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Court of Appeals
Division II
State of Washington
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No.522454-II

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

STATE OF WASHINGTON, Respondent

v.

DONALD BANGO, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE JUDGE JOHN HICKMAN

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERRORS

- A. Mr. Bango's Fourteenth Amendment right to equal protection was violated where the state improperly used a peremptory strike to remove the only potential juror of his race.

LEGAL ISSUE: Under *Batson*, *Saintcalle*, *Erickson*, and *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018), the State must present a race-neutral reason for a peremptory excusal of a juror. Was Mr. Bango denied his right to a fair trial when the State peremptorily excused an African American juror who was well-educated in diversity and differences in perceptions of multi-cultural individuals because she might not "follow the absolute norms of society when it comes to following the law"?

LEGAL ISSUE: Did the trial court err by denying a motion for a new trial?

- B. The trial court erred in granting the State's request for a first aggressor instruction.

LEGAL ISSUE: Did the trial court err in providing a first aggressor instruction where the evidence did not support the theory that display of a JRA badge was reasonably likely to provoke a belligerent response?

LEGAL ISSUE: Mere words are insufficient to support a first aggressor instruction . Did the trial court err when it gave a first aggressor instruction on the theory that Mr. Bango's words provoked Shaw to draw his weapon?

- C. The trial court erred when it admitted statements made during a second police interrogation held after Mr. Bango asserted his right to counsel.

LEGAL ISSUE: The relinquishment of *Miranda* rights must be voluntary and not the product of intimidation, coercion or deception. Did the trial court err when it found the police did not coerce Mr. Bango, and admitted a taped interrogation, which occurred after an unrecorded interrogation where Mr. Bango invoked his right to counsel?

LEGAL ISSUE: Has the time come for the Supreme Court to explore an evidentiary rule which would require all interrogations to be electronically recorded in order to be admissible?

- D. Mr. Bango's right to a fair trial was violated when the court allowed the State to question a material witness about cell phone pictures Mr. Bango showed him but denied Mr. Bango

the opportunity elicit testimony about why they were looking at the pictures.

LEGAL ISSUE: Did the trial court abuse its discretion when it reversed its ruling on the admissibility of evidence, without analysis after previously ruling the statements went to state of mind and was part of the res gestae of the alleged crime?

- E. The State did not disprove self-defense beyond a reasonable doubt.

LEGAL ISSUE: To convict Mr. Bango of murder second degree, and felony murder in the second degree, the State was required to prove that Mr. Bango did not act in self-defense. Did the State fail to disprove that Mr. Bango acted in self-defense?

LEGAL ISSUE: Did Jury Instruction No. 44 relieve the State of its burden to disprove self-defense beyond a reasonable doubt with regard to the predicate felony of criminal impersonation?

- F. The trial court erred when it did not vacate the conviction for felony murder.

LEGAL ISSUE: When two convictions violate the prohibition against double jeopardy, the proper remedy is to vacate the

conviction with the lesser sentence. Did the trial court err when it did not vacate the conviction?

II. STATEMENT OF FACTS

Donald Bango needed to buy heroin. On December 13, 2015, he called Curtis Wikstrom, a middleman¹ to assist him in buying drugs from Jeffrey Shaw. 6/1/17 RP 81.

As they waited for a couple of hours in a parking lot for Shaw to arrive, Mr. Bango showed Wikstrom cell phone pictures of himself in the military, pictures of guns, and photos of drugs on scales. RP 1327; 6/1/17 RP 84, 93. He showed him a 12-gauge pump shotgun. RP 1329. Wikstrom told Mr. Bango that Shaw carried a firearm. RP 995.

Shaw arrived and when Wikstrom asked Mr. Bango for the money to pay for the drugs he told him to have Shaw come to him. RP 1323,1352,1338-39. Shaw refused wanting Mr. Bango to come to his car. RP 1341,1343. Angry that Mr. Bango was adamant about meeting Shaw, Wikstrom delivered the messages. RP 1339-42, 1352. He said Mr. Bango put on black gloves, however, video of

¹ A middleman refers to the role of the individual who is a go-between a seller and buyer. RP 1042; 6/1/17 RP 56.

Mr. Bango showed he was not wearing gloves. RP 1344; PI. Exh. 118.

Still angry, Wikstrom returned to Shaw and climbed in the backseat of the car, which was driven by Jesse Neil. RP 1344. He told Shaw and Neil that Mr. Bango had guns and no money, and he would rob them. They drove away. 6/1/17 RP 122, 1174,1345. He admittedly got Shaw "riled up". RP 1347-48.

Mr. Bango immediately called, and Shaw agreed to meet at a 7-11. RP 1347-49. Mr. Bango wanted to meet in a place that was lighted and somewhat public. PI. Exh. 370; CP 177.

When Shaw, Neil and Wikstrom arrived at the 7-11 Mr. Bango approached the passenger side to talk to Shaw. He put his cell phone on the car roof, and said he was not trying to do "anything funny." RP 1141,1217,1354. Mr. Bango retrieved a scale from his car for Shaw to weigh the quarter ounce of heroin. RP 1012, 1217; PI. Exh. 118. Mr. Bango handed 294 dollars to Shaw. CP 179,197, PI. Exh. 370. Shaw told Mr. Bango he had a .40 caliber gun. RP 1348-49.

Mr. Bango saw the gun, and described it as a 1911 Para Ordinance, stainless and black, with writing toward the front of the

barrel. CP 179, PI. Exh. 370. Police later recovered that weapon from inside of Shaw's car. RP 2433.

After a short conversation Mr. Bango became concerned they were going to steal his money and drive away. CP 180; PI. Exh. 370. He saw Shaw reaching for his gun. PI. Exh. 370; CP 197. He opened his jacket, pulled out a lanyard with a JRA² badge, and said he was a police officer. RP 1358. He told Shaw to get out of the car. RP 1358; CP 197; PI. Exh. 370. Mr. Bango said he brought the lanyard in case things went poorly, he could pretend to be a police officer so he would not be robbed or shot. CP 197, 199; PI. Exh. 370;

Mr. Bango saw Shaw grab his gun, and heard him tell Neil to drive. RP 1359, PI. Exh. 370. Wikstrom and Neil testified they saw Mr. Bango reach inside of his coat and they immediately ducked. RP 1023, 1359. Neither of them saw what Shaw was doing. RP 1485. Mr. Bango believed he heard and saw Shaw pull the trigger of his gun. CP 180. Mr. Bango stepped back and fired his gun twice. CP 181. PI. Exh. 370, 118. Shaw's car sped away. PI. Exh. 370, CP 182.

² Juvenile Rehabilitation Agency RP 1897

Wikstrom later confided to Mr. Bango's wife that he believed Mr. Bango was startled by the sound of the automatic shift when Neil put the car in reverse. RP 1401-02. Wikstrom said the automatic gear shift made a loud popping sound; however, at trial he changed his story and said he had been speculating. RP 1404. He also told Mrs. Bango that Mr. Bango truly believed he was in danger³. RP 1403.

As Neil drove Shaw to the hospital, he grabbed Shaw's black and silver gun and put it under his seat. He also took all of Shaw's money, 340 dollars. RP 1023-1024,1049,1114. Wikstrom grabbed Shaw's heroin and left after they arrived at the hospital. RP 1030, 1052,1231,1233. Shaw passed away about 15 minutes after he arrived at the hospital. RP 1074.

1. Peremptory Challenge

³ At trial Wikstrom said his statement to Mrs. Bango was completely fictitious because he just wanted information from her. RP 1402. He made his sworn statement that the loud popping noise startled Mr. Bango "just to say it." RP 1404.

The only African American in a potential seated jury pool was Juror 26⁴. CP 551, RP 810. She earned her Ph.D. in multicultural ethnicity and described her occupation as an education/trainer for a nonprofit she developed called the Multicentric Institute. She provides education and training for educators, and the Washington State Department of Personnel to facilitate understanding others who are multiracial and multicultural. RP 579-582.

In individual voir dire questioning she reported that her sister had been murdered during a nightclub altercation about 40 years ago. She believed the outcome of that trial had been fair and just. RP 576-77. She said she could “absolutely” decide the current case on the facts and evidence. RP 577.

In answer to the State’s question if she had ever called the police, she described an event in 1991 when someone had called her a “nigger” and she called the police. The operator asked her if she was offended and she was so surprised she just hung up. RP 578.

⁴ Juror 26 is multiracial, but for purposes of the challenge the court considered her to be African-American. CP 551.

The State sought to exercise a peremptory challenge for Juror 26. RP 801, 803. She was the only African-American juror in the jury panel with a possibility of being on the jury. RP 810. Defense counsel excepted, noting she said she could be fair and impartial. RP 805.

The State gave reasons for the challenge: (1) there were two other people of color on the panel⁵; (2) Juror 26's sister had been murdered and it was not a good case for the juror; (3) the State worried that because the case was a self-defense case, the juror would be very forgiving of Mr. Bango's perception of danger; and (4) the juror's field of study meant she may not see the rules of the court as applying to her; "she is going to interpret Mr. Bango's perception how she wants to, as opposed to what the evidence is going to show."⁶ RP 806-07.

Defense counsel argued the peremptory challenge was being exercised in a discriminatory fashion and the only other

⁵ These jurors were not African-American. RP 818.

⁶ The State did not challenge Juror 50, who had a bad experience with police and judicial system, and though he believed he could be impartial, he did not think anyone would want him on a jury. RP 659. Juror 63 was excused by stipulation of all parties after he discussed the murder of a nephew three years earlier, and which still upset him. RP 684.

African American did not have a possibility of being seated.

Counsel argued: “And so, to come forward with we don't believe that she's going to follow the law and we don't like her perspective on the world because it doesn't match ours is exactly what *Batson* is all about.” RP 807-08.

Analyzing the question under *Rhone*, the court found the State had not struck a group of venire members in an organized attempt to eliminate minority jurors. RP 817; there were other minorities on the jury, of either Asian or Filipino descent. RP 818; the court was not aware of any history of the prosecutor dismissing jurors on a *Batson* type challenge on a regular and consistent basis. RP 818; neither party targeted Juror 26. RP 820. The court concluded there was no bias or discrimination and the State simply did not “agree with her world view of things, and their concern about sympathy or prejudice that she may have towards a defendant, whether black, white or any minority or race.” RP 820.

2. CrR 3.5 Hearing

Detective Brian Vold began an interrogation of Mr. Bango at 8:39 p.m. He advised him of his Miranda rights, and completed an advisement card, signed by Mr. Bango. RP 112. Vold testified he spent the first ten minutes building rapport, getting background

information and engaging Mr. Bango in conversation. RP 115,131. He did not write a report about the beginning portion of the interrogation. RP 123-24. He did not audio or videotape that portion of the interrogation.

Detective Nist served as the “note-taker” during the interrogation; however, she destroyed her notes and wrote only a summary report about three and a half weeks later. Her report documented her involvement of being called in, and the start and stop time of the interrogation. It did not include the first 15 minutes of the interrogation. RP 165,167.

At 8:49 p.m., Mr. Bango asked for an attorney. RP 114-15, 116. Vold did not know what specific statements he said after Mr. Bango invoked his right to counsel but reported that he usually says the interrogation is over, the individual is under arrest, and going to jail. RP 142.

Both Vold and Nist testified that one minute after invoking his right to counsel Mr. Bango waived his right. Vold then insisted on doing a taped interview. Nist could recollect none of the conversation before or after Mr. Bango invoked his right to counsel. RP 155,157. The taped interrogation began at 8:54 pm. RP 117; Pl. Exh. 370. Neither Nist nor Vold could explain what happened

between the time Mr. Bango invoked his right to counsel and when he agreed to talk to the officers without his attorney, or the four minutes before the recorder began. RP 141-42, 144, 157.

Mr. Bango's recitation of events differed markedly from Vold's account. Mr. Bango said he was taken to the interrogation room, advised of his Miranda rights, and invoked his right to counsel. RP 187, 190. He said he never told anyone that he did not need an attorney. RP 193.

He said Vold told him he had all the information and wanted Mr. Bango's side of the story. RP 190. Mr. Bango repeated he needed a lawyer. Vold said that a SWAT team was already searching his hotel room and the same team would execute a search warrant on his home looking for guns and drugs. RP 191-92. Vold said if the contraband items were found there, it would have implications for his wife, and his children could be taken from their mother. RP 191. Mr. Bango felt threatened that SWAT would go to his home and coerced into waiving his right to counsel. RP 192,194, 213.

Vold admitted that even if he could not have gotten a search warrant for the Bango home, there is "a certain amount of bluffing that goes on" when interrogating a suspect. RP 225-226. Vold

disagreed he said he would get a search warrant for the Bango home. RP 223.

The court entered oral findings that the right to end questioning was scrupulously honored, and there was no interrogation after assertion of the right to counsel. The court found the police did not engage in tactics designed to coerce Mr. Bango into changing his mind, and the waiver was knowing and voluntary. During the taped portion of the interrogation Mr. Bango referenced that Vold had stopped the tape after he asked for his attorney and restarted it after the coercive statements⁷. Pl. Exh. 370. The court, however, found there was no record of the conversation between the detectives and Mr. Bango about the alleged threat, and Mr. Bango did not make a record on tape of the remarks or his unwillingness to talk without counsel. RP 417. With redactions, the interrogation was admitted as evidence. Pl.Exh. 370.

3. Motions in Limine

a. Cell Phone Pictures of Guns

⁷ It appears from context that Mr. Bango saw Vold's tape recorder on the table and assumed that it was recording. However, Vold said he did not begin recording until after Mr. Bango agreed to talk without his attorney present. Exh. 370, RP 114-115.

The State wanted to introduce evidence that Mr. Bango showed cell phone pictures of guns to Wikstrom while they waited for Shaw. The State's theory was that Mr. Bango was showing the photos to intimidate, and as a precursor that something other than a drug deal was about to unfold. RP 45.

The court ruled defense counsel could ask Wikstrom if the reason for the photo share was to let him know that someone had allegedly stolen those guns from him. 6/1/17 RP 39, 45. The court found it went to state of mind and was a *res gestae* issue. 6/1/17 RP 45. It said:

If a question is asked about what Mr. Bango said about those weapons he showed you on his cell phone, you are allowed to give *his explanation* as to why he was showing them to you.

6/1/17 RP 47 (emphasis added).

Wikstrom testified Mr. Bango showed him pictures of assault rifles. RP 1171-72. However, before cross-examination, the court either forgot or erroneously believed it disallowed the testimony about why pictures of guns were shown to Wikstrom and said, "I think I've already ruled that I wasn't going to allow that to be mentioned, that they were guns that were allegedly stolen." RP 1315-16. Defense counsel objected. RP 1316.

4. Jury Instructions

Defense counsel objected to Juror Instruction No. 43. RP 2600.

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill, use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the flight then self-defense is not available as a defense.

CP 398: RP 2648.

The jury found Mr. Bango guilty of second-degree murder (Count 2), second degree felony murder (Count 3), criminal impersonation in the first degree (Count 4) and tampering with a witness (Count 5). The court dismissed count 3. CP 521. The court imposed a 260-month sentence, and a criminal filing fee and a DNA database fee. CP 523-24.

5. Post-Trial Motion For A New Trial

Days after the jury rendered its verdict, the Court issued its opinion in *City of Seattle v. Erickson*⁸. Defense counsel moved for a new trial based on the dismissal of Juror 26. CP 484-

⁸ *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

486. The Court issued a written decision, finding: (1) there was not a prima facie case of racial discrimination; (2) the State did not conduct a “fishing expedition” based on racial motivation or unconscious bias in its extensive questioning of Juror No. 26; (3) there was not a pattern of eliminating all people of color or ethnic minorities by the State; and (4) the State articulated sufficient race-neutral reasons for excusing Juror 26. The court denied the motion for a new trial. CP 550-553. Mr. Bango made a timely appeal. CP 534-535

III. ARGUMENT

A. The Violation of Batson Requires Reversal.

“The Equal Protection Clause prohibits a prosecutor from using the State’s peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race.” *Powers v. Ohio*, 499 U.S. 400, 409, 113 S.Ct. 1364, 113 L.Ed.2d 411 (1991). It guarantees the State will not exclude members of a defendant’s race on the false assumption that members of his race as a group are not qualified to serve as jurors. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct.1712, 90 L.Ed.2d 69 (1986); U.S. Const. amend. 14.

All defendants are harmed when racial discrimination in jury selection compromises the right of trial by an impartial jury, but racial minorities are harmed more generally, because “prosecutors drawing racial lines in picking juries establish ‘state sponsored group stereotypes rooted in, and reflective of, historical prejudice.’” *Miller-El v. Dretke*, 545 U.S. 231, 237-38, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005)⁹.

To that end, *Batson* applied a three-part analysis to determine whether a party improperly used a peremptory challenge to exclude a potential juror based on race, whether real or perceived. *Batson*, 476 U.S. at 93-94. First, the party challenging the peremptory bore the burden of making a prima facie showing of purposeful discrimination. *Batson*, 476 U.S. at 93-94. Second, if the prima facie showing is made, the challenged party bears the burden of presenting a race-neutral explanation for the challenge.

Finally, if a race-neutral explanation is provided, the trial court must weigh all the relevant circumstances and determine if the strike was motivated by racial discrimination. *Batson*, 476 U.S. at 97-98.

⁹ The claim of a *Batson* error does not assign racial animus to the prosecutor or the trial court, nor is animus a required component in the analysis.

In 2013 our Supreme Court announced the need for a new *Batson*- type framework that did not just acknowledge unconscious bias in jury selection but eliminated it all together. *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013)(overruled by *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017)). The Court wanted a framework that gave trial courts the ability to recognize and remove unconscious bias “without fear of reversal and without the need to level harsh accusations against attorneys or parties.” *State v. Jefferson*, 192 Wn.2d 225, 241, 429 P.3d 467 (2018)(emphasis added).

In his motion for a new trial, Mr. Bango relied on the new bright-line rule for the first step of a *Batson* inquiry. *City of Seattle v. Erickson*, 188 Wn.2d at 734. The first step in a *Batson* type inquiry mandates that a trial court *must* recognize a prima facie case of discriminatory purpose when a party strikes the last member of a racially cognizable group. The trial court is directed to require an explanation from the striking party. *Id.*

In *Jefferson*, because the Court recognized the *Batson* framework made it difficult for defendants to prove discrimination even where it surely existed, it modified the third step of the inquiry. *Jefferson*, 192 Wn.2d at 230. The new final inquiry directs the court

to ask, “whether an objective observer *could* view race or ethnicity as a *factor* in the use of the peremptory challenge.” If so, then the peremptory strike *shall* be denied. *Id.* at 230. (emphasis added).

The Court emphasized the question was not whether a party intentionally used ‘purposeful discrimination’, but rather whether an average reasonable person, “who is aware of the explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways” could view race as a factor in the peremptory challenge. *Id.* at 249-250. Where an objective observer could view race as a *factor* in the peremptory strike of a juror, the matter must be reversed and remanded for a new trial. *Jefferson*, 192 Wn.2d at 252.(emphasis added).

Batson challenges are reviewed for clear error. “Clear error exists when the court is left with a definite and firm conviction that a mistake has been committed.” *State v. Saintcalle*, 178 Wn.2d at 41.

This Court should apply the *Batson* test as modified in *Erickson* and *Jefferson*. The *Jefferson* Court found that the “alteration would not change the basis for a *Batson* challenge. The evil of racial discrimination is still the evil this rule seeks to eradicate.” The “alteration provides parties and courts with a new

tool, allowing them an alternate route to defend the protections espoused by *Batson*.” *Jefferson*, 192 Wn.2d at 249. (internal citation omitted).

1. Under *Rhone*, *Saintcalle*, *Erickson*, and *Jefferson*, Mr. Bango established a prima-facie showing of discriminatory purpose.

Here, in its initial analysis and at the motion for a new trial, the trial court did not find a prima facie case of racial discrimination. CP 551. Using a *Rhone*¹⁰ analysis, the court found there was no purposeful discrimination because only one African-American woman had been struck from the venire, and there were other people “of either Asian or Filipino descent” who remained in the venire. This is clear error.

Juror 26 was the only African-American who had a possibility of being seated on the jury venire. The fact that the State had not challenged potential jurors who were of Asian or Filipino descent is does not change the analysis. Referencing *Saintcalle*, the *Erickson* Court said “*Batson* is concerned with whether a juror was struck because of his or her race, not the level of diversity remaining in the

¹⁰ *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010) (overruled by *Erickson*, 188 Wn.2d at 724).

jury. *Saintcalle*, 178 Wn.2d at 42.” “It is misguided to infer that leaving some members of cognizable racial groups on a jury while striking the only African American members proves the prosecutor’s strike was not racially motivated.” *Erickson*, 188 Wn.2d at 733. A *Batson* violation can occur if even one juror is struck, regardless of the racial diversity of the remaining jury. *Erickson*, 188 Wn.2d at 733.

Under Washington law, a *Batson* type inquiry mandates that a trial court must recognize a prima facie case of discriminatory purpose when a party strikes the last member of a racially cognizable group. *Erickson*, 188 Wn.2d at 734. Under *Erickson* and *Jefferson* striking Juror 26 was sufficient for a prima facie showing of a discriminatory purpose.

The court also found that the prosecutor did not have a history of discriminatory challenges, and thus there was no prima facie showing. This same reasoning was addressed in *State v. Hicks*, and *Erickson*. *State v. Hicks*, 163 Wn.2d 477, 484, 181 P.3d 831(2008); *Erickson*, 188 Wn.2d at 733. The Court held it was error to rely on lack of pattern and the presence of other nonwhite jurors as a basis for not making a finding of a prima facie showing.

It was error for the trial court here to find there was no prima facie showing of discrimination¹¹.

2. The Proffered Reasons For Striking Juror 26 Are Prohibited By *Batson*.

The State presented two arguments as race-neutral reasons for striking Juror 26. First, because Juror 26's sister had been murdered about 40 years ago the State argued it might not be a good trial for her. However, Juror 26 was very clear it would not be a factor in her decision making, and she felt justice had been done for her sibling.

Second, the State did not want her on the jury because she looked at the "system" through a filter of understanding that individuals who are part of more than one culture or ethnicity may perceive things differently. The State clearly articulated it was concerned Juror 26 would be very forgiving and sympathetic of Mr. Bango's perceptions: "[S]he is going to interpret Mr. Bango's perception how she wants to, as opposed to what the evidence is going to show." RP 806.

¹¹ Although the trial court found there was no prima facie showing of discrimination, it went on to conduct an analysis.

In other words, because Juror 26, an African American, had an understanding of diversity, multi-culturism, and differences in cultural perceptions, she would be not only sympathetic to a black defendant, but also unable to follow the evidence and the law. This is exactly what *Batson, Rhone, Saintcalle, Erickson, and Jefferson* prohibit.

The court focused on reason two: “I don't believe it is a bias or discriminatory in nature. It may be that they just simply don't agree with her world view of things and their concern about sympathy or prejudice that she may have towards a defendant, whether black, white or any minority or race.” RP 820; CP 551-552. The court reasoned that jurors who have unique perceptions of the world, but who say they can follow the court’s instructions can still be the subject of peremptory challenges. CP 552.

As defense counsel argued, “...we [the State] don't believe that she's going to follow the law and we don't like her perspective on the world because it doesn't match ours is exactly what *Batson* is all about.” RP 806. The State's reasons were not race-neutral.

3. An Objective Observer Could View Race Or Ethnicity As A Factor In The Use Of The Peremptory Strike of Juror No.26.

Under *Jefferson*, the third step of analysis is reviewed *de novo* rather than under a clear error standard. *State v. Jefferson*, 192 Wn.2d at 250. The test is whether an objective observer could conclude race was a factor in the peremptory strike of Juror 26. The test does not demand that race be “the” factor, simply a factor is sufficient.

Under the objective observer standard, the average reasonable person, “who is aware of the explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways” could view race as a factor in this peremptory challenge.

The State boiled down its argument for the court: “We’re prosecuting a homicide case. *I need her to follow the absolute norms of society when it comes to following the law.*” 10/15/18 RP 95. The State’s reasoning is exactly why the Court altered the *Batson* test for Washington courts. Juror 26’s race, ethnicity, training, education, and teaching career demonstrated her awareness that individuals who are part of more than one race, ethnicity or culture may and likely will perceive the world differently.

This matter must be reversed and remanded for a new trial. *Jefferson*, 192 Wn.2d at 251.

B. Mr. Bango Should Be Granted A New Trial Based On The Improperly Given First Aggressor Instruction.

Our Court has said that few situations warrant the necessity of a first aggressor instruction because the theories of a case can be adequately argued and understood by the jury without it. *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 644 (1999). A first aggressor instruction directs the jury to determine whether the defendant's acts precipitated a confrontation with the victim. *Id.* at 909-910. The record in this case does not support giving the first aggressor instruction.

1. The First Aggressor Instruction Was Not Applicable To The Facts In This Case.

An appellate court reviews de novo whether sufficient evidence supports the first aggressor instruction. *State v. Sullivan*, 196 Wn.App. 277, 289, 383 P.3d 574 (2016)(rev. denied, 187 Wn.2d 1023 (2017)). On review, the Court views the evidence in the light most favorable to the party that requested the instruction. *State v. Bea*, 162 Wn.App. 570, 577, 254 P.3d 948 (rev. denied, 173 Wn.2d 1003 (2011)).

The State bears the burden of establishing the applicability of a first aggressor instruction. *State v. Riley*, 137 Wn.2d at 910-11.

The instruction is appropriate when there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense. *State v. Riley*, 137 Wn.2d at 909-910. That is, where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant's conduct provoked the fight; or (3) the evidence shows the defendant made the first move by drawing a weapon. *State v. Anderson*, 144 Wn.App.85, 89, 180 P.3d 885 (2008). In other words, did the defendant undertake some intentional act that could reasonably be likely to provoke a belligerent response.

A first aggressor instruction potentially removes self-defense from the jury's consideration, relieving the State of the burden of proving that a defendant did not act in self-defense. It is for this reason, it should be used sparingly. *State v. Bea*, 162 Wn.App. at 575-76.

An example of a jury reasonably determining from the evidence the defendant provoked the fight is found in *Anderson*. There, the defendant yelled at his girlfriend as she sat in a chair, standing over her and leaning into her face. *State v. Anderson*, 144 Wn.App. at 87. Her daughter came into the room, with a steel bar in

her hands, telling Anderson to step away. She directed her mother to leave with her, and Anderson pointed a shotgun at them. There was a physical altercation which included grappling over the bar and gun, and Anderson choking and slamming people's heads. The Court agreed that a first aggressor instruction was appropriate because Anderson's conduct provoked the altercation. *Id.* at 90.

However, in *State v. Douglas*, 128 Wn.App. 555, 116 P.3d 1012 (2005), the Court found the 'victim', not the defendant was the actual first aggressor. There, the 'victim' entered the Douglas home uninvited, was confrontational, yelled profanities, and threatened the occupants. He threw hot liquid at them, ignored their demands to leave, and backed the defendant into a corner. The defendant grabbed his shotgun, aimed it at the intruder, and the gun discharged accidentally. *Id.* at 564-65. The Court determined the first aggressor instruction prevented consideration of the defendant's self-defense claim and prevented him from receiving a fair trial. *Id.* at 565.

Here, the State requested a first aggressor instruction because a jury could reasonably conclude that "pulling the badge resulted in them throwing the car in reverse and Mr. Shaw grabbing for the gun and the defendant then shooting him. Or that the

defendant started this whole process by pulling the badge and instigated a robbery¹², and then he – Mr. Shaw pulled a gun in defending himself, and then the defendant shot him.” RP 2600.

Under the State’s theory, and per Mr. Bango’s interrogation, Mr. Shaw drew his weapon first. Mr. Bango’s intentional act, as alleged by the State, was the display of his JRA badge. The display of a badge is insufficient provocation of a belligerent response, that would justify a ‘victim’ using deadly force. The first aggressor instruction was improper and relieved the State of its burden to prove that Mr. Bango did not act in self defense beyond a reasonable doubt. The error is presumed prejudicial. *State v. Imokawa*, 4 Wn.App. 545, 559, 422 P.3d 502 (2018).

2. Mere Words Are Inadequate Provocation To Negate Self Defense.

Even if the Court were to consider Mr. Bango’s words “I’m a cop. Get out of the car”, mere words are inadequate provocation to overcome the right to self-defense. *State v. Kee*, 6 Wn.App.2d 874, 880, 431 P.3d 1080 (2018). If a reasonable person were to conclude that Mr. Bango’s words provoked Shaw to draw his

¹² The State alleged in closing argument that Mr. Bango attempted to rob the three individuals in the car by himself. (RP 2662,2669). There was no evidence Mr. Bango told them to give him their drugs or money.

weapon, the trial court should have instructed the jury that for purposes of the first aggressor instruction, words alone are insufficient. *Kee*, 6 Wn.App. at 882.

Kee held “When there is evidence that the defendant provoked an altercation with words, particularly when the State suggests that those words constitute first aggression, WPIC 16.04 is inadequate to convey the law established in *Riley*.” *Id.* at 882. The Court reversed in *Kee*, finding error in failure to give the instruction that words alone are not sufficient to make a defendant the first aggressor in an altercation. *Id.* The same error and remedy should be found here.

3. The Instruction Was Prejudicial Because It Nullified Mr. Bango’s Legitimate Claim of Self Defense.

Where a claim of self-defense is made, its absence becomes another element of the offense which the State must prove beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Espinosa*, 8 Wn.App. 353, 362, 438 P.3d 582 (2019). An error affecting a claim of self-defense is constitutional in nature and cannot be deemed harmless unless it is deemed harmless beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983). Thus, it is for good

reason a first aggressor instruction is not favored, and courts are cautioned against giving them. *State v. Kidd*, 57 Wn.App. 95,100, 786 P.2d 847 (1990).

To prove a constitutional error harmless, the State bears the burden of showing that any reasonable fact finder would have reached the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Where the error is not harmless, the defendant is entitled to a new trial. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The instruction in this matter was prejudicial because it nullified Mr. Bango's claim of self-defense, effectively and improperly removing it from the jury's consideration. *State v. Douglas*, 128 Wn.App. 555, 563, 116 P.3d 1012 (2005). Mr. Bango did not provoke a belligerent response when he showed Shaw his badge. His words were not sufficient to provoke or justify a lethal response from Shaw. Shaw drew his weapon first.

The prejudicial instructional error, giving the first aggressor instruction, or in the alternative, failing to give an instruction that words alone are insufficient for first aggression requires reversal

and a new trial. *State v. Townsend*, 142 Wn.2d 838, 848, 145 P.3d 145 (2001).

C. Mr. Bango's Statements Were Obtained In Violation Of His Constitutional Right To An Attorney And Should Have Been Excluded.

A trial court's findings of fact from a CrR 3.5 hearing are reviewed to determine if they are supported by substantial evidence. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Conclusions of law are reviewed de novo, to determine whether they are supported by the findings of fact. *State v. Grogan*, 147 Wn.App. 511, 516, 195 P.3d 1017 (2008).

Mr. Bango challenges the trial court's finding that police did not engage in tactics designed to coerce him into changing his mind and its conclusion that the recorded statements were admissible.

1. The Custodial Statements Were The Product Of Coercion and Were Inadmissible.

The federal and state constitutions guarantee that an accused has the right to not incriminate himself. U.S. Const. amends. V; Const. art. I, § 9. Custodial questioning, by its very nature is coercive, and law enforcement officers must advise a

suspect of his constitutional rights before questioning and then scrupulously honor his assertion of those rights. *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

For a defendant's custodial statements to be used against him the State must show by a preponderance of the evidence he made a knowing, voluntary and intelligent waiver of his constitutional rights. *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004); *State v. Campos-Cerna*, 154 Wn.App. 702, 709, 225 P.3d 185 (2010); *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). To "voluntarily" relinquish means the waiver was a free and deliberate choice, rather than one made under intimidation, coercion, or deception. *Moran v. Burbine*, 475 U.S.412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986); *State v. Mayer*, 184 Wn.2d 548, 556-57, 362 P.3d 745 (2015).

A signed waiver of *Miranda* rights is "not inevitably either necessary or sufficient to establish waiver", but it "is usually strong proof of the validity of that waiver." *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *State v. Woods*, 34 Wn.App. 750, 759, 665 P.2d 895 (1983).

A trial court must make four specific findings before custodial statements made after an assertion of *Miranda* rights are held

admissible as a voluntary waiver of such rights. The State must prove: 1) that the right to cut off questioning was scrupulously honored; 2) that police engaged in no further “interrogation” after defendant asserted his rights; 3) that police did not engage in tactics designed to coerce defendant to change his mind; and 4) that the subsequent waiver was knowing and voluntary. *State v. Pierce*, 94 Wn.2d 345, 352, 618 P.2d 62 (1980); *See also State v. Coles*, 28 Wn.App. 563, 625 P.2d 713, n.1 (1981).

Here, the State did not prove by a preponderance of the evidence that Mr. Bango validly and voluntarily waived his right to have an attorney present during questioning. The trial court erroneously found the police did not engage in coercive tactics.

The State cannot account for the first 15 minutes of the unrecorded interrogation. At 8:39 p.m., officers took Mr. Bango into an interrogation room equipped for audio and visual recording. They did not begin the recording using either the official AV system or Detective Vold’s tape recorder. RP 2442. Officers reported that Mr. Bango invoked his right to counsel at 8:49 pm and waived his right at 8:50 pm. Neither officer could remember what was said before or after he invoked his rights. And neither could give any reason why he so suddenly changed his mind. RP 2449.

Mr. Bango was clear that during the unrecorded time between invoking and relinquishing his right to counsel Vold told him he was getting a search warrant to search his family home, his wife could be arrested, and his children taken. When a police officer uses a bluff, lie, or psychological ploy to obtain information, the question is always whether the tactics were so manipulative or coercive, the suspect was deprived of his ability to make a voluntary rational decision to waive his rights. *State v. Unga*, 165 Wn.2d 95, 196 P.3d 645 (2008).

Detective Vold denied he said such a thing but testified as a trained interrogator he bluffs and lies in hopes of getting information. RP 128,260, 2706, 2707. Vold testified that in order to obtain a search warrant for the home, he would have needed to show a nexus between the crime and the place to be searched. He admitted that when interrogating a suspect, he would not he had to show a nexus. RP 225. In other words, he could have bluffed and lied about having a warrant. The bluffing and lying were evident in the taped portion of the interrogation.

And although he testified he did not tell Mr. Bango he could have his home searched, he also confidently testified that if Mr. Bango had asked for a glass of water, he would have provided it.

However, during the 90-minute taped portion Mr. Bango twice asked for water and twice Vold disregarded the request.

The State can show Mr. Bango signed the waiver card before he invoked his right to counsel. The State can produce evidence that once the tape recorder started Mr. Bango was again informed of his *Miranda* rights. What the State did not and could not produce was a reliable record of what happened during the unrecorded 15 minutes. The State conceded that if Mr. Bango's recitation of events was accurate, the statements should have been suppressed. RP 246.

The trial court appears to have filled in the blank 15 minutes by using the recorded portion to conclude detectives did not coerce Mr. Bango into waiving his rights. The court relied on the even tone of voice of the interrogator, that during the recorded portion there was no undue pressure used, that detectives had already started to build their case, and that Mr. Bango did not mention his wife or children during the recorded portion. RP 418. It is also more than reasonable to conclude that because the officer knew he was recording the interrogation he used an even toned voice and did not make threats. Moreover, it was clear Mr. Bango assumed the

recorder had been on the entire time and the conversation, threats and undue pressure had been recorded.

However, in the absence of officers being able to recount what was said during the 15 minutes, the court's findings do not lead to its conclusion of law that Mr. Bango's statements were made voluntarily.

2. Washington Must Either Recognize A Constitutional Due Process Right Or Adopt An Evidence Rule Requiring Interrogations To Be Electronically Recorded To Be Admissible.

Sister states Wisconsin, Minnesota, Indiana, Utah and Alaska have either recognized a state constitutional due process right that a custodial statement must be electronically recorded to be admissible, or exercised supervisory authority through an evidence rule, requiring a recording. *Stephan v. State*, 711 P.2d 1156, 54 USLW 2355 (1985); Utah Rule of Evidence 616 (2016); Indiana Rule of Evidence 617 (2011); *State v. Scales*, 518 N.W.2d 587 (Minn. 1994); *In re Jerrell C.J.*, 283 Wis.2d 145, 699 N.W.2d 110 (2005)(requires all juvenile custodial interrogations be electronically recorded).

Historically, lower Appellate Courts in Washington have found no state constitutional due process right requiring

interrogations to be recorded to be admissible against a defendant. *State v. Turner*, 145 Wn.App. 899, 187 P.3d 835 (2008); *State v. Spurgeon*, 63 Wn.App. 503, 820 P.2d 960 (1991). To date, the Washington Supreme Court has declined to consider the issue or exercise supervisory authority and adopt a rule excluding evidence from interrogations that are not electronically recorded. See *Spurgeon, rev. denied* 118 Wn.2d 1024, 827 P.2d 1393 (1992); *Turner, rev. denied* 165 Wn.2d 1016, 199 P.3d 411 (2009).

With the advent of the capability of law enforcement officers to wear body cameras for evidence gathering, surveillance, police accountability, and a way to counter wrongful claims of police misconduct the time to convene and consider an evidence rule requiring electronic recording of interrogations has arrived.

Beginning in 2009, Washington jurisdictions started implementing the use of body cameras for law enforcement officers¹³. In 2016, RCW 10.109.900 mandated the legislature to convene a task force to study and make recommendations regarding all aspects of body worn cameras by law enforcement officers. RCW 10.109.030; RCW 10.109.900(9). Research has

¹³ Chapman, Brett, *National Institute of Justice*, NIJ Journal No. 280 (December 2018).

found the electronic recording policies have resulted in not only a reduction in police use of force, but improved behavior among both officers and citizens, and served as a way to substantiate or dismiss claims of police misconduct¹⁴.

The Courts should not place a burden on the trial judge to fill in the blanks where a Fifth Amendment right is at stake. Here, the incomplete record is troublesome. The trial judge overlooked the glaring omission of the interrogation before the recording started and found the officer's account credible. The result is a perpetuation of incidents where defendants testify to one thing and a law enforcement testifies to the opposite; the defendant who has coerced or intimidated into waiving his rights cannot substantiate his experience because police did not make a recording. It is unjust for a court to make a determination of lack of credibility of a defendant, when the circumstances of interrogation are entirely within the State's control. Mr. Bango respectfully asks the Court to review this issue and recommend review by the Supreme Court.

¹⁴ Id.

D. The Court Erroneously Excluded Relevant NonHearsay Evidence Resulting In Unfair Prejudice To Mr. Bango.

In pretrial hearings, the court ruled the defense was allowed to cross examine Wikstrom about the cell phone gun pictures Mr. Bango showed to him. It found it relevant to Mr. Bango's state of mind and part of the res gestae of the crime. RP 45. However, when it was time for cross examination, the court erroneously said it had already ruled the defense could not ask Wikstrom why Mr. Bango showed him the photos. This was error.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). An erroneous evidentiary ruling requires reversal where the defendant has been prejudiced by that error. *State v. Gonzalez-Gonzalez*, 193 Wn.App. 683, 689, 370 P.3d 989 (2016).

A defendant has the right to present relevant evidence. ER 401; *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). If the evidence is relevant, the burden shifts to the State to show that the relevant evidence "is so prejudicial as to disrupt the fairness of the fact-finding process." *Id.* The State's interest in excluding prejudicial evidence must be balanced against the defendant's

need for the information. Relevant evidence can be withheld only if the State's interest outweighs the defendant's need. *Id.*

Here, the evidence met the threshold of relevance.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

The State wanted to create the impression that Mr. Bango was intimidating Wikstrom in preparation for a robbery. The statements were relevant because they went directly to state of mind and credibility of the witness. The question the State placed for the jury was whether Mr. Bango intimidating Wikstrom because he was going to rob Shaw, or was he showing Wikstrom the pictures to let him know not to buy stolen guns. Counsel is entitled to ask any questions on cross examination which tend to test the accuracy, veracity or credibility of the witness. *Farah v. Hertz Transporting, Inc.* 196 Wn.App. 171, 383 P.3d 552 (2016). The statements from Mr. Bango completed the picture for the jury and the evidence was relevant. *State v. Brown*, 132 Wn.2d 529, 569, 940 P.2d 546 (1997).

The State cannot meet the burden of showing the relevant evidence was so prejudicial it disrupted the fairness of the fact-finding process. The central issue of this case was whether Mr. Bango acted in self-defense. The defense had the right to test the veracity and credibility of the witness's story about the pictures. Providing a complete picture of the interaction would have added to the fairness of the fact-finding process.

The State's interest in presenting only the skewed version of the conversation did not outweigh Mr. Bango's need. The court never articulated reasons the evidence was *not* admissible, and its later ruling was exercised for untenable reasons. Discretion is abused when the trial court's decision is manifestly unreasonable or exercised untenable grounds or for untenable reasons. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

The court's ruling was manifestly unreasonable both under the evidence rules and its earlier ruling that the evidence was relevant because it went to state of mind and was part of the *res gestae* of the crime. The ruling was unfairly prejudicial because it allowed the jury to wrongly conclude that Mr. Bango showed the pictures because he had nefarious intentions while he waited for Shaw.

This Court should reverse the evidentiary ruling because no reasonable person would have taken the view adopted by the trial court. *Peralta v. State*, 187 Wn.2d 888, 894, 389 P.3d 596(2017).

E. The State Failed To Disprove Mr. Bango Acted Lawfully In Self-Defense.

Due process rights, guaranteed under both the Washington Constitution and the United States Constitution, require the State to prove every element of a charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 24 L.Ed.368 (1970); *State v Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983).

Where the issue of self-defense is raised, the absence of self-defense becomes an element of the offense, which the State must prove beyond a reasonable doubt. *State v. Kyllö*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The court gave two instructions on justifiable homicide. The first instruction (no. 39) applied to the murder in the second degree charge:

A homicide is justifiable when an individual reasonably believes that (1) another intended to inflict death or great personal injury to him, or is resisting an attempt to commit a felony (2) and he was in imminent danger, and (3) he used the force and means a reasonably prudent person would use under the same or similar conditions, taking into account all

the facts and circumstances as they appeared to him at the time of the incident.

CP 394.

Instruction No. 44 was provided for the felony murder

second degree charge:

It is a defense to the predicate felony of assault in the second degree as charged in Count III that the force used was lawful as defined in this instruction. *This instruction does not apply to the predicate felony of criminal impersonation in the first degree as charged in Count III.*

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

CP 399. (emphasis added).

A self-defense claim is rooted in the right of every citizen to reasonably defend himself against an unwarranted attack. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Evidence of self-defense must be assessed from the viewpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." See *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007). Here, the parties understood they were trying to conduct a drug deal in the early morning and large sums of money

were involved. Neither party trusted the other. Both Mr. Bango and Shaw knew the other carried a weapon.

The videotape showed movement in the center part of the car, followed by Mr. Bango moving back and to the side of the passenger window. The videotape confirmed Mr. Bango's statement to Vold that he saw Shaw reach for and raise his gun; then Mr. Bango reached for and fired his own weapon. Deadly force may be used in self-defense if a defendant reasonably believes he was threatened with death or great personal injury. *State v. Walden*, 131 Wn.2d 469, 474-75, 932 P.2d 1237 (1997).

Mr. Bango had every reason to believe he was threatened with death or great personal injury. He saw Shaw's gun well enough and long enough to later identify the make, model and distinctive writing on the barrel of the gun.

Additionally, jury instruction No. 44 specified that it did not pertain to the charged offense of criminal impersonation. This means that if the jury found Mr. Bango guilty of criminal impersonation, regardless of Shaw's actions, Mr. Bango had no defense. This is error because it impermissibly relieved the State of the burden to disprove self-defense. This matter requires reversal and a new trial.

F. The Court Must Vacate The Conviction For Felony Murder
As It Violates The Constitutional Right To Be Free From
Double Jeopardy.

The Double Jeopardy Clause guarantees that no person shall be twice put in jeopardy for the same offense. U.S. Const. Amend.V¹⁵; Wash.Const. Art. I,§ 9¹⁶. The State may bring multiple charges arising from the same criminal conduct, but the double jeopardy provisions bar multiple punishments for the same offense. *State v. Kier*, 164 Wn.2d 798, 803, 104 P.3d 212 (2008). Whether the convictions violate double jeopardy is a question of law reviewed de novo. *State v. Freeman*, 153 Wn.2d 765, 770 108 P.3d 753 (2005).

Double jeopardy is violated when a defendant receives multiple convictions for a single offense. *State v Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)(Courts may not exceed legislative authority by imposing multiple punishments for the same offense.).

Here, the court rightly recognized the convictions for second degree murder and felony murder constituted the same offenses. It erred when it dismissed the conviction for felony murder rather

¹⁵ No person shall be subject to the same offense to be twice put in jeopardy of life or limb

¹⁶ No person shall be twice put in jeopardy for the same offense.

than vacated it. Intentional murder and felony murder are not two different crimes, but are alternate ways of committing the single crime of second degree murder. See *State v. Johnson*, 113 Wash.App. 482, 487, 54 P.3d 155 (2002). The legislature does not intend to provide multiple punishments for a single homicide. *State v. Womac*, 160 Wn.2d 643, 656, 160 P.3d 40 (2007). Because of adverse consequences which carry “an unmistakable onus which has a punitive effect”, and the violation of double jeopardy, the matter should be remanded for vacation of the conviction. *Id.* at 659.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bango respectfully asks the Court to reverse his convictions and remand for a new trial.

Respectfully submitted this 3rd day of September 2019.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do certify under penalty of perjury under the laws of the State of Washington, that on SEPTEMBER 3, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a copy of the Appellant's Opening Brief to: Pierce County Prosecuting Attorney at pcpatcecf@co.pierce.wa.us and to Donald Bango, DOC 410585, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA. 99362.

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