

NO. 33328-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOHN MUNZANREDER,

Appellant.

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Court of Appeals
Division III
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

John Munzanreder was denied the most priceless safeguard of liberty—a fair trial before an impartial jury. The murder of his wife in the small town of Union Gap was salaciously covered by local media and extensively commented on by the community. Over 80 percent of the jurors had been exposed to this publicity. Three sitting jurors admitted to having previously formed the opinion he was guilty. The trial should have been held in a different county to protect Mr. Munzanreder’s right to a fair trial by an impartial jury.

B. ASSIGNMENTS OF ERROR

1. Mr. Munzanreder was denied his state and federal constitutional rights to a fair trial by an impartial jury.

2. The trial court erroneously denied Mr. Munzanreder’s motion for change of venue based upon substantial saturation of pretrial publicity.

3. The process employed for removing biased jurors violated Mr. Munzanreder’s state and federal due process rights to a fair trial by an impartial jury.

4. The trial court abused its discretion in failing to excuse biased jurors.

5. The trial court's instructions on murder in the first degree and the lesser-included offense, murder in the second degree, are ambiguous, contradictory and confusing, denying Mr. Munzanreder due process.

6. The judgment and sentence cites to the statutory provisions for a "deadly weapon" enhancement, but the jury found and the court imposed a "firearm" enhancement.

7. The judgment and sentence incorrectly lists the date of verdict as February 2, 2015.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions guarantee Mr. Munzanreder a fair trial by an impartial jury. Was this right denied where the trial court required him to be tried in a county where over 80 percent of jurors had been exposed to continuous, inflammatory pretrial publicity that included information about the case not presented at trial, where three jurors who actually sat on Mr. Munzanreder's jury and many more who did not admitted to having already formed opinions on guilt, where the government was involved in the dissemination of some of the information, where the charge was among the most serious in the state, and where jurors spent only four hours deliberating?

2. The state and federal right to a fair trial by an impartial jury includes the right to a jury free from bias. Did the trial court abuse its

discretion by denying challenges for cause on jurors who admitted to actual bias, and were Mr. Munzanreder's constitutional rights denied by the process employed to select the jury in this context of salacious, extensive pretrial publicity and a saturated jury pool?

3. Jury instructions must make the law manifestly apparent to the average juror and must not be misleading. A misleading to-convict instruction violates a defendant's right to due process. Was Mr. Munzanreder denied due process where the to-convict instructions on murder in the first degree and the lesser-included offense of murder in the second degree contained a marked difference that created ambiguity and confusion?

4. Where the judgment and sentence contains two clerical errors, should this Court remand to the trial court to correct those errors?

5. Should this Court decline to award appellate costs if the State is the substantially prevailing party where Mr. Munzanreder is indigent and subject to a lengthy sentence?

D. STATEMENT OF THE CASE

1. Press coverage began immediately after Cynthia Munzanreder was shot outside a movie theater in Union Gap; this was only the town's second or third murder in 15 years.

John Munzanreder and his wife, Cynthia, planned to see a movie the evening of February 28, 2013.¹ Married for almost 20 years, the couple separated for several months in 2011 or 2012, but resumed living together after that brief period and spent a lot of time together.² They had worked together for years at the Valley Ford car dealership where they met before Mrs. Munzanreder was hired into a better position at Mike Olsen Dodge in 2012.³ Mr. Munzanreder was the parts and service manager at Valley Ford, making him well-known in the community.⁴

On February 28, they were the only ones at Union Gap's Majestic Theater for the 6:50 p.m. showing of Parental Guidance. 1/22/15 RP 1780-81. The couple did not have their cell phones with them that

¹ The verbatim report of proceedings is contained in two sequentially-paginated sets. The set transcribed by Jennifer Albino, which is consistently labeled by volume number, is referred to by volume number, e.g., "Vol. I RP [Page #]." The other sequentially-paginated set is transcribed by Joan Anderson. The set is referred to by the first date transcribed, e.g., "01/06/15 RP [Page #]," even though the cover pages to the trial proceedings within this set also contain volume numbers.

² 1/16/15 RP 1286, 1300; 1/20/15 RP 1408-09; 1/27/15 RP 2175; 1/28/15 RP 2323-25; 2/3/15 RP 3124.

³ 1/20/15 RP 1405-07, 1416-17; 1/28/15 RP 2321; 1/29/15 RP 2491-92.

⁴ 1/27/15 RP 2173; 1/29/15 RP 2464-65; CP 11 (defense motion).

evening. 1/20/15 RP 1457; 1/30/15 RP 2794-95. On the way out of the theater, they used the restroom and went to their car. 1/22/15 RP 1791; 1/30/15 RP 2771-73. Mr. Munzanreder approached the driver's side and Mrs. Munzanreder the passenger's side. As they were getting in the pickup truck, several loud sounds interrupted the quiet night. Mr. Munzanreder darted behind the car to follow someone he saw run into the bushes; he fell on a curb in the bushes that separated the theater parking lot from the neighboring shopping complex; he came out onto the passenger's side of the truck to find his wife laying on the ground.⁵ He went to her and held her head, kneeled over her, and held her hand.⁶

Mrs. Munzanreder died from a single bullet to the head; another bullet had entered and exited her left hip without much damage.⁷ The town of Union Gap, population six thousand, had its third homicide in 15 years. Vol. V RP 426, 431. The local media quickly reported the unsolved homicide, and readers began commenting online.⁸

⁵ *E.g.*, 1/20/15 RP 1358, 1364-67, 1456; 1/22/15 RP 1650-52.

⁶ 1/20/15 RP 1370-71; 1/22/15 RP 1673-75, 1748.

⁷ 1/20/15 RP 13-17, 1319, 1322-23, 1328, 1336. Mrs. Munzanreder died March 2, 2013 at the hospital, after she was kept on life support while organ donation was finalized. 1/20/15 RP 1311-13.

⁸ *See generally* Ex. F (Venue-publicity, March 2013 A, pp.1-8 & B, pp.1-25, 27-28, 32-34). With regard to Exhibit F, this brief cites to the pages of the entire pdf files (not to other page numbers listed on various pages of the exhibit).

2. In a move widely publicized by the local media, Union Gap police accused Cynthia Munzanreder's husband, John Munzanreder, and his employee, Juan Ibanez.

Union Gap police arrived at the theater parking lot around 8:45 p.m. and began investigating.⁹ They called in off-duty officers from Yakima to assist with crime-scene mapping.¹⁰ At the scene where he was sobbing, and later at the police station where he was held for the night, Mr. Munzanreder told police he did not know who shot his wife, that he heard a shot, saw a subject in a dark sweatshirt run through the bushes, chased after him, fell, returned to the passenger side of his truck, and found his wife on the ground.¹¹ Mr. Munzanreder had no weapons on him and a small abrasion under his left eye; he cooperated with police.¹² During the 10 to 12 hours he was held at the station, the flesh wound developed into a black eye.¹³ Law enforcement officers were preoccupied with Mr. Munzanreder's emotions, emphasizing he sobbed, rocked back

⁹ 1/20/15 RP 1353-54; 1/22/15 RP 1792-93; 1/29/15 RP 2563.

¹⁰ 1/20/15 RP 1472-75; 1/21/15 RP 1519.

¹¹ *E.g.*, 1/20/15 RP 1364-65, 1385-88; 1/21/15 RP 1546-47, 1552-54, 1626, 1631-32; 1/22/15 RP 1799-1800; 1/29/15 RP 2571, 2574-80, 2650.

¹² 1/20/15 RP 1366-67, 1377, 1392-94; 1/21/15 RP 1611, 1613-14; 1/22/15 RP 1799-1800; 1/29/15 RP 2577-78; 2/2/15 RP 2727-28. Mr. Munzanreder even told the police he would take a polygraph examination. *See* 1/6/15 RP 537; 1/16/15 RP 1303; 1/22/15 RP 1806-19 (evidence excluded at trial).

¹³ *E.g.*, 1/20/15 RP 1366-68; 1/6/15 RP 470-75, 491-92; Exs. 41, 50.

and forth, but shed no tears. *E.g.*, 1/21/15 RP 1554-56. At least one witness, however, noticed Mr. Munzanreder's tears. 1/22/15 RP 1673-75.

Police executed a warrant on the Munzanreders' home while John was held at the station and Cynthia was still on life support at the hospital. 1/22/15 RP 1641-42, 1645-46. Police seized some documents and computers, but did not find any guns. 1/22/15 RP 1641-42.

Near the scene, police located two men in black, hooded sweatshirts, matching Mr. Munzanreder's description.¹⁴ There were not many other people around that night. 1/20/15 RP 1382. The neighboring stores did not have video surveillance. 1/20/15 RP 1376. Nothing was located in a search of Mr. Munzanreder's pickup truck. 1/22/15 RP 1639-40. Police found a bullet had shattered the glass and lodged in one of the theater doors, about 250 feet from where Mrs. Munzanreder was shot.¹⁵ Evidence was not collected for bullet trajectory analysis. 1/20/15 RP 1495-98.

On March 1, the police began interviewing other people who worked at Valley Ford, including Juan Ibanez.¹⁶ Law enforcement first

¹⁴ Ex. 117; 1/20/15 RP 1374-75; 1/21/15 RP 1601-02, 1624-25; 1/22/15 RP 1795-97; 1/30/15 RP 2648-49, 2774-78.

¹⁵ 1/20/15 RP 1395-98, 1475; 1/21/15 RP 1521-29, 1593-97; 1/27/15 RP 2257.

¹⁶ 1/21/15 RP 1564-67, 1573-74, 1576-77, 1580-82; 1/22/15 RP 1644.

connected Juan Ibanez to the crime when they saw his truck at Valley Ford, which matched the description of one seen at the scene. 1/30/15 RP 2660-61. Police recovered bullets for a .22 caliber gun at the dealership. 1/21/15 RP 1574. Mr. Ibanez was arrested for possession of a firearm and, after interviews at the station, also for murder. 1/21/15 RP 1574-75. He told police John Munzanreder had promised him \$20,000, which he needed to pay for a professional toolbox, if Mr. Ibanez helped kill his wife. 1/23/15 RP 1835-36, 1841-43; *see* 1/23/15 RP 1929-33 (Ibanez admits to telling many lies to law enforcement). He told police he had purchased the murder weapon and placed it at the dealership, in an area where he worked; the police found a gun there.¹⁷

Based on Mr. Ibanez's statements, Mr. Munzanreder was arrested on March 4, and both were charged with first degree murder.¹⁸ The State charged Mr. Munzanreder as either a principal or accomplice to premeditated first degree murder as a crime of domestic violence and with a firearm enhancement.¹⁹

The press covered Mr. Munzanreder's arrest in depth. The top-of-the-fold headline in the print edition of the Yakima Herald read, "Cops:

¹⁷ 1/21/15 RP 1605; *see* 1/23/15 RP 1845-53.

¹⁸ 1/21/15 RP 1575; 1/6/15 RP 512-13, 522, 526.

¹⁹ CP 5 (citing RCW 9A.32.030(1)(a); RCW 9A.08.020; RCW 10.99.020; RCW 9.94A.533(3) & RCW 9.94A.825).

husband did it” above a large photo of Mr. Munzanreder with a black eye, in jail clothes, and with his hands behind his back, presumably in handcuffs. Ex. F (Venue-publicity, Venue in the news, p.5); Ex. G. The coverage was salacious and in depth. For example, it was widely reported Mr. Munzanreder was having an affair with Amanda Davis, although she was never charged or connected with Cynthia Munzanreder’s death.²⁰ It was extensively reported he offered Mr. Ibanez \$20,000 to assist Mr. Munzanreder.²¹

3. The press continued to publicize developments in the case.

The defendants were concerned about the public nature of the case from the outset. Vol. II RP 112-20 (in 2013, Ibanez concerned for length of jury selection because it is a “public case”); Vol. III RP 218-19 (Munzanreder intends to seek different venue due to publicity). On April 22, 2014, Mr. Munzanreder filed a motion to change venue due to inflammatory publicity and the couple’s notoriety in the community. CP

²⁰ *E.g.*, Ex. F (Venue-publicity, Ibanez plea, p.6); Ex. F (Venue-publicity, March 2013 A, pp.9, 14 (“Upon interviews with those who knew John and Cynthia Munzanreder, it was made clear John was openly having an affair ‘for more than a couple months.’”), 29); Ex. F (Venue-publicity, March 2013 B, pp.42, 50); 1/23/15 RP 1962-77, 1981-83 (Davis’s testimony that she did not know Cynthia and Mr. Munzanreder never promised he and Davis would have a future together and she did not ask him to promise a future for them together).

²¹ *E.g.*, Ex. F (Venue-publicity, Ibanez plea, p.6); Ex. F (Venue-publicity, March 2013 A, pp.9, 30, 45).

9-17 (motion and response). The court decided to consider the motion after jury selection. Vol. III RP 226-30; 1/6/15 RP 546. The news media covered this motion as well.²²

After a Criminal Rule 3.5 hearing, the court held Mr. Ibanez's statements to law enforcement were voluntary and admissible at trial, although he had asked whether he should get an attorney.²³ The media continued to follow the case through these developments. Vol. VI RP 487; 5/22/14 RP 144-46, 163-64; Ex. F (3.5 public comment).²⁴ The local CBS affiliate's Facebook page published that "A judge is going to allow the confession of a Union Gap murder suspect to be used in court. Juan Ibanez Cortes told police he helped hide the gun John Munzanreder used to kill his wife in a movie theater parking lot." Ex. F (3.5 public comment, p.1). 219 people "liked" the story and it was shared 29 times. *Id.* The comments include: "Yup the husband should hang!!"; "Good they need to put that husband away forever!"; and "Is this the murder they planned at Valley Ford?" with a response "Yes it is." *Id.* at pp.1-2.

²² 5/22/14 RP 144-45 (ABC News); Ex. F. (Venue-Publicity, Venue in the news).

²³ 9/18/13 RP 10-116, 5/22/14 RP 117-224; Vol. IV RP 260-389; Vol. V RP 390-483; Vol. VI RP 484-578; Vol. VII RP 614-723; 7/10/14 RP 285-427; Vol. VIII RP 732-48.

²⁴ Counsel for Mr. Munzanreder was even contacted by Good Morning America. 5/22/14 RP 144-46, 163-64.

With the admission of Mr. Ibanez's statements to law enforcement, Mr. Munzanreder moved to redact the statements to cleanse them of reference to him. CP 18-19. The parties and the court worked extensively to redact the statements. But the court ultimately held that the codefendants' trials must be severed.²⁵

The court ordered that Mr. Ibanez would be tried before Mr. Munzanreder.²⁶ Mr. Munzanreder objected, in part because publicity about Mr. Ibanez's trial would further prejudice Mr. Munzanreder's ability to receive a fair trial in Yakima County. Vol. XI RP 1057, 1060-61. The media covered this ruling, and the public commented extensively.²⁷

Mr. Ibanez and the State promptly entered into a plea agreement. Vol. XII RP 1119-23; *see* Ex. 131 (plea agreement). He pled guilty to second degree murder and agreed to testify truthfully at Mr. Munzanreder's trial.²⁸ The State agreed to recommend a 10-year

²⁵ Vol. IX RP 789-95, 798, 802, 806, 813, 818-22, 868; Vol. X RP 946-76; Vol. XI RP 1023; Vol. X RP 986-1015 (denying State's motion for reconsideration).

²⁶ Vol. XI RP 1058; Vol. XI RP 1087-1103 (denying reconsideration); CP 22-23.

²⁷ Ex. F (3.5 Public comment, pp.14-23); Ex. F (Venue-publicity, Ibanez plea) (pp.1-2).

²⁸ 1/23/15 RP 1826, 1884; *see* 2/2/15 RP 2823-26 (Ibanez did not provide any new information at time of plea).

sentence.²⁹ Mr. Ibanez’s plea also garnered much publicity, including front-page coverage in the Yakima Herald.³⁰

4. Eighty percent of the jury had followed the pretrial publicity; three impaneled jurors had already concluded Mr. Munzanreder was guilty; and publicity continued through the trial.

Mere days before jury selection began in Mr. Munzanreder’s trial, Yakima’s CBS affiliate, KIMA TV, broadcast a provocative story about the upcoming trial on television and online.³¹ The video shows in-life pictures of Mrs. Munzanreder. Ex. F (KIMA video at 00:25-27). It reports that the Union Gap police were “not buying” Mr. Munzanreder’s “story.” *Id.* at 00:27-45. It also falsely states that Mr. Munzanreder has access to guns and mischaracterizes the burden at a Criminal Rule 3.5 hearing (stating Munzanreder challenged admissibility).³² While reporting that Mr. Munzanreder “through it all maintains his innocence,” the video shows him smiling, perhaps laughing, towards his attorney. Ex. F (KIMA video at 01:30-37).

²⁹ 1/23/15 RP 1826. The minimum sentence for first-degree murder is 20 years. RCW 9.94A.515; RCW 9.94A.510.

³⁰ Ex. F (Venue-publicity, Ibanez plea, pp.5-45) (collecting articles and public comments); Ex. I.

³¹ 1/6/15 RP 609-17; Ex. F (KIMA video). The story and video remain available on KIMA’s website, <http://kimatv.com/news/local/pre-trial-motions-begin-for-man-accused-of-killing-wife-in-union-gap> (last visited Mar. 13, 2016).

³² 1/6/15 RP 612-13; Ex. F (KIMA video at 01:22-37); *see* 1/16/15 RP 1289-90, 1292 (Munzanreder did not have guns).

On January 12, 2015, jury selection commenced. 1/12/15 RP 651-52. Panelists completed a lengthy questionnaire, which included a section on publicity. CP 154-63. With 128 completed questionnaires, the record contains data on 127 jurors' exposure to pretrial publicity;³³ 105 people (over 82 percent) responded they knew of the case in advance from pretrial publicity and/or from hearing about it from friends, colleagues, or family; 24 admitted they had formed an opinion based on what they heard, with most reporting their opinion was that Mr. Munzanreder was guilty of murder. CP 199-1481 (completed questionnaires). In addition, 40 venire members reported knowing people involved in the case. *Id.*

The publicity infected not only the pool of jurors, but also the jury that decided the case: three of the impaneled jurors had formed the opinion that Mr. Munzanreder was guilty from what they had learned outside of the courtroom.³⁴

Mr. Munzanreder supplemented his motion for a change of venue with newspaper and television clippings to excerpt the pretrial publicity.

³³ Two jurors did not complete the questions about publicity. CP 669, 779 (questionnaires for jurors 207 & 227). Juror 207 revealed in voir dire that she had read about the case in the Yakima Herald. 1/15/15 RP 1083-88. Juror 227's exposure to pretrial publicity is not in the record, and is therefore not included in the following statistics.

³⁴ 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).

1/15/15 RP 982-84; Exs. F, G, H, I. The court denied the motion after voir dire concluded. 1/15/15 RP 1097-1106; 1/16/15 RP 1231-32. In its ruling, the court admitted it had not recalled the startling headlines from March 2013 that Mr. Munzanreder presented, but was “impressed by quality of the panel[,]” “saw nothing in the dialog we had with the jurors that we’ve impaneled now that would suggest that they were in any way influenced or biased [sic] by the news coverage,” and did not think media coverage had been as extensive as represented. *Id.*

Media coverage continued during the trial.³⁵ The trial court instructed the jury to ignore the press and other outside information related to the trial.³⁶

In addition to Mr. Munzanreder’s statements and Mr. Ibanez’s testimony,³⁷ the relevant evidence at trial can be summarized as follows: A few witnesses in the parking lot heard something like two or three gunshots, saw a young person carrying a backpack walk by, saw a person run into the bushes, but were not sure who killed Mrs. Munzanreder and were inconclusive as to where Mr. Munzanreder was, except that he came

³⁵ *E.g.*, 1/16/15 RP 1233-35; 1/20/15 RP 1307; 1/21/15 RP 1504-06, 1551; 1/23/15 RP 1824-25 (court asks media to minimize disruptions); 1/23/15 RP 1983; 1/28/15 RP 2313-17 (defense counsel concerned about effect of cameras on witnesses); 1/28/15 RP 2439-40; 2/2/15 RP 2815-16.

³⁶ *E.g.*, 1/16/15 RP 1226-28; 1/22/15 RP 1819.

³⁷ Exs. 138, 139, 140, 141; 1/23/15 RP 1826-1960.

to his wife's side.³⁸ A couple was in the parking lot on the other side of the bushes; they heard a loud noise, then saw a young Hispanic man run out of the bushes, toss something into his truck like he was trying to get rid of something, and run over to the witnesses' car.³⁹ "He asked us if we heard the gunshots. We told him we thought it was a pallet dropping. He told us that it was a gunshot, that somebody had gotten shot [and they needed to get out of there]."⁴⁰ The witnesses watched the young man drive away.⁴¹ He did not look like John Munzanreder.⁴²

The Mike Olsen Dodge dealership where Mrs. Munzanreder managed the books was having serious financial problems and some people told the police that people there might have wanted Mrs. Munzanreder dead.⁴³

Cynthia Munzanreder had been concerned she had breast cancer in 2012-13, but the final diagnosis was negative.⁴⁴ The couple had taken out

³⁸ 1/22/15 RP 1656-77, 1683-1701; 1/22/15 RP 1708-50.

³⁹ 1/22/15 RP 1750-57, 1760-61, 1763-69.

⁴⁰ 1/22/15 RP 1757, 1760-61, 1768-69.

⁴¹ 1/22/15 RP 1757, 1760-61.

⁴² 1/22/15 RP 1776. In Juan Ibanez's testimony, he identified himself as the young Hispanic man who came out of the bushes, threw something into the back of his truck, and approached the witnesses. 1/23/15 RP 1870.

⁴³ 1/21/15 RP 1622-23; 1/30/15 RP 2655-56.

⁴⁴ 1/22/15 RP 1653; 1/30/15 RP 2742-48; Ex. 165.

life insurance policies in 1996.⁴⁵ The insurance company had recently sent them a letter about their coverage, and, as is a common response to these letters, Mr. Munzanreder called the company with questions about how the policy operated.⁴⁶

Mr. Ibanez claimed Mr. Munzanreder planned to text Mr. Ibanez in code to make sure Mr. Ibanez was ready in the bushes to receive the gun. 1/23/15 RP 1859. Mr. Ibanez testified he received a text message from Mr. Munzanreder around 8 p.m. with the “code,” “are you working on the van,” and that Mr. Ibanez responded before he had even left for the theater.⁴⁷ However, Mr. Munzanreder did not have his cell phone with him at the theater. 1/30/15 RP 2794-95. There was a message from Mr. Munzanreder to Mr. Ibanez on the cell phone police found at Mr. Munzanreder’s home, but it was sent at 5 p.m., well before the Munzanreders would have left for the 6:50 p.m. movie and before the 8 p.m. text to which Mr. Ibanez testified.⁴⁸

Computers seized from Valley Ford showed internet search histories related to gun shows, “spousal murder,” and stories about Cynthia Munzanreder’s death, but the State could not show who

⁴⁵ 1/20/15 RP 1426-30.

⁴⁶ 1/20/15 RP 1431-33, 1436-37, 1446-49; Ex. 71.

⁴⁷ 1/23/15 RP 1861-63, 1913-17, 1951-53, 1958-60.

⁴⁸ 1/23/15 RP 1875-76; 1/30/15 RP 2749-50, 2794-95; 2/2/15 RP 2823.

conducted the searches and “everyone . . . that worked there” had access to and used those computers.⁴⁹

The State could not prove in which order the bullets hit Mrs. Munzanreder, and there was no trajectory analysis to pin down where the shooter was.⁵⁰ The coroner testified the gun that caused Mrs. Munzanreder’s death was fired from two to six feet away.⁵¹ A State expert testified, based on the path of blood from a gunshot wound, that most of the blood would be expected on the exit wound side, with possibility for a little “backsplash” on the side where the bullet entered. 1/26/15 RP 1999-2002. The bullet moved from left to right on Mrs. Munzanreder. 1/26/15 RP 1999-2002. The expert could not say from where the debris on the passenger door of the Munzanreders’ truck derived or what it was. 1/26/15 RP 2011-15. The weapon the State thought Mr. Munzanreder used to shoot his wife and then passed to Mr. Ibanez did not have DNA from either of them.⁵² Mr. Munzanreder’s clothing had some blood on it; Mr. Ibanez’s clothing and the clothing from

⁴⁹ 1/26/15 RP 2051-76; 1/27/15 RP 2179-80; 1/28/15 RP 2351-55.

⁵⁰ 1/20/15 RP 1339-40; 1/28/15 RP 2433.

⁵¹ 1/20/15 RP 1325-27; *accord* 1/28/15 RP 2422-24, 2429 (testimony of forensic scientist Johan Schoeman that gun was fired from 27 inches up to 6 feet away).

⁵² 1/26/15 RP 2016-24; 1/29/15 RP 2550-51; 2/2/15 RP 2818-20.

one of the men in the hooded sweatshirt did not.⁵³ The DNA on parts of the clothing collected from Mr. Munzanreder the night of the shooting was only his DNA. 1/26/15 RP 2034-42; 2/2/15 RP 2818-20.

The State hired Thomas Kubic to test for gunshot (primer) residue on Mr. Munzanreder's clothing and swabs taken from his hands the night of the shooting.⁵⁴ Using up-to-date testing procedures, as requested, Dr. Kubic did not find gunshot residue on the clothing. 1/26/15 RP 2101-06, 2147 (used scanning electron microscopy; discovered some residue on clothing but could not conclude it was gunshot residue; particles found were consistent with Munzanreder's employment). Defense expert Dale Mann concurred with Dr. Kubic's work to this point. 2/2/15 RP 2873-77, 2883-84.

However, Dr. Mann testified to the inaccuracy of the remainder of Dr. Kubic's testing and analysis.⁵⁵ Here, Dr. Kubic used an older, less precise bulk analysis to test the swabs—this test can only detect the elements that are present, not that they occur in a form that assures they are from gunshot residue—and determined a few were consistent with gunshot residue. 1/26/15 RP 2106-12, 2122 (used atomic absorption,

⁵³ 1/27/15 RP 2258-94 (testimony of Margaret Barber); *see* 1/27/15 RP 2302 (Ibanez's ex-girlfriend testified his clothing was probably washed before it was collected).

⁵⁴ 1/26/15 RP 2094-2154; 1/30/15 RP 2684-87, 2784-86.

⁵⁵ 2/2/15 RP 2876-77, 2878-82, 2885-87, 2913-14, 2897, 2905-06.

which was being conducted by few people at this time); *see* 1/26/15 RP 2146 (nothing he found would rule out that Munzanreder was a bystander to shooting); *see also* 2/2/15 RP 2893-96 (Mann does not know of any crime lab in United States that uses atomic absorption to test for presence of gunshot residue), 2917 (scientific community has “abandoned the technique”). Dr. Mann disagreed with this conclusion. 2/2/15 RP 2887-92, 2897-98, 2915-17.

Dr. Mann opined the particles Dr. Kubic discovered using atomic absorption were from environmental contamination, not indicative of firearm use.⁵⁶ Dr. Kubic agreed with Dr. Mann it is a “real possibility” that gunshot residue transferred to Mr. Munzanreder’s hands while he was in a police vehicle or at the station.⁵⁷ Dr. Kubic also testified it is possible the particles from the hand swabs derived from the same source as the residue on the clothing, which was not shown to be from a gunshot.

1/26/15 RP 2133. The coroner testified gunshot residue likely transferred from Mrs. Munzanreder’s hair when he autopsied Mrs. Munzanreder, and Mr. Munzanreder held and was in contact with his wife after she was

⁵⁶ 2/2/15 RP 2887-92, 2900-01, 2917-18.

⁵⁷ 1/26/15 RP 2131-33; 2/2/15 RP 2887-88, 2901-04; *see* 1/29/15 RP 2571; 1/26/15 RP 2132 (Munzanreder sat in back of police vehicle at scene while police investigated; he was transferred to another police vehicle for transport).

shot.⁵⁸ Other State witnesses testified that many variables affect the dispersion of gunshot residue, including factors related to the gun and the weather. 1/27/15 RP 2255-56 (testimony of Glenn Davis); 1/28/15 RP 2433-34 (testimony of Johan Schoeman: anybody standing next to you when you fire a gun will also get some of that residue on them). However, for the first time at trial, Dr. Kubic concluded the residue on the hand swabs was more likely than not from firing a firearm.⁵⁹

The State's forensic pathologist testified that Mr. Munzanreder's abrasion and resulting black eye might have stemmed from a number of causes, including falling on an edge, falling on a rock, or kickback from a gun. 1/20/15 RP 1308-09, 1328-32, 1345-46.

Over Mr. Munzanreder's objection, the court granted the State's request to instruct the jury on the inferior degree offense of second-degree murder.⁶⁰ The court used the State's proposed instructions, which contained inconsistent accomplice liability language between murder one and murder two. *Compare* CP 110 (to-convict on first-degree murder states "Munzanreder died as a result of the defendant's and/or an accomplice's acts") *with* CP 113 (to-convict on second-degree murder

⁵⁸ 1/20/15 RP 1342; 1/20/15 RP 1370; 1/22/15 RP 1673-74.

⁵⁹ 1/26/15 RP 2140-41.

⁶⁰ 2/3/15 RP 2928-40, 2958; CP 95-119 (court's instructions).

states “Munzanreder died as a result of the defendant’s or an accomplice’s acts”); *see* CP 164-86 (plaintiff’s proposed instructions).

After about four hours of deliberation, the jury convicted Mr. Munzanreder of first-degree murder against a member of the same family or household while armed with a firearm. CP 122-25 (verdict forms); *see* CP 1510 (trial minutes p.15).

The court sentenced 45-year-old John Munzanreder to 340 months (almost 30 years) in prison. CP 127 (defense presentence report), 131-38 (judgment and sentence).

E. ARGUMENT

The Washington Constitution provides even greater protection for the right to an impartial jury than the federal constitution. It requires the right to an impartial jury be held “inviolable” and emphasizes the critical role of the jury through multiple provisions. A full state constitutional analysis is set forth in Section Three, *infra*. In the meantime, that structure should be kept in mind when reading Sections One and Two below, such that even if the federal constitution does not protect Mr. Munzanreder to the extent argued below, which we do not concede, our State’s constitution surely does.

1. By denying the motion to change venue, the trial court denied Mr. Munzanreder a trial by a fair and impartial jury, because pretrial publicity about this high profile murder was opinionated and frequent and it saturated the area from which the venire was drawn.

a. Venue must be changed where there is a probability of prejudice, unfairness, or partiality from inflammatory pretrial publicity.

John Munzanreder had the constitutional right to a trial before an unbiased and impartial jury. Const. art. I, § 22; U.S. Const. amend. VI. “A fair trial in a fair tribunal is a basic requirement of due process.” *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). The jury trial is “the most priceless” safeguard of “individual liberty and of the dignity and worth of every man.” *Id.* at 721. A trial by a jury with biased or prejudiced jurors is unconstitutional. *State v. Stiltner*, 80 Wn.2d 47, 53, 491 P.2d 1043 (1971).

The trial court should have granted a change of venue because Mr. Munzanreder showed a probability of unfairness, partiality or prejudice. *State v. Rupe*, 108 Wn.2d 734, 750, 743 P.2d 210 (1987); *State v. Crudup*, 11 Wn. App. 583, 586-87, 524 P.2d 479 (1974) (moving party need not show actual prejudice to justify change of venue); *see* RCW 10.25.070 (procedure for change of venue motion). Because Mr. Munzanreder made

this showing but venue was not changed, his trial in Yakima County was “inherently lacking in due process.” *Stiltner*, 80 Wn.2d at 54; *see Rupe*, 108 Wn.2d at 750; *Stiltner*, 80 Wn.2d at 52-53 (while trial court is vested with discretion to decide change of venue motion, those courts “must recognize” that trial by jury where one or more members are biased or prejudiced violates constitutional rights).

In examining whether Yakima County was an appropriate venue for Mr. Munzanreder’s murder trial, this Court “must independently review the record.” *State v. Whitaker*, 133 Wn. App. 199, 210-11, 135 P.3d 923 (2006).⁶¹ In like cases, our appellate courts have held the trial court’s denial of a change of venue motion violated the defendant’s constitutional rights. *State v. Hillman*, 42 Wash. 615, 617-19, 85 P. 63 (1906) (change of venue from King County necessitated where pretrial publicity with large circulation assumed defendants’ guilt and misstated facts); *Stiltner*, 80 Wn.2d at 54-55. That is the result compelled here.

⁶¹ *Accord Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) (“Appellate tribunals have the duty to make an independent evaluation of the circumstances.”); *Stiltner*, 80 Wn.2d at 55 (conducting “independent review of the record” and finding “the probability of prejudice is so apparent that it was error not to grant the motion for a change of venue”).

- b. The inflammatory pretrial publicity saturated the small community throughout the time leading up to trial, which together with the relative notoriety of individuals involved and the severity of the charge, compelled a change of venue.

“Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.” *Sheppard*, 384 U.S. at 362.

How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.

Irvin, 366 U.S. at 729-30 (Frankfurter, J. concurring). “[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors’ claims that they can be impartial should not be believed.”

Patton v. Yount, 467 U.S. 1025, 1031, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984) (referring to rule set forth in *Irvin*, 366 U.S. 717). As set forth below, the record here shows pretrial publicity necessitates a presumption of partiality. To subject Mr. Munzanreder to a constitutionally fair trial, trial had to be held in a different venue.

In Washington, courts look to a non-exhaustive set of factors to help determine whether a new venue was required. *Rupe*, 108 Wn.2d at

752. These factors are: (1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn. *Id.* (quoting *Crudup*, 11 Wn. App. at 587). Because the *Crudup* factors are not exhaustive, additional salient facts are set forth below. Every factor indicates the trial court denied Mr. Munzanreder due process by holding his trial in Yakima County.

i. *The publicity leading up to Mr. Munzanreder's trial was provocative.*

First, the publicity about this case was inflammatory. The responses to juror questionnaires prove it. Of the 24 people who admitted to having formed an opinion, none of them expressed the opinion that Mr. Munzanreder was presumed innocent. CP 218, 308, 419, 529, 509, 579, 629, 819, 839, 890, 910, 920, 970, 980, 1020, 1060, 1190, 1200, 1250,

1360, 1380, 1460, 1470 (questionnaires for jurors 3 (“I believe this guy did this to his wife by the articles in the paper.”), 9 (“It sounded like the husband was involved.”), 11 (“accounts seemed to point toward the guilt of Mr. Munzanreder”), 19 (“opinion mainly from recent events in News”), 21, 25 (“he killed his wife”), 26 (“think he will be found guilty because he planned this crime”), 29, 49, 51 (“that he was the responsible one”), 59, 83, 88, 100 (“He is guilty.”), 103, 115 (“I’m sure he is guilty”), 136 (“he looked like he did it”), 155, 174, 175, 190 (“Hes [sic] guilty”), 201, 235 (“Bastard is guilty as sin!”), 238 (“I remember being against the defendant initially”); *accord* 1/13/15 RP 811-15 (everyone juror 21 has heard talk about the case has perceived Munzanreder’s guilt from the publicity); 1/14/15 RP 976-78 (from what juror heard in the news “I would be doing an injustice versus a justice for this person”).

The provocative publicity started immediately. On March 6, 2013, the top-of-the-fold headline in the print edition of the Yakima Herald read, “**Cops: husband did it**” above a large photo of Mr. Munzanreder with a “a very dark black eye,” in jail clothes, and with his hands behind his back, presumably in handcuffs. Ex. F (Venue-publicity, Venue in the news, p.5) (emphasis added); Ex. G. The online version of the article was headlined, “**Police say husband fatally shot wife** at movie theater.” Ex. F (Venue-publicity, March 2013 A, p.28) (emphasis added). Both articles

report, in the first line, that Mr. Munzanreder is accused of “**gunning down**” his wife. Ex. F (Venue-publicity, Venue in the news, p.5); Ex. F (Venue-publicity, March 2013 A, p.28). The article continues by eroding the presumption of innocence, publicizing the high bail, and drawing attention to his injury: “John J. Munzanreder, 43, of Terrace Heights had little to say during his brief appearance before Yakima District Judge Kevin M. Roy, who set bail at \$2 million Munzanreder sported a very dark black eye, but police said later it was unrelated to his arrest.” *Id.*⁶²

The KIMA video from January 7 is a prime example of the inflammatory publicity that saturated the Yakima area. It manipulated footage (combining images from one context with audio from another); it reports on the police labeling Mr. Munzanreder’s “crocodile tears” the night of the shooting. Ex. F (KIMA video at 00:57-01:22). Moreover, as the story reports that Mr. Munzanreder “through it all maintains his innocence,” he is shown smiling, even laughing, with his attorney in court. Ex. F (KIMA video at 01:30-37).

Further, NBC reported “John Munzanreder is accused of devising a **gruesome plan** to have someone kill his wife, before ending up taking the

⁶² Pictures of Mr. Munzanreder with a black eye and in jail clothes dominated the media coverage even months after the black eye had healed and additional proceedings had occurred. *E.g.*, Ex. F. (Venue-Publicity, Venue in the news, p.1).

shot himself.” Ex. F (Venue-publicity, March 2013 A, p.9) (emphasis added); *accord* Ex. F (Venue-publicity, March 2013 B, p.48). In a published article, counsel for Mr. Ibanez commented that the plea agreement recognized his client “had been **manipulated by Mr. Munzanreder.**” Ex. F (Venue-publicity, Ibanez plea, p.6); Ex .I, p.2 (emphasis added). Headlines also questioned Mr. Munzanreder’s right to court-appointed counsel, for example, “Should taxpayers cover Majestic murder suspect’s tab?” Ex. F (Venue-publicity, March 2013 B, pp.51-53) (including comments in which all but one commenter believed Munzanreder should be required to pay for counsel).

Coverage repeatedly discussed Mr. Munzanreder’s “lack of ‘sincere emotion’” and “crocodile tears.” *E.g.*, Ex. F (Venue-publicity, Ibanez plea, p.6); Ex. F (Venue-publicity, March 2013 A, pp.9, 14, 29); Ex. F (Venue-publicity, March 2013 B, p.42); Ex. F (KIMA Video).

Publically available online and Facebook comments were also inflammatory. *E.g.*, Ex. F (Venue-publicity, Ibanez plea, p.42 (“The guy who took the plea deal . . . was being black mailed by the killer (his boss at work) in order to get him the hide the gun.”)); *id.*, p.43 (“the husband better get more time than that”); *id.* (“I know [Juan Ibanez]. . . . He was beat up and threatened by his boss.”); 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.”).

The coverage not only harmed Mr. Munzanreder directly, it also praised law enforcement. Ex. F (3.5 public comment, p.3) (noting in a four-sentence article about admission of Ibanez’s statements that “Union Gap Police handled the questioning appropriately”). Mrs. Munzanreder’s character was lauded as well. *E.g.*, Ex. F (Venue-publicity, March 2013 B, pp.1-2).

This was the kind of prejudicial information “viewers could not reasonably be expected to shut from sight.” *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). The publicity imbedded opinions of Mr. Munzanreder’s guilt into the minds of at least three seated jurors, as well as many prospective jurors. 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). Those numbers only reflect jurors who admitted they had formed an opinion.

As demonstrated, the publicity was inflammatory and conclusory. This case is thus unlike *Rupe*, where our Supreme Court noted the factual and noninflammatory nature of the reporting at issue. 108 Wn.2d at 752. It is likewise contrary to the cases examined in *Stiltner*, where the

reporting did not prejudice the defendant. 80 Wn2d at 53-54 (discussing *State v. Valenzuela*, 75 Wn.2d 876, 454 P.2d 199 (1969), where the publicity did not single out and hardly showed the defendant, and *State v. Malone*, 75 Wn.2d 612, 452 P.2d 963, 964 (1969), where nothing in the publicity indicated prejudice to the defendant). Unlike those cases, the coverage of Cynthia Munzanreder's murder targeted Mr. Munzanreder as the guilty party and presented manipulated footage in a manner that engendered prejudice against him. This factor accordingly weighs heavily in favor of a change of venue.

ii. *The inflammatory publicity saturated Yakima County.*

The publicity was not only inflammatory, but it heavily saturated the area from which Mr. Munzanreder's jury was drawn. Many news outlets and different forms of media covered the homicide, investigation, charges, and trial. *See generally* Ex. F (collecting publicity from local sources including Fox News Radio, KIMA (the local CBS affiliate), KAPP (the local ABC affiliate), and the Yakima Herald, KNDO and KNDU (the local NBC affiliates), as well as shorter stories from further afield, such as the Seattle Times and the Wenatchee World). The coverage was likely widespread, because in the prior 15 years, Union Gap had experienced only two or three other homicides. Vol. V RP 431, 436.

It is also clear the coverage was followed by the public. Many commented on the articles published online and on Facebook. *E.g.*, Ex. F (Venue-publicity, March 2013 B, pp.3-25 (commenting on March 5, 2013 article); *see generally* Ex. F (Venue-publicity). KIMA noted the outpouring of interest in one of its early articles: “As KIMA has seen your comments on our Facebook page ever since the shooting, this is a story that troubles a lot of you.” Ex. F (Venue-publicity, March 2013 B, p.35). Trial counsel, likewise, noted that the crime scene video on the Yakima Herald’s website was the second most popular story, photo or video posted on KIMA’s website in 2013. CP 11; *see* Ex. F (Venue-Publicity, Most Viewed YHR 2013-15).

Moreover, unlike the metropolises at issue in *Skilling* (Houston, Texas) and *Mu’Min* (the Washington, D.C. metro area), Union Gap has an estimated population of 6,030.⁶³ Yakima County had an estimated 150,000 people eligible for jury duty in 2013. CP 4-5; *Crudup*, 11 Wn. App. at 587 (size of area from where venire is drawn is the ninth enumerated factor relevant to propriety of new venue). The Yakima Herald has a readership of about 100,000 people online and circulation of

⁶³ Compare *Skilling*, 561 U.S. 358; *Mu’Min v. Virginia*, 500 U.S. 415, 440, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991) with U.S. Census Bureau, Population, 2014 estimate, Quick Facts (Union Gap), <http://quickfacts.census.gov/qfd/states/53/5373290.html> (last visited Mar. 13, 2016).

the printed newspaper is between 30,000 and 40,000. CP 4-5. Thus the area from which the venire was drawn was heavily saturated by the provocative media.

iii. *The publicity started immediately and continued through trial.*

The third *Crudup* factor evaluates the length of time between the public dissemination of information and the trial. Where a great deal of time has passed between the pretrial publicity and the seating of the jury, a court is less likely to find probable prejudice. *Rupe*, 108 Wn.2d at 751 (citing *Patton*, 467 U.S. at 1032-35). A “lapse in time” can have “a profound effect . . . in softening or effacing opinion.” *Patton*, 467 U.S. at 1033. Here, however, the biased publicity was not only pervasive around the time of the crime but it continued and was renewed with vigor closer to the time of trial.

The coverage of Cynthia Munzanreder’s death started immediately, and it garnered wide attention, in part, because Union Gap is seldom a location for murder and because the “seemingly random attack in such a public place” kept the public and press on constant watch for updates.⁶⁴ Publicity remained pervasive during the investigation, pretrial

⁶⁴ Ex. F (Venue-publicity, March 2013 A, p.29); Ex. F (Venue-publicity, March 2013 B, p.28); *see generally* Ex. F (Venue-publicity, March 2013 A & B).

proceedings, and trial.⁶⁵ For example, Mr. Munzanreder's motion to change venue in April 2014 received much attention in the local press. Ex. F. (Venue-Publicity, Venue in the news, pp.1-4). Articles on the venue motion were not limited to that development; they rebroadcast details from the investigation. *Id.* The pages of attendant comments make clear the public remained interested and engaged. *Id.* at 3-4.

The admission of Mr. Ibanez's statements in August 2014, also received extensive coverage. Ex. F (3.5 public comment); Vol. VI RP 487; 5/22/14 RP 144-46, 163-64. In October 2014, Mr. Ibanez was set to go on trial, but pled guilty, drawing heavy media coverage just a couple months before Mr. Munzanreder's trial. 1/14/15 RP 923-30 (juror 132 saw television news story that someone involved admitted to getting rid of evidence and had taken a deal); Ex. F (Venue-publicity, Ibanez plea) (collecting articles and public comments).

Likewise, as discussed, just days before jury selection, a news story broadcast Mr. Munzanreder's March 2013 statements, incorrectly asserted that Mr. Munzanreder challenged the admission of his in-custody

⁶⁵ *E.g.*, Ex. F (Venue-publicity, March 2013 A); Ex. F (Venue-publicity, March 2013 B); Ex. F. (Venue-Publicity, Venue in the news); 1/15/15 RP 1019-24 (juror saw publicity at outset as well as during the weeks before jury selection), 1054-55 (juror noted recent headlines), 1062-69 (juror has heard about case at work, in newspaper, on the internet and a little on television, including since being called for jury duty).

statements and had access to guns, and included testimony from the police asserting Mr. Munzanreder displayed “crocodile tears.” *Compare* Ex. F (KIMA video) *with* 2/3/15 RP 3011 (evidence shows no access to guns). Prospective jurors were aware of that and other publicity in the days before—and on the day of—jury selection. 1/13/15 RP 886-88 (heard story the night before on KIMA); 1/13/15 RP 843 (Yakima Herald published story on the morning jury selection commenced); 1/14/15 RP 943-44 (saw newspaper article); 1/15/15 RP 1004-05 (saw something “three or four days ago,” after picked for this panel). This factor also demonstrates the need for a different venue.

iv. *The jurors were overly familiar with the public coverage.*

The factor addressing the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them also weighs heavily in favor of reversing the trial court. Over 82 percent of the panelists called for jury duty remembered hearing about the case in the media or, to a lesser extent, from people in the community. CP 199-1481 (completed questionnaires).⁶⁶ Almost 20 percent of these jurors admitted the publicity

⁶⁶ In a recent federal case, a defense motion for new venue based on pretrial publicity was granted, moving the trial from federal court in Spokane to Richland, Washington, although less than half the prospective jurors in Spokane had heard about the case. Jeffrey Humphrey, “Media coverage prompts Carlile murder trial move to Richland,” KXLY.com,

had led them to form an opinion, and virtually all of them had predetermined Mr. Munzanreder was guilty. *Id.*

As one juror said, “there has been so much pretrial coverage that I think that [enters] into it.” 1/13/15 RP 797. Another said, “It’s been plastered all over the news . . . it’s been so widely publicized. There isn’t a person that I know that hasn’t, you know, read or seen something about it.” 1/13/15 RP 812-13. Jurors reported they had heard on television that Mr. Munzanreder had “hired” someone to commit the crime; that his demeanor was guilty; “from what everything I’ve heard it’s guilty”; “the gun” was “stored”; and the car dealership was involved. 1/14/15 RP 923-30, 938-43, 968-71, 976-77. The message from the media, which the jury received loud and clear, was that Mr. Munzanreder was responsible for his wife’s death. *E.g.*, 1/15/15 RP 1041.

v. *Despite care, jury selection was difficult.*

While care was taken during jury selection, the difficulty in ultimately finding an impartial jury places this factor on the scale in favor of a new venue. 150 jurors were summoned. Vol. XII RP 1158-59;

<http://www.kxly.com/news/spokane-news/media-coverage-prompts-carlile-trial-move-to-richland/35341412> (last viewed Mar. 13, 2016); Associated Press, “Murder-for-hire trial moved from Spokane to Richland,” Seattle Times, <http://www.seattletimes.com/seattle-news/murder-for-hire-trial-moved-from-spokane-to-richland/> (Sept. 18, 2015). Here, over 80 percent of the prospective jurors had heard about this case before trial began.

1/12/15 RP 656-57, 708. 128 jurors completed a lengthy questionnaire, which included a page-long section on pretrial publicity and questions about familiarity with people involved in the case. CP 154-63. The court and counsel individually questioned jurors with extensive exposure to pretrial publicity or preformed opinions. *E.g.*, 1/13/15 RP 755-58 (juror 235 read things in the newspaper and heard things from her brother that make her believe the “bastard is guilty as sin”); 1/14/15 RP 923-30 (“Mr. Munzanreder, just his demeanor on television. I don’t know. I formed an opinion.”).

Crudup also looks to the challenges exercised by the defendant in selecting the jury. Mr. Munzanreder made at least seven challenges for cause on six jurors not otherwise excused by the court or agreed upon with the State, with the court rejecting five of the challenges.⁶⁷ By agreement and on the court’s independent judgment, many more jurors were excused for cause.⁶⁸ Mr. Munzanreder and the State also each exhausted the full

⁶⁷ 1/13/15 RP 781-88 (motion on juror 51 denied); 1/13/15 RP 831-41 (motion on juror 29 denied); 1/15/15 RP 1187-89 (second motion on juror 29 denied); 1/15/15 RP 1193 (court *sua sponte* excuses juror 29); 1/13/15 RP 863-74 (motion on juror 89 denied); 1/14/15 RP 967-71 (motion on juror 190 granted); 1/15/15 RP 993-99, 1002-03 (motion on juror 49 denied); 1/15/15 RP 1184-86 (motion on juror 216 granted).

⁶⁸ 1/12/15 RP 652-56 (two jurors excused for involvement with defendant and case); 1/13/15 RP 755-58 (juror 235 excused by agreement based on opinions on case from publicity and friends); 1/13/15 RP 811-15 (juror 21 excused by agreement based on opinions on case from publicity);

nine peremptory challenges, yet the jury still included members who had been immersed in pretrial publicity and concluded Mr. Munzanreder was guilty. *See* 1/15/15 RP 1194; 1/16/15 RP 1216-23; CP 187 (peremptory challenge sheet). Despite efforts, the voir dire process was not sufficient to root out prejudice, counseling in favor of a new venue.

vi. *The State was involved in some of the prejudicial publicity.*

The next factor is that government officials were involved in the dissemination of information. Although the prosecutor told the trial court it was not the source of the publicity, the State did play some role in the inflammatory press. 1/15/15 RP 1103. For instance, the lead prosecutor commented to the press after Mr. Ibanez's plea was entered that Mrs. Munzanreder's family and the Union Gap Police Department supported the deal. Ex. F (Venue-publicity, Ibanez plea, p.6); Ex. I. By drawing on

1/13/15 RP 788-92 (juror 3 excused by court for opinions on case from publicity); 1/13/15 RP 797-801 (juror 11 excused by agreement for opinions from publicity); 1/13/15 RP 874-87 (juror 98 excused by court for involvement in case); 1/14/15 RP 962-63 (juror 168 excused by court for relationship with law enforcement witness); 1/14/15 RP 964-65 (juror 174 excused by court for relationships with people involved in case); 1/14/15 RP 976-78 (juror 239 excused by court for opinions on case from publicity); 1/15/15 RP 987-89 (juror 196 excused by court for relationship with Juan Ibanez); 1/15/15 RP 992 (juror 44 excused by court for relationship with law enforcement witness); 1/15/15 RP 993 (juror 45 excused by court for relationship with law enforcement witness).

the support of the victim's family and law enforcement, the State further poisoned the well against Mr. Munzanreder.

In March 2013, the Yakima County Prosecuting Attorney assured the public, through press that was broadly disseminated, that aggravated murder charges could be filed. Ex. F (Venue-publicity, March 2013 A, pp.45, 46, 48, 51, 52, 54, 56, 57, 60); Ex. F (Venue-publicity, March 2013 B, pp.29, 31); Ex. F (Venue-publicity, Venue in the news, p.23). In fact, the threat of greater charges was reported on the front-page, above-the-fold article in the Yakima Herald on March 8, 2013. Ex. H. The threat to charge an even higher offense gives the impression Mr. Munzanreder was guilty of an even greater offense than that for which he ultimately stood trial, that he should be eligible for the death penalty, and that he ultimately was getting off easy with only a first-degree murder charge. The prosecutor's statements were a poignant complement to the public commentary that Mr. Munzanreder should "hang!!" Ex. F (3.5 public comment, pp.1-1); *accord* Ex. F (Venue-publicity, Venue in the news, p.3 ("Try him and fry him. Next.")).

Thus, the role of the government in the prejudicial press was not neutral.

- vii. *First degree murder is among the most severe charges.*

Finally, *Crudup* directs that courts should look to the severity of the charge when evaluating the denial of a motion to change venue. Murder in the first degree is one of the most severe charges a man can face. *Furman v. Georgia*, 408 U.S. 238, 393 n.18, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); Vol. III RP 228 (court notes “gravity of situation” renders cost concerns a “secondary consideration”). It is second to only aggravated first degree murder in terms of seriousness in this State. *State v. Witherspoon*, 180 Wn.2d 875, 908, 329 P.3d 888 (2014) (citing RCW 9.94A.515). The standard range sentence Mr. Munzanreder faced if found guilty was 240 to 320 months. RCW 9.94A.510. This grave consequence further demonstrates this factor, the severity of the charge, which is a hefty stone on the scale in favor of the change in venue motion.

- viii. *Additional facts show probable prejudice.*

Other facts, not enumerated in *Crudup*, suggest the extent of prejudice here. First, although the presentation of the case took 12 days, the jury deliberated for only about 4 hours. See CP 1510 (trial minutes p.15). The State’s evidence was far from airtight, and the scientific testimony was extensive. See *generally supra* at 14-20 (discussing expert testimony, other suspect evidence, contradictions in Ibanez’s testimony,

and lack of direct evidence). The brevity of the deliberations, in comparison with the length of the trial and the extent of the evidence, strongly suggests the jurors had already made up their minds.

Additionally, the extensively-followed pretrial publicity included information not available at trial. *See Marshall v. United States*, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (2000) (granting new trial where jury exposed to prejudicial evidence excluded at trial); *Sheppard*, 384 U.S. at 360-61 (publicity misrepresented evidence at trial and included evidence not offered at trial). An October 2014 article quoted from a “police affidavit” that was not published to the jury at trial.⁶⁹ CBS affiliate KIMA’s Facebook page linked viewers to the full probable cause statement.⁷⁰ Witness Jacee Brost was excluded from trial but commented online.⁷¹ At least one of the witnesses at trial, A’Lanna Patterson, made comments revealing facts related to the case on KIMA’s public Facebook

⁶⁹ Ex. F (Venue-publicity, Ibanez plea, p.2).

⁷⁰ KIMA Action News, https://www.facebook.com/kimatv/?target_post=10151364807029958&ref=story_permalink (Mar. 6, 2013) (last visited Mar. 13, 2016); *see* Ex. F (Venue-publicity, Venue in the news, pp.16-22).

⁷¹ 1/6/15 RP 601 (excluding Jacee Brost); 1/29/15 RP 2493-94 (ruling affirming exclusion of Jacee Brost); Ex. F (Venue-publicity, March 2013 A, p.16 (commenting on KIMA article, “Pretty sure he helped Juan get the documents showing he was legal because he liked him so much when he was interning at Ford.”)).

page.⁷² Another commenter who purported to know Mr. Ibanez but did not testify at trial wrote, “[Juan Ibanez] told me that his boss Blackmill [sic] him 5 day before he got arrested. He was like a big brother to me.”⁷³ Tom Sparling, the owner of Valley Ford, also commented online but did not testify at trial. Ex. F (Venue-publicity, March 2013 A, p.16 (providing Juan Ibanez’s employment credentials and attesting to Mrs. Munzanreder’s “kindness”)).

The salacious comments did not end there. Mrs. Munzanreder’s sister-in-law condemned Mr. Munzanreder online.⁷⁴ And a woman calling herself Cynthia Munzanreder’s “best friend” also decried Mr. Munzanreder, commenting, “He needs to rot in jail for killing my best friend!! I can not believe I ate with you!! Your name should be JOHN MURDERER!!”⁷⁵

Another factor pointing toward probable prejudice is the presence of media during the trial.⁷⁶ The presence of cameras and journalists in the courtroom can change a juror’s perception of her duty and influence a

⁷² Ex. F (3.5 Public comments, pp.11-13, 16, 19-23).

⁷³ Ex. F (Venue-publicity, Ibanez plea, p.31).

⁷⁴ Ex. F (Venue-publicity, March 2013 A, p.41) (comment by sister-in-law Suzan Kelley).

⁷⁵ Ex. F (Venue-publicity, Venue in the news, p.3).

⁷⁶ 1/16/15 RP 1233-35; 1/20/15 RP 1307; 1/21/15 RP 1504-06, 1551; 1/23/15 RP 1824-25 (court asks media to minimize disruptions); 1/23/15 RP 1983; 1/28/15 RP 2313-17 (defense counsel concerned about effect of cameras on witnesses); 1/28/15 RP 2439-40; 2/2/15 RP 2815-16.

witness's testimony. "Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them." *Estes v. Texas*, 381 U.S. 532, 545, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). Where the weight of the pretrial publicity and public commenting was overwhelmingly against Mr. Munzanreder, it is plain that any pressure the jurors felt to act in view of their friends and neighbors could only harm Mr. Munzanreder's right to a fair trial.

- c. Because all of these circumstances demonstrate the need for a different venue, this case must be remanded for a new trial before an impartial jury.

A jury's verdict must be based upon the evidence developed at trial. *Irvin*, 366 U.S. at 722. The pretrial publicity here convicted Mr. Munzanreder and thwarted his ability to have a fair trial in Yakima County. "[A] juror who has formed an opinion cannot be impartial." *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 155, 25 L. Ed. 244 (1878)). It bears repeating that a showing of actual prejudice is not required. *Stiltner*, 80 Wn.2d at 54-55. Our courts require only a probability of prejudice; it is that threshold that demonstrates an inherently unfair trial. *Id.*

In *Hillman*, our Supreme Court reversed convictions where the trial court improperly denied a change in venue motion. 42 Wash. 615 at 619. In that case, pretrial publicity had been “inflammatory and sensational,” “often with flaring headlines.” *Id.* at 618. Affiants attested that the publicity was “most always unfavorable to the defendants.” *Id.* And this publicity was “widely circulated throughout the county.” *Id.* at 619. The voir dire process further demonstrated “nearly all of the jurymen stated that they had read more or less of these newspaper articles, although the accepted jurors believed that they were not so affected as to prevent them from acting fairly and impartially as jurymen.” *Id.* at 618-19. Our Supreme Court remanded for a new trial, concluding,

The law contemplates and guaranties to every defendant a fair and impartial trial according to the usual and ordinary forms of law; and it is incumbent upon the courts to see that this purpose and guaranty are made effectual. The repeated and continuous publications, hereinbefore referred to, seconded by the efforts of the Hillman Victim Club, as set forth in the affidavits, were well calculated to arouse in the public mind that prejudice and antagonism which the affidavits alleged to have existed against these appellants. We do not think the defendants in a criminal case should be forced to trial in such an environment. The refusal of the court to grant the motion for a change of venue was error.

Hillman, 42 Wash. at 619.

This case bears substantial similarities to *Hillman*. As in *Hillman*, there was extensive pretrial publicity that was inflammatory and

prejudiced against Mr. Munzanreder. This media saturated Yakima County. And like in *Hillman*, voir dire demonstrated the pervasiveness of the publicity. Moreover, many jurors admitted they had already formed an opinion on Mr. Munzanreder's guilt.

On the other hand in *Crudup*, this Court did not find change of venue necessary because the reporting was "noninflammatory, factual reporting of the pretrial criminal procedure," and voir dire "disclosed no specific recollection and little general remembrance of the content of the publicity, so there was no resultant effect upon [the jurors'] ability to fairly try the defendant." 11 Wn. App. at 588-89.

This case is patently distinguishable from *Crudup*. Rather, like in *Stiltner*, the pretrial publicity here "involve[d] a probability that prejudice [would] result" that was borne out in voir dire. 80 Wn.2d at 54. These proceedings must consequently be "deemed inherently lacking in due process." *Id.* The trial court erred by denying Mr. Munzanreder's motion to change venue to a location substantially less saturated by the prejudicial, inflammatory pretrial publicity in Yakima County.

"The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S.

454, 462, 27 S. Ct. 556, 51 L. Ed. 879 (1907). “[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.” *Sheppard*, 384 U.S. at 363. Because there was a probability that the venire was prejudiced against Mr. Munzanreder by pretrial publicity, the trial court denied Mr. Munzanreder due process in denying his motion to change venue. *See, e.g., Crudup*, 11 Wn. App. at 586-87; 2/3/15 RP 3127-28 (based on post-trial conversation with jurors, defense counsel had renewed concern for prejudicial effect of pretrial publicity). The trial court did not guarantee Mr. Munzanreder the presumption of innocence, an impartial jury, or a constitutionally fair trial. These rights require that the conviction be reversed and remanded for a new trial. *See Hillman*, 42 Wash. at 619.

2. In violation of due process and the right to an impartial jury, the voir dire process employed did not root out bias.

Absent a change of venue, constitutional guarantees required a more rigorous voir dire process in order for Mr. Munzanreder to have a fair trial by an impartial jury. Despite the extensive publicity and the presumption of Mr. Munzanreder’s guilt, the trial court followed only the minimum standards for rehabilitation. Neither the process nor the result instills confidence in the impartiality of the jury actually selected.

“The underlying goal of the jury selection process is ‘to discover bias in prospective jurors’ and ‘to remove prospective jurors who will not be able to follow [] instructions on the law,’ and thus, to ensure an impartial jury, a fair trial, and the appearance of fairness.” *State v. Saintcalle*, 178 Wn.2d 34, 76, 309 P.3d 326 (2013) (Gonzalez, J. concurring) (quoting *State v. Davis*, 141 Wn.2d 798, 824-26, 10 P.3d 977 (2000)) (alteration in original). “One primary purpose of the voir dire process is to determine whether prospective jurors harbor ‘actual bias’ and are thus unqualified to serve in the case.” *Saintcalle*, 178 Wn.2d at 77-78 (Gonzalez, J. concurring). This aspect of voir dire is intended to determine whether a juror can “set aside personal beliefs, opinions, or values insofar as is necessary to follow the law and decide the case fairly;” “adjudicate disputed factual issues based solely on the evidence that is allowed and presented at trial;” and “be free from the undue influence of any special relationships or personal interests (even if such relationships or interests do not qualify as implied bias).” *Id.*

Appellate courts “are well qualified to inquire into whether a trial court implemented procedures adequate to keep community prejudices from infecting the jury.” *Skilling*, 561 U.S. at 447 (Sotomayor, J. concurring in part and dissenting in part).

Minimal rehabilitation procedures are simply not robust enough to root out bias in a case like Mr. Munzanreder's. "[J]urors may not fully appreciate or accurately state the nature of their own biases." *Saintcalle*, 178 Wn.2d at 78 (Gonzalez, J., concurring). Prejudice "may go unrecognized in those who are affected by it." *United States v. McVeigh*, 918 F. Supp. 1467, 1472 (W.D. Okla. 1996). Therefore, "a juror's mere assertion that she or he is impartial . . . is not dispositive." *Id.* "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." *Irvin*, 366 U.S. at 727. The United States Supreme Court recognizes, "Jurors cannot be expected invariably to express themselves carefully or even consistently." *Patton*, 467 U.S. at 1039.

[D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many 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 v. Witt, 469 U.S. 412, 424-25, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

The extensive, provocative pretrial publicity and the community's response to it indicate heightened standards were required to seat an

impartial jury here. We also know that over 80 percent of Mr. Munzanreder's venire had been exposed to the publicity, including the passions and purported facts not admitted at trial. These are simply the admitted facts. "In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question." *Murphy v. Florida*, 421 U.S. 794, 803, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975). In this context, "jurors' assurances of impartiality simply are not entitled to [a] sort of talismanic significance." *Skilling*, 561 U.S. at 457-58 (Sotomayor, J. concurring in part and dissenting in part).

Where extrajudicial activity suggests outside influence and information lurks in the minds of the venire, voir dire is not well-suited to single out actual prejudice. *Stiltner*, 80 Wn.2d at 54-55. Counsel is justifiably loath to pressure a juror to recall the negative publicity that jeopardizes her client's rights to a fair and impartial jury. *Id.* Similarly, while rehabilitation through a few questions likely to receive an affirmative response may be sufficient to show a threshold lack of "actual prejudice," the probability of subconscious and pervasive prejudice in that juror and the others on the panel remains. Justice Chambers in dissent in *Saintcalle* also recognized the fallibilities of the for-cause process, noting jurors' "deep seated prejudices may not be easily developed during voir

dire to support a for-cause challenge.” 178 Wn.2d at 119 (Chambers, J., dissenting).

“Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial.” *Mu’Min v. Virginia*, 500 U.S. 415, 440, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991) (Marshall, J. dissenting) (quoting *United States v. Dellinger*, 472 F.2d 340, 375 (7th Cir. 1972)). A “juror may have an interest in concealing his own bias ... [or] may be unaware of it.” *Smith v. Phillips*, 455 U.S. 209, 221-22, 102 S. Ct. 940, 948, 71 L. Ed. 2d 78 (1982) (O’Connor, J., concurring).

Jurors’ responses are difficult to trust also because impartiality is a mixed question of law and fact. A prospective juror cannot be presumed to understand the important legal meaning of bias, fairness or impartiality. For this reason too, a juror’s affirmative response that she can be “fair and impartial” cannot simply be taken at face value. *Mu’Min*, 500 U.S. at 442-43 (Marshall, J. dissenting); accord *State v. Patterson*, 183 Wash. 239, 246, 48 P.2d 193 (1935).

The very heart of the deliberative process requires more careful protection. “The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an

attribution to something not included in the evidence.” *Skilling*, 561 U.S. at 463-64 (Sotomayor, J. concurring in part and dissenting in part) (quoting *McVeigh*, 918 F. Supp. at 1472).

Studies prove that bias cannot be determined by asking a juror yes or no questions. A telling study was examined in *Saintcalle*. “In a carefully designed experiment, researchers found that when offered a choice of two rooms in which movies were playing, people avoided the room with a handicapped person, but only when doing so could masquerade as a movie preference.”⁷⁷ When prejudice was exposed to others, people went to extreme lengths to hide their true state. As Justice Wiggins explained, “when offered outright the choice of sitting next to a handicapped or nonhandicapped person, people [in this experiment] chose to sit by the handicapped person to conceal their prejudice.” 178 Wn.2d at 49.

⁷⁷ *Saintcalle*, 178 Wn.2d at 49 (quoting Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington’s Criminal Justice System (2011) (citing Melvin L. Snyder et al., *Avoidance of the Handicapped: An Attributional Ambiguity Analysis*, 37 J. Personality & Soc. Psychol. 2297, 2297, 2304 (1979))). The Task Force report is available at <http://www.law.seattleu.edu/Documents/korematsu/race%20and%20criminal%20justice/preliminary%20report%20-%20final%20release%20march%201%202011%20for%20printer%20.pdf>.

Accepting a prospective juror's spontaneous assurance to be fair and impartial does not resolve pervasive prejudice. Jurors with predetermined opinions—most of whom have never sat through a criminal trial or been tasked with determining another's life and liberty—cannot be presumed to fairly assess their own ability to set those opinions aside.

Three jurors who entered the courtroom with a predetermined belief from pretrial publicity that Mr. Munzanreder was guilty actually sat on the jury.⁷⁸ Juror 51 is a former corrections officer familiar with the case from the media. 1/13/15 RP 781. He had formed the opinion that Mr. Munzanreder “was the responsible one. . . . That’s what the paper was telling you.” 1/13/15 RP 783-84. It would be up to the evidence to change Juror 51’s mind. 1/13/15 RP 784. The court asked, “Can you be fair and unbiased in this case?” To which Juror 51 responded, “I believe I could.” 1/13/15 RP 786. The defense motion to dismiss for cause was denied. 1/13/15 RP 786-88.

Juror 59 formed the opinion from what he had read that “this was a violent crime and justice needs to be served appropriately.” 1/13/15 RP 769-70. He tends to believe what sees in the news. CP 1250

⁷⁸ 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).

(questionnaire for juror 59, p.9). But he also said “All statements need to be heard for me to form a solid opinion of guilt or innocence.” 1/13/15 RP 770. His opinion was “not set in stone.” 1/13/15 RP 770. He answered the court affirmatively that he could follow instructions and be fair and unbiased to both sides. 1/13/15 RP 771. Once he was prompted by the court that his decision as a juror would be based on evidence that has not been presented yet, he said he would not be able to definitively vote on guilt or innocence now. 1/13/15 RP 771-72.

Juror 19 looks at the internet, newspapers, radio and television. 1/13/15 RP 801. He had formed an opinion from what he saw about this case that Mr. Munzanreder was guilty. 1/13/15 RP 801-03.

THE COURT: . . . You said that, in answer to question 39, you have formed opinions about this case.

JUROR NO. 19: From what I already known I had formed an opinion, yes.

THE COURT: What is that opinion? Again, keep in mind you haven't heard any evidence about anything.

JUROR NO. 19: No, I haven't been part of the case, just from what I've read.

THE COURT: What is that opinion?

JUROR NO. 19: I thought he was guilty.

THE COURT: From what you have read?

JUROR NO. 19: Just based on the news media.

THE COURT: Just based on the news media?

JUROR NO. 19: Just based on the articles I've read, yeah.

1/13/15 RP 802-03. In response to questioning about his ability to act fairly and impartially in individual voir dire, he said his opinion was not “set in stone. . . . I think you can change my mind. . . . but you would have to change my mind.” 1/13/15 RP 803-04. He would “certainly try” to afford Mr. Munzanreder the presumption of innocence and base his decision just on the evidence. 1/13/15 RP 804-06. “I could make that commitment.” 1/13/15 RP 803-06. Eventually he said in response to the court that he would only consider the evidence presented in the courtroom and will follow the court’s instructions, right before he asked “Am I done?” 1/13/15 RP 809-10.

Juror 33, another seated juror, “read the newspaper article stating that the defendant hired a co-worker to commit the crime.” CP 1080 (questionnaire p.9). Juror 33 reported she had not formed an opinion about this case, but she generally believes what she reads in the newspaper. *Id.*

These jurors sat on Mr. Munzanreder’s jury and determined his liberty. The questioning of jurors who were eventually struck also shows the fallibility of the process. For example, Mr. Munzanreder moved to

strike juror 29 for cause twice, each challenge being denied by the court. Eventually, however, juror 29 got emotional enough that the court decided to excuse her. 1/13/15 RP 831-41 (motion on juror 29 denied); 1/15/15 RP 1187-89 (second motion on juror 29 denied); 1/15/15 RP 1193 (court *sua sponte* excuses juror 29). It is fortuitous, in the case of juror 29, that she broke down during voir dire. The court recognized her inability to sit impartially on Mr. Munzanreder's jury due to her interactions with members of Mrs. Munzanreder's family before it was too late. But how many other veniremen and women were capable of the same response, due to relationships with people involved in the case or exposure to publicity, yet happened not to show it during voir dire? *See, e.g.*, 1/13/15 RP 863-74 (motion on juror 89 denied despite relationship with law enforcement); 1/15/15 RP 993-99, 1002-03 (motion on juror 49 denied) (same).

Due process required more protection from latent prejudice and actual bias than in the typical criminal case. Here, a twenty year minimum sentence was at issue. Continuous pretrial publicity had saturated the community, and we know it saturated the venire. By narrowly applying the test for excusal, the trial court denied Mr. Munzanreder a fair trial before an impartial jury. The process was so flawed that after numerous jurors were excused for cause by the court or by agreement, and several of Mr. Munzanreder's motions were denied, and after he and the State

exercised all peremptory challenges, three jurors who had already opined on his guilt were seated on his jury. The end result cannot be said to have constituted a fair trial because the process did not enable the parties to seat an impartial jury. Reversal is required.

3. Our state constitution protects the right to an impartial jury even more broadly than the federal constitution.

The Washington State Constitution broadly protects the right to an impartial jury in all criminal trials. Article 1, section 21 provides: “The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record.” Article 1, section 22 provides: “[i]n criminal prosecutions the accused shall have the right . . . to . . . trial by an impartial jury.”

The Washington Constitution provides greater protection for jury trials than is provided in the federal constitution. *E.g.*, *City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) (“It is evident, therefore, that the right to trial by jury which was kept “inviolate” by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789.”); *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003); *State v. Pierce*, 134 Wn. App. 763, 770, 773, 142 P.3d 610 (2006). “From the earliest history of this state, the

right of trial by jury has been treasured, and this right has been protected.”
City of Pasco, 98 Wn.2d at 99.

In contrast to the language of our state constitution, the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury.”

Our courts look to six nonexclusive criteria for determining whether, in a given situation, the Washington State constitution extends broader rights to its citizens than does the United States constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). These nonexclusive factors are (1) textual language, (2) differences between the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. *Id.* at 58, 65-67.

The first and second criteria show this State more broadly protects the jury trial right. There are significant differences in the language of the pertinent provisions of the state and federal constitutions. *City of Pasco*, 98 Wn.2d at 97. The Washington Constitution holds the right to a jury trial “inviolable.” “The term ‘inviolable’ connotes deserving of the highest protection.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989); *accord Smith*, 150 Wn.2d at 150 (“inviolable” means pure, unbroken, untouched). This language emphasizes the importance of the right and is without federal counterpart. *State v. Brown*, 132 Wn.2d 529,

595, 940 P.2d 546 (1997). We also provide for the right in two distinct provisions, article 1, sections 21 and 22. This structure further “indicates the general importance of the right under our state constitution.” *Smith*, 150 Wn.2d at 151. While not on point for the scope of the right to an impartial jury trial, additional distinctions show Washington’s right to a jury trial to be more expansive. For example, article 1, section 21 confers on the Legislature power to provide for juries of less than 12 in courts not of record. There is no similar provision in the federal constitution. *City of Pasco*, 98 Wn.2d at 97.

Next, the *Gunwall* factors examine state constitutional history to determine the scope of the right to an impartial jury. Our drafters strongly believed in the inviolate right to an impartial jury. One drafter “devoted more commentary to his proposed [jury trial] provision than to any other right contained in his proposed bill of rights.” Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 46 (2d ed. 2013). There were no successful changes to article 1, section 21. Beverly Paulik Rosenow, ed., *The Journal of the Washington State Constitutional Convention 1889*, 491, 510 (1999).⁷⁹ Section 22, on the other hand, was initially proposed without the “impartial” jury requirement. *Id.* at 511. This was amended to

⁷⁹ Available at <http://lib.law.washington.edu/waconst/Sources/Rosenow.pdf>.

ensure the right to a jury included the right to an impartial jury by amendment 10 approved in 1922. Laws of 1921, p.79, § 1. Although not included in the original text, impartiality was always a core principal in Washington. Our Supreme Court noted years ago that this State has “always insisted that a guarantee of a speedy and public trial by an impartial jury under Const. art. 1, s 22, both before and after its change by the Tenth Amendment, means a fair trial.” *Stiltner*, 80 Wn.2d at 53.

Preexisting state law demonstrates Washington’s history of providing greater protection for the right to trial by an impartial jury than available federally. *City of Pasco*, 98 Wn.2d at 97-99 (From the earliest days, misdemeanors and violations of municipal ordinances were tried by juries in Washington, whereas the federal constitutional right was applied more narrowly.) (discussing *Callan v. Wilson*, 127 U.S. 540, 8 S. Ct. 1301, 32 L. Ed. 223 (1888)).

Preexisting state law also shows the process for impaneling an impartial jury was enshrined early in our history. Article 1, section 21 preserved the scope of the right to a jury trial as it existed at the time of adoption. *Sofie*, 112 Wn.2d at 645. That is part of the meaning of the jury trial right remaining “inviolable.” Our State has long protected the right to for-cause and peremptory challenges. Hill’s General Statutes 1891, §§ 340-52 (providing for peremptory and for-cause challenges based on

implied and actual bias). The right to a jury trial on the determination of guilt was also protected by the Code of 1881. *E.g.*, *State v. Williams-Walker*, 167 Wn.2d 889, 914, 225 P.3d 913 (2010) (Fairhurst, J. dissenting); *Smith*, 150 Wn.2d at 153-55.

The case of *State v. Coella* is also instructive on the above two factors. 3 Wash. 99, 28 P. 28 (1891). In a trial for murder, the trial court denied defendant's challenge for cause to a juror who stated the deceased "was in his employ. Heard and read of case in newspaper. Was so horrified at the murder that it made me sick. Have formed and expressed an opinion which would require evidence to remove. Would try the case on the evidence and the law." *Id.* at 103. On appeal, the court found the challenge for cause should have been granted on the grounds of actual and implied bias. *Id.* The juror's statement that "he would try the case upon the evidence and the law does not amount to" an assertion that he could "disregard the opinion he had formed." *Id.* at 103-04. The hasty examination of the juror was insufficient and "his testimony is very unsatisfactory to show his ability to give the defendant a fair and impartial trial." *Id.* at 104.

Likewise, in *State v. Wilcox*, 11 Wash. 215, 39 P. 368 (1895), our Supreme Court reversed a conviction based on the trial court's failure to exclude for actual bias.

The court in this case, as usual in such cases, finally elicited the statement from the juror that he thought he could lay this opinion aside, and try the case upon the evidence produced at the trial; but we do not think that this question of capability should be submitted to a juror who has already stated that he has an opinion, and such an opinion as it would take evidence to remove. . . . If reading reports of the commission of crime in newspapers produces the impression on minds of jurors that this juror declared it did on his, and such jurors are pronounced by the courts to be competent, then the practical result will be that men will be tried and convicted by the newspapers, instead of by the testimony which is adduced in court

Wilcox, 11 Wash. at 221-22. Confirming the constitutional protection this State afforded even at that time, the Court declared, “Courts always are and should be loath to disturb the verdicts of juries for errors of this kind, but it is the constitutional right of every citizen to be tried by an impartial jury, and, when that right is denied, he must have redress.” *Id.* at 223.

The Court further noted that the charge of murder in the first degree for an offense that caused public outrage provided “the strongest reason for according him a trial by an impartial and unprejudiced jury, totally uninfluenced by public sentiment,—a jury every member of which could without question pass upon his guilt or innocence solely and exclusively from the testimony presented at the trial.” *Id.* It is apparent that our State would have protected Mr. Munzanreder’s right to an impartial jury had he been on trial or appeal in the 1890s. The same should be true now.

The fifth *Gunwall* factor—the structural distinctions between the two constitutions—generally compels a broader interpretation of our State’s constitution. *E.g.*, *Gunwall*, 106 Wn.2d at 66-67.

The final *Gunwall* criterion—whether the means of ensuring the right to an impartial jury in criminal cases is a matter of particular state or local concern—compels separate application of our State’s constitution. The procedure through which to guarantee this “inviolable” right, within limits, should be left to our State (and other states) to determine independently of the federal government. There is no need for national uniformity here. *See Smith*, 150 Wn.2d at 152 (holding that providing jury trials for adults is matter of local concern). The United States Supreme Court recognizes that this is a matter of state concern. *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). It has said, for example, “The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community.” *Id.*

On the whole, the *Gunwall* factors demonstrate Mr. Munzanreder’s right to a fair trial by an impartial jury is more broadly protected by the State constitution. For this reason, in addition to those set forth in Sections one and two, *supra*, a new trial is required.

4. The jury instructions created a conflict between murder in the first degree and the lesser-included offense of murder in the second degree, depriving Mr. Munzanreder of due process.

Jury instructions are erroneous if they mislead the jury. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Jury instructions “must [do] more than adequately convey the law.” *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). The instructions also must make the applicable legal standard “manifestly apparent to the average juror.” *Id.* (quoting *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)).⁸⁰

The “to convict” instruction, in particular, serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Where the to-convict instruction “purport[s] to include all the essential elements of the crime[,]” the court “[i]n effect . . . furnished a yardstick by which the jury were to measure the evidence in determining appellant’s guilt or innocence of the crime charged.” *State v. Emmanuel*, 42 Wn.2d 799, 817, 819, 259 P.2d 845 (1953). Therefore, it is “not a sufficient answer to say that the jury could have supplied the omission of this element . . . by reference to the other instructions.” *Id.*; accord *Smith*, 131 Wn.2d at 262-63. Jurors also are entitled to presume that each instruction has meaning.

⁸⁰ This Court reviews de novo alleged jury instruction errors. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010).

State v. Hutchinson, 135 Wn.2d 863, 884, 959 P.2d 1061 (1998). “It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” *Smith*, 131 Wn.2d at 263.

The State charged Mr. Munzanreder with first degree murder. CP 5 (information). On the State’s request at trial, and over Mr. Munzanreder’s objection, the trial court instructed the jury on second-degree murder as a lesser-included offense. CP 111 (jury instruction); 2/3/15 RP 2928-38, 2940, 2958 (discussion of instruction); 2/3/15 RP 2966-68 (to-convict instructions read to jury). The two instructions are inconsistent on an element that should be identical between them.

The to-convict instruction for murder in the first degree lists the elements as:

- (1) That on or about February 28, 2013, the defendant or an accomplice acted with intent to cause the death of Cynthia C. Kelley-Munzanreder;
- (2) That the intent to cause the death was premeditated;
- (3) That Cynthia C. Kelley-Munzanreder died as a result of the defendant’s **and/or an accomplice’s acts**; and
- (4) That any of these acts occurred in the State of Washington.

CP 110 (emphasis added). On the other hand, the to-convict instruction for the lesser-included offense, murder in the second degree, lists the elements as:

- (1) That on or about February 28, 2013, the defendant or an accomplice acted with intent to cause the death of Cynthia C. Kelley-Munzanreder;
- (2) That Cynthia C. Kelley-Munzanreder died as a result of the defendant's **or an accomplice's acts**; and
- (3) That any of these acts occurred in the State of Washington.

CP 113. Thus, 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. For murder in the second degree, however, the jury only could have convicted Mr. Munzanreder if it found her death was caused by either Mr. Munzanreder's actions or his accomplice's actions, but not a combination of both.

Because jurors are entitled to presume that each instruction has meaning, it cannot be argued that the jurors should not have imbued meaning into the distinction between the elements in these instructions. *Hutchinson*, 135 Wn.2d at 884. Moreover, "the standard for clarity in a jury instruction is higher than for a statute." *LeFaber*, 128 Wn.2d at 902. A jury lacks the interpretive tools of trained jurists, "and thus requires a

manifestly clear instruction.” *Id.* An instruction is manifestly clear only if it leads to no ambiguity. *Id.* at 902-03.

At best, the instructions here are ambiguous as to whether the same standard is required for murder one and murder two. *Compare* CP 110 with CP 113; *see State v. Kozey*, 163 Wn. App. 692, 696, 334 P.3d 1170 (2014) (in performing statutory interpretation, courts first look to the text of the provision at issue and related provisions). But given that the jurors are entitled to presume each instruction has meaning, the differences between the instructions cannot be read out or glazed over. *Cf.* 2/3/15 RP 2977-78 (prosecutor’s closing argument emphasizes the importance of each instruction). Nothing in either instruction compels the jury to conclude that despite the different language, the two elements should be interpreted identically. *See LeFaber*, 128 Wn.2d at 902-03.⁸¹

It is true that the jury was instructed to consider murder in the first degree first, and to move on to murder in the second degree only if the jury could not agree or believed Mr. Munzanreder was not guilty of first-degree murder. CP 111. However, the jury might have been deadlocked

⁸¹ While under principles of statutory interpretation, this Court might take additional steps to interpret these provisions if they appeared in a statute, as noted, the jury lacks these interpretive tools. *See Kozey*, 163 Wn. App. at 696 (discussing interpretation of “and” versus “or” when used in statute); *LeFaber*, 128 Wn.2d at 902-03 (instructions must be models of clarity because jurors lack interpretive tools).

on murder in the first degree and moved on to second degree murder only to find that the linguistic distinction in the second element prohibited them from finding Mr. Munzanreder and Mr. Ibanez's conduct together resulted in Mrs. Munzanreder's death. As a result, the jury might have returned to murder in the first degree and then had enough votes to convict Mr. Munzanreder of that crime.

A jury instruction that misstates the law amounts to a violation of due process. *See* U.S. Const. amend. XIV; Const. art. I, § 3; *LeFaber*, 128 Wn.2d at 900. "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. The conflicting to-convict instructions require reversal.

5. The judgment and sentence contains two clerical errors.

The Court should remand for the trial court to correct two clerical errors in the judgment and sentence. First, the State charged Mr. Munzanreder with a firearm enhancement. CP 5. The jury found that enhancement, and the court imposed the same. 2/3/15 RP 3130, 3131; CP 124, 131, 132. While the text of the judgment and sentence reflects a firearm enhancement, the statutory citations are to provisions relating to a "deadly weapon" enhancement. CP 131 (citing RCW 9.94A.510; RCW 9.94A.825). These citations are incorrect and should be fixed.

The second error is in the date of verdict. Although the jury returned its verdict on February 4, 2015, the judgment and sentence states Mr. Munzanreder was found guilty on February 2, 2015. *Compare* CP 131 *with* CP 122-25; 2/3/15 RP 3075, 3077-80. This error should also be corrected on remand.

6. If the State substantially prevails on appeal despite the above errors, this Court should decline to award appellate costs.

If, despite the above errors, the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. RAP 14; *see* RAP 1.2(a), (c); RAP 2.5. Due to Mr. Munzanreder's lengthy sentence, imposed at age 45, and indigence, the lower court waived all non-"mandatory" costs. 2/3/15 RP 3131-35; CP 126-27, 134. Those same facts counsel against burdening Mr. Munzanreder with appellate costs. *See* CP 1487-92 (motion and order of indigency for appeal).

The award of costs on appeal to the substantially prevailing party is entirely discretionary with this Court. RCW 10.73.160(a); RAP 1.2(a), (c); RAP 2.5; RAP 14.1(a), (b); *State v. Sinclair*, __ Wn. App. __, 2016 WL 393719, *2 (Jan. 27, 2016); *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015); *Blazina*, 182 Wn.2d at 841 (Fairhurst, J. concurring). In fact, the relevant statutes and constitutional provisions counsel against the award of costs against indigent defendants like Mr. Munzanreder.

U.S. Const. amend. XIV; Const. art. I, § 3; RCW 10.01.160(3) (costs should only be awarded against those who have likely ability to pay); *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) (upholding Oregon costs statute that required inquiry into ability to pay and prohibited imposing costs against those who could never repay); *Blazina*, 182 Wn.2d at 830, 837-38; *id.* at 834, 837 (discussing “significant disparities” and inconsistencies in imposition and administration of costs); RCW 9.94A.010(3) (requiring sentencing consistency); *see* GR 34(a).

Consequently, this Court should not assess costs against Mr. Munzanreder. *See Sinclair*, 2016 WL 393719, at *5-7.

F. CONCLUSION

Prejudicial publicity cannot simply be effaced from the minds of jurors, even if they affirm their ability to be fair. The continuous, inflammatory pretrial publicity surrounding this case precluded Mr. Munzanreder from having a fair trial by an impartial jury in Yakima County. A new venue was required by the state and federal constitutions. In the alternative, the procedures used to select a constitutional jury from the venire needed to be more rigorous, in light of the salacious media reports and online comments for the 22 months preceding the trial.

The Court should also reverse because the two to-convict instructions were contradictory and ambiguous. Finally, barring retrial, the Court should correct the errors in the judgment and sentence.

DATED this 16th day of March, 2016.

Respectfully submitted,

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **OPENING 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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SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF MARCH, 2016.

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