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NO. 32919-4-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LUIS GOMEZ-MONGES, Appellant.

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

- A. Was there sufficient evidence to support the conviction of first degree murder?
- B. Did the trial court properly deny the CrR 8.3 motion to dismiss regarding the elected prosecutor’s letter to the presiding judge?
- C. Should discretionary costs of attorney fees and costs of incarceration be waived in the interest of judicial economy?

II. STATEMENT OF THE CASE

The appellant, Luis Gomez-Monges, was charged with first degree murder for the death of Vernon “Vern” D. Holbrook on May 25, 2013. CP 29-30. The State also filed a deadly weapon enhancement and alleged two aggravating circumstances under RCW 9.94A.535(3). CP 30. The charges stemmed from the following facts:

Gomez-Monges was dating Adriana Mendez and was in an intimate relationship with her for four years. RP 2047.¹ They lived together at the Sunshine motel, along with Ms. Mendez’s three children. *Id.* at 2045, 2049. Gomez-Monges did not have a job but worked now and then as a mechanic and did seasonal work during the apple season. *Id.* at 2049.

¹ “RP” will refer to the volumes of transcript (pages 1-2433) that were prepared by the court reporter. For the court hearings that were transcribed from an FTR recording, the State will refer to the date of the recording, i.e. “10/9/14 RP.”

In 2012, Ms. Mendez met Daniel Blizzard, a real estate agent, through her friend and former roommate, Jill Taylor. *Id.* at 1953-54, 2050. Mr. Blizzard and Ms. Taylor had previously dated for five years and thereafter were friends. *Id.* at 1555-56. Ms. Mendez learned from Ms. Taylor that Mr. Blizzard was willing to pay \$10,000 to have Vern Holbrook, a real estate broker, killed. *Id.* at 2054, 2062. Mr. Blizzard had previously tried to get Ms. Taylor to poison Mr. Holbrook. *Id.* at 2231-2. Mr. Blizzard wanted the proceeds from a life insurance policy. *Id.* at 2232. There was a key man insurance policy in place that Mr. Blizzard's company was paying on. *Id.* at 1981-3, 2032. The policy would have paid out 1.58 million dollars to Mr. Blizzard's company if Mr. Holbrook died. *Id.* at 1981.

Toward the end of February 2013, Ms. Mendez approached Mr. Blizzard about the \$10,000 proposal. *Id.* at 2055. Gomez-Monges was present during the conversation and an agreement was reached. *Id.* at 2056-7. Gomez-Monges told Ms. Mendez to tell Mr. Blizzard that he was going to do it. *Id.* at 2058. Ms. Taylor was also present during the conversation and saw Gomez-Monges nodding his head up and down. *Id.* at 2314. Ms. Taylor also gave the victim's business card to Gomez-Monges so he could identify his target, Mr. Holbrook. *Id.* at 2297. Mr.

Blizzard showed Ms. Mendez the cash to show that he was not joking about paying the \$10,000, and also talked about a bonus. *Id.* at 2062-3.

A couple weeks later, Mr. Blizzard told Ms. Taylor that Gomez-Monges and Ms. Mendez were going to go after Mr. Holbrook. RP 2288. Ms. Taylor asked Gomez-Monges if he was really going to do it and he said “yes.” *Id.* He said he was “going to get the job done.” *Id.* Later, Mr. Blizzard followed up by asking Ms. Mendez how it was going. *Id.* at 2058. Ms. Mendez told Mr. Blizzard she did not know. *Id.* She then relayed to Gomez-Monges that Mr. Blizzard wanted to know what was going on. Gomez-Monges replied that it was going to get done. *Id.* at 2060.

Mr. Blizzard came up with a plan to schedule an appointment with Mr. Holbrook to view a home that was for sale. RP 2061. He told Ms. Mendez to set up the appointment and gave her the target’s phone number. *Id.* at 2066. Gomez-Monges and Mr. Blizzard agreed that she would give the real estate broker fake names. *Id.* at 2139. On May 24, 2013, after using *67 to block her number, she called the victim and set a date to look at a home. *Id.* at 1702, 2066-7, CP 1693. Mr. Holbrook agreed to show a house the next day, Saturday, May 25. RP 1527. He subsequently told his bookkeeper that he would call her if they were ready to make an offer. *Id.*

Before the appointment, Gomez-Monges, along with Ms. Mendez and Mr. Blizzard, went to see where the house was located. RP 2070.

On the morning of May 25, 2013, Gomez-Monges borrowed his mom's car and drove his girlfriend and her children to their appointment with Mr. Holbrook in Tieton. RP 2071. They met him at the house and went inside. *Id.* at 2072-3. They left after about 20 minutes because the broker wanted to show them another home. *Id.* at 2073. They followed Mr. Holbrook to the second home and went inside. *Id.* at 2075. The three children stayed in the car. *Id.*

While inside of the master bedroom, Gomez-Monges attacked Mr. Holbrook. RP 2078-9. Mr. Holbrook went down to the floor. *Id.* at 2079. Ms. Mendez saw Gomez-Monges hit the victim in the head repeatedly while the victim laid on his back. *Id.* at 2081. Ms. Mendez walked out when she saw blood. *Id.* at 2082. When Gomez-Monges was done, he came out of the house and they drove off. *Id.* at 2084, 2129. He took the victim's cell phone and came up with the idea to break it. *Id.* at 2084-5. Ms. Mendez broke it and threw it out the window on the drive back to Yakima. *Id.* He then told Ms. Mendez to text Mr. Blizzard and let him know it was done. *Id.* at 2085. Ms. Mendez called Mr. Blizzard and told him that it was done. *Id.* at 2084, 2128. She later broke her cell phone and threw it into a vacant lot across from their motel. *Id.* at 1542-3.

After the attack, Gomez-Monges dropped Ms. Mendez off at the motel and returned his mom's car. RP 2122-3. Later that same day, he and his girlfriend met and talked with Mr. Blizzard. *Id.* at 2087-8. Mr. Blizzard told them that he was not going to give them the money until someone else confirmed that the job was done. *Id.* Ms. Mendez translated this for Gomez-Monges and the defendant agreed by stating, "okay." *Id.*

Later that afternoon, Gomez-Monges met with Juan Martinez, the owner of an auto repair shop. RP1536-7. Mr. Martinez testified that Gomez-Monges had not been by for a few days and had stopped by to say that he was out of town to get some money. *Id.*

Mr. Blizzard later gave Ms. Mendez \$12,000 cash, which she turned over to Gomez-Monges. *Id.* at 2140, 2143. Gomez-Monges put the money in his pants. *Id.* at 2144. They then came up with a plan on what to tell detectives. *Id.* at 2179. The plan included leaving Ms. Taylor and Mr. Blizzard's names out of it. *Id.* at RP 2148, 2179. Gomez-Monges told Ms. Mendez to do whatever she had to do to avoid getting locked up. *Id.* at 2202.

A friend of Mr. Holbrook's, Javier Cardenas, found the victim's truck at a house in Cowiche after hearing that he was missing. RP 1324-26. Cardenas entered the house and found the victim lying in a pool of blood in one of the bedrooms. *Id.* at 1327-8, 1348. Officers responded

and saw that Mr. Holbrook had numerous lacerations on the front and back of his head and a cut on his neck. *Id.* at 1349. His eyes were swollen shut, his breathing was labored, he was twitching, and he did not speak when spoken to. *Id.* at 1348-9. His face was swollen and black and blue. *Id.* at 1384, 1399. Paramedics on scene assessed his condition as critical and near death. *Id.* at 1375. Mr. Holbrook was taken to the emergency room, where he was unresponsive and comatose. *Id.* at 1457, 1459.

A neighbor near the scene of the attack, Michael Bealer, reported that after a truck arrived, he saw a man and woman get out of their car and walk towards the front door of the house. RP 1421. He thought they were Hispanic. *Id.*

Officers did not find a weapon at the scene of the crime. RP 1357. They did locate handwritten notes in the victim's truck that contained the names "Nichole and Ricardo Espinoza." *Id.* at 1576, 2393. These were the names that Ms. Mendez gave after it was agreed that she would give Mr. Holbrook fake names. *Id.* at 2138-9. The victim's cell phone was never found, and the last connected call was at 11:15 a.m. that morning. *Id.* at 1582-3. That last call was from Ms. Mendez's phone. *Id.* at 1582-3, 1585.

Cell phone records later revealed frequent text messages between Ms. Mendez and Mr. Blizzard the day before and the day of the attack.

Id. at 1680-2, 1704; CP 1772-1784; State's Exhibit 58. On May 24, 2013, Ms. Mendez texted Mr. Blizzard about going shopping. RP 2135-6; CP 1772; State's Exhibit 58. When asked to explain what she meant by shopping, Ms. Mendez testified that she told Mr. Blizzard their plans to spend the money after the job was done. RP 2135. She said that her and Gomez-Monges were going to buy the kids clothes and get a place to stay. *Id.* Ms. Mendez also texted Mr. Blizzard about what to wear when meeting the victim. *Id.* at 2136-7. And on that same day she texted him for help with their rent and he paid it for them. *Id.* at 2136; CP 1773; State's Exhibit 58.

The next day, May 25, at 9:24 a.m., the day of the attack, Mr. Blizzard texted her, "Don't b late for shopping." State's Exhibit 58; CP 1780. She texted back that she was waiting on her ride. *Id.* At 12:04 p.m. she texted him, "We r going shopping." State's Exhibit 58; CP 1782. Later, he asked where the defendant was. State's Exhibit 58; CP 1783. Ms. Mendez texted, "Here he wants to drink some of the mix drinks I made u he said that he will accept one from u if u afford hgim [sic] one now lol." *Id.* Mr. Blizzard replied, "Lol. Go for it. Have at it. I'm sure ya'all could use one. :D." *Id.*

Cell phone records also revealed incriminating texts between Ms. Taylor and Mr. Blizzard. *See* State's Exhibit 69A. On January 13, 2013,

Ms. Taylor texted Mr. Blizzard because she was upset that he continued to solicit her friends to kill Vern. RP 2291-3. Her text said:

...you know I'm paying you back. If you would have stopped asking me to kill Vern like I told you to, because it was driving me nuts, I would maybe care about myself and you, but you didn't. I never asked you to pay for life insurance.

Id. at 2291; *see* State's Exhibit 69A. Another text read:

All you want is to do him in, and you'll probably kill me, too. You don't care, only if it benefits you. You proved that finally. That's why I can't stand being around you.

Id. His response was, "where is all this coming from?" *Id.*

In addition, phone records showed two phone calls between Ms. Mendez and the victim on the morning of the attack. RP 1682; State's Exhibits 56-7. Location data for her phone showed that during the first call she was in northeast Yakima and during the second call, at 11:15 a.m., she was in the Cowiche area. RP 1683, 1691. At 11:16 a.m., the victim sent a text indicated that the client was lost and just arriving. *Id.* at 1691.

Officers also obtained surveillance video from the Sunshine Motel where Gomez-Monges and his girlfriend were residing. RP 1647; State's Exhibits 70-2. The video shows Ms. Mendez with Mr. Blizzard and motel employees on May 17. State's Exhibit 70. He was there to pay Ms. Mendez's rent for the week. RP 2109-10. Video on the day of the crime,

May 25, 2013, shows Gomez-Monges picking up Ms. Mendez at around 10:41 a.m. *Id.* at 2116-9. This was when Ms. Mendez and her kids went to meet the victim. *Id.* at 2121-2. The video also shows Gomez-Monges drop her off when they came back from the attack. *Id.* at 2122. And the video later shows, at 1:26 pm, Gomez-Monges coming back from dropping off his mother's car. *Id.* at RP 2124-5.

Video at 2:13 p.m. on May 25 shows Blizzard at the motel in his grey vehicle. RP 2112-4. He is seen in a hallway video inside of the motel when visiting Ms. Mendez. *Id.* at 2115-6. Ms. Mendez testified that he came to buy her some stuff at the store that day. *Id.* at 2127-8. They returned to the motel at 3:21 p.m. *Id.*

On May 27, 2013 at 10 p.m., Gomez-Monges was arrested at Legends Casino. RP 1593-4. When questioned, he was not truthful with the detectives. 10/9/14 RP 169. He told the detectives that he picked up his girlfriend on Saturday in his mom's car but that they did not look at any houses. State's Exhibit 54. He said that they drove to some orchards and then came back to the hotel. *Id.* He denied meeting a realtor on Saturday. *Id.*

His mother's car, the one used on the date of the crime, was seized and a blood-stained box cutter was found in the trunk. RP 1599-1600, 1727. The box cutter contained DNA on it but not enough to be make any

comparisons to the victim's DNA profile. *Id.* at 1744. In addition, officers seized Gomez-Monges' cell phone and receipts from the Phone Lot with his phone number on them. *Id.* at 1602. He claimed that he traded in his mother's phone for a new one, State's Exhibit 54, but the phone he traded in was an iPhone, and his mom never owned an iPhone, RP 2267.

Vern Holbrook never walked or talked again and was in a chronic vegetative state. RP 1450, 1493. After being sent to Harborview, a nursing facility, and then hospice, he eventually passed away on January 26, 2014. *Id.* at 1451-2.

Dr. Reynolds, a forensic pathologist conducted an autopsy of the victim. RP 2322. The victim had multiple skull fractures and a cut across his throat. *Id.* at 2343, 2357. The cause of death was determined to be severe blunt force trauma to his head. *Id.* at 2336-7, 2381. The blunt force trauma caused brain damage, and his impaired mental status led to pneumonia. *Id.* at 2336-7. Another forensic pathologist, Dr. Wigren, agreed with the cause of death. *Id.* at 2354. Dr. Reynolds opined that any sharp blade, including a package cutting knife, could have caused the cut to the victim's neck. *Id.* at 2335.

At trial, Gomez-Monges denied that there was a plan to kill the victim. 10/9/14 RP 181. He claimed that Ms. Mendez hit the victim with a rock. *Id.* at 155.

Ultimately, the jury convicted Gomez-Monges of first degree murder. CP 1864-67. The jury answered “no” as to the three special verdicts. 10/13/14 RP 324; CP 1865-7. On October 30, 2014, Gomez-Monges was sentenced to 320 months in prison. RP 2363.

On September 1, 2016, a codefendant’s case was decided by this Court. *State v. Blizzard*, 195 Wn. App. 717, 381 P.3d 1241 (2016). Mr. Blizzard raised similar issues based on combined pretrial hearings. He argued that the separation of powers doctrine was violated and that there were due process violations requiring dismissal under Criminal Rule 8.3. *Id.* at 724-5. This court rejected those arguments, and found that he waived any appearance of fairness claims by not promptly seeking recusal of the trial judge. *Id.* at 726.

Gomez-Monges filed an opening brief on September 19, 2016 and the State responded. He was appointed new counsel who filed a replacement brief on August 25, 2017. The State hereby responds by filing a replacement brief.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION OF FIRST DEGREE MURDER.

Gomez-Monges claims that there is insufficient evidence to support his conviction for first degree murder either as a principal or an accomplice. Appellant's Brief at 1. He argues that although he had knowledge and was present during the killing, there was no evidence he committed an overt act in furtherance of killing Mr. Holbrook or was ready to assist. Appellant's Brief at 16.

In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 599, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most

strongly against the defendant. *Id.* Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. *State v. Jackson*, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Circumstantial evidence may be used to prove any element of a crime. *State v. Garcia*, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The appellant was charged with first degree murder. Here, there was more than sufficient evidence to convict Gomez-Monges under either a principal or accomplice liability theory.

WPIC 26.02 sets forth the only elements that the State must prove beyond a reasonable doubt:

- To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
- (1) That on or about (date), the defendant acted with intent to cause the death of (name of person);
 - (2) That the intent to cause the death was premeditated;
 - (3) That (name of decedent) died as a result of the defendant’s acts; and
 - (4) That any of these acts occurred in the State of Washington.

The court's Jury Instruction Number 14 contained this pattern instruction. CP 1852. Considering the evidence in the light most favorable to the State, a rational jury could have found all of these essential elements. The State will address each element in turn.

First, the date of the crime, "on or about May 25, 2013," and the location of the crime, the State of Washington, were not in dispute and were proven beyond a reasonable doubt.

Second, there is overwhelming evidence that Gomez-Monges acted with intent to cause the death of the victim. Ms. Mendez testified that her boyfriend agreed to kill Mr. Holbrook for money. She testified that she saw Gomez-Monges attack Mr. Holbrook by hitting him on the head repeatedly while the victim was on his back. She walked out of the house when she saw blood and left Gomez-Monges alone with the victim.

Mr. Holbrook was later found in critical condition, near death, with multiple fractures to both sides of his skull, and severe face trauma. RP 1373, 1375, 1392, 1479, 2328. Dr. Reynolds, the forensic pathologist, concluded that the proximate cause of death was severe blunt force trauma to his head. RP 2336. Specifically, there were three head injuries caused by three separate impacts or hits. *Id.* at 2335, 2338. The trauma resulted in brain damage. *Id.* at 2336. Dr. Wigren, the defense expert, concluded

that the blunt injuries occurred first, and that the victim's neck was cut when the victim was likely unconscious or near unconscious. *Id.* at 2366.

Dr. Padilla opined that the skull fractures could have been caused by a number of blunt, hard objects, and perhaps a very hard blow with a fist, elbow, or knee. *Id.* at 1457-8. He testified that because of the deep bruising, there was a considerable amount of force used. *Id.* at 1478. Dr. Pauldine concluded that the head injury could be the result of several mechanisms, including punching, kicking, hitting the head against any type of object, or being hit with any type of a blunt object. *Id.* at 1469-70. Furthermore, both forensic pathologists indicated stomping on the head could cause fractures. *Id.* at 2338, 2380.

There was also a thin five- to six-inch incision on the victim's neck. *Id.* at 2333, 2343. No major arteries were hit. *Id.* at 2343-5, 2363-4. Dr. Reynolds testified that the cut could have been caused by any sharp blade, a knife, razor blade, or something with an edge. *Id.* at 2334, 2444. Dr. Padilla testified that it could have been caused by "a knife, utility knife, scalpel, something sharp." RP 1457.

With the severe injuries Gomez-Monges inflicted and his agreement to kill the victim for \$10,000 cash, there can only be one intent, an intent to kill. From the evidence presented, a rational trier of fact could

have concluded that Gomez-Monges intentionally struck the victim multiple times on both sides of the head with the goal of killing him.

Further, there was sufficient evidence that the defendant's intent to cause the victim's death was premeditated. Premeditation has been defined as "the deliberate formation of and reflection upon the intent to take a human life" and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Gentry*, 125 Wn.2d 570, 598-99, 888 P.2d 1105, *cert. denied*, 116 S. Ct. 131 (1995). Premeditation must involve more than a moment in point of time. RCW 9A.32.020(1).

Here, there was direct evidence of premeditation in that Gomez-Monges agreed in February of 2013 to kill Mr. Holbrook for \$10,000 cash. This was about three months before the attack. There was thinking and planning beforehand. The testimony showed that Ms. Mendez approached Mr. Blizzard about the offer to kill the victim in exchange for \$10,000. RP 2055. Gomez-Monges was present during the conversation and an agreement was reached. *Id.* at 2056-7. Ms. Taylor witnessed this agreement. *Id.* at 2314. Gomez-Monges told Ms. Mendez to tell Mr. Blizzard that he was going to do it. *Id.* at 2058. A few weeks later, he told Ms. Taylor that he was going to get the job done. *Id.* at 2288.

Premeditation may also be inferred when the circumstances of the crime suggest that the defendant considered the death prior to acting. *Gentry*, 125 Wn.2d at 598-99. Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial. *Id.* at 598. A number of appellate cases have considered the sufficiency of evidence with respect to premeditation and demonstrate that a wide range of proven facts will support an inference of premeditation. *Id.*

For example, sufficient evidence to infer premeditation has been found where (1) multiple wounds were inflicted; (2) a weapon was used; (3) the victim was struck from behind; and (4) there was evidence of a motive, such as robbery or sexual assault. *Id.* at 599. Here, the victim suffered multiple wounds--skull fractures to both sides of his head and a deep cut to his neck. He was first struck in the back of his head from behind. RP 2130. And given the severe force that impacted the victim's skull, *id.* at 2353, a weapon may have been used. Furthermore, there was substantial evidence of a motive--a financial payout of \$10,000 from Mr. Blizzard.

The record also demonstrated that Gomez-Monges was having financial troubles. Gomez-Monges told detectives that Mr. Blizzard would take them grocery shopping since they did not have much money.

State's Exhibit 54. He also admitted that they sometimes did not have rent money and that the motel owner would let them stay a week without paying. *Id.* He also did not have a car and had to borrow his mom's car. *Id.* Juan Martinez, the owner of a repair shop, testified that he hired the defendant for three days because he did not have money to feed his family. RP 1547. As such, there was ample evidence of a financial motive—the defendant was struggling financially and was offered \$10,000 to kill Mr. Holbrook. In sum, the evidence was sufficient to support the jury's finding of premeditation.

The State also must prove that the victim died as a result of the defendant's acts. The uncontroverted testimony, from both the State's forensic pathologist, and the defense expert, Dr. Wingren, was that the victim died from the blunt impacts to his head. RP 2336, 2381. After being attacked, the victim got pneumonia in multiple areas. *Id.* at 2332-3. The pneumonia was secondary to the impaired mental status due to the victim's head trauma. *Id.* at 2337. Because the brain damage suppressed the victim's defense mechanisms, the victim could not cough as much and could not defend his lungs very well. *Id.* at 2332-3.

Gomez-Monges first claims that there was no evidence that he killed Mr. Holbrook. Appellant's Brief at 11. However, this argument is

based on viewing the evidence in the light most favorable to the defendant, and completely ignores Ms. Mendez's testimony.

He claims that he was clearly not the principal as reflected in the jury's special verdicts. The special verdicts rendered no answers as to whether the appellant was a principal or accomplice and are entirely irrelevant to that issue. The jury answered no to the special verdicts which means either that the jury unanimously agreed that the answer was "no" or could not unanimously agree that "yes" was the correct answer.

Gomez-Monges seems to imply that the jury verdict and the special verdict on the deadly weapon are inconsistent. As explained in *State v. Goins*, 151 Wn.2d 728, 733, 92 P.3d 181 (2004):

Juries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity. Despite the inherent discomfort surrounding inconsistent verdicts, the United States Supreme Court, in the context of federal crimes, has recognized that a guilty verdict can stand, even where the defendant was inconsistently acquitted of a predicate crime. The Powell Court reasoned that an inconsistent guilty verdict "should not necessarily be interpreted as a windfall to the Government at the defendant's expense." It is equally possible that the jury was convinced of the defendant's guilt on the compound offense, and then "through mistake, compromise, or lenity, arrived at an inconsistent [acquittal on the predicate] offense." Because one could not be sure which was the verdict that

the jury “really meant,” an acquittal on a predicate offense did not necessarily require the Court to vacate the conviction. Even so, the trial and appellate courts provide a safeguard from jury error by independently evaluating whether the guilty verdict rested on sufficient evidence. (citations omitted).

Gomez-Monges claims that because the deadly weapon allegation was not proven and because no one saw him with a deadly weapon, there was no evidence that he caused the cut to Mr. Holbrook’s neck.

Appellant’s Brief at 12.

First of all, the jury did not need to find that Gomez-Monges cut Mr. Holbrook’s neck in order to find him guilty. The blunt force trauma to the head was the cause of death. RP 2336-7, 2381. The jury only needed to find that he acted with intent to cause the death of the victim. WPIC 26.02.

Second of all, the jury did not need to find that he used a deadly weapon when cutting the victim’s neck or fracturing the victim’s head. The jury only needed to find the elements of the crime, none of which require the use of a deadly weapon. *See* WPIC 29.02. The deadly weapon allegation required that the jury find he was armed with a deadly weapon at the time of the crime, a weapon specifically defined by statute. *See* CP 1856. This was not an element of first degree murder.

As to the cut on the victim's neck, Dr. Wigren testified it was likely caused by a sharp force, like a kitchen or steak knife. RP 2368. Dr. Reynolds testified that any sharp blade could have caused the cut, including a package cutting knife. RP 2335. Based on the evidence and testimony, it's possible the jury believed Gomez-Monges used a boxcutter or something else with a sharp blade in the attack, but that they did not find it was a deadly weapon as defined by RCW 9.94A.825.

As to the victim's head injuries, Dr. Reynolds testified the injuries were caused by something firm, which could be a piece of wood or something with an edge to it. RP 2334-5, 2338. Dr. Wigren testified that the injuries were consistent with an edge of a piece of wood, a two-by-four or even the edge of a brick, or maybe even a rock. RP 2358. At trial, Gomez-Monges claimed that his girlfriend used a rock to hit the victim in the head. It is quite possible that the jury believed that Gomez-Monges was actually the one who used a rock to hit the victim in the head but did not find a rock was a deadly weapon under the statute. Or it is possible they believed he used an unknown item with an edge, but could not find it was a deadly weapon as defined by law.

It's also possible the jury did not believe that Gomez-Monges used any object when he attacked Mr. Holbrook. Dr. Robert Padilla opined that the skull fractures could have been caused by a number of blunt, hard

objects, and *perhaps a very hard blow with a fist, elbow, or knee*. *Id.* at 1457-8 (emphasis added). Dr. Pauldine concluded that the head injury could be the result of any of a number of mechanisms, including *punching, kicking, hitting the head against any type of object* or being hit with any type of a blunt object. *Id.* at 1469-70 (emphasis added). Both forensic pathologists indicated stomping on the head could also cause fractures. *Id.* at 2338, 2380.

In sum, the fact that the jury did not answer “yes” to the deadly weapon allegation tells us nothing about the jury verdict and we can infer nothing from that fact. The State did not have to prove the existence of a deadly weapon in order to prove that the defendant acted with intent to kill the victim.

Similarly, the fact that no one saw him with a deadly weapon does not mean there was insufficient evidence of the elements of murder in the first degree. Evidence may be direct or indirect. Here, there was enough circumstantial evidence to prove that Gomez-Monges caused the victim’s injuries despite no one witnessing him with a weapon. Ms. Mendez testified that she saw Gomez-Monges hitting the victim in the head repeatedly while he laid on his back. RP 2081. She walked out and he later came out and told her to tell Mr. Blizzard “it was done.” *Id.* at 2082. There was a period of time (up to about 5 minutes according to Ms.

Mendez) when he was with the victim and she was not in the room. RP 2129. Later that same day he was found with multiple fractures to his head and a cut across his throat. And a boxcutter was subsequently found in the car he borrowed from his mother to drive to the scene of the crime. Viewing the evidence in the light most favorable to the State, a reasonable inference from the evidence is that he caused the injuries to the victim, some of which his girlfriend witnessed and some of which she did not witness.

Gomez-Monges also argues that the State had no murder weapon. In some murder cases, the weapon is never found. That does not mean the State has not proven the elements of the crime. The jury could have believed that the defendant used his own body, including his hands, fists, elbows, fists, or feet to injure Mr. Holbrook. The jury was entitled to weigh the testimony and believe Ms. Mendez when she testified about Gomez-Monges attacking Mr. Holbrook. They were entitled to reject the testimony of Dr. Wigren, the defense expert. On the other hand, they were also entitled to believe that based on the significant injuries, the defendant used some type of weapon, but concealed or disposed of it after the attack.

Gomez-Monges also claims that there was “no evidence he was ready to assist Ms. Mendez.” Appellant’s Brief at 16. However, the only evidence he considers is his *own* testimony at trial. *Id.* at 18. This is

clearly not the standard of review. Looking at *all* the evidence in the light most favorable to the State, even if the jury did not believe he was the principal, there was more than enough evidence to find that he was an accomplice.

To prove that one present is an aider, it must be established that one is “ready to assist” in the commission of the crime. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981) (citing *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979)). The law holds an accomplice equally culpable as the principal, regardless of which one actually performed the harmful act. *State v. Silva-Baltazar*, 125 Wn.2d 472, 886 P.2d 138 (1994); *State v. McDonald*, 90 Wn. App. 604, 611, 953 P.2d 470 (1998), *aff’d*, 138 Wn.2d 680, 981 P.2d 443 (1999). All that is required is that the accomplice encouraged, rendered assistance, or aided in the planning or commission of the crime. *State v. McDonald*, 90 Wn. App. at 611 (1998).

For sake of argument, if Ms. Mendez was the principal, there was substantial evidence that Gomez-Monges rendered assistance and aided in the planning and commission of the crime. He agreed with her to plan and kill the victim in exchange for \$10,000. He agreed that she should give the victim false names when setting up an appointment with him. He went with her and Mr. Blizzard to scope out the location of the planned attack. On the day of the appointment, he borrowed his mom’s car and drove his

girlfriend to the appointment. He then joined Ms. Mendez in meeting with the victim and following him to the location of a second house where the attack took place. After the attack, he took the victim's phone and came up with the idea of breaking it. Finally, he drove Ms. Mendez away from the scene and accepted the cash that Ms. Mendez received from Mr. Blizzard for completing the job. Gomez-Monges then lied to detectives about ever going in the house, evidence of his guilty knowledge. Therefore, even if Gomez-Monges was not the principal, he engaged in sufficient acts to make him liable under an accomplice theory. Importantly, it is not necessary that jurors be unanimous as to the manner of an accomplice's and a principal's participation as long as all agree that they did participate in the crime. *State v. Hoffman*, 116 Wn.2d 51, 104-105, 804 P.2d 577 (1991).

In summary, the evidence at trial, direct and circumstantial, supports any rational juror's determination beyond a reasonable doubt that Gomez-Monges was a principle or accomplice to first degree murder.

B. The trial court properly denied the CrR 8.3 motion to dismiss regarding the elected prosecutor's letter to the presiding judge.

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Brett*, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995) (citing *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902

(1986)). Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Appeals courts will find a decision manifestly unreasonable "if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Id.* (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)). A decision is based on untenable grounds "if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Id.*

A trial court's decision on prosecutorial misconduct is given deference on appeal. *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). This is because the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced the defendant's right to a fair trial. *Id.*

To support dismissal under Criminal Rule (CrR) 8.3(b), the defendant must show by a preponderance of the evidence both (1) arbitrary action or governmental misconduct, and (2) actual prejudice affecting the defendant's right to a fair trial. *Rohrich*, 149 Wn.2d at 654, 658; *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). Dismissal under CrR 8.3(b) is an extraordinary remedy that is improper except in truly egregious cases of mismanagement or misconduct that materially

prejudice the rights of the accused. *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003); *Wilson*, 149 Wn.2d at 9.

Government conduct may be so outrageous that it exceeds the bounds of fundamental fairness, violates due process, and bars a subsequent prosecution. *United States v. Hunt*, 171 F.3d 1192, 1195 (8th Cir. 1999); *State v. Lively*, 130 Wn.2d 1, 18, 921 P.2d 1035 (1996). The level of governmental misconduct needed to prove a violation of due process must shock the conscience of the court and the universal sense of fairness. *Hunt*, 171 F.3d at 1195; *Lively*, 130 Wn.2d at 19.

In this case, numerous pretrial motions were heard. Gomez-Monges' pretrial motions were consolidated with the codefendants' pretrial motions, including Mr. Blizzard's. On May 21, 2014, while court dates were pending on the motions, the elected prosecutor sent a letter to Presiding Judge Elofson, stating that Judge Reukauf should recuse herself from the pending cases involving the Vern Holbrook matter. CP 338-41. The presiding judge shared the contents of the letter with the trial judge. RP 566.

On May 28, Judge Reukauf sent the letter to the trial prosecutor and defense attorney in this case, and then filed the letter with the clerk. CP 336-41. A hearing was set on that same date in court on pretrial

matters. During that hearing the trial judge was very clear that she felt she could be fair and impartial on the case:

I have absolutely no question in my mind that I can continue to be fair and impartial in this case. I have absolutely no question in my mind that I have been fair and impartial on this case.

RP 496. After making that declaration in open court, she followed up by reviewing the Code of Judicial Conduct and consulting with the Ethics Advisory Committee through the Administrative Office of the Courts. *Id.* at 497, 499. The trial judge then explained that if a motion for recusal was being made by any of the parties, that it needed to be done in writing. *Id.* at 501. Briefing deadlines were set. CP 342. The defendants' motions for recusal and dismissal were due June 2 and the State's response was due June 5. *Id.*

On June 2, the State filed a notice of abandonment of the motion for recusal of judge. CP 353-4. The prosecutor stated in the notice, "The Deputy Prosecuting Attorney, Alvin Guzman, believes a fair trial can be had before Judge Reukauf in the above captioned case." *Id.* No motions to recuse were filed by any defendants, including Gomez-Monges. The defense filed a motion to dismiss under CrR 8.3(b), and the State filed a memorandum in response. *Id.* at 363-73.

At the CrR 8.3 hearing, the trial judge went on to make an independent decision that she was not going to voluntarily recuse and made a thorough record as to her decision. RP 569.

The court then ruled on the CrR 8.3 motion. The trial court found that the letter was an ex parte communication with the trial judge and constituted misconduct. RP 566. The manner of the communication, not the content, was the basis for the misconduct finding. However, the trial court denied a motion to dismiss, stating that “any prejudice that may still result from this conduct is premature to assess” and “isn’t ripe yet” because jury selection had not begun. *Id.* at 570, 575. The court also found that the conduct did not rise to a structural error. *Id.* at 576.

On appeal, Gomez-Monges claims that the prosecutor’s letter violated his right to due process and right to a fair trial, and therefore, the CrR 8.3 motion should have been granted.

1. Appellate review under the appearance of fairness doctrine has been waived.

In *State v. Blizzard*, this Court held that once a basis for recusal is discovered, prompt action is required and that delaying a request for recusal until after a judge has issued an adverse ruling is considered tactical and constitutes waiver. 195 Wn. App. 717, 381 P.3d 1241 (2016). Based on the same facts presented in this case, this Court held that

appellate review was waived because Blizzard never made a motion for recusal. This Court stated:

Mr. Blizzard cannot now go back on his choice to remain with the trial judge simply because he has been convicted. Appellate review under the appearance of fairness doctrine has been waived.

195 Wn. App. at 725.

2. The trial judge properly refused to dismiss based the defendant's separation of powers argument.

Gomez-Monges argues that the prosecutor's letter violated the separation of powers doctrine. Appellant's Brief at 20-1. The county prosecutor's letter could only implicate separation of powers if it was so powerful and divisive that it had the capacity to threaten the judge's independence. *Blizzard*, 195 Wn. App. at 725 (citing *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)). As indicated in *Blizzard*:

Mr. Blizzard argues the county prosecutor's letter threatened to undermine the balance of powers between the judicial and executive branches of government. We agree this is a basis for concern. But it is a concern that would only become manifest were we to grant relief. There must be consequences to prosecutorial misconduct. However, dismissal is not always the appropriate response. Dismissal in this case would not punish the prosecutor. With dismissal, the executive branch might lose an individual case, but it would gain daunting power. A rule requiring recusal in cases such as Mr.

Blizzard's would enable the executive to manipulate the judiciary and force future recusals at virtually any juncture of the proceedings simply by hurling politically charged attacks. Dismissal would not punish the executive. It would punish the judiciary. It would also punish Mr. Holbrook's family. The very need to preserve separation of powers requires that Mr. Blizzard's challenge be denied.

Id. at 729.

3. Gomez-Monges has failed to make any argument that there was actual prejudice.

Assuming, for sake of argument, that Luis Gomez-Monges established arbitrary action or governmental misconduct by a preponderance of the evidence, there was no actual prejudice. On appeal, Gomez-Monges claims that there was misconduct but he fails to argue that there was any actual prejudice and points to none. During the pretrial hearing, trial counsel for Gomez-Monges did not argue that there was actual prejudice. He stated, "It's potentially going to have effect on the proceedings as we go forward." RP 495. Actual prejudice is the second requirement under CrR 8.3. As such, the court properly denied the dismissal motion because Gomez-Monges did not show actual prejudice.

4. Assuming, *arguendo*, that there was governmental misconduct and resulting prejudice, any prejudice was cured.

Prosecutorial misconduct can be cured. For example, an objection and appropriate instruction can cure prejudice caused by a prosecutor's cross-examination. *State v. Stith*, 71 Wn. App. 14, 20, 856 P.2d 415 (1993). Even flagrant misconduct can be cured. *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) (citing *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) ("prosecutor's conduct was certainly flagrant," but given the context of the total argument, issues, evidence, and jury instructions, any error was cured)).

Assuming, for sake of argument, that there was governmental misconduct in this case, to the extent that there was any prejudice caused by the letter, it was remedied when the letter was made known to all parties in the case. Had the arguments contained in the letter been filed with the court as part of a formal motion for recusal, there would have been no issue of governmental misconduct. The court, however, considered the letter an *ex parte* communication with the trial judge because it was sent to the presiding judge without being sent to defense counsel. RP 566. Any prejudice was remedied when the court disclosed the letter to the parties (both the defense attorneys and the trial prosecutors) and set a deadline for any motions for recusal to be filed. RP

501, CP 342. Gomez-Monges' attorney chose not to file a motion for recusal and made a thorough record that he agreed with the other three defense attorneys who stated they could have a fair trial. RP 495. All three attorneys agreed that there was no reason for the trial judge to recuse. *Id.* at 476, 479, 493. Counsel for Gomez-Monges agreed. *Id.* at 495. As such, any prejudice caused by the letter was cured by the trial judge when she sent the letter to all the parties.

5. The trial court properly found that there was no structural error.

As to structural error, there is a strong presumption that errors are not structural. *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), *cert. denied*, 131 S. Ct. 160 (2010). A structural error is rare and courts are hesitant to classify errors as structural. *See, e.g., In re Pers. Restraint of Benn*, 134 Wn.2d 868, 921, 952 P.2d 116 (1998) (rejecting argument that violation of the right to be present is a structural error). It is an error that “affect[s] the framework within which the trial proceeds” and renders a criminal trial an improper “vehicle for determin[ing] guilt or innocence.” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). In other words, the court must ask if the error necessarily rendered the trial

fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009) (internal quotation marks omitted) (quoting *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)), *cert. denied*, 131 S. Ct. 160 (2010)).

It is arguable whether structural error analysis even applies in the context of prosecutorial misconduct. In *State v. Warren*, the Supreme Court declined to reach the issue of whether a constitutional error analysis might be appropriate if the prosecutorial misconduct directly violated a constitutional right. 165 Wn.2d 17, 195 P.3d 940 (2008). The Court noted that:

Like most errors, even constitutional ones, it is subject to some sort of harmless error analysis. *See Neder v. United States*, 527 U.S. 1, 7-8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (misstatement of elements subject to harmless error analysis); accord *Bartlett v. Battaglia*, 453 F.3d 796, 801 (7th Cir. 2006) (declining to extend Sullivan's structural error analysis to prosecutorial argument misstating the burden of proof).

Assuming, *arguendo*, that structural error analysis applies to this case, which involves a claim of government misconduct, Blizzard has not shown a structural error. Here, the trial court specifically found that there was no structural error. RP 572.

Structural errors encompass only the most egregious constitutional violations. *See, e.g., State v. Vreen*, 143 Wn.2d 923, 930, 26 P.3d 236 (2001) (denial of peremptory challenge is structural error). As indicated in *Johnson v. United States*:

Courts have found structural errors *only in a very limited class of cases*. *See Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) (a total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927) (lack of an impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984) (the right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984) (the right to a public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993) (erroneous reasonable-doubt instruction to jury).

520 U.S. 461, 468-469, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)

(emphasis added).

The conduct alleged in this case (an ex parte communication) does not fall within the limited class of cases outlined in *Johnson*. The record shows no basis for concluding that the prosecutor's letter "seriously

affected the fairness, integrity or public reputation of judicial proceedings.” Here, the communication was made known to all the parties. RP 501, CP 336-341. Upon learning of the letter or at any point thereafter, Gomez-Monges did not seek recusal of the trial judge. There was simply no “miscarriage of justice” warranting reversal. It cannot be said that the conduct rendered the trial fundamentally unfair.

In *State v. Blizzard*, this court agreed there was no structural error.

195 Wn. App. 717, 381 P.3d 1241 (2016). This court noted:

Through our country’s significant history of litigation, only three circumstances have been found to create unconstitutional judicial bias: (1) when a judge has a financial interest in the outcome of a case, (2) when a judge previously participated in a case in an investigative or prosecutorial capacity, and (3) when an individual with a stake in a case had a significant and disproportionate role in placing a judge on the case through the campaign process. *Caperton*, 556 U.S. at 877-884. In addition, the Supreme Court has suggested, though not held, there may be an impermissible risk of bias when a judge is the recipient of personal criticisms that are highly offensive. *Ungar v. Sarafite*, 376 U.S. 575, 583, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).

Id. at 727-8. The court went on to hold that that the circumstances presented by Mr. Blizzard did not fall into any of the three established categories of unconstitutional judicial bias. *Id.* at 728. Furthermore, the

criticisms were professional, not personal, and did not fall into a potential fourth category referenced in *Ungar. Id.* As such, there was no due process violation. *Id.* at 727-8. Because Blizzard was based on the same facts as this case, this court should deny Gomez-Monges' claims that his right to due process and right to a fair trial were violated.

C. Discretionary costs of attorney fees and costs of incarceration should be waived in the interest of judicial economy.

Gomez-Monges did not object to the imposition of attorney fees and costs of incarceration at trial. As such, the court should, in its discretion, decline to address this issue since it was raised on the first time on appeal. However, in the interest of judicial economy, the State agrees to waive both discretionary costs if the Court allows the issue to be considered for the first time on appeal.

IV. CONCLUSION

Based on the above arguments, the State asks this Court to affirm Gomez-Monges' conviction and sentence.

Respectfully submitted this 3rd day of January, 2018,

s/Tamara A. Hanlon
TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on January 3, 2018, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Mr. Thomas Kummerow at tom@washapp.org. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of January, 2018 at Yakima, Washington.

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