

FILED  
DEC 14, 2016  
Court of Appeals  
Division III  
State of Washington

NO. 339581

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

---

STATE OF WASHINGTON

Respondent

vs.

FRANCISCO J. RESENDEZ- MIRANDA,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FO BENTON COUNTY  
The Honorable Bruce A. Spanner

---

**AMENDED APPELLANT'S OPENING BRIEF**

---

TANESHA LA'TRELLE CANZATER  
Attorney for Appellant  
Post Office Box 29737  
Bellingham, Washington 98228-1737  
(360) 362-2435

## TABLE OF CONTENTS

I. <u>ASSIGNMENTS OF ERROR</u> .....	1
II. <u>ISSUES PRESENTED</u> .....	1
III. <u>STATEMENT OF THE CASE</u> .....	1
<u>Substantive Facts</u> .....	1
<u>Procedural Facts</u> .....	1
IV. <u>ARGUMENT</u> .....	12
A. THE AUTOPSY PHOTOGRAPH OF THE FETUS IN UTERO WAS UNNECESSARY TO PROVE THE AGGRAVATING FACTOR AND LIKELY CREATED PREJUDICE.....	12
B. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE DEFENSE, EVIDENCE WAS ENOUGH FOR THE JURY TO INFER SOMETHING OTHER THAN PREMEDITATION.....	16
1. <u>The court denied Mr. Miranda his statutory right to            present a lesser-included instruction to the jury</u> .....	16
2. <u>Without a lesser-included instruction, the jury no choice            but to convict Mr. Miranda of first-degree            aggravated murder</u> .....	17
3. <u>Mr. Miranda was entitled to a lesser-included instruction</u> .....	17
C. THE STATE WAS NOT ENTITLED TO AN ACCOMPLICE LIABILITY INSTRUCTION BECAUSE EVIDENCE DID NOT PROVE MR. MIRANDA PLAYED A MAJOR PART IN THE EVENTS THAT LEAD TO THE MURDERS .....	21

V. CONCLUSION ..... 24



## **TABLE OF AUTHORITIES**

### United States Supreme Court Decisions

<u>Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) .....</u>	22
---	----

### Washington State Supreme Court Decisions

<u>State v. Adams, 76 Wash.2d 650, 656, 458 P.2d 558 (1969), rev'd on other grounds, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971).....</u>	13, 14
<u>State v. Berlin, 133 Wash.2d 541, 947 P.2d 700 (1997) .....</u>	16
<u>State v. Blair, 117 Wash.2d 479, 816 P.2d 718 (1991).....</u>	18
<u>State v. Brown, 147 Wash.2d 330, 340, 58 P.3d 889 (2002) .....</u>	22
<u>State v. Condon, 182 Wash.2d 307, 316, 343 P.3d 357, 361 (2015).....</u>	17, 19, 20
<u>State v. Crenshaw, 98 Wash.2d 789, 806, 659 P.2d 488 (1983).....</u>	13, 14
<u>State v. Davis, 121 Wash.2d 1, 4, 846 P.2d 527 (1993).....</u>	16
<u>State v. Fernandez-Medina, 141 Wash.2d 488, 455-56, 6 P.3d 1150 (2000) .....</u>	18, 19
<u>State v. Finch, 137 Wash.2d 792, 813, 975 P.2d 967, 982 (1999).....</u>	14
<u>State v. Fowler, 114 Wash.2d 59, 67, 785 P.2d 808 (1990).....</u>	18
<u>State v. Gamble, 154 Wash.2d 457, 462-63, 114 P.3d 646, 648 (2005) ...</u>	16
<u>State v. Henderson, 182 Wash.2d 734, 736, 344 P.3d 1207, 1208 (2015).....</u>	17
<u>State v. Hill, 123 Wash.2d 641, 870 P.2d 313 (1994).....</u>	23
<u>State v. Lord, 117 Wash.2d 829, 870, 822 P.2d 177, cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).....</u>	13, 14

<u>State v. Lord</u> , 161 Wash.2d 276, 283-84, 165 P.3d 1251 (2007) .....	13
<u>State v. Mak</u> , 105 Wash.2d 692, 718 P.2d 407 (1986).....	23
<u>State v. Parker</u> , 102 Wash.2d 161, 683 P.2d 189 (1984).....	19
<u>State v. Rhinehart</u> , 92 Wash.2d 923, 927, 602 P.2d 1188 (1979).....	16
<u>State v. Roberts</u> , 142 Wash.2d 471, 505, 14 P.3d 713 (2000).....	23, 25
<u>State v. Speece</u> , 115 Wash.2d 360, 362-63, 798 P.2d 294 (1990).....	18, 19
<u>State v. Vidal</u> , 82 Wash.2d 74, 80, 508 P.2d 158, 162 (1973).....	12
<u>State v. Walker</u> , 136 Wash.2d 767, 771, 966 P.2d 882 (1998).....	16
<u>State v. Workman</u> , 90 Wash.2d 443, 447-48, 584 P.2d 382 (1978) ...	17, 18
<u>State v. Yates</u> , 161 Wash.2d 714, 768, 168 P.3d 359, 389 (2007).....	12, 14

Washington State Court of Appeals Decisions

<u>State v. Chase</u> , 134 Wash.App. 792, 803, 142 P.3d 630 (2006).....	22
<u>State v. Cuthbert</u> , 154 Wash.App. 318, 341, 225 P.3d 407, 420 (2010) ...	22
<u>State v. Mee Hui Kim</u> , 134 Wash.App. 27, 41-42, 139 P.3d 354 (2006).....	22
<u>State v. Lyons</u> , 96 Wash.App. 447, 450, 979 P.2d 926 (1999).....	16
<u>State v. Stackhouse</u> , 90 Wash.App. 344, 357-58, 957 P.2d 218, 225-26 (1998).....	13
<u>State v. Teal</u> , 117 Wash.App. 831, 843, 73 P.3d 402, 409 (2003), <i>aff'd</i> , 152 Wash.2d 333, 96 P.3d 974 (2004) .....	25
<u>State v. Trujillo</u> , 112 Wash.App. 390, 400-01, 49 P.3d 935, 941 (2002), <i>as amended</i> (Aug. 2, 2002).....	22
<u>State v. Whitaker</u> , 133 Wash.App. 199, 233, 135 P.3d 923, 940 (2006) ..	23

Revised Code of Washington

<u>RCA 9A.32.030(1)(a)</u> .....	17
<u>RCW 9A.32.050</u> .....	17
<u>RCW 10.61.006</u> .....	16

Washington State Pattern Instructions

<u>11 Wash Prac. Pattern Jury Instr. Crim. WPIC 10.51 (4<sup>th</sup> Ed.)</u> .....	23
<u>5 Wash. Prac. Pattern Jury Instr. Evidence Law and Practice</u> <u>§402.24 (6<sup>th</sup> ed.)</u> .....	13

I. ASSIGNMENTS OF ERROR

1. The trial court aroused the jury's passion and created prejudice when it allowed the state to introduce autopsy photographs of a fetus in an open womb.
2. The trial court abused its discretion when it denied the defense's request to instruct the jury on the lesser-included offense. (Defendant's Proposed Jury Instructions; CP 12-30)
3. The trial court erred when it allowed the state to include an accomplice liability instruction. (Jury Instruction #9; CP 31-67)

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it allowed the state to present autopsy photographs of a dead fetus in utero to prove an aggravating factor, when the state could have relied on testimony instead? (Assignment of Error 1)
2. Did the trial court abuse its discretion when it denied the defense's request to instruct the jury on the lesser-included offense? (Assignment of Error 2)
3. Did the trial court abuse its discretion when it allowed the state to include an accomplice liability instruction, without proving who the major participant was in activities that lead to the murders? (Assignment of Error 3)

III. STATEMENT OF THE CASE

Substantive facts

A farmworker discovered the bodies of David Saucedo Perez (David) and Abigail Renteria Torres (Abigail), next to a truck, in a corn field, on a remote area of a farm. 11/4/15 RP 555; 11/4/15 RP 453; 11/4/15 RP 412; 11/4/15 RP 414. The first detective to arrive at the scene discovered a third body situated in corn stalks some

distance away. 11/4/15 RP 454. That body was later identified as Victoria Torez (Victoria). 11/4/15 RP 455.

David sustained two gunshot wounds to the head. 11/6/15 RP 771. A pathologist surmised from gunpowder residue around the wounds, the gun used to kill David was either near or touching his scalp when it discharged. 11/6/15 RP 778. The first gunshot wound would have caused a concussion. The second wound would have killed him immediately. 11/6/15 RP 778.

Abigail sustained a gunshot wound to her right cheek which passed through the cheek and settled in the most vital area of her brain. A pathologist concluded once the bullet hit that part of the brain, she would have lost consciousness and would have died immediately. 11/6/15 RP 783. Because there was little gunpowder residue around the wound, the gun used to kill Abigail could have been either a couple of feet or 200 feet away when it discharged. 11/6/15 RP 785. When the coroner rolled Abigail's body at the scene, the detective noticed significant movement in her belly and presumed she was pregnant. 11/4/15 RP 452.

The pathologist later confirmed Abigail was pregnant with a developed baby. 11/6/15 RP 786. The baby's size, at 16 inches long and three pounds six ounces, seemed to correlate with Abigail's small frame. From the way Abigail's abdomen protruded, a person could have told she was pregnant. 11/6/15 RP 788-89.

Victoria sustained a gunshot wound, to the right side of her neck. Given there was no gunpowder residue around the wound, the pathologist surmised the gun used to shoot Victoria was more than two feet away when it discharged. 11/6/15 RP 791-93. The pathologist opined from how the bullet passed through her neck, it was likely she

turned to look at the person who shot her as she ran away. 11/6/15 RP 795. The gunshot wound would not have caused Victoria to lose consciousness. 11/6/15 RP 794. So if she tried to run away from the person who shot her, the gunshot would not have stopped her.

But, Victoria sustained injuries other than the gunshot wound. 11/6/15 RP 795. She had a complex assortment of neck injuries that were consistent with a belt pulled tightly around her neck from behind. 11/6/15 RP 797. There were also circular areas on her neck consistent with which, as if the rosary beads she wore were pressed against her neck or if a belt was applied tightly over the beads. 11/6/15 RP 797. The pathologist rendered another explanation for the circular areas. In addition to a belt placed over the rosary and tightened, the person grabbed the rosary from behind and used it to strangle her. 11/6/15 RP 800. As to whether or not the gunshot wound or the strangulation caused Victoria's death, the pathologist concluded, she sustained an injury from one method, but death was hastened by the other. 11/6/15 RP 801.

A firearms and tool marks forensic scientist examined bullet casings recovered during the investigation. He opined revolvers and .357 Magnums can fire .357 Magnum caliber ammunition and .38 Special caliber ammunition, so the bullets could have been fired from Ruger, Smith & Wesson and Taurus revolvers, .357 Magnums, and .38 Special calibers and FN Smith & Wesson pistols in nine millimeter Luger caliber. 11/6/15 RP 824-827, 11/6/15 RP 829. Based on the evidence, there could have been more than one caliber weapon used to kill David, Abigail, and Victoria. 11/18/15 RP 2035-36.

Detectives zeroed in on Francisco J. Resendez-Miranda (Mr. Miranda). Cristian Hurtado (Hurtado), an ex-convict, who testified for the state at Mr. Miranda's trial, told police Mr. Miranda confessed to the killings. Hurtado worked at the same farm as David and the Miranda family- Mr. Miranda, his two brothers, and his father. 11/13/15 RP 1219. Hurtado told police Mr. Miranda shot David once. David did not fall after the first shot, so he shot him again. Hurtado also told police Mr. Miranda claimed one of the girl's did not die after she was shot, so he and his father finished her with a belt. 11/13/15 RP 1283. Detectives found out later Hurtado owned a .45 caliber handgun. 11/10/15 RP 1065.

Archivaldo Marquez (Marquez) also worked at the farm. 11/16/15 RP 1454-55. He told police Mr. Miranda borrowed his .38 caliber handgun. When he retrieved the gun the next day, he noticed blood spatter and something white around the barrel. He freaked out and threw the gun over a bridge. 11/16/15 RP 1461-62; 11/13/15 RP 1325-26; 11/16/15 RP 1488-1490. He claimed Mr. Miranda told him that they found one guy and beat him up, and that he would not have to worry about him anymore. 11/16 /15 RP 1508.

Omar Vargas (Vargas), a supervisor at the farm, told police Mr. Miranda confessed to him that his brothers were there when he shot David in the head. Vargas claimed Mr. Miranda told him, "Nobody's gonna steal from me!" 11/9/15 RP 865; 11/9/15 RP 898-902.

Detectives interrogated Mr. Miranda for hours. 11/17/15 RP 1887. Throughout the interrogation, he maintained he did not murder David, Abigail, and Victoria. He was with his girlfriend during the time police believed they were killed. 11/17/15 RP 1925; 11/17/15 RP 1968.

Police arrested Mr. Miranda and the state charged him with three counts aggravated first-degree murder. CP 5-6. While in county jail, Mr. Miranda continued to proclaim his innocence. An inmate overheard Mr. Miranda tell others he did not kill anyone and did not understand why this happened to him. The inmate described Mr. Miranda as emotional. 11/9/15 RP 999-1004.

Mr. Miranda pleaded not guilty and exercised his right to trial. At trial, the state theorized Mr. Miranda planned to murder David, Abigail, who he knew was pregnant, and Victoria as retribution because he believed they broke-in the apartment he shared with his father and two brothers.

According to state witnesses, Mr. Miranda sold methamphetamine out of the apartment. 11/13/15 RP 1294; 11/9/15 RP 884. The day of the murders, David and Marco Garcia (Garcia), David's relative by marriage, decided to go to Mr. Miranda's apartment to buy methamphetamine. 11/16/15 RP 1428. Abigail, who knew Garcia through one of his ex-girlfriends, and Victoria, whose mother lived at Garcia's house from time to time, basically went along for the ride. 11/16/15 RP 1396-97; 11/16/15 RP 1389-90; 11/16/15 RP 1437.

When they arrived at Mr. Miranda's apartment, David and Garcia went inside. Abigail and Victoria stayed behind in David's truck. 11/13/15 RP 1228-30; 11/16/15 RP 1396-97; 11/16/15 RP 1227. When David and Garcia returned, Abigail needed to

use the bathroom, so David walked with her back to the apartment. 11/16/15 RP 1399. He left Abigail in the apartment and returned to the truck. While they waited on Abigail, Garcia asked David to drive him to the Pik A Pop gas station. 11/16/15 RP 1404.

Garcia went inside the gas station. David and Victoria stayed behind in the truck. From inside the store, Garcia noticed David pull the truck forward. He thought David moved the truck so someone could access the gas pump. But when he came out of the store, David and Victoria were gone. He decided to wait. 11/16/15 RP 1404-05.

Somewhere between the time Garcia and David first went inside the apartment and the time David walked back to the apartment so Abigail could use the bathroom, Mr. Miranda left the apartment with Archivaldo Marquez (Marquez) for Marco Rodriguez's (Tony) house. While at Tony's house, one of Mr. Miranda's brothers called and told him someone had just jumped out of the back window of their apartment. 11/16 /15 RP 1466. The person left in what looked like David's truck. 11/13/15 RP 1326.

Mr. Miranda borrowed Marquez's .38 caliber handgun and they returned to the apartment. 11/13/15 RP 1325-26. Mr. Miranda's father and brothers were already there. 11/13 /15 RP 1257. Hurtado and Tony showed up later. 11/13/15 RP 1236. Abigail was still in the apartment when everyone arrived. 11/ 4 /15 RP 651. She seemed anxious like she wanted to find her friends. 11/4/15 RP 655-66.

They all congregated outside. Soon after, someone spotted David's truck. They all got in their vehicles and followed the truck to the Pik A Pop gas station. 11/13 /15 RP 1325-26; 11/13/ 15 RP 1238-39. Abigail rode to the Pik A Pop gas station with one of Mr. Miranda's brothers. 11/13 /15 RP 1248. Surveillance video from the

Pik A Pop gas station showed Mr. Miranda, in a white T-shirt and blue jeans, approach David. 11/10/15 RP 1185-87; 11/10/15 RP 1252. It captured Abigail walk from the brother's truck to David's truck. 11/13/15 RP 1248. Hurtado and Tony were also captured on the video as they approached David's truck to talk to Victoria and Abigail. 11/13/15 RP 1249. The state argued Mr. Miranda ordered David into Hurtado's vehicle and ordered Tony to drive David's truck, with Victoria and Abigail, back to the apartment. 11/ 13/15 RP 1252; 11/13/15 RP 1259; 11/ 18/15 RP 2087. A witness described the situation at the Pik A Pop as normal, even lighthearted. Mr. Miranda did not yell at or threaten David, and Tony joked with one of the girls. 11/16/15 RP 1475.

The state argued Mr. Miranda secured David, Victoria, and Abigail at the apartment. Then he and perhaps either his father or a brother set out to look for Garcia. After David left him at the Pik A Pop, Garcia waited for about 30 minutes before he decided to walk. He walked for a bit but returned to the gas station about 20 minutes later to call his brother from the pay phone. 11/13/15 RP 1259; 11/18/15 RP 2087; 11/16/15 RP 1404-05; 11/16/15 RP 1406-7.

The state argued Mr. Miranda spotted Garcia at the pay phone. He and a second person jumped out of their car and ran towards Garcia. 11/16/15 RP 1407. Mr. Miranda brandished a knife and Garcia gave chase. Garcia tried to wave down a car, but it did not stop. He ran until a car hit him.

When a semi-truck drove by, Garcia managed to roll out of the way, grab on to the side of the truck, and hitch a ride to another gas station, where he called a friend to pick him up. 11/16/15 RP 1410; 11/16/15 RP 1412. Sometime later, he saw David's

truck drive by. He waved David down. David stopped and told him to get in. Garcia saw someone in the backseat and walked back to the store. 11/16/15 RP 1414.

Although Garcia could not describe who chased him and did not see who hit him with a car, Mr. Miranda pleaded guilty to menacing. The court dropped other charges brought against him. 11/16/15 RP 1439; 11/16/15 RP 1756.

The state theorized when Mr. Miranda and perhaps either his father or a brother failed to capture Garcia, they went back to the apartment, collected David, Abigail, and Victoria, and drove them out the farm. The next day, Mr. Miranda's father and two brothers left for Mexico. 11/ 16/15 RP 1578; 11/13/15 RP 1354; 11/18/15 RP 1970.

Throughout trial, the state tried to implicate Mr. Miranda through theory. However, its physical evidence failed to link Mr. Miranda to the crimes. The detective who analyzed shoe impressions found at the scene concluded someone who wore size 10 Nike Air Jordan sneakers, with specific tread design, made the impressions. 11/ 9/15 RP 948; 11/9/15 RP 951. He compared shoe impressions from the scene to three pairs of size 9 ½ Nike Air Jordan sneakers collected from Mr. Miranda. 11/9/15 RP 948. The tread design from the shoe impressions at the scene was consistent with the tread design on Mr. Miranda's sneakers. However, there was a sufficient difference in the sizes to say with certainty Mr. Miranda's shoes made those impressions. 11/9/15 RP 950. Someone else could have made those impressions. 11/4/15 RP 496.

A forensic scientist took soil samples from the scene and botanical matter from David's truck. He compared the samples to soil and botanical matter found on Mr. Miranda's sneakers. He concluded there was no soil, just dust particles on one pair of sneakers. The amount of soil on another pair of sneakers was not enough for

comparison. And on the pair that had enough soil to compare, the soil did not match. Also there was no botanical matter from the scene on any of the sneakers. 11/18/15 RP 2098-99.

The state also introduced evidence from Mr. Miranda's apartment. A forensic scientist tested three pieces of clothing that had reddish brown stains. The reddish brown stains tested positive for blood. 11/6/15 RP 834. One of the pieces was a tank top found inside an ammunition box. 11/6/15 RP 835-36. The scientist extracted three DNA profiles from the tank top. 11/9/15 RP 985. The DNA profile that was found most on the tank top came from Victoria. 11/9/15 RP 975. The second DNA profile belonged to an unknown contributor the scientist dubbed, "Individual A." The third DNA profile also belonged to another unknown contributor the scientist dubbed, "Individual B." 11/9/15 RP 980-81.

The second piece taken from the apartment was a T-shirt. The DNA profile obtained from that shirt belonged to Individual B. The third piece taken from the apartment was a pair of green jeans. The DNA profile obtained from the waistband of those jeans belonged to Individual A. 11/9/15 RP 991.

The scientist examined blood stains on another T-shirt and a pair of blue jeans collected from Mr. Miranda's truck. 11/9/15 RP 986. Those clothing items seemed consistent with the clothes Mr. Miranda wore on the Pik A Pop video. The DNA profile obtained from the jeans belonged to another unknown contributor the scientist dubbed, "Individual C." No DNA from David, Abigail, or Victoria was found on the jeans. 11/9/15 RP 991.

Finally, the state's forensic scientist lifted fingerprints from David's truck. 11/4/15 RP 533. Most of the prints lifted could not be identified. 11/4/15 RP 551. However, three prints on the exterior of the passenger's rear door belonged to Marquez, not Mr. Miranda. 11/4/15 RP 535.

#### Procedural facts

The state sought to admit photographs from autopsies to further explain how David, Abigail, and Victoria died, including a photograph of Abigail's dead fetus in her open womb. The state argued unless Mr. Miranda stipulated he knew she was pregnant, it needed the photograph to prove Abigail was pregnant with a full-term baby and she looked pregnant to the outside observer. 11/6/15 RP 749; 753.

Mr. Miranda objected to the photograph and declined to stipulate. He maintained such a photograph was unnecessary because the state could establish its theory through testimony. The photograph would do nothing more than arouse the jury's passion and prejudice the proceedings. 11/6/15 RP 756-57.

The court acknowledged during jury selection, jurors had visceral reactions, as did the court, when it was mentioned one of the victims was pregnant. The court admitted the photograph because it would be used to prove an aggravating factor to which Mr. Miranda declined to stipulate. It concluded although the photograph was extremely probative, it was also extremely prejudicial. But its probative value outweighed any prejudicial effect. 11/6/15 RP 761-62.

Before closing arguments, Mr. Miranda moved the court to include a lesser-included jury instruction. CP 167. He argued evidence presented at trial was sufficient for the jury to infer something other than premeditation. There were no eyewitnesses to

describe what happened on the farm and there was no testimony to prove he told anyone he planned to kill. There was testimony that Mr. Miranda confessed after the fact, but no physical evidence to place him at the scene. 11/19/15 RP 2137-38.

The state maintained it would be difficult to suggest the jury could infer anything less than premeditation from the evidence presented. David was shot twice, and once in the head. Abigail was also shot in the head and according to the pathologist's testimony Victoria was shot and then chased down and strangled to death. 11/19/15 RP 2142-43.

The court denied Mr. Miranda's motion. It reasoned based the totality of the evidence the court could not justify instructions on the lesser-included. There were no facts to suggest or to support they were out on the farm to either frighten or intimidate them. 11/19/15 RP 2148. The facts support nothing other than premeditation. 11/19/15 RP 2149.

Mr. Miranda also objected to an accomplice liability instruction the state sought to admit. Mr. Miranda argued it was not fair to allow the jury to consider that theory when he was the only person on trial and the state failed to prove the major participant. 11/18 /15 RP 2122-23; CP 168.

The state argued testimonies from Hurtado, Marquez, and Vargas that Mr. Miranda confessed to the killings, were enough to prove he played a major part in the events that lead to the murders. Although it could not prove who actually killed David, Abigail, and Victoria, the state argued the accomplice liability instruction allowed the jury to consider whether or not Mr. Miranda was just there or whether or not he was involved in the crimes. 11/ 18 /15 RP 2125. The court agreed and allowed the instruction. 11/ 18 /15 RP 2125.

The jury found Mr. Miranda guilty on all three counts aggravated first-degree murder. 11/23/15 RP 2296-97; CP 70-76. The jury determined the state proved special aggravating circumstances that more than one person was murdered as part of a common scheme or plan. Although the jury found Mr. Miranda guilty of Abigail's murder, it found he did not know she was pregnant. 11/23/15 RP 2299; CP 76. The court sentenced Mr. Miranda to life without the possibility of parole. CP 77-86. The appeal followed. CP 87; CP 88-89.

#### IV. ARGUMENT

##### A. THE AUTOPSY PHOTOGRAPH OF THE FETUS IN UTERO WAS UNNECESSARY TO PROVE THE AGGRAVATING FACTOR AND LIKELY CREATED PREJUDICE.

###### Standard of review

This court must review a trial court's decision to admit autopsy photographs for an abuse of discretion. State v. Yates, 161 Wash.2d 714, 768, 168 P.3d 359, 389 (2007). A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. State v. Lord, 161 Wash.2d 276, 283-84, 165 P.3d 1251 (2007). The decision whether or not to admit autopsy photographs lies largely within the trial court's discretion. However, if the trial court's decision is based on untenable grounds or on untenable reasons, then this court must overturn the decision. State v. Vidal, 82 Wash. 2d 74, 80, 508 P.2d 158, 162 (1973).

###### Analysis

Autopsy photographs are admissible if they are "[a]ccurate," and "if their probative value outweighs their prejudicial effect." State v. Crenshaw, 98 Wash.2d 789, 806, 659 P.2d 488 (1983); ER 403. Autopsy photographs have probative value when

“used to illustrate or explain the testimony of the pathologist who performed the autopsy.” State v. Lord, 117 Wash.2d 829, 870, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Gruesome photographs are admissible if accurate and if their probative value outweighs their prejudicial effect. Crenshaw, 98 Wash.2d at 806, 659 P.2d 488. An ugly crime need not be prettified for the jury. State v. Adams, 76 Wash.2d 650, 656, 458 P.2d 558 (1969), *rev'd on other grounds*, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971)). “[A] bloody, brutal crime cannot be explained to a jury in a lily-white manner.” State v. Crenshaw, 98 Wash.2d at 807 (*quoting State v. Adams*, 76 Wash.2d 656); State v. Lord, 117 Wash.2d 829, 871, 822 P.2d 177, 201 (1991). However, prosecutors are not given a carte blanche to introduce every piece of admissible evidence if the cumulative effect of such evidence is inflammatory and unnecessary. Id. They “as well as trial courts must exercise their discretion in the use of gruesome photographs.” Id. at 807. When proof of criminal acts may be amply proven through testimony and non-inflammatory evidence, prosecutors must “use restraint in their reliance on gruesome and repetitive photographs.” Id. But a brutal crime cannot be explained as anything other than a brutal crime. Id. (*quoting Adams*, 76 Wash.2d at 656, 458 P.2d 558); State v. Stackhouse, 90 Wash. App. 344, 357–58, 957 P.2d 218, 225–26 (1998); 5 Wash. Prac., Evidence Law and Practice § 402.24 (6th ed.).

Our Supreme Court will generally uphold trial courts’ decisions to admit autopsy photographs that show injuries and the relationship between different injuries, that explain how a person died, that show the extent of injuries which were relevant to the contested issues of intent to kill and premeditation, and to illustrate or explain the

testimony of the pathologist who performed the autopsy. Id.; State v. Finch, 137 Wash. 2d 792, 813, 975 P.2d 967, 982 (1999).

For example, in State v. Yates, 161 Wash. 2d 714, 768–69, 168 P.3d 359, 389 (2007), Yates was on trial for killing two prostitutes. He had previously pled guilty to killing thirteen other victims. The trial court allowed autopsy photographs of incisions in one victim’s arm that revealed subcutaneous puncture marks, which were relevant to the state’s theory Yates selected women with serious drug addictions. The trial court allowed a photograph of incisions into the leg of another victim to show that tissue was still available from which viable DNA material could be extracted. The court allowed another photograph to show the victim with plastic bags tied around her head, perforated and drawn partially into her mouth, to illustrate she was still alive when Yates encased her head. Because their probative value outweighed their prejudicial effect, our Supreme Court found the trial court did not abuse its discretion when it admitted the autopsy photographs and upheld the trial court’s decision.

Unlike the autopsy photographs in Yates, there was no reason to show an autopsy photograph of Abigail’s fetus in her open womb, other than to arouse the jury’s passion. Here, the state sought to admit the photograph to show Abigail was pregnant with a full-term baby and that to the outside observer she looked pregnant. 11/15/15 RP 753. The state argued unless Mr. Miranda stipulated that he knew Abigail was 8 months pregnant, the autopsy photograph was the only way to prove as much. 11/15/15 RP 749. Mr. Miranda objected to the photograph, but declined to stipulate that he knew Abigail was pregnant. And the court found because he declined to stipulate, any photograph that

tended to establish the fetus's size and development would help prove whether or not he knew. 11/6/15 RP 762.

However, there was testimony and other less inflammatory evidence the state could have relied on to establish its theory. For example, the detective, at the scene, testified when the coroner rolled Abigail's body, he noticed significant movement in her belly and presumed she was pregnant. 11/4/15 RP 452. The pathologist that performed her autopsy confirmed she was pregnant. 11/6/15 RP 786. He measured and weighed the fetus and determined it was full-term. 11/6/15 RP 788-89. His expert testimony would have been enough for the jury to determine whether or not Mr. Miranda knew Abigail was pregnant. The jury even heard from Garcia, who had known Abigail for years. He testified although he could not tell she was pregnant, because she wore baggie clothes, he found out she was pregnant from the news. 11/16/15 RP 1438.

The jury ultimately determined Mr. Miranda did not know Abigail was pregnant but convicted him on all three counts aggravated first-degree murder. CP 76. Given the lack of physical evidence presented to link Mr. Miranda to the killings, it is unlikely the image of the dead fetus in its mother's dead womb had no effect on proceedings.

**B. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE DEFENSE, EVIDENCE PRESENTED WAS ENOUGH FOR THE JURY TO INFER SOMETHING OTHER THAN PREMEDITATION.**

#### Standard of review

The standard for appellate review depends on whether the trial court's decision to not give a lesser-included offense instruction is based on legal or factual grounds. State v. Walker, 136 Wash.2d 767, 771, 966 P.2d 883 (1998). If based on a ruling of law, this court will review the trial court's decision de novo. State v. Walker, 136 Wash.2d at 772.

If based on a factual dispute, this court will review the decision for abuse of discretion. State v. Walker, 136 Wash.2d at 771–72. Here, the trial court’s decision is based on a factual dispute. This court must review whether it abused its discretion.

### Analysis

1. The court denied Mr. Miranda his statutory right to present lesser-included instructions to the jury. Both the defendant and the state have a statutory right to present lesser-included offense instructions to the jury. State v. Davis, 121 Wash.2d 1, 4, 846 P.2d 527 (1993), abrogated on other grounds by State v. Berlin, 133 Wash.2d 541, 947 P.2d 700 (1997). The relevant statute provides: “[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.” RCW 10.61.006; State v. Gamble, 154 Wash. 2d 457, 462–63, 114 P.3d 646, 648 (2005). Either party may request an instruction on a lesser crime, State v. Lyon, 96 Wash.App. 447, 450, 979 P.2d 926 (1999), and the court may give such an instruction on its own motion. State v. Rhinehart, 92 Wash.2d 923, 927, 602 P.2d 1188 (1979). However, if the defendant requests the instruction, in an appropriate case, it is reversible error to refuse to give the instruction. State v. Parker, 102 Wash.2d 161, 683 P.2d 189 (1984).

2. Without a lesser-included instruction, the jury had no choice but to convict Mr. Miranda of first-degree aggravated murder. In criminal trials, juries are given the option to convict defendants of lesser-included offenses when warranted by the evidence. To give juries this option is crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free. In some cases, that will create a risk that

the jury will convict the defendant despite having reasonable doubts. State v. Henderson, 182 Wash. 2d 734, 736, 344 P.3d 1207, 1208 (2015).

To minimize that risk, courts must err on the side of instructing juries on lesser-included offenses. A jury must be allowed to consider a lesser-included offense if the evidence, when viewed in the light most favorable to the defendant, raises an inference that the defendant committed the lesser crime instead of the greater crime. State v. Fernandez–Medina, 141 Wash.2d 448, 455–56, 6 P.3d 1150 (2000). If a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense. Id. at 456, 6 P.3d 1150; State v. Henderson, 182 Wash. 2d at 736.

3. Mr. Miranda was entitled to lesser-included instructions. A defendant is entitled to an instruction on a lesser-included offense if he can satisfy conditions under a two-pronged test. State v. Condon, 182 Wash. 2d 307, 316, 343 P.3d 357, 361 (2015); State v. Workman, 90 Wash.2d 443, 447–48, 584 P.2d 382 (1978). Under the first, or legal, prong of the test, the court asks whether the lesser-included offense consists solely of elements that are necessary to conviction of the greater, charged offense. Id.

Here, the trial court answered “yes.” The state charged Mr. Miranda with three counts aggravated first-degree murder. CP 5-6. Second-degree murder is a lesser offense. A person commits second-degree murder when, with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person. RCW 9A.32.050; CP 12-30. Moreover, a person commits first-degree murder, when with a premeditated intent to cause the death of another person he or she causes the death of such person or of a third person. RCW 9A.32.030(1)(a). Because elements to

convict Mr. Miranda on second-degree murder consist solely of elements necessary to convict him on first-degree murder, the court found Mr. Miranda satisfied this prong of the test.

Under the second, or factual, prong, the court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense. Id. at 448, 584 P.2d 382. Here, the trial court, answered “no.” It reasoned given the totality of the evidence and the lack of evidence to explain what happened on the farm, the court could not justify an instruction for the jury on the lesser-included. 11/19/15 RP 2149.

The jury’s prerogative to disbelieve the state’s evidence does not alone support an instruction on the lesser offense. State v. Speece, 115 Wash.2d 360, 362–63, 798 P.2d 294 (1990); State v. Fowler, 114 Wash.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wash.2d 479, 816 P.2d 718 (1991). Some evidence must be presented which affirmatively establishes the defendant’s theory on the lesser-included offense. State v. Speece, 115 Wash.2d at 362–63; State v. Fowler, 114 Wash.2d at 67; State v. Condon, 182 Wash.2d 307, 321, 343 P.3d 357, 363 (2015); State v. Parker, 102 Wash.2d 161, 166, 683 P.2d 189, 192 (1984). The trial court must consider all evidence presented at trial, including the state’s evidence. State v. Fernandez–Medina, 141 Wash.2d 448, 455–56, 6 P.3d 1150 (2000). But, the court must view the evidence in the light most favorable to the party requesting the lesser-included offense instruction. Id.

For example, in State v. Condon, 182 Wash.2d 307, 311, 343 P.3d 357, 359 (2015), the state in that case charged Condon with first-degree aggravated murder and first-degree felony murder when he shot and killed a homeowner during a home invasion

robbery attempt. Condon and his associate mistakenly believed the home was that of a drug dealer he planned to rob. Instead of a drug dealer, Condon and his associate encountered a man, a woman, and three children. The woman testified when the man tried to wrest a gun away from Condon, a car pulled into the driveway and frightened him. She heard gunshots. Condon and associate fled, but left behind a cell phone. State v. Condon, 182 Wash. 2d 307, 311, 343 P.3d 357, 359 (2015).

Condon's associate told police the man managed to get him in a chokehold and as he lost consciousness, Condon shot him. The man later died. At trial, the state presented the associate's testimony that Condon was the shooter, testimony by a jailhouse informant that Condon admitted he shoot the man when he "screwed up on a home invasion," and the woman's pretrial lineup and in-court identification. State v. Condon, 182 Wash. 2d at 312-13.

Before closing arguments, Condon's attorney asked the court to instruct the jury on second-degree intentional murder as a lesser-included offense to aggravated (premeditated) first-degree murder. The attorney reasoned the jury could find he committed the murder but without premeditation. The court denied the request for two reasons: first, that the evidence presented did not support an inference that the shooting was not premeditated, and second, that second degree murder was a lesser-included offense to the first-degree (premeditated) murder charge, but not to the first-degree felony murder charge. Id.

The court of appeals found the trial court's failure to instruct on the second-degree intentional murder as a lesser degree to the state's first-degree premeditation charge was harmful error and reversed the conviction. Our Supreme Court upheld the

court of appeal's decision. It found the trial court failed to view evidence presented in the light most favorable to Condon. Although there was evidence to support the premeditation finding, namely that Condon entered the man's home with a loaded handgun to commit robbery, there was evidence the shooting was a sudden reaction, based in fear rather than "weighing or reasoning, when the man tried to wrest the handgun away from Condon." "A jury could conclude from eyewitness testimony Condon shot the man in reaction when the man tried to wrest the handgun from him, or that he shot the man because his associate was turning purple from the man's chokehold." Id. at 307.

The trial court here did not view evidence presented in the light most favorable to the party that requested the instruction. Condon requires that to be enough to warrant a reversal and a new trial. Id. at 311. Mr. Miranda requested the lesser-included instruction, which required the court to view the evidence presented in the light most favorable to him. Instead, the court reasoned, based on the totality of the evidence, the evidence could not prove anything other than premeditation.

The court surmised evidence showed everyone mobilized after the break in and headed to the Pik A Pop gas station, where they lured David, Abigail, and Victoria back to the apartment. They spent some time at the apartment before they headed to the farm. There, David and Abigail were shot in the head, execution style. Victoria was shot, and then strangled to death. 11/19 /15 RP 2148. Because there were no facts to prove they took David, Abigail, and Victoria to the farm to frighten or to intimidate them, the court concluded it could not justify a lesser-included instruction.

When viewed in the light most favorable to Mr. Miranda, the same evidence could have allowed the jury to infer the shootings were reactionary had it also been instructed on a lesser-included offense. The pathologist confirmed David's and Abigail's deaths were immediate. They were both shot in the head, execution style. From that evidence, the jury could have inferred their deaths were premeditated.

On the other hand, Victoria did not die immediately. The bullet that struck Victoria did not injure the part of her brain that would have caused her to lose consciousness. 11/6/15 RP 794. So, if she tried to run away from the person who shot her, the gunshot wound would not have stopped her. 11/6/15 RP 795. The jury could have inferred several ways that scenario played out, had it been instructed on the lesser-included offense. Without the lesser-included offense, the jury was instructed to infer only one scenario to fit aggravated first-degree murder.

C. THE STATE WAS NOT ENTITLED TO AN ACCOMPLICE LIABILITY INSTRUCTION BECAUSE EVIDENCE DID NOT PROVE MR. MIRANDA PLAYED A MAJOR PART IN THE EVENTS THAT LEAD TO THE MURDERS.

Standard of review.

“This court must review the trial court’s decision to include a particular instruction for abuse of discretion.” State v. Chase, 134 Wash.App. 792, 803, 142 P.3d 630 (2006); State v. Cuthbert, 154 Wash. App. 318, 341, 225 P.3d 407, 420 (2010). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. State v. Mee Hui Kim, 134 Wash.App. 27, 41–42, 139 P.3d 354 (2006); State v. Cuthbert, 154 Wash. App. 318, 326, 225 P.3d 407, 412 (2010).

Instructional errors are subject to a harmless error analysis. State v. Brown, 147 Wash.2d 330, 340, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 9, 119

S.Ct. 1827, 144 L.Ed.2d 35 (1999)). If the record demonstrates conclusively that such error could have materially affected the jury's deliberations in this case, this court must hold the error was not harmless beyond a reasonable doubt. State v. Trujillo, 112 Wash. App. 390, 400–01, 49 P.3d 935, 941 (2002), as amended (Aug. 2, 2002).

#### Analysis.

For accomplice liability to attach “a defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime charged.” State v. Brown, 147 Wash.2d 330, 338, 58 P.3d 889 (2002). However, a defendant may be convicted of first-degree aggravated murder based solely on an accomplice theory, State v. Mak, 105 Wash.2d 692, 718 P.2d 407 (1986) (overruled in part on other grounds in State v. Hill, 123 Wash.2d 641, 870 P.2d 313 (1994)), but only when the state can prove “major participation by [the] defendant in the acts giving rise to [the] homicide.” State v. Roberts, 142 Wash.2d 471, 505, 14 P.3d 713 (2000); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (4th Ed).

For example, in State v. Roberts, 142 Wash.2d 471, 14 P.3d 713 (2000), the defendant was convicted as an accomplice of aggravated premeditated first-degree murder and first-degree felony murder, and was sentenced to death.

Our Supreme Court found to execute a defendant convicted solely as an accomplice, the state must prove the defendant was a major participant in the acts that lead to the homicide. To merely satisfy the minimal requirements of the accomplice liability statute is insufficient to impose the death penalty, under the Eighth and Fourteenth Amendments, and the cruel punishment clause of the Washington State Constitution. Roberts, 142 Wash.2d at 506. This requirement, however, is not reserved

solely for cases that have the death penalty. State v. Whitaker, 133 Wash. App. 199, 233, 135 P.3d 923, 940 (2006).

Here, the court allowed the following accomplice liability instruction:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

Solicits, commands, encourages, or requests another person to commit the crime, or,

Aids or agrees to aid another person in the planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

Jury Instruction #9; CP 31-67.

The jury was also instructed to convict Mr. Miranda of aggravated first-degree murder, if it could prove beyond a reasonable doubt, he intended to cause the victims’ deaths, his intent was premeditated, and the victims died as a result of his acts. Jury Instructions #11; 12; & 13; CP 31-67.

The jury found Mr. Miranda guilty of aggravated first-degree murder, on all three counts, even though there was no evidence he committed the murders. CP 70-76. That suggests the jury convicted him solely on an accomplice theory.

Shoe impressions found at the farm were size ten Nike Air Jordan sneakers, with specific tread design, while Mr. Miranda’s Jordan sneakers were size nine and a half. 11/9/15 RP 948; 11/9/15 RP 951. Furthermore, there was no soil or botanical matter from the scene on Mr. Miranda’s sneakers. 11/18/15 RP 2098-99. The state’s expert witness concluded someone else could have made those impressions. 11/4/15 RP 496.

DNA extracted from clothes similar to clothes Mr. Miranda wore on the Pik A Pop contained no samples from David, Abigail, or Victoria. 11/9/15 RP 991; 11/9/15 RP 986. However, DNA extracted from a tank top found in Mr. Miranda's apartment belonged to Victoria and two unknown contributors dubbed "Individual A" and "Individual B." 11/9/15 RP 975. And, fingerprints lifted from David's truck belonged to Marquez, not Mr. Miranda. 11/4/15 RP 535.

The surveillance video showed Mr. Miranda approach David. But it showed David leave with Hurtado. 11/13/15 RP 1252; 11/13/15 RP 1259; 11/18/15 RP 2087. Nothing in the video depicted Mr. Miranda as angry or forceful. 11/10/15 RP 1252; 11/10/15 RP 1248. And, the situation at the Pik A Pop was described as normal, even lighthearted. 11/16/15 RP 1475.

For the court to have included the accomplice liability instruction without proof Mr. Miranda was a major participant in the events that lead to murders, was not harmless error. The instruction could have materially affected the jury's deliberations in this case. Because there was no physical evidence, the jury probably found Mr. Miranda guilty based on perceived complicity. 11/16/15 RP 1439; 11/16/15 RP 1756; 11/10/15 RP 1185-87; 11/10/15 RP 1252. This is reversible error and entitles Mr. Miranda to a new trial. State v. Roberts, 142 Wash. 2d 471, 509, 14 P.3d 713, 734 (2000).

## V. CONCLUSION

Given the arguments set forth above, we ask this court to reverse Mr. Miranda's convictions and to remand this case for a new trial.

Submitted this 14<sup>th</sup> day of November, 2016.

s/Tanesha L. Canzater

Tanesha La'Trelle Canzater, WSBA# 34341

Attorney for Francisco J. Resendez-Miranda

Post Office Box 29737

Bellingham, WA 98228-1737

(360) 362- 2435 (mobile office)

(703) 329-4082 (fax)

Canz2@aol.com

## DECLARATION OF SERVICE

I declare under penalty and perjury of the laws of Washington State that on **Wednesday, December 14, 2016**, I filed this **AMENDED APPELLANT'S OPENING BRIEF** with Division Three Court of Appeals and served copies of the same to the following counsel of record and/or other interested parties:

### **BENTON COUNTY PROSECUTORS OFFICE**

[prosecuting@co.benton.wa.us](mailto:prosecuting@co.benton.wa.us)

\*This office accepts service by email.

### **WASHINGTON STATE PENITENTIARY**

Francisco J. Resendez-Miranda DOC #387673

E-204

1313 North 13<sup>th</sup> Avenue

Walla Walla, WA 99362

\*As soon as I can hire a translator to covert this brief into Spanish, I will serve Mr. Miranda a copy.

[s/Tanesha La'Trelle Canzater](#)

Attorney for Francisco J. Resendez-Miranda

Tanesha L. Canzater, WSBA# 34341

Post Office Box 29737

Bellingham, WA 98228-1737

(360) 362-2435 (mobile office)

(703) 329-4082 (fax)

[Canz2@aol.com](mailto:Canz2@aol.com)