

NO. 33328-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

JOHN MUNZANREDER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The inflammatory publicity about Cynthia Munzanreder's murder and the charges against Mr. Munzanreder and his codefendant saturated the jury pool, including three jurors who sat on the jury with preformed opinions, denying Mr. Munzanreder his right to a fair trial before an impartial jury.

Mr. Munzanreder was denied his right to a fair trial by an impartial jury because over 80 percent of jurors had been exposed to the persistent and provocative pretrial publicity, which portrayed Mr. Munzanreder negatively and ascribed him guilt. Jurors who actually sat on the jury acknowledged they had predetermined Mr. Munzanreder's guilt.

Although the trial encompassed several weeks, the jury deliberated for only four hours before declaring a guilty verdict. The trial court erred in denying Mr. Munzanreder's motion for a new venue. *See* Op. Br. at 22-45.

In the opening brief, Mr. Munzanreder noted that of the 128 completed jury questionnaires, 105 jurors (or over 82%) had heard of the case before trial. *E.g.*, Op. Br. at p.13 & n.33; pp.34-35. The State responds, in several parts of its brief, that these figures do not represent the saturation level because more than 128 jurors were called for trial. Resp. Br. at 13, 21, 37. However, the court excused jurors for hardship before they were provided with questionnaires. *See, e.g.*, 1/12/15 RP 693

(sending jurors out to complete questionnaires after several are excused for hardship), 746-47 (same as to second set of jurors). Therefore, only 128 jurors filled out questionnaires. *See* 1/12/15 RP 747-48. The record accordingly does not contain completed questionnaires for some jurors who were summonsed, but there is no basis to presume none of those individuals had been exposed to the case, as the State contends. Resp. Br. at 21 (claiming including jurors called but excused prior to voir dire would decrease percentage of saturation from 80 to 40%).¹

The 128 completed questionnaires, moreover, provide the information on the most relevant individuals—jurors who participated in voir dire. The State’s argument ignores that, even in the cases it relies upon, courts regularly rely upon completed questionnaires and information from jurors actually questioned—not those excused without questioning. *E.g., State v. Rice*, 120 Wn.2d 549, 557, 844 P.2d 416 (1993) (noting nearly all of the jurors “noted on their juror questionnaires that they knew of the” murders); *State v. Crudup*, 11 Wn. App. 583, 589, 524 P.2d 479 (1974) (evaluating the responses of jurors questioned during voir dire); *Mu’Min v. Virginia*, 500 U.S. 415, 417, 419-21, 111 S. Ct. 1899, 114 L.

¹ The State presents no support for its assumption that exactly none of the jurors who did not encounter the courtroom had been exposed to pretrial publicity that permeated the county for the two years prior to trial and reached 82% of the questioned jurors.

Ed. 2d 493 (1991) (discussing juror responses during voir dire questioning). Completed questionnaires are the appropriate base, moreover, because they reflect the views of the total number of jurors subject to voir dire.

Although the State portends to take issue with the number of questionnaires, it also attests that its appendix contains the “entire record of the voir dire of the individuals who were eventually seated on Appellant’s jury.” Resp. Br. at 27. It argues this limited appendix shows the trial court appropriately denied a new venue and the jury could be fair and impartial. *Id.* at 27-28. This argument is flawed. Neither the *Crudup* factors nor any other case posits this Court should look only to the voir dire of the eventually seated jurors to determine whether a change in venue should have been provided. Rather, the analysis must regard also, for example, the extent and nature of the publicity, its saturation in the community, the community’s reaction to the publicity, the venire’s questionnaire responses, as well as the voir dire of excused jurors and of those who were not seated. The State’s appendix clearly does not resolve the issue here.

Even excerpts from the voir dire of seated jurors, however, show the need for a different venue or, in the alternative, a more thorough system of voir dire. Juror 59, for example, stated he had not formed “solid

opinions” that were “set in stone” but had clearly formed opinions after following the case in the newspaper and on television. 1/13/15 RP 669-72. From the pretrial publicity, he appeared prepared to decide Mr. Munzanreder’s innocence or guilt, until he was coached that, as a juror, his “decision [could] be based only on evidence that’s presented in this courtroom.” 1/13/15 RP 771-72. Juror 51 also had formed the opinion that Mr. Munzanreder was “the responsible one” from the publicity he read, primarily in the paper. 1/13/15 RP 781. He told the court he *thought* he could “set those issues aside.” *Id.*

The Court should look to the complete record—the transcripts, questionnaires and other relevant portions of the clerk’s papers. The State’s partial summary of the record in the appendix is not helpful.

The State also repeatedly seeks to rely on a theory of relativity, arguing that media coverage today is often inflammatory, murders are common in Yakima County, and case law from the 1900s is not relevant because the world has changed. Resp. Br. at 8-9, 14, 27, 29, 34, 34-35, 36, 41. The State apparently believes that, if media coverage of murders is generally sensational and if there are a high number of murders in a county, no individual defendant is denied his or her right to a fair trial by an impartial jury. The State also seems to posit that, because no defendant “could ‘hide’” from Facebook, no defendant is denied a fair trial anymore.

Resp. Br. at 8-9. The law is clear, however, that each change of venue case is unique and must be decided on its own facts. *State v. Jackson*, 150 Wn.2d 251, 270, 76 P.3d 217 (2003); *Rice*, 120 Wn.2d at 556.

Moreover, the *Crudup* factors do not relate merely the concentration of crimes, coverage, or jurors affected but to the quality and content of that effect. *See, eg., Crudup*, 11 Wn. App. at 587. Thus the proliferation of a 24-hour news cycle, the reach of social media, and the raw population of Yakima County or its murder statistics do not resolve the fair trial inquiry demanded by *Crudup* and our constitution.

The State next argues the two years between Cynthia Munzanreder's death and the start of her husband's trial obviates the need for a change in venue. Resp. Br. at 19. The State's argument ignores the continually pervasive nature of the publicity about this case throughout the two years and even during trial. As one juror stated, "there has been so much pretrial coverage" about this case. 1/13/15 RP 797; *accord, e.g.*, 1/13/15 RP 843 (another juror notes article about case appeared in Yakima Herald during voir dire). The publicity started the night Mr. Munzanreder's wife was shot. Ex. F (Venue-publicity, Venue in the news, p.5 (Yakima Herald front-page article with headline "Cops: husband did it")); Ex. F (Venue-publicity, March 2013 A, p.28); Ex. F (Venue-

publicity, March 2013 A, p.9); Ex. F (Venue-publicity, March 2013 B, p.48); Ex. G. And then it continued.

For example, the public “liked” and commented on coverage of a hearing in February 2014, almost a year after the murder. Ex. F (Venue-Publicity, Venue in the news, pp.23-30). An April 2014 article bears a photograph of Mr. Munzanreder with the black eye from the night of his wife’s death—an obviously outdated photograph that creates an emotional response, i.e. is inflammatory. Ex. F. (Venue-Publicity, Venue in the news, p.1). Articles abounded into August 2014, where, for example, one online version was “liked” by over 200 people, “shared” by 29, and commented on by others. Ex. F (Venue-3.5 Public comment, pp.1-8). The record shows publicity continued into October 2014, when stories repeated law enforcement’s sentiment that Mr. Munzanreder “lacked ‘sincere emotion’ over his wife’s death[,]” reported that he “was having an affair with another woman[,]” and discussed that he was being held in county jail pending trial. Ex. F (Venue-publicity, Ibanez plea, pp.1-45); Ex. F (Venue-3.5 Public comment, pp.9-23). The Yakima Herald repeated this information in an above-the-fold front-page article. Ex. I. Pages of comments to the online articles show the publicity was being followed by those who lived in Yakima County. Ex. F (Venue-publicity, Ibanez plea,

pp.1-45); Ex. F (Venue-3.5 Public comment, pp.9-23). This reporting was not left to the facts, it was one-sided and provocative.

Three months later, pretrial motions were publicized by the media days before jury selection commenced, including through the KIMA web and television video with manipulated footage that makes it seem Mr. Munzanreder is making light of his wife's death and the judicial process. Ex. F (KIMA video). That pretrial video is likewise inflammatory because it contains in-life photographs of Mrs. Munzanreder, reports the police were "not buying" Mr. Munzanreder's story, and falsely reports Mr. Munzanreder had access to firearms. Ex. F (KIMA video). This is not a mere recounting of facts; it is a sensationalized video montage. *Cf.* 1/14/15 RP 923-25, 928-29 (juror saw a different television story shortly before trial, that showed the scene of the crime, and had concluded that Munzanreder was guilty).

The State further fails to recognize that the saturation of inflammatory coverage focused on the Yakima jury pool. There was minimal coverage outside of Yakima media sources. *Compare* Ex. F (March 2013 A, pp.2, 11, 34-37, 51-63, 71-72) *with* Ex. F (March 2013 A, pp.1, 3-10, 12-33, 38-50, 64-70, 73-74 & B, pp.1-55).. And the content of the short coverage in other counties was more impartial and factual than the sensational, provocative, and inflammatory coverage from Yakima

media outlets. *E.g.*, Ex. F (March 2013 B, pp.54-55 (local article with headline “Woman on movie shooting: ‘I guess nothing is really safe now’)).²

The murder of Cynthia Munzanreder was the Yakima Herald’s second most popular video and story for 2013. Ex. F (Most Viewed YHR 2013-15, pp.1-2); CP 11. Staff predicted on January 1, 2015—in an online article featuring, again, a photograph of John Munzanreder with a black eye—that the story would feature heavily in the 2015 news cycle. *Id.* at 3-8. In fact, the media was in the courtroom during trial. 1/16/15 RP 1233-35; 1/20/15 RP 1307; 1/21/15 RP 1504-06, 1551; 1/23/15 RP 1824-25; 1/23/15 RP 1983; 1/28/15 RP 2313-17; 1/28/15 RP 2439-40; 2/2/15 RP 2815-16.

² The State argues “It is also well known that a provocative headline most times does not reflect the content of the article.” Resp. Br. at 8. But the headline is the feature most likely to be seen and most likely to have an impact. *E.g.*, Maria Konnikova, “How Headlines Change the Way We Think,” *The New Yorker*, <http://www.newyorker.com/science/maria-konnikova/headlines-change-way-think> (Dec.17, 2014) (reporting on studies that show “everyone knows that a headline determines how many people will read a piece, particularly in this era of social media. But, more interesting, a headline changes the way people read an article and the way they remember it. The headline frames the rest of the experience.”). For example, Juror 51 stated he typically just “read[s] the main headlines. I don’t care for all the details.” 1/13/15 RP 784-85. From that review of newspaper headlines about this case, he perceived Mr. Munzanreder was “the responsible one.” 1/13/15 RP 781-82.

This review shows not only the continuity of the coverage but also its inflammatory nature. Juror 51, who sat on Mr. Munzanreder's jury, noted the media had "glamorized or sensationalized" the story and that "the paper was telling you" Mr. Munzanreder "was the responsible one." 1/13/15 RP 783. It does not get much clearer than that.

Juror 51 was not an outlier. For instance, juror 21 described the case as "so widely publicized" and "plastered all over the news." 1/13/15 RP 812, 813. "There isn't a person that I know that hasn't, you know, read or seen something about it." 1/13/15 RP 813. Everyone juror 21 knew or encountered took from that publicity that Mr. Munzanreder is guilty. 1/13/15 RP 813-14.

Another illustrative juror stated that from the "bits and pieces . . . seen on the news . . ., I already kind of came to a conclusion . . . towards guilt versus innocent." 1/14/15 RP 977. The court excused the juror because the juror had already "jumped to a conclusion." 1/14/15 RP 977-78.

The State claims Mr. Munzanreder's argument that the press was inflammatory is circular. Resp. Br. at 6-7. The State seeks to minimize the coverage, asserting, "as media does, they made them into headlines. *Id.* This does not change the facts; it may emphasize some but that is not 'inflammatory.'" Resp. Br. at 7. The State also argues, "Munzanreder

takes innocuous stories and tries to make them into something inflammatory.” But the media coverage sensationalized the crime (wife was “gunn[ed] down,” Munzanreder “devis[ed] a gruesome plan”), reported Munzanreder “manipulated” his co-defendant, used repeatedly the most damaging picture of Mr. Munzanreder (showing him throughout the two years with a black eye as if he partook in a physical scuffle), questioned his right to court-appointed counsel, ignored the presumption of innocence, highlighted his irrelevant extramarital affair, and reported on his perceived lack of sincere emotion and “crocodile tears.” The coverage was not an impartial reporting of the facts but an attempt to lure readers at Mr. Munzanreder’s expense.

The comments, visible to all online, constitute further inflammatory publicity. *E.g.*, Ex. F (Venue-publicity, Venue in the news, p.3 (“he killed someone and now he wants something to be ‘fair’?? lol”); *id.* (“Try him and fry him. Next.”); *id.* (describing conviction as “slam-dunk” and “undoubtedly guilty”); *id.* (“Jurors anywhere in the world are smart enough to that this is a case of Premeditated Murder. . . . if someone deserves the Maximum Sentence is [sic] that murder.”); Ex. F (Venue-publicity, March 2013 A, p.18) (“Set the standard now Yakima”); Ex. F (Venue-publicity, Ibanez plea, p.42 (“I know [Juan Ibanez]. . . . He was beat up and threatened by his boss.”)); Ex. F (Venue-publicity, Venue in

the news, p.3) (“Looks like he is good friends with the other inmates. . . Nice black eyes.”).

The State also does not deny that the publicity contained information not included in evidence at trial. *Compare* Op. Br. at 40-41 *with* Resp. Br. at 8. Rather, the State mentions Mr. Munzanreder does not prove jurors read or heard the specific outside-the-record publicity. Resp. Br. at 8. However, Mr. Munzanreder could not have questioned jurors about specific publicized information without revealing to them the very information excluded from trial. Mr. Munzanreder has shown, however, that over 80% of jurors had heard about the case prior to trial, one-fifth had formed an opinion on Mr. Munzanreder’s guilt before trial began, articles about the case were among the most popular stories published by the Yakima Herald in 2013 and 2015, and stories about the case were extensively “liked,” shared and commented upon.

One of the nine non-exhaustive factors to assess the need for a new venue relates to the connection between the disseminated publicity and the government. *State v. Rupe*, 108 Wn.2d 734, 752, 743 P.2d 210 (1987) (quoting *Crudup*, 11 Wn. App. at 587). Mr. Munzanreder pointed out that the government was the source of two pieces of publicized information: that Mr. Munzanreder could be charged with aggravated murder and the police and Mrs. Munzanreder’s family supported Mr. Ibanez’s plea. Op.

Br. at 37-38. Thus, he argues in the opening brief that the government played “some role” in the inflammatory pretrial publicity making this factor “not neutral.” *Id.* Mr. Munzanreder contrasted this with the prosecutor’s assertion at trial that “The state has not had a connection with the release of publicity.” Op. Br. at 37 (citing 1/15/15 RP 1103). Relying on the prosecutor’s statement, the State claims Mr. Munzanreder’s argument is “patently false” and makes assumptions “pulled from the ether.” Resp. Br. at 32-33. Mr. Munzanreder simply asks this Court to refer back to his argument at pages 37 to 38 of the opening brief, which presents a fair representation of the record regarding the government’s limited, but actual, involvement in the release of information prejudicial to Mr. Munzanreder.

The State also claims Mr. Munzanreder “pulls from the ether ‘other facts no enumerated in *Crudup*.’” Resp. Br. at 38. Our courts have explicitly stated that the nine enumerated *Crudup* factors are merely exemplary, not exhaustive. *Rupe*, 108 Wn.2d at 751-52 (examining various factors, including those set forth in *Crudup*). In fact, the State recognizes earlier in its brief that the nine factors are “nonexclusive.” Resp. Br. at 3. Accordingly, Mr. Munzanreder posited other indicators that a change in venue was required. Op. Br. at 39-41.

The State further claims the Court should not consider that the jury deliberated for a mere four hours although it was to consider evidence from 12 days of trial, including scientific and expert evidence. Resp. Br. at 38-39. The State argues “courts of this State have steadfastly ruled that this type of speculation or inquiry [into deliberations] is not appropriate.” The argument is incorrect. Our courts will consider the length of the jury’s deliberations, particularly in comparison to the evidence presented, and whether questions were posed by the jury. *See, e.g., State v. Barnes*, 54 Wn. App. 536, 541, 774 P.2d 547 (1989) (considering length of jury deliberations to support its “thorough examination of the issue of credibility before the verdict was reached”); *State v. Christopher*, 114 Wn. App. 858, 864, 60 P.3d 677 (2003) (weighing length of deliberations and questions posed by jury in determining the admission of improper testimony was not harmless); *State v. Davis*, 182 Wn.2d 222, 235-36, 340 P.3d 820 (2014) (Stephens, J. dissenting) (noting “jury’s deliberations are not entirely opaque” and assigning significance to nature of jury’s question during deliberations).

As discussed here and in the opening brief, the publicity about Cynthia Munzanreder’s death was widespread, sensationalized, one-sided, and prejudicial to Mr. Munzanreder; it reached the jurors called for trial. Because the *Crudup* factors and additional criteria support the necessity of

a change in venue, this Court should reverse and remand the matter for trial in a different county.

2. Alternatively, the voir dire process was insufficient to ensure Mr. Munzanreder was tried by an impartial jury.

The constitution guarantees Mr. Munzanreder the right to a jury free from bias. If an impartial jury was possible in Yakima County, the voir dire process employed at trial was insufficient to ensure an impartial jury was seated.

Once an individual has formed an opinion—consciously or unconsciously—it becomes entrenched and particularly difficult to change. *Irvin v. Dowd*, 366 U.S. 717, 727, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). “The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.” *Id.* Thus a juror who begins with a blank slate is not the same as a juror who arrives with a preformed opinion he or she believes (or claims) to be able to set aside. *State v. Wilcox*, 11 Wash. 215, 217-21, 39 P. 368 (1895) (juror who arrived with preformed opinion should have been excused for bias).

In *Rideau v. Louisiana*, only three seated jurors had seen the confession video that had been aired, yet “without pausing to examine a particularized transcript of the voir dire examination of the jury” the U.S.

Supreme Court held it constituted a violation of due process. *Rideau v. Louisiana*, 373 U.S. 723, 724-27, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963).

The State ignores the authority set forth in the opening brief regarding unrevealed bias. Resp. Br. at 14-16. Courts recognize that jurors may not “appreciate or accurately state their own biases.” *State v. Saintcalle*, 178 Wn.2d 34, 78, 309 P.3d 326 (2013) (Gonzalez, J., concurring). Bias is often unconscious. *United States v. McVeigh*, 918 F. Supp. 1467, 1472 (W.D. Okla. 1996) (prejudice “may go unrecognized in those who are affected by it”). The subconscious nature makes it particularly ill-suited to be rooted out through questioning because “a juror’s mere assertion that she or he is impartial . . . is not dispositive.” *Id.*; *Wainwright v. Witt*, 469 U.S. 412, 424-25, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). “[M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made ‘unmistakably clear’; these veniremen may not know how they will react when faced with [making decisions on life or liberty], or may be unable to articulate, or may wish to hide their true feelings.” *Wainwright*, 469 U.S. at 424-25; *see United States v. Pratt*, 728 F.3d 463, 470 (5th Cir. 2013) (forbidding trial courts from relying “solely on a juror’s assertion of impartiality but instead must conduct a sufficiently probing inquiry to permit the court to reach its own conclusion.”).

Two conclusions result: First, we cannot presume that jurors who admitted they had formed opinion could just set that opinion aside, even if they assured the court they could. Second, the fact that many admitted they had formed opinions before the start of trial indicates that many others likely had as well, but simply did not admit it (because they were not aware or did not want to pronounce it publicly). *Murphy v. Florida*, 421 U.S. 794, 803, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975) (“In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others’ protestations may be drawn into question.”). These conclusions have been set forth by other courts, they are not arguments that Mr. Munzanreder imagined. Resp. Br. at 14-16 (calling argument a “type of wild speculation [that] has no supporting law because there is and can be none to [sic] in the system this country employs to conduct trials”).

Apparently because it cannot succeed under the settled standard, the State attempts to import a new requirement that a party need not only exhaust challenges during voir dire but have actually requested additional peremptory challenges. Resp. Br. at 31-32; *see also* Resp. Br. at 11 (nor did trial counsel indicate . . . [he] needed additional preemptory challenges”). But the State presents no authority to support this additional burden, presumably because there is no support for it. *See Irvin*, 366 U.S.

at 727 (finding sufficient that defendant used the maximum allotted peremptory challenges without requesting more). Mr. Munzanreder moved for a change of venue; he exhausted his challenges; and he was still tried by a biased jury.

Mr. Munzanreder also challenged jurors for cause, like juror 51 who arrived with a preconceived opinion on guilt. *Compare* 1/13/15 RP 783-84, 786-88 (denying motion for cause); CP 1200. Mr. Munzanreder also challenged juror 89 for cause, which the court denied. 1/13/15 RP 863-74. *Cf.* 1/13/15 RP 831-41; 1/15/15 RP 1187-89 (challenges for cause to juror 29 denied); 1/15/15 RP 993-99, 1002-03 (challenge to juror 49 denied); 1/14/15 RP 967-71 (motion on juror 190 granted); 1/15/15 RP 1184-86 (motion on juror 216 granted). These challenges were well-cited in Mr. Munzanreder's opening brief. Op. Br. at 36 & n.67. It is unclear why the State finds these challenges insufficient. Resp. Br. at 11, 30 (arguing, without citation, Munzanreder failed to make "formal" for cause challenges).

The minimal rehabilitation procedures employed below are simply not robust enough to root out bias in a case like this. A juror's assertion that he or she can be impartial is not reliable. *McVeigh*, 918 F. Supp. at 1472; *Patton v. Yount*, 467 U.S. 1025, 1039, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984); *Wainwright*, 469 U.S. at 424-25. Accepting a prospective

juror's spontaneous assurance to be fair and impartial does not resolve pervasive prejudice. The extensive, provocative pretrial publicity and the community's response to it indicate heightened standards were required to seat an impartial jury here. Three jurors who sat on Mr. Munzanreder's jury admitted their predetermined bias. CP 970, 1200, 1250 (questionnaires for jurors 19, 51 & 59 at page 9); 1/13/15 RP 802-03 (juror 19); 1/15/15 RP 781-84 (juror 51); 1/13/15 RP 769-71 (juror 59); 1/16/15 RP 1222-23 (jurors 19, 51, 59 impaneled). Due process required more protection from latent prejudice and actual bias than in a more typical criminal case. By narrowly applying the test for excusal, the trial court denied Mr. Munzanreder a fair trial before an impartial jury.

3. These errors also require reversal under the State's broader constitutional protection.

In the opening brief, Mr. Munzanreder showed through a thorough *Gunwall* analysis that the Washington Constitution more broadly protects the right to an impartial jury in all criminal trials. *See* Op. Br. at 55-61. For example, our Supreme Court recognizes, "It is evident, therefore, that the right to trial by jury which was kept 'inviolable' by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789." *City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982).

Our drafters protected the right to criminal jury trials through two provisions, which in language and structure distinguish it from other states and the federal constitution. Oregon’s constitution contains only a single clause that protects the right to “impartial” jury trials but makes the right inviolate only for civil trials. Or. Const. art. I, §§ 11, 17; *see also* Ind. Const. art. I, §§ 13, 20. California and Nevada’s constitutions use the word “inviolate” but do not explicitly protect the impartiality of juries. Cal. Const. art. I, § 16; Nev. Const. art. I, § 3. Our courts rightfully imbue meaning to Washington’s unique constitution, which explicitly provides for an inviolate right to impartial criminal jury trials through two sections. *E.g., Pasco*, 98 Wn.2d at 99; *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003).

W. Lair Hill, one of the most influential drafters of our constitution, was particularly concerned with Washington juries remaining free from outside influences. William Lair Hill, *A Constitution Adapted to the Coming State: Suggestions by Hon. W. Lair Hill: Main Features Considered in Light of Modern Experience: Outline and Comment Together at 15-16* (1889).³ Article I sections 21 and 22 were adopted to enshrine the inviolate right to impartial juries for criminal trials like Mr.

³ Available at <http://lib.law.washington.edu/waconst/Sources/Hill%20Constitution.pdf>.

Munzanreder's. Washington intended to be uniquely protective of these rights.

The State, nevertheless, first argues that *State v. Smith*, is factually distinguishable because it determined the extent of the right to a jury for sentencing. Resp. Br. at 47-48. However, Mr. Munzanreder does not rely on *Smith* to assert he was entitled to a jury at sentencing. Rather, he relies on *Smith*'s discussion of the importance of the right to impartial jury trials under our state constitution and the breadth of the protection assured by our two constitutional provisions. Op. Br. at 55, 56, 57. The State's critique is inapposite and the State fails to dispute the propositions for which *Smith* applies here.

The State's remaining argument is that voir dire in this case survives "no matter what standard is used" therefore no *Gunwall* analysis is necessary. Resp. Br. at 48-49. The Court should disregard this hyperbole. The structure, language and history of our constitutional provisions demonstrate Washington provides greater protection for the right to impartial jury trials, a right which shall remain inviolate. Under our state constitutional standards, Mr. Munzanreder was denied a fair trial by an impartial jury because inflammatory pretrial publicity saturated the jury pool and cursory voir dire was used to explore jurors' biases.

4. The conflicting jury instructions for murder in the first degree and the lesser-included offense of murder in the second degree deprived Mr. Munzanreder of due process.

Jurors may presume that each instruction has meaning. *State v. Hutchinson*, 135 Wn.2d 863, 884, 959 P.2d 1061 (1998). Ambiguous to-convict instructions deprive criminal defendants of a fair trial. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

The contradictory language in the second-degree murder instruction created a conflict with the to-convict instruction on murder in the first degree. For murder in the first degree, the jury could have found Mr. Munzanreder's wife died either as a result of his actions, as a result of his actions and an accomplice's actions, or as a result of an accomplice's actions. CP 110 (element 3). But with regard to murder in the second degree, the to-convict instruction only permitted conviction if the jury found the death was caused by either Mr. Munzanreder's actions or his accomplice's actions, and not by a combination of both. CP 113 (element 3).

The distinction between the elements in these instructions must be given meaning. *Hutchinson*, 135 Wn.2d at 884. Further, the jury was read every instruction, including the conflicting to-convict instructions, before

deliberations began. And, in closing argument, the prosecutor emphasized that “[a]ll of the instructions are equally important.” 2/3/15 RP 2977-78. Accordingly, the jury was well aware of the distinct requirements, even if it never deliberated on the lesser offense.

The State argues that Mr. Munzanreder invited the error. Resp. Br. at 45-46. But the State proposed the instruction on second-degree murder and defense counsel explicitly objected to it. CP 164-86; 2/3/15 RP 2928-38, 2940, 2958. The court provided the instruction at the State’s request, over Mr. Munzanreder’s objection. CP 111-13; 2/3/15 RP 2928-30, 2958, 2966-68.⁴ If the court had agreed with Mr. Munzanreder’s objection, the conflict between the to-convict instructions would not exist. Mr. Munzanreder did not invite the error in this instruction.

The conflicting to-convict instructions require reversal. “It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element.” *Smith*, 131 Wn.2d at 263.

⁴ Defense counsel’s comment that the State’s instructions otherwise mirrored the defense-proposed instructions cannot be construed to include the second-degree murder instruction as Mr. Munzanreder did not propose this lesser-included offense instruction and specifically objected to it. *See* 2/3/15 RP 2928-31.

5. The State concedes two clerical errors in the judgment and sentence require correction.

The State concedes that the judgment and sentence contains two clerical errors that should be corrected. First, the text of the judgment and sentence reflects a firearm enhancement, which the State charged and the jury found, but the statutory citations refer to deadly weapon (not firearm) provisions. CP 131 (citing RCW 9.94A.510; RCW 9.94A.825). These citations are incorrect and should be amended to reflect the firearm enhancement.

Second, the date of verdict should be amended from February 2 to February 4, 2015. CP 122-25, 131; 2/3/15 RP 3075, 3077-80.

The Court should remand with instructions to correct these errors.

6. The State has not overcome the presumption of indigency or demonstrated an ability to pay where Mr. Munzanreder will be over 70 years old upon release from prison.

The State argues the Court should award appellate costs if requested because Mr. Munzanreder has not shown he is not indigent. Resp. Br. at 46-47. The State flips the burden on its head. Mr. Munzanreder was found indigent and that presumption continues unless this Court finds that Mr. Munzanreder's "financial condition has improved to the extent that [he] is no longer indigent." RAP 15.2(f); *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612 (2016) (State's speculation

not sufficient to overcome presumption of continued indigency). The State presents no evidence that Mr. Munzanreder's financial condition has improved while he has been imprisoned. Moreover, the record does not show Mr. Munzanreder's financial condition will improve in the future. *See* Resp. Br. at 47 (arguing "nothing would indicate [Munzareder] will not be able to find employment" 30 years from now). Mr. Munzanreder is serving a 340-month sentence; he will be in his mid-seventies when he is released. CP 131, 132-33. His age, felony record, and decades without employment experience make it incredibly unlikely he will find gainful employment upon release.

In addition to the reasons set forth in the opening brief, the Court should deny an award of costs to the State because the State's concession regarding the clerical errors in the judgment and sentence preclude a finding that the State is the substantially prevailing party on review. *Compare* Resp. Br. at 46 *with* RAP 14.2.

The State fails to show Mr. Munzanreder will have the likely future ability to pay thousands of dollars in appellate costs plus accruing interest. The Court should deny an award of appellate costs to the State if it substantially prevails on appeal.

B. CONCLUSION

Media coverage sensationalized Cynthia Munzanreder's death. The publicity was pervasive, provocative, and prejudicial to Mr. Munzanreder. To ensure Mr. Munzanreder's constitutional rights the trial should have been transferred to a new venue or voir dire needed to delve deeper into jurors' biases. Further, contradictory language in the to-convict and lesser included instructions deprived Mr. Munzanreder of due process. The Court should reverse and remand for a new, fair trial.

DATED this 27th day of December, 2016.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 33328-1-III
v.)	
)	
JOHN MUNZANREDER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF DECEMBER, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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