest a "correct" verdict in any way. Until a verdict is accepted for filing, the trial court may send the jury back to consider and *clarify or correct mistakes* appearing on the face of the verdict. *Ford*, 171 Wn.2d 185 at 196, citing *Beglinger v. Shield*, 164 Wn. 147, 152, 2 P.2d 681 (1931) (emphasis added). In this case, the court concluded that there was a conflict between the presiding juror's representation that they had a unanimous guilty verdict as to assault in the first degree on count III and the verdict forms, which indicated a guilty

verdict to the lesser charge of assault in the second degree. The trial court correctly gave the jury an opportunity to clarify and correct this inconsistency and this court should find this claim to be without merit.

4. THE DEFENDANT'S CLAIM THAT APPELLATE COSTS SHOULD NOT BE IMPOSED WAS NOT PROPERLY RAISED IN THE OPENING BRIEF, BUT SUCH A CLAIM IS MOOT AS THE STATE WILL NOT BE SEEKING APPELLATE COSTS SHOULD IT PREVAIL ON APPEAL.

Generally, arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant); RAP 10.3(a).

In this case, no analysis was provided by the defendant regarding the claim of appellate costs. However, the State will not be seeking appellate costs in this specific case, which would render the issue moot.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that the defendant's convictions be affirmed.

DATED: MAY 4, 2018

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Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:

The undersigned certifies that on this day she delivered by E-File 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.

5/7/18 [Signature]
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

May 07, 2018 - 9:46 AM

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Appellate Court Case Title: State of Washington, Respondent v. Odies Walker, Appellant
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