

NO. 34872-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER RAMIREZ,

Appellant.

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

APPELLANT'S **CORRECTED** OPENING BRIEF

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A. INTRODUCTION

Arturo Gallegos was killed by a single shot to the head in the bedroom of his Spokane Valley apartment. His brother, Juan, was found dead outside the door of a neighbor's apartment with ten or more gunshot wounds. No one witnessed their deaths. No one saw the assailants. No murder weapon was ever discovered. The only witness who might have spoken with the murderer twice failed to identify that person as Christopher Ramirez, the nephew of Arturo and Juan. Nevertheless the State prosecuted Ramirez for premeditated first degree murder based on the general location of his cellular phone, a four-month-old text message, and the presence of his hat and glove in his uncles' apartment. Because the evidence was insufficient, the convictions should be reversed.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove beyond a reasonable doubt that Ramirez committed first degree murder as charged in count one.
2. The evidence was insufficient to prove beyond a reasonable doubt that Ramirez committed first degree murder as charged in count two.
3. The evidence was insufficient to prove beyond a reasonable doubt that Ramirez committed unlawful possession of a firearm as charged in count three.
4. The admission of an unreliable identification, formed only after the witness saw media coverage about the charges against Ramirez, violated Ramirez's state constitutional due process right to a fair trial.
5. The admission of the unreliable identification violated Washington's evidentiary rules.

6. The trial court abused its discretion by admitting an unreliable identification in violation of ER 403.

7. The trial court abused its discretion by overruling Ramirez's objection to testimony about Arturo and Juan Gallegoses' personality characteristics and sympathetic traits.

8. The trial court abused its discretion by admitting an out-of-court statement from a non-testifying declarant as a statement of identification pursuant to ER 801(d)(1)(iii).

9. The prosecutor committed flagrant and ill-intentioned misconduct by arguing facts not in evidence and inflaming the jury's passions and prejudices.

10. The trial court erred in admitting an FBI analyst's historical cell-site analysis testimony because it is not generally accepted by the scientific community.

11. The trial court erred in admitting an FBI analyst's historical cell-site analysis testimony under ER 702 because it is not helpful to the jury.

12. The trial court abused its discretion by admitting a four-month-old text message stating, in part, "we all die," to prove motive or intent under ER 404(b) and ER 403.

13. Cumulative error denied Ramirez his due process right to a fair trial.

14. Ramirez did not receive adequate notice of the aggravating circumstance submitted to the jury.

15. The State failed to prove the aggravating circumstance beyond a reasonable doubt.

16. The sentencing court erred by imposing consecutive sentences under RCW 9.94A.589(1)(b) without recognizing its discretion to consider concurrent sentences under RCW 9.94A.535.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State must present sufficient evidence to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3. Premeditated intent is an essential element of first degree murder that requires the State to prove deliberate formation of and reflection upon the intent to take a human life. It involves the mental process of thinking beforehand, deliberation, reflection, weighing, or reasoning for a period of time.

a. Did the State fail to prove Ramirez premeditated the murder of Juan Gallegos where the evidence showed minimal opportunity for reflection and no evidence proved an actual deliberative process?

b. Did the State fail to prove Ramirez premeditated the murder of Arturo Gallegos where there was no evidence showing how or where the murder weapon was procured, the single shot to Arturo's head does not show the shooter deliberated on any intent to kill, and Arturo's lack of defensive wounds suggests there was not a prolonged struggle before the shot was fired?

2. Did the State fail to prove Ramirez possessed a firearm where the firearm used in the crimes was never located, no one saw Ramirez at the apartment complex or with a firearm, cellular phone tracking evidence indicated Ramirez was within the general geographic area of about a mile radius near the apartment complex, which was only three or four miles from Ramirez's home, and Ramirez had innocent reasons for being in the area such that the unlawful possession of a firearm count must be reversed? U.S. Const. amend. XIV; Const. art. I, § 3.

3. Reliability is the primary concern of eyewitness identification testimony under the state constitution. Research shows eyewitness misidentifications are the leading cause of wrongful convictions and post-event information alters memories and reduces their reliability. Should Carlton Hritsco's identification have been excluded as unreliable where he twice failed to identify the person he spoke with on November 1, 2014, but later identified Ramirez only after Hritsco saw news coverage portraying Ramirez as the individual charged in this case?

4. Should Carlton Hritsco's identification have been excluded under ER 403 where its unreliability rendered it minimally probative and the undue weight that juries ascribe to eyewitness identification rendered it substantially prejudicial?

5. A victim's character is generally not relevant in a homicide case. Did the trial court abuse its discretion by admitting testimony over Ramirez's objection about personality characteristics and sympathetic traits of the victims that a witness "missed the most" where it was not relevant to the State's proof of the charged crimes?

6. Statements of identification are admissible at trial if the declarant testifies and is subject to cross-examination. ER 801(d)(1)(iii). Did the trial court err in admitting statements, over Ramirez's objection, from unidentified and non-testifying declarants that were also not statements of identification?

7. As a quasi-judicial officer, a prosecutor must not encourage verdicts based on facts not in evidence, prejudices, or emotions. It is misconduct for a prosecutor to fabricate an emotionally charged story of how the victims might have struggled and what the victims might have thought. It is also misconduct to speculate about the defendant's thought process. Did the

prosecutor commit misconduct in closing argument by arguing the jury should speculate about the victims' suffering and emotions and the defendant's thought processes at the time of the crime?

8. Expert testimony is admissible only if it is based on methodology that is generally accepted in the scientific community and is helpful to the jury. Historical cell-site analysis purports to track an individual's location through his or her cell phone based on the cell towers to which the phone connected at a given time or over time. Did the trial court err when it admitted the testimony of FBI Special Agent Banks because her cell-site analysis methodology has not been tested or accepted outside the law enforcement community and is not helpful to the jury because it fails to account for factors that divert a cell phone from connecting to the closest cell tower?

9. Other acts of misconduct are admissible only if relevant for a purpose other than proving the accused person's bad character and only if the probative value of that other purpose substantially outweighs the unfair prejudice. Did the trial court abuse its discretion by admitting a group text message Ramirez sent four months before his uncles died that did not state an intent to kill as evidence of motive or intent and where prejudice stemmed from interpretations of the message including possible gang-affiliation and competency issues?

10. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. Const. art. I, § 3; U.S. Const. amend. XIV. Was Ramirez denied a fundamentally fair trial by the cumulative effect of the errors assigned above?

11. An accused person has the due process right to notice of aggravating circumstances. Const. art. I, §§ 3, 22; U.S. Const. amend. XIV. Was notice of the aggravating circumstance submitted to the jury insufficient where it was not pleaded in the information or otherwise discussed before trial?

12. Did the State fail to prove the aggravating circumstance beyond a reasonable doubt where a common scheme or plan and a single act by the same person are alternative means and the evidence showed the murders were not a single act but no special verdict form was provided and the State did not elect a single alternative means?

13. While RCW 9.94A.589(1)(b) indicates that sentences for serious violent offenses shall run consecutively, that provision is subject to the exceptional sentencing statute at RCW 9.94A.535, which provides a sentencing court discretion to impose concurrent sentences. If the sentencing court indicates it possibly would consider a concurrent sentence but believes it is required to impose consecutive sentences, an appeals court should remand for resentencing at which time the sentencing court can consider a mitigated sentence. Should Ramirez's sentence be remanded for resentencing where the sentencing court indicated it was "required" to impose consecutive sentences but possibly would have considered concurrent sentences if the court knew it had such discretion?

D. STATEMENT OF THE CASE

1. Someone killed Arturo and Juan Gallegos in their apartment complex after they used drugs.

Residents of the Broadway Square apartments in Spokane Valley, Washington called 911 around 9:30 on November 1, 2014, reporting that they heard multiple gunshots in the complex. RP 446-47, 449, 532-33, 537-38, 542-44, 1085-89.¹ The complex of about 100-150 residents was a frequent site of criminal activity,² and people began dispersing as the police arrived. RP 465-67, 491-92, 539-40, 552, 1044. That night, brothers Arturo and Juan Gallegos were found dead. Juan Gallegos's body was found with about 10 gunshot wounds in it outside the door of a neighbor's apartment. RP 450-51, 453, 544, 859, 887-88, 895-96. A single bullet to the head killed Arturo Gallegos in the bedroom of the apartment the brothers shared. RP 369, 456, 848, 852-87, 895-96.

The police proceeded to search the brothers' apartment and the complex and to recover items of potential evidentiary interest. They found malt liquor cans, a methamphetamine pipe, blood spatter, and cartridge casings in the Gallegoses' apartment. *E.g.*, RP 687, 693-95, 705-07, 729-30, 735, 1056-57. A knit cap stuck to a glove lay on the bed near Arturo's body. RP 689-90. One flip-flop shoe was found in one area and the other elsewhere in the apartment. RP 708-

¹ The verbatim report of proceedings transcribed in the set of consecutively paginated volumes is referred to herein as "RP." The two separately paginated volumes are referred to by the first hearing date transcribed, "RP (1/23/15)" and "RP (3/6/15)."

² The apartment complex was eventually torn down. RP 539-40.

09. Cellular phones were collected. RP 720-28. There was no sign of forced entry into or out of the apartment where Juan was found. RP 971-72, 1058-59.

An autopsy revealed Juan and Arturo had used methamphetamine. RP 896-97. Arturo had also been drinking alcohol before he died, and Juan had consumed marijuana. *Id.*

A police officer with a K-9 found no scents near the bodies, but eventually picked up a scent at a fence where there was a hole used as a common shortcut; a resident of the apartment complex heard what she thought was someone using that shortcut earlier that night, which she remarked was uneventful. RP 473-74, 489, 493-94, 499-504. The police K-9 tracked the scent south before the dog stopped tracking at some businesses nearby. *E.g.*, RP 475, 502-04, 1051-53, 1059-60. A homeowner two blocks south of the complex, Carlton Hritsco, approached the tracking officers to report that a couple of hours earlier he had spoken for 15 or 20 minutes with a 5'8" "Indian or Hispanic-looking" male of 180 pounds who called himself "Demon" and had long, slicked-back hair and scars or acne. RP 476, 516-18, 522.³ Hritsco "got an eerie feeling" from Demon, but was unaware of any police activity and Demon did not mention anything about it. RP 514, 516-17. Rather, Demon shared a cigarette with Hritsco and asked for bus directions. RP 517-18.

Hritsco thought he would definitely be able to identify the man he spoke with if shown a photograph. RP 1056. The police showed Hritsco photographs of five individuals that law

³ Ramirez was six feet tall and weighed about 220 pounds. RP 463-64, 469, 1069; Ex. 115.

enforcement associated with the name “Demon,” including Ramirez,⁴ but Hritsco did not identify any of them or recognize Ramirez as the person he had spoken with that night. RP 476-78, 486, 518. The lead detective interviewed Hritsco again the next day, November 2, and showed Hritsco a photographic montage of six photographs, including a photograph of Ramirez taken the same day. RP 949, 1053-56. Hritsco again did not identify Ramirez. RP 519.⁵

Angel Valerio visited Juan Gallegos just minutes before he was killed. RP 379-80, 389. Valerio dropped some marijuana off for Juan and then went to Walmart. RP 380-82 (Valerio initially lied to the police about providing marijuana). When the police visited him the next day, Valerio offered up his cousin-in-law, Christopher Ramirez, as a suspect—even though he “pretty much grew up with the Gallegoses—because “last time [Valerio] checked” Juan and Arturo Gallegos “had a problem” with Ramirez. RP 369-70, 394 (they were a “tight-knit family”).⁶ Valerio referenced a text message Ramirez sent four months earlier to the Gallegos side of the family in Spokane bearing a photograph of his relatives and the message, “Tio. We all die. Rest in peace. Fuck you all if that’s how it is.” RP 375-76; Exs. 141-42. While Valerio thought the message might be suicidal or a threat, the family still interacted with Ramirez. RP 376-79, 442-43, 1079-81. Ramirez had even helped the Gallegoses with a recent move. RP 398-99. Valerio

⁴ A couple of witnesses testified at trial that Ramirez’s nickname was Demon. RP 385, 441.

⁵ Hritsco testified he did not recognize Ramirez from the photograph shown to him on November 2 because it was “old.” RP 519. But the photograph of Ramirez had actually been taken the same day. RP 1053-56.

⁶ Angel Valerio’s wife, Rosemary, also testified her family was “close” and she was unaware of any problem between her father and Ramirez. RP 439, 443-44.

also thought a jealous husband might have been the perpetrator, as Arturo was something of a ladies' man who often had "tweaker girls over." RP 394-96.

The State tested two of Angel Valerio's firearms and neither appeared to be used in the murders. RP 388-89. The police never recovered the murder weapon. *E.g.*, RP 508, 523, 620, 763, 972-74. A search of Ramirez and his apartment uncovered no evidence of the murders. RP 527-31, 975-79, 995-1004, 1072-77.

2. The State charged the Gallegoses' nephew, Christopher Ramirez, even though no one saw Ramirez at the apartments, the murder weapon was never recovered or linked to Ramirez, and a witness who spoke to someone that night did not think it was Ramirez.

The State charged Christopher Ramirez with the premeditated first degree murders of Arturo and Juan Gallegos, RCW 9A.32.030(1)(a), while armed with a firearm, RCW 9.94A.533 and RCW 9.94A.825, as well as one count unlawful possession of a firearm, RCW 9.41.040. CP 1-2 (information), 232-33 (amended information removing a single count of assault).

On the Friday before trial, two years after the incident, the lead detective and the prosecutor visited Hritsco, who "said that he has seen Christopher Brian Ramirez on TV, and he is 100% certain that Mr. Ramirez is the person he spoke to on the night of November 1, 2014." RP 62; CP 224-26.⁷ Ramirez moved to exclude Hritsco's late identification relying on ER 401, 403 and Criminal Rule 4.7. RP 47, 48-69; CP 66-74, 145-62, 193-96, 218-26. The trial court admitted the evidence, finding the State did not control Hritsco's late identification. CP 301-03;

⁷ See also RP 519-20 (Hritsco testimony that he could identify Ramirez after seeing "an updated photo of him on the news."); RP 1163-64 (prosecutor argues to jury that Hritsco saw video of Ramirez on news).

RP 204-05. Hritsco, therefore, identified Ramirez in court as the “Indian or Hispanic-looking man” who gave him an “eerie feeling” on November 1, 2014. RP 515, 519-20. The court provided a defense-requested instruction on eyewitness identification testimony. RP 1102-15; CP 256.

Ramirez also moved to exclude testimony of FBI Special Agent Jennifer Banks, a member of the FBI’s Cellular Analysis Survey Team (CAST), due to late disclosure of her report (Criminal Rule 4.7), as substantially more prejudicial than probative under ER 403, because her testimony did not satisfy ER 702, and because her scientific principles of methodology were not generally accepted in the scientific field pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). CP 97-104 (motion in limine), 201-03 (reply); RP 110-11. After “indulg[ing] the defense” by holding a *Frye* hearing, the trial court ruled Banks’s expert testimony was admissible and the defense could request a continuance to cure the State’s late disclosure. RP 69, 91-156, 215-19; CP 293-99. Ramirez exercised his right to a speedy trial. RP 150. Banks testified that through her analysis of Ramirez’s AT&T cellular phone records, she believed Ramirez’s cell phone was in the general geographic coverage area of the Broadway Square apartments at 9:24 p.m., but not at 9:41 p.m. and 9:43 p.m. on November 1, 2014 (about 10 minutes after the 911 calls were placed), or 9:59 p.m. RP 919, 921, 927-29.

The court also denied Ramirez’s motion to exclude the text message from Ramirez sent in July 2014 nearly four months before his uncles were killed. CP 106-10 (motion in limine citing ER 404(b)), 203-04 (reply), 299 (ruling); RP 164-89, 220-21 (argument and oral ruling). Ramirez argued the July text message did not indicate an intent to commit an act that occurred

four months later and that the prejudicial value from the content of the message, which might be construed as a threat or to associate Ramirez with a gang or gangster lifestyle,⁸ outweighed any slight probative value. RP 168-78. However, granting Ramirez's alternative remedy, the court also admitted text messages between Ramirez and Arturo Gallegos from October to November 2014, which showed the relatives continued to engage in normal relations after the July text message. CP 111; *see* RP 170-71, 181, 222. In fact, Arturo and Ramirez had exchanged innocuous text messages on October 31 and November 1 about getting together. RP 1013-29, 1079-81; Ex. 39.

DNA⁹ results showed Ramirez probably, at some unknown time even months earlier, wore the hat and glove found in his uncle's bedroom; but there was also at least one other unidentified contributor of DNA for each item. RP 801-15, 822-27, 833.

In its proposed instructions, filed after trial commenced, the State for the first time proposed an aggravating circumstance for multiple victims asking the jury to determine as to each count of murder "whether the following aggravating circumstance exist: There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person." Supp. CP __ (Sub 71, pp.30-33). This language was not charged in the information or amended information. CP 1-2, 232-33. This aggravating circumstance does not appear in the Sentencing Reform Act (SRA), Chapter 9.94A RCW, but at RCW

⁸ The prosecution told the court it did not believe the murders were gang-related and did not intend to educate the jury on potential gang-related interpretations of the text message. RP 183.

⁹ Deoxyribonucleic acid. RP 795-96.

10.95.020(10). The State did not cite either that provision or any part of Chapter 10.95 RCW (Capital Punishment-Aggravated First Degree Murder) in the information. CP 1-2, 232-33. Nevertheless, the special verdicts were submitted to the jury. CP 271, 272.

The jury convicted Ramirez of the two counts of premeditated murder and one count of unlawful possession of a firearm. CP 275, 277, 279-81. The jury also found the aggravating circumstance for each count. CP 276, 278.

At sentencing, the State argued the sentences for the two murders with firearm enhancements must run consecutively under RCW 9.94A.589(1)(b)'s serious violent offense provision. CP 304-07 (State's sentencing brief). The court agreed it was "required" to impose consecutive sentences, and sentenced Ramirez to 608 months for count one and 380 months for count two, for a total of 988 months of incarceration, with the unlawful possession of a firearm count running concurrently to the others. RP 1229-33; CP 311-25 (judgment and sentence). The State did not request, and Ramirez did not receive, any additional time for the aggravating circumstance the jury found for each count. *See* CP 304-07, 311-25.

E. ARGUMENT

1. The State presented insufficient evidence to prove beyond a reasonable doubt that the murders were premeditated.

- a. The State must prove every element of a criminal charge beyond a reasonable doubt.

To sustain a criminal conviction, the State must prove every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435

(2000); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Hummel*, 196 Wn. App. 329, 352, 383 P.3d 592 (2016); U.S. Const. amend. XIV; Const. art. I, § 3.

Whether the evidence is sufficient to sustain a conviction is a question of constitutional law reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). This Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found any one or more of the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

Speculation is not sufficient to sustain the State's burden. *Hummel*, 196 Wn. App. at 357 (citing *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013); *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010)).

The absence of proof of an element beyond a reasonable doubt requires dismissal of the conviction and charge. *E.g.*, *Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

- b. Premeditation is an essential element of first degree murder that must be proved by the State beyond a reasonable doubt.

To convict Ramirez as charged, the State bore the burden of proving beyond a reasonable doubt that Ramirez acted with premeditated intent to cause the death of Juan Gallegos and that Ramirez acted with premeditated intent to cause the death of Arturo Gallegos. RCW 9A.32.030(1)(a) (A person is guilty of murder in the first degree when “[w]ith a premeditated

intent to cause the death of another person, he or she causes the death of such person.”); CP 232-33 (amended information).

The element of premeditated intent distinguishes murder in the first degree from murder in the second degree. *State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986).

Premeditated intent, in particular, means “the deliberate formation of and reflection upon the intent to take a human life” and involves “the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995)). “When intent is an element of the crime” it “may not be inferred from conduct that is ‘patently equivocal.’” *Vasquez*, 178 Wn.2d at 7.

Premeditation “must involve more than a moment in point of time.” RCW 9A.32.020(1). “To establish premeditation, the State must show ‘the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.’” *Hummel*, 196 Wn. App. at 354 (quoting *State v. Hoffman*, 116 Wn.2d 51, 82, 804 P.2d 577 (1991); *Gentry*, 125 Wn.2d at 596-97). Simple “opportunity to deliberate is not sufficient.” *Bingham*, 105 Wn.2d at 827.

Premeditation is not proven by showing the act causing death occurred over an appreciable amount of time, because to do so “obliterates the distinction between first and second degree murder.” *Bingham*, 105 Wn.2d at 826. “Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation.” *Id.*

c. The State did not prove Ramirez premeditated the murder of Juan Gallegos.

The prosecution argued to the jury that it had proved the premeditated murder of Juan Gallegos because 10 gunshots were fired at him. RP 1166. The State's evidence is insufficient because it depends upon a mere opportunity for the shooter to have stopped, deliberated, and formed a premeditated intent to kill. The State did not present evidence that Ramirez (or any shooter) in fact engaged in a "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning." See *Bingham*, 105 Wn.2d at 823 (quoting *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982)). In short, the State's theory is speculative.

The State's theory, moreover, is foreclosed by *Bingham*, 105 Wn.2d 820. In *Bingham*, the defendant met the victim on a bus and later that day they hitchhiked on a rural highway. 105 Wn.2d at 821. The victim was later found dead and evidence showed the defendant held his hand over her mouth, strangling her before raping her. *Id.* The State theorized that Bingham wanted to have sex with the victim and that he had to kill her in order to do so. *Id.* at 822. Although our Supreme Court found sufficient opportunity (*i.e.*, time) for deliberation, it found no evidence from which the jury might have inferred Bingham actually deliberated on the killing. *Id.* at 827. The Court held that the mere passage of time while the killing is being perpetrated, in that case the approximately three to five minutes it took to kill by manual strangulation, showed only an opportunity to deliberate. *Id.* at 822, 826. This opportunity to form premeditated intent was insufficient to sustain the element of premeditation absent evidence that the defendant did in fact deliberate. *Id.* at 822, 826.

To “allow a finding of premeditation only because the act takes an appreciable amount of time” is insufficient because it “obliterates the distinction between first and second degree murder.” *Bingham*, 105 Wn.2d at 826 (agreeing with Court of Appeals majority).¹⁰ Because “no evidence was presented of deliberation or reflection before or during the strangulation, only the strangulation” itself, *Bingham*’s conviction was reversed. *Id.* at 827. The same result is compelled here.

As in *Bingham*, the State presented no evidence of deliberation or reflection before or between the shots that were fired into Juan Gallegos. In fact, the evidence indicates that Juan’s murder was not prolonged. Although he received multiple shots, all the shots were fired before 911 was called and before his body was located outside the neighboring apartment. *See* RP 446-47, 449, 532-33, 537-38, 542-43, 550-53. No one claimed to hear a struggle between Juan and his murderer. The State argued the jury could infer Ramirez began shooting Juan when Juan surprised Ramirez after Juan heard the gunshot that killed Arturo. RP 1155-56. This suggests spontaneity, not premeditation. Further, there was little, if any, gap between the murders of Arturo and Juan. *See* RP 1157 (prosecutor’s argument).

¹⁰ In *State v. Allen*, on the other hand, the State presented sufficient evidence of premeditation where an appreciable period of time preceded the commencement of the strangulation, during which time there was an altercation that moved from the kitchen to the bedroom and involved pushing and wrestling before escalating to strangulation. 159 Wn.2d 1, 7-8, 147 P.3d 581 (2006). The involvement of a prolonged period of time and the infliction of injuries by various, escalating means over that time supported a finding of premeditation. *Id.*; *accord State v. Gibson*, 47 Wn. App. 309, 734 P.2d 32 (1987) (evidence of a brief lapse of time between blunt force blows to the head and later strangulation was sufficient to show premeditation).

As in *Bingham*, the State at most presented evidence of an opportunity to form premeditation. 105 Wn.2d at 827. But mere opportunity is insufficient to sustain the State's burden. *Id.* The State presented no evidence Ramirez planned or formed an intent to murder Juan Gallegos. *Hummel*, 196 Wn. App. at 355-56, 358 (reversing for insufficient evidence of premeditated intent). Speculation that premeditated intent was formed, like an opportunity to form intent, does not satisfy the State's burden. *Id.* at 357 (citing *Vasquez*, 178 Wn.2d at 16; *Nevils*, 598 F.3d at 1167).

Our courts have affirmed for sufficient evidence of premeditation where the State can substantiate several factors: motive, procurement of a weapon, stealth, and the method of killing. For example, in *Pirtle*, there was sufficient evidence of premeditation where the State proved at least two motives as well as planning, all of which supported a method of killing that suggested premeditation. 127 Wn.2d 628, 644. The defendant in *Pirtle* first rendered the victim unconscious, then cut her throat. 127 Wn.2d at 628. Further, there was evidence the victim resisted. *Id.* The defendant then committed another murder before returning to the first victim to kill her with at least 16 cuts to the throat. *Id.* Finally, the Court found the defendant "had the presence of mind to change clothes, gather the robbery proceeds" and return home while attempting to dispose of the evidence. *Id.* at 62, 644. As in *Pirtle*, the State has presented sufficient evidence in other cases based on the motive, method, stealth and the weapon involved. *E.g.*, *State v. Ollens*, 107 Wn.2d 848, 853, 733 P.2d 984 (1987) (sufficient evidence of premeditation where a weapon was used, multiple non-lethal wounds were inflicted, victim's throat was cut after infliction of the other wounds, victim was struck from behind, and there was

evidence of a motive—robbery); *State v. Ortiz*, 119 Wn.2d 294, 312-13, 831 P.2d 1060 (1992) (sufficient evidence of premeditation where murder was committed with a knife procured on the premises but weapon was taken from place of procurement into a different room where murder was committed, multiple wounds were inflicted, victim was struck in the face with something other than the knife, and defensive wounds on the victim suggested a prolonged struggle)¹¹; *State v. Townsend*, 142 Wn.2d 838, 48-49, 15 P.3d 145 (2001) (sufficient evidence of premeditation where defendant offered to “take care of” the problem a friend was having with the victim, procured a gun and brought it into the woods to confront victim, fired one non-fatal shot but would not seek aid for victim’s wounds, instead defendant asked for “God’s forgiveness” before firing the second, fatal shot to the head).

This case is not comparable to *Pirtle*, *Ollens*, *Ortiz*, or *Townsend*. Here, the State proved a gun was used, but it could not present any evidence of how the gun came to be found at the murder scene. Evidence that a gun was used cannot alone sustain the convictions where our Supreme Court has reversed even where greater evidence regarding the murder weapon is produced. Compare *State v. Baker*, 150 Wash. 82, 94-96, 272 P. 80 (1928) (reversing conviction; mere transport of weapon, gun, from home to scene of crime is insufficient to prove premeditation where gun might have been brought simply to protect interests rather than for premeditated killing) with *State v. Condon*, 182 Wn.2d 307, 315, 343 P.3d 357 (2015) (evidence

¹¹ *Ortiz* was disapproved of on other grounds in *State v. Condon*, 182 Wn.2d 307, 323-24, 343 P.3d 357 (2015).

sufficient where State proved defendant not only transported loaded gun to murder scene but arrived with intent to rob a drug dealer).

d. The State did not prove Ramirez premeditated the murder of Arturo Gallegos.

The State likewise depended on mere speculation to argue the murder of Arturo Gallegos was premeditated. First, the State claimed Ramirez brought a gun to Arturo's home. RP 1164. But, as discussed, there was no evidence how or where the murder weapon was procured. No one saw the weapon before or during the murders, and it was never recovered. Such speculation is insufficient to sustain the State's burden of proof. *E.g., Hummel*, 196 Wn. App. at 357; *Vasquez*, 178 Wn.2d at 16, 309 P.3d 318 (2013); *Nevils*, 598 F.3d at 1167.

Next, the State argued that Ramirez aimed a shot at Arturo's head from 18 to 24 inches away. RP 1164. Here, the State might have proved intent, but it did not prove premeditation. Impulsive or spontaneous acts causing someone's death are not premeditated. *State v. Luoma*, 88 Wn.2d 28, 34, 558 P.2d 756 (1977). A killing that occurs in the heat of passion may have been intentional but not premeditated. *State v. Bolen*, 142 Wash. 653, 666, 254 P. 445 (1927). The State presented no evidence that Arturo's killing was anything more than an intentional act.

Finally, the State argued that the lack of defensive wounds on Arturo or other evidence of a fight showed premeditation. RP 1166. This argument was also insufficient. A lack of defensive wounds corroborates a lack of premeditation because it suggests there was not a protracted struggle during which the accused deliberated on an intent to kill and escalated the violence. *See State v. Sherrill*, 145 Wn. App. 473, 485, 186 P.3d 1157 (2008) (defensive marks on victim coupled with history of domestic violence and course of attack that occurred over 42

hours sufficient to prove premeditation); *Ortiz*, 119 Wn.2d at 312-13 (defensive wounds on victim coupled with transportation of murder weapon from one room to another to kill victim, infliction of multiple wounds and signs of prolonged struggle sufficient to prove premeditation).

The State may also argue that Ramirez's July 15 text message supports premeditation. But that text message was sent four months before Arturo was killed, and Ramirez and Arturo had communicated and seen each other in the interim, including when Ramirez helped Arturo move.

e. Insufficient evidence of premeditated intent requires reversal.

The absence of proof of an element beyond a reasonable doubt requires reversal of the conviction and dismissal of the charge. *Jackson*, 443 U.S. at 319; *Green*, 94 Wn.2d 216. The State did not ask that the jury be instructed on any lesser offense than premeditated first degree murder. Because the State failed to prove this charge, Ramirez is entitled to have the convictions dismissed. *Hummel*, 196 Wn. App. at 359 (citing *In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 294, 274 P.3d 366 (2012)).

f. The unlawful possession of a firearm conviction must also be reversed for insufficient evidence.

To prove unlawful possession of a weapon, the State must establish actual or constructive possession of a firearm. RCW 9.41.040; *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012).¹² The only evidence that connected Ramirez to a firearm was if the State proved he

¹² Ramirez stipulated he had been convicted of an offense that rendered him ineligible to possess a firearm. CP 247.

murdered Arturo and Juan Gallegos, because they died from gunshot wounds. The firearm that killed them was never recovered. And no firearms were found on Ramirez or among his possessions.

Because the State failed to prove the two counts of murder, it necessarily also failed to prove Ramirez possessed a firearm. Furthermore, the evidence connecting Ramirez to the murder weapon was particularly weak: no one saw Ramirez at the apartment complex, his cellular phone was tracked only to within the general geographic area of about a mile radius near the apartment complex, which was only three or four miles from Ramirez's home, and even if Ramirez was in the area, he had innocent reasons for being there, including the innocuous exchange of messages with his uncle about meeting up that day. Exs. 166-168; RP 921-29, 934-35; *see Chouinard*, 169 Wn. App. at 897, 903 (insufficient evidence of possession of a firearm where State showed shots were fired from area in which defendant was located but could not prove defendant ever had actual or constructive possession of the firearm used). Moreover, Hritsco twice could not identify the person he spoke with the night of the murders and, even if it was Ramirez, Hritsco did not see Ramirez with a firearm and could not connect him to the murders. Ramirez's DNA was among the DNA on a hat and glove in Arturo's bedroom, but again, Ramirez and Arturo were relatives and the State could not prove when the DNA was placed on the items.

In sum, the State failed to prove Ramirez possessed a firearm on November 1, 2014. The conviction should be reversed and the count should be dismissed.

2. Carlton Hritsco twice failed to identify the person he talked to the night Arturo and Juan Gallegos died; because Hritsco only identified Ramirez after Hritsco saw Ramirez on the news as the murder suspect, Hritsco's identification was unreliable and should have been excluded.

“The identification of strangers is proverbially untrustworthy.” *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). Carlton Hritsco had a 15 to 20 minute conversation with an “Indian or Hispanic looking” man on November 1, 2014. Just a couple of hours later the police showed Hritsco photographs that included Ramirez. But Hritsco did not identify Ramirez as the person he spoke with that night. The next day, the police again presented a photographic montage that included Ramirez to Hritsco. Hritsco again did not identify Ramirez. Hritsco’s subsequent identification of Ramirez was unreliable and should have been excluded because it was tainted by Hritsco’s exposure to Ramirez in the media as the person charged.

- a. Washington’s constitutional due process guarantees protect more broadly than the federal constitution.

The due process analysis used to evaluate the inadmissibility of an identification procedure under the Fourteenth Amendment is focused on the suggestiveness of the police procedures. *See Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012). Deterring law enforcement from “rigging identification procedures” is one of the primary aims of a federal due process clause analysis. *Id.* at 232-33. Therefore, the only

identifications that raise federal due process concerns are those tainted by improper government conduct. *Id.* at 246.

But our state constitutional due process right to a fair trial guarantees more than deterring law enforcement. Reliability is the primary concern under article I, section 3. An independent evaluation of article I, section 3 demonstrates that reliability of the identification should be the touchstone.

This Court should hold that the reliability of an identification is not dependent upon the propriety of government conduct. Rather, the Court should adopt a totality of the circumstances test that includes the *Biggers* factors¹³ as well as those factors determined to be relevant to reliability and accuracy in scientific studies and court decisions since *Biggers*. Many other states have updated their standards in light of current scientific data, and this Court should do the same. *See, e.g., Oregon v. Lawson*, 352 Or. 724, 291 P.3d 673 (2012) (departing from federal due process analysis to hold under state law that reliability of identification is not dependent upon state action); *State v. Henderson*, 208 N. J. 208, 27 A.3d 872 (2011) (adopting new test); *State v. Chen*, 208 N.J. 307, 27 A.3d 930 (2011) (reliability of eyewitness identification must be examined before trial even when suggestiveness derives from private, not public, actor); *Wisconsin v. Dubose*, 699 N.W.2d 582 (Wis. 2005) (relying on state constitutional due process to

¹³ In *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Supreme Court adopted five factors to be applied to determine whether a suggestive identification would be admissible at trial: (1) the opportunity of the witness to view the defendant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the defendant; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

adopt new approach to determining reliability of showup identifications); *State v. Hunt*, 69 P.3d 571 (Kan. 2003) (adopting new test that refines *Biggers* model); *Utah v. Ramirez*, 817 P.2d 774 (Utah 1991) (adopting new test); *Massachusetts v. Johnson*, 650 N.E.2d 1257 (Mass. 1995) (adopting more protective rule under state constitution than required by federal constitution); *New York v. Adams*, 423 N.E.2d 379 (N.Y. 1981) (same).

State v. Gunwall sets forth six nonexclusive factors to guide the Court in determining whether a state constitutional protection affords greater rights than a similar federal provision: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions; (3) state constitutional history; (4) preexisting state law, (5) structural differences between the state and federal constitutions; and (6) matters of particular state or local concern. 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986).

With regard to factors one and two, the textual language of the federal due process clause and article 1, section 3 are not significantly different. Both prohibit the deprivation of “life, liberty, or property without due process of law.” U.S. Const. amend. XIV; Const. art. I, § 3. This does not end the inquiry, however.

Even where state and federal constitutional provisions are identical, the intent of the framers of each constitution may have been different or another intent may be found in a different provision of the state constitution. *Gunwall*, 106 Wn.2d at 61; Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 514-16 (1983-1984) (interpret

identically worded provisions independently absent a strong “historical justification for assuming the framers intended an identical meaning”).

While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary. The people of this state shaped our constitution, and it is our solemn responsibility to interpret it.

Dubose, 699 N.W.2d at 597.

For example, in *State v. Bartholomew*, our Supreme Court held that despite textual similarity, article I, section 3 is broader than the Fourteenth Amendment. 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984) (“*Bartholomew II*”) (interpretation of Fourteenth Amendment does not control interpretation of art. 1, § 3). Thus the provisions of the capital punishment statute at issue in *Bartholomew II* violated due process under the state constitution even if the same result is not compelled under the Fourteenth Amendment. *Id.*

The third *Gunwall* factor, state constitutional history, counsels for an independent state constitutional analysis revealing broader protections. Article 1, section 3 requires independent interpretation unless historical evidence shows otherwise. Utter, 7 U. Puget Sound L. Rev. at 514-16. The framers of the Washington constitution modeled article I, section 3 after the Oregon and Indiana constitutions rather than the federal constitution. Justice Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 3 (2002) (hereinafter Utter & Spitzer). Like their Indiana and Oregon counterparts, the framers “originally intended [the provisions of the Declaration of Rights] as the primary devices to protect individual rights.” *Id.* Thus the federal Bill of Rights, including the Fourteenth Amendment, “was intended as a

secondary layer of protection” that applies only against the federal government. Utter, 7 U. Puget Sound L. Rev. at 636.

Preexisting state law, the fourth *Gunwall* factor, also points toward an independent state constitutional analysis and broader protection against unreliable identifications. The Washington Supreme Court has held that the standard for reliability of evidence embodied in the state constitution’s due process clause provides broader protection than the federal due process clause, and it has never retreated from this holding. *Marriage of King*, 162 Wn.2d 378, 414, 174 P.3d 659 (2007) (Madsen, J., dissenting) (citing *Bartholomew II*, 101 Wn.2d at 639). In *Bartholomew I*, the Court held that certain provisions of Washington’s death penalty statute violated the federal due process clause because they permitted consideration of any relevant evidence at the penalty phase regardless of its reliability. *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982) (“*Bartholomew I*”). The U.S. Supreme Court vacated the judgment and remanded for reconsideration in light of its decision in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). On remand, our Supreme Court emphasized the importance of the state constitution’s different due process considerations.

[I]n interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court’s interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution’s due process clause.

Bartholomew II, 101 Wn.2d at 639. It held that the statute violated article I, section 3, declaring, “We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability.” *Id.* at 640. It stressed that “the independent state constitutional

grounds we have articulated are adequate, in and of themselves, to compel the result we have reached.” *Id.* at 644.

This independent interpretation of article I, section 3 is not an outlier. In *State v. Davis*, 38 Wn. App. 600, 686 P.2d 1143 (1984), the trial judge inferred guilt from the defendant’s post-arrest silence. This did not violate the federal due process clause because the defendant had not been read *Miranda* warnings. *Davis*, 38 Wn. App. at 604 (citing *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982)). But this Court held that article I, section 3 required a different result. *See id.*

Pre-existing state law addressing both the fairness of procedures in state courts, and the specific question of whether article I, section 3 provides greater protection against the admissibility of unreliable evidence in a criminal trial, unequivocally favors an independent constitutional analysis with respect to identification testimony.

The fifth factor, differences in structure between the state and federal constitutions, supports an independent analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State’s power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); *Gunwall*, 106 Wn.2d at 66.

Finally, the sixth factor weighs heavily in favor of independent interpretation because the reliability of identifications and their admissibility in state court proceedings are inherently matters of state or local concern. *Bartholomew II*, 101 Wn.2d at 643-44; *Young*, 123 Wn.2d at 180.

On balance, the *Gunwall* criteria compel an independent state constitutional analysis and dictate that article 1, section 3 is more protective than the Fourteenth Amendment.

- b. Hritsco’s identification was constitutionally unreliable because he could not identify until he viewed news stories that connected Ramirez to the crimes and the person Hritsco initially described did not match Ramirez.

This Court should hold that article 1, section 3, prohibits the admission of unreliable identification evidence. Admissibility should not turn on the goal of deterring police misconduct because our constitution is more concerned with reliability and fairness than with deterrence. *See Bartholomew II*, 101 Wn.2d at 640 (“We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability”); *cf. State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (unlike the Fourth Amendment, primary purpose of article I, section 7 of Washington Constitution is not to deter police misconduct, but to protect privacy). Instead, the suggestive circumstances surrounding the identification should be one factor in the totality-of-circumstances analysis.

“[E]yewitness misidentification is the leading cause of wrongful convictions, a factor in 75 percent of post-conviction DNA exoneration cases.” Jason Cantone, *Do You Hear What I Hear?: Empirical Research on Earwitness Testimony*, 17 Texas Wesleyan L. Rev. 123, 128 (Winter 2011). Decades of scientific research shows that the federal standard “does not offer an adequate measure for reliability” and “overstates the jury’s inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.” *Henderson*, 27 A.3d at 878. A witness’s recollection of a total stranger can be easily, and unintentionally, distorted by the circumstances. *Mason v. Brathwaite*, 432 U.S. 98, 112, 97 S. Ct. 2243, 53 L. Ed. 2d 140

(1977). Eyewitness identification testimony causes wrongful convictions because it is compelling for a jury even if inaccurate. Despite the science demonstrating flaws in eyewitness identification, to a jury “there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981) (Brennan, J., dissenting) (quoting Elizabeth Loftus, *Eyewitness Testimony* 19 (1979)). Identification testimony is particularly compelling where other evidence—such as confessions, forensic science, or informants—is lacking. *Henderson*, 27 A.3d at 867.

In *State v. McDonald*, 40 Wn. App. 743, 744, 700 P.2d 327 (1985), a robbery victim viewed a line-up and picked out number four, who was not the defendant. Afterward, the detective told him that the person in position number three was the one who had been arrested. *Id.* The witness also saw the defendant handcuffed outside the courtroom. *Id.* at 745. The victim then identified the defendant in-court as the perpetrator, despite defense objection. *Id.*

This Court ruled that the in-court identification should not have been permitted. By telling the witness that the defendant was the person who had been arrested, the detective effectively told the victim that “this is the man” who did it. *Id.* at 746. The witness did not have a strong enough independent memory to overcome the suggestiveness of the identification procedure. The incident lasted only five or six minutes and the perpetrators were behind the victim for half of that time. *Id.* at 747. The victim did not describe the person’s facial features clearly or his clothes accurately. *Id.*

The court held there was a substantial likelihood of misidentification. *Id.* The court also refused to remand the case for a hearing on whether the in-court identification came from an independent memory of the incident. It ruled that “any identification” by the witness “would be so unreliable that its admission would violate due process.” *Id.* at 748 n.2.

For similar reasons, Connecticut recently held “that first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court.” *State v. Dickson*, 322 Conn. 410, 426, 141 A.3d 810, 824 (2016), *cert. denied*, 137 S. Ct. 2263 (Jun. 19, 2017). In-court identifications are inherently problematic because the witness has already been informed of the identity of the person who has been charged with committing the crime. *Id.* at 439-40. Thus, due process requires additional protections—such as for the trial court to pre-screen the identification. *Id.*

Hritsco’s identification of Ramirez bore the same unreliable and suggestive hallmarks as *Dickson* and *McDonald*. Although Hritsco twice failed to pick Ramirez out of photographic montages, Hritsco subsequently viewed Ramirez in the media, identified as the person charged with committing these murders. Like the witnesses in *Dickson* and *McDonald*, Hritsco was able to identify Ramirez only after Hritsco had been informed that the State had charged Ramirez. “Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime.” *United States v. Rogers*, 126 F.3d 655, 659 (5th Cir. 1997) (holding in-court identification was

impermissibly suggestive because it occurred only after witness had seen defendant in court, seated next to his lawyer).

Moreover, by the time Hritsco saw Ramirez named as the suspect, he had already twice viewed him in the photographic arrays presented by the police. Source memory confusion is a known cause of misidentification. *E.g., Massachusetts v. Collins*, 470 Mass. 255, 21 N.E.3d 528, 534 & n.9 (2014). A witness who is shown an individual's face numerous times may identify that person due to the repetition and not because the witness recognizes him or her from the circumstances of the crime. *Id.* After seeing the accused in several arrays and on television, “[a]n eyewitness may recall the defendant’s face, but not recall that the source of the eyewitness’s memory was the defendant’s presence in a pretrial lineup or photographic array rather than the defendant’s presence at the scene of the crime [or witness’s other prior contact with suspect].” *Id.* at 534 n.9.

Further, Hritsco’s identification was not corroborated by the description he provided police. Hritsco told the officers that the person he spoke with was 5 feet 8 inches tall, weighed 180 pounds, was Indian or Hispanic-looking, called himself “Demon,” and had long, slicked-back hair and scars or acne. RP 476, 516-18, 522. Ramirez, on the other hand, is six feet tall and weighs 220 pounds. RP 463-64, 469, 1069; Ex. 115. Ramirez does not have scars or acne. Ex. 115. He does not have long, slicked-back hair. *Id.* Though witnesses testified Ramirez used the nickname “Demon,” there were several “Demons” known to law enforcement in Spokane Valley. RP 51, 385, 441.

Some courts have held that a witness's exposure to the defendant through the media does not taint a subsequent identification. *Rogers v. Texas*, 774 S.W.2d 247, 259-60 (Tex. Ct. Crim. App. 1989) (in-court identification admissible where witnesses were exposed to a newspaper article identifying the defendant the day before attending the lineup because court excluded testimony from the one witness who admitted she was influenced by newspaper photograph), *overruled on other grounds by Peek v. Texas*, 106 S.W.3d 72 (2003); *United States v. Kimberlin*, 805 F.2d 210, 233 (7th Cir. 1986) (finding no due process violation where a witness had seen a picture of the defendant on television because it was not the result of government conduct); *Connecticut v. Berthiaume*, 171 Conn. App. 436, 157 A.3d 681, 692-94 (2017) (no due process claim where taint derived from seeing defendant in the newspaper rather than as a result of government conduct); *Arizona v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, 728-30 (2001) (finding no state action where a witness observed the defendant in a newscast of his arraignment), *abrogated on other grounds by Arizona v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012); *O'Connell v. Indiana*, 742 N.E.2d 943, 948 (2001) ("A witness' viewing of a suspect's photograph through the media does not ordinarily constitute an impermissibly suggestive identification procedure because it is not engineered by prosecution or law enforcement agencies."). However, in none of these cases did the witness first fail to identify the defendant in two police-initiated procedures that included photographs of the defendant and then only "recognize" the defendant following this media exposure.¹⁴

¹⁴ In *State v. Sanchez*, 171 Wn. App. 518, 572-83 & n.23, 288 P.3d 351 (2012), the witness did not identify the defendant in photographic arrays but then saw the defendant in the

In Hritsco’s identification, the baseline was clear. Prior to any media exposure or direction from others that Ramirez was the one charged with the crimes, Hritsco could not identify Ramirez—twice. This was true even though those opportunities were close in time to Hritsco’s conversation with Ramirez. Hritsco could not identify Ramirez until Hritsco learned from media exposure that Ramirez was, in fact, the suspect.

Constitutional errors require reversal unless the State proves beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). At trial, the State argued that Hritsco was a “very critical witness” and excluding Hritsco’s placement of Ramirez “at the scene” that night would be “a big deal” and a “significant blow to the State’s case.” RP 62-63. The State cannot now meet its burden to show Hritsco’s identification did not contribute to the verdict.

- c. Alternatively, Hritsco’s eventual identification should have been excluded under ER 403 because it was substantially more prejudicial than probative.

Alternatively, even if the state constitution does not compel exclusion of Hritsco’s tainted identification, our evidentiary rules do. *See Chen*, 27 A.3d 930 (New Jersey courts must test reliability of identifications tainted by non-government action under state evidentiary rules); *State v. Hibel*, 290 Wis.2d 595, 714 N.W.2d 194 (2006) (remanding to consider whether

news and in court at a pretrial hearing. This Court’s decision is not applicable here, however, because the due process issue addressed was limited to the role of police conduct in out-of-court identification procedures, an issue distinct from the one presented here, and the Court did not decide the limited state constitutional issue raised there (whether the *Biggers* factors should be rejected).

identification made after viewing defendant in courthouse should be suppressed under state evidentiary rules while leaving open that a highly unreliable identification could violate due process even if government conduct is absent); *Lawson*, 352 Or. at 751-63 (adopting new test incorporating evidentiary rules to govern admissibility of eyewitness identification evidence). An unreliable identification should be excluded under ER 403 if its probative value is substantially outweighed by its prejudicial impact or its risk of misleading the jury. *Perry*, 565 U.S. at 247.

Ramirez moved to exclude Hritsco's identification under ER 403. RP 47, 48-69; CP 66-74, 145-62, 193-96, 218-26. The trial court did not conduct an ER 403 balancing test in its written or oral findings. CP 301-03; RP 204-05. But as the above discussion shows, juries give undue weight to eyewitness identification. Thus, the prejudicial force of an unreliable identification is plain. The unreliability of the identification also renders the evidence less probative. A false identification is not at all relevant to a fair fact finding process. In balancing the ER 403 factors, therefore, the probative value of Hritsco's tainted identification is outweighed by the substantial risk of undue prejudice.

ER 403 provides an alternative grounds for the exclusion of Hritsco's identification.

3. The court abused its discretion in overruling Ramirez's objection to testimony about what a witness missed most about her deceased relatives.

Only relevant evidence is admissible at trial. ER 402. Evidence is relevant if it has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if

relevant, evidence should be excluded if its probative value is substantially outweighed by the risk of undue prejudice. ER 403.

A victim's character is generally not relevant in a homicide case. *State v. Mayes*, 20 Wn. App. 184, 194-95, 579 P.2d 999 (1978). Yet, over Ramirez's objection, the prosecutor elicited testimony from Arturo Gallegos's daughter, Rosemary Valerio, about what she "miss[es] about [her] dad the most." RP 439-40.

Q What are the things that you miss about your dad the most?

A His sense of humor.

[Defense counsel]: I would like to object for relevance, please.

THE COURT: Mr. Treece.

MR. TREECE: Your Honor, I'm trying to show this was a human being. It's an element of the crime. To show that he is essentially a human being, I've got to establish that he had human traits.

THE COURT: All right. Let's be judicious about it.

RP 439-40.

Because the court overruled Ramirez's objection, the prosecutor continued his questioning. Thus, the witness added to her testimony with warm characteristics and sympathetic traits about her deceased father. RP 440.

Q (By Mr. Treece) Please tell us what are the things that you miss about your dad.

A He was a funny guy, you know. He liked life. He loved life. Always trying to find ways to make us laugh. He was always joking around.

RP 440. Then, upon further questioning from the prosecutor, the witness provided similar emotional testimony about her uncle Juan.

Q What about your uncle?

A Same thing. He was very kind-hearted and, you know, he was religious, strong believer in God, so he was always trying to get us to go to church and every chance he got he would like to preach to us, you could say, about God.

Q Did you go to church with him sometimes?

A No, not together, but he went to church.

RP 440.

This evidence was irrelevant to whether the State could prove Ramirez committed premeditated first degree murder. The human traits of Arturo and Juan Gallegos were not part of the State's burden. *See* CP 259, 260 (to-convict instructions); *Mayes*, 20 Wn. App. at 194-95. The medical examiner, moreover, testified to each victim's death. RP 852-58, 886-88. Where self-defense is at issue, a homicide victim's reputation for violence may be relevant. *Mayes*, 20 Wn. App. at 194-95; *State v. Hixson*, 94 Wn. App. 862, 867, 973 P.2d 496 (1999). But self-defense was not at issue here. Therefore, the Gallegoses' character traits and what their relatives miss the most about them were irrelevant to the State's burden. *See id.*

The testimony was not only irrelevant, but it was also highly prejudicial. The State garnered sympathy for the victims and against Ramirez by personifying the victims in an extremely favorable, colorful, and warm light.

The trial court abused its discretion in admitting the irrelevant and prejudicial testimony about Juan and Arturo's best traits. The error can be harmless only if there is no reasonable

possibility that the inadmissible evidence was used to reach the guilty verdict. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). There is at least a reasonable probability the jury was swayed in part by the irrelevant but highly emotional testimony about the victims' best characteristics, particularly where the remaining evidence was weak—for example, no murder weapon was located, no one saw Ramirez at the apartment complex or with the deceased that night, and Hritsco's belated identification of Ramirez as someone he spoke to that night was tainted by media exposure. The erroneous admission accordingly requires reversal.

4. The court erred by admitting hearsay from a non-testifying declarant as a statement of identification.

Hearsay is “a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801 (c). Subject to narrow exceptions, hearsay is presumptively inadmissible. ER 802. Whether or not a statement is hearsay is reviewed de novo. *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (citing *State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001)).

Evidence Rule 801 provides several categories of out of court statements that are not hearsay. ER 801(d). Prior statements by a witness are not hearsay if (a) “the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement,” and (b) the statement is “one of identification of a person made after perceiving the person.” ER 801(d)(1)(iii); *State v. Grover*, 55 Wn. App. 252, 256-58, 777 P.2d 22 (1989).

The trial court erred when it admitted pursuant to this provision testimony from Rosemary Valerio, over Ramirez's objection, that she had heard that Ramirez goes by another name, "Demon." RP 441.

Q Did you know Christopher Ramirez to go by any other names?

A No, **not me personally. I've heard**, but I never heard him say another name.

Q What did you hear him go by?

MS. FOLEY: Objection, Your Honor. Hearsay.

MR. TREECE: Identity.

THE COURT: Sustained.

MR. TREECE: Identity specifically and exception to hearsay, Your Honor.

THE COURT: All right. Overruled.

A **They used to call him Demon.**

Q (By Mr. Treece) Had you ever seen his Facebook page?

A I don't do Facebook.

Q **Have you heard** what his Facebook page name was?

A **Yes.**

Q What was that?

A I believe it was Demon Ramirez.

RP 441 (emphasis added).

This evidence fails both the first and the second prongs of the statement of identification exception to the hearsay bar. *See* ER 801(d)(1)(iii). First, Ms. Valerio did not have personal

knowledge of Ramirez's nickname; she was not the declarant. RP 441. Instead, Ms. Valerio received this information from unspecified declarants who did not testify at trial and were not subject to cross examination. ER 801(d)(1) (prior statements by a witness are not hearsay if "the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement"); *State v. Jenkins*, 53 Wn. App. 228, 232-34, 766 P.2d 499 (1989) (rule is satisfied if opponent has a full and fair opportunity to cross-examine the declarant as to the hearsay).

Second, the statement was also not "one of identification of a person made after perceiving the person," thus failing the second prong as well. See ER 801(d)(1)(iii). That "they used to call" Ramirez "Demon" is not a statement of identification made after perceiving Ramirez. See *Grover*, 55 Wn. App. at 256-57. It is simply a nickname or a manner in which Ms. Valerio heard that unspecified persons referred to Ramirez.

The evidence was prejudicial. *Guloy*, 104 Wn.2d at 426 (evidentiary error requires reversal unless there is no reasonable possibility the inadmissible evidence was used to reach a verdict). Hritsco's identification of Ramirez was unreliable, but he had consistently stated that the person he spoke to that evening referred to himself as "Demon." Although other witnesses also testified that Ramirez used the nickname "Demon," Ms. Valerio's inadmissible testimony indicated a larger, unspecified community knew him by that name.

5. The prosecutor inflamed the prejudices of the jury against Ramirez by arguing from facts not in evidence about the victim's suffering and the defendant's internal thought processes.

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State

Constitution.” *State v. Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). As quasi-judicial officers, prosecutors have a duty to ensure the accused person receives the constitutionally fair trial to which he is entitled. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

A prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. *Glasmann*, 175 Wn.2d at 704 (quoting Am. Bar Assoc’n, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980)). A prosecutor has “wide latitude” to draw and argue reasonable inferences from the evidence, but he may not “invite the jury to decide any case based on emotional appeals.” *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986).

Furthermore, a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). As this Court noted in *Pierce*, misconduct by appeals to the jury’s passions and prejudices is closely related to facts-not-in-evidence misconduct because “appeals to the jury’s passion and prejudice are often based on matters outside the record.” 169 Wn. App. at 53 (citing *State v. Belgarde*, 110 Wn.2d 504, 507-10, 755 P.2d 174 (1988); *State v. Claflin*, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984)).

Finally, it is patently improper for the prosecutor to “fabricat[e] an emotionally charged story of how the victims might have struggled” and to speculate on the defendant’s “thought process leading up to the crime”. *Pierce*, 169 Wn. App. at 554.

Here, the prosecutor violated all three precepts by stepping into the victim’s and defendant’s shoes without any evidence of these thought processes in the record. The

prosecutor's argument was calculated to inflame the passions and prejudices of the jury. It was improper.

First, the prosecutor speculated simultaneously on Ramirez's thought process and the victim's struggle by arguing,

Juan Gallegos doesn't stand a chance, because now Chris has line of sight and he has the gun. And he has a decision. Is it the first shot? Is it the second? Is it the third, the fourth, the fifth, sixth, seventh, eighth, the ninth, tenth? It's premeditation. It's cold. It's coming up from behind somebody and putting so many bullets into them that the end of their life must have been absolutely miserable.

RP 1167. Then the prosecutor continued by improperly asking the jurors to put themselves into the victim's head: "Think about all those wounds that Juan Gallegos had. Think about what he felt like in the last 30 seconds, maybe? That's premeditation." *Id.*

"[I]t is improper for the prosecutor to step into the victim's shoes and become his representative." *Pierce*, 169 Wn. App. at 554. Yet, "it is far more improper for the prosecutor to step into the defendant's shoes during rebuttal and, in effect, become the defendant's representative." *Id.* The prosecutor here did both, urging the jury to "think about . . . what he felt like in the last 30 seconds." RP 1167. The prosecutor further speculated Juan "must have been absolutely miserable" at the end. *Id.*

This argument was a calculated appeal to the jury's passions, prejudices and sympathies that could not have been cured by an instruction. *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) (argument that have an "inflammatory effect" on the jury are generally not curable by a jury instruction). The improper misconduct requires reversal. *See Glasmann*, 175 Wn.2d at 711

(when examining misconduct based on facts not in evidence and comments that deliberately appeal to the jury’s passion and prejudice, the “focus must be on the misconduct and its impact, not on the evidence that was properly admitted”).

6. The FBI agent’s historical cell-site analysis testimony relied on methodology that was developed by the FBI and has not been peer reviewed or generally accepted outside law enforcement and is not helpful to the jury. It should have been excluded.

Expert testimony that is neither generally accepted by the scientific community nor helpful to the jury is not admissible at trial. The trial court erred in admitting the testimony of an FBI agent who relied on proprietary methodology that overpromised and under-delivered.

- a. Special Agent Banks used proprietary methodology developed by the FBI for its exclusive use.

In an attempt to prove Ramirez was at the Broadway Apartment complex on November 1, 2014, the State hired FBI Special Agent Jennifer Banks who works in the FBI’s Cellular Analysis Survey Team (CAST). RP 93-95. CAST uses cell tower location information and cellular phone callers’ history—both provided by cellular providers to the FBI—to determine a one-to-two mile area in which a caller was located. RP 101-03. Banks testified at a pretrial hearing that CAST is generally accepted within law enforcement in the United States as the “preeminent program.” RP 98, 101.

CAST is generally accepted within law enforcement only because the program is proprietary intellectual property of the FBI. RP 107. Thus, it has not been tested by scientists outside the FBI. RP 113-14. Put otherwise, there has been no external validation. RP 114. Peer review is conducted only internally among CAST agents at the FBI. *See* RP 107-09. Moreover,

the program is relatively new and the FBI is still in the process of developing “best standards” for its use. RP 98, 111-12.

Nevertheless, over Ramirez’s objection under ER 702 and *Frye*’s standard of general acceptance, the trial court admitted Banks’s testimony. CP 97-104 (motion in limine), 201-03 (reply), 293-99 (ruling); RP 91-156, 215-19 (ruling). Banks then testified at trial about her CAST analysis in this case and showed the jury maps that indicated she pinpointed Ramirez through his cell phone to an area around the Broadway Apartments complex at 9:24 p.m., but that he was not at the apartment complex by 9:41 p.m. RP 919, 921, 927-29; Exs. 165-167.

- b. Expert testimony must be generally accepted and helpful to the jury to be admissible at trial.

Two standards govern the admissibility of expert testimony—ER 702 and *Frye*. First, under rule 702, expert evidence may be admitted only if “helpful to the jury in understanding matters outside the competence of ordinary lay persons.” *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 600, 260 P.3d 857 (2011).

Second, in determining the reliability and admissibility of scientific evidence, Washington courts apply the *Frye* standard. *Anderson*, 172 Wn.2d at 600-01; *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999); *see Frye*, 293 F. at 1014. *Frye* directs courts to apply certain criteria in assessing the reliability and admissibility of expert testimony.

General acceptance in the scientific community is the touchstone of our state’s admissibility under *Frye*. *See State v. Gentry*, 125 Wn.2d 570, 585, 888 P.2d 1105 (1995). Evidence based on a scientific theory or principle must have “achieved general acceptance in the

relevant scientific community” before it is admissible at trial. *Id.* The admissibility of evidence under *Frye* is a mixed question of law and fact subject to de novo review. *Anderson*, 172 Wn.2d at 600 (citing *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996)).

Testimony “concerning how cell phone towers operate constitute[s] expert testimony because it involve[s] specialized knowledge not readily accessible to any ordinary person.” *United States v. Yeley–Davis*, 632 F.3d 673, 684 (10th Cir. 2011); *accord, e.g., United States v. Natal*, 849 F.3d 530, 536 (2d Cir. 2017); *United States v. Hill*, 818 F.3d 289, 296 (7th Cir. 2016); *Maryland v. Payne*, 440 Md. 680, 104 A.3d 142 (2014). Courts, however, are split on whether historical cell-site analysis is admissible. *E.g., United States v. Evans*, 892 F. Supp. 2d 949, 956-57 (N.D. Ill. 2012) (FBI agents’ historical cell-site analysis testimony should have been excluded as unreliable and “wholly untested by the scientific community”); *Hill*, 818 F.3d at 298 (noting “No federal court of appeals has yet said authoritatively that historical cell-site analysis is admissible to prove the location of a cell phone user.”); *United States v. Reynolds*, 626 Fed. Appx. 610, 616-17 (6th Cir. 2015) (noting “split among federal courts” on admissibility of historical cell-site analysis but declining to resolve it because expert did not use analysis to pinpoint sector in which individuals were located)¹⁵. This Court should hold that Banks’s testimony did not satisfy ER 702 or *Frye* and should have been excluded.

¹⁵ While this unpublished opinion is not precedential, it is cited as persuasive authority pursuant to RAP 14.1(b). A copy is attached as an Appendix.

- c. Historical cell-site analysis like that presented by Banks should be excluded because it is not generally accepted by the scientific community and is not helpful to the jury, who may overvalue it.

Banks's testimony should have been excluded both under *Frye*, because it is not generally accepted in the scientific community, and under ER 702, because it is not helpful to the jury.

Proprietary, exclusive methodology is concerning because it is “not subject to independent peer review” and because it lacks an established “error rate with which to assess reliability because there was no information on how many times the technique was employed unsuccessfully.” *Reynolds*, 626 Fed. Appx. at 616. The FBI's historical cell-site analysis has not been subject to peer review. *Id.*; *Hill*, 818 F.3d at 298. The Sixth Circuit cautioned in *Reynolds* that claims of successful use by law enforcement personnel are “precisely the sort of ‘ipse dixit of the expert’ testimony that should raise a gatekeeper’s suspicion.” 626 Fed. Appx. at 616-17.

The evidence is also not helpful to the jury because it overpromises and under-delivers. FBI historical cell-site tracking does not account for factors that cause a cell phone to connect to a tower that is farther away but has a stronger signal—factors such as weather, obstructions, and network traffic. *Evans*, 892 F. Supp. 2d at 956; *Reynolds*, 626 Fed. Appx. at 615. The Seventh Circuit also recently cautioned that juries “may overestimate the quality of the information provided by this [historical cell-site] analysis.” *Hill*, 818 F.3d at 299. “The admission of historical cell-site evidence that overpromises on the technique's precision—or fails to account adequately for its potential flaws—may well be an abuse of discretion.” *Id.* Accordingly, because this testimony is also not helpful to the jury, it should be excluded under ER 702.

The trial court erred in admitting Banks's testimony because it is neither generally accepted by scientists outside law enforcement nor helpful to the jury. Because there was little evidence connecting Ramirez to the site of the murders at the time they occurred, Banks's testimony was a significant piece of the State's case. There is at least a reasonable probability the jury was swayed by Banks's testimony, which purported to show Ramirez could have been at the apartment complex where the Gallegoses died around the time of the murders and could have been at Hritsco's property shortly thereafter. Consequently, the improper admission requires reversal. *See Guloy*, 104 Wn.2d at 426.

7. The July 15 text message stating 'we all die' was inadmissible other acts evidence that was substantially more prejudicial than probative.

The trial court abused its discretion by admitting a July 2014 text message from Ramirez to a group of relatives because it was attenuated from the crime, minimally relevant at best, and substantially more prejudicial than probative.

- a. The State bears a heavy burden to show the probative value of evidence of uncharged other acts is not substantially outweighed by unfair prejudice .

The State cannot admit propensity evidence in a criminal trial. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The rule, which has no exceptions, is designed to prevent the State from suggesting once a criminal, always a criminal or that the accused is generally a bad person. *Id.* at 421; *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

The State bears a “substantial burden” to show admission of uncharged conduct is appropriate for a purpose other than propensity. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003). Evidence of an uncharged act may be admissible for purposes other than propensity, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). But, before a trial court admits evidence of other misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the other misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *E.g.*, *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis*, 150 Wn.2d at 17.

Close cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

This Court reviews this evidentiary error for an abuse of discretion. *Gresham*, 173 Wn.2d at 419. A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds, or if the court fails to adhere to the requirements of an evidentiary rule. *Thang*, 145 Wn.2d at 642; *Neal*, 144 Wn.2d at 609.

The trial court abused its discretion by admitting a July 2014 text message because the probative value did not substantially outweigh the undue prejudice to Ramirez and because the court failed to conduct the thorough analysis required by ER 404(b).

- b. The four-month-old group text message was no more than minimally relevant and carried undue prejudice that substantially outweighed any probative value.

The trial court admitted Ramirez's July 2014 text message to a group of relatives as evidence of motive and intent. But the content of the message did not indicate a premeditated intent by Ramirez to murder his relatives. The message only stated, "We all die. Rest in peace. Fuck you all if that's how it is." RP 375; Exs. 141, 142. It acknowledges the fact of death and adds, "Rest in peace." This does not convey an intent to kill, and it does not indicate premeditation.

The context of the message also shows its, at best, minimal relevance. First, the message was sent almost four months before Arturo and Juan Gallegos were found dead. The message is too removed from the crime to constitute relevant evidence of motive or intent to commit that crime. *See State v. Perez-Valdez*, 172 Wn.2d 808, 816, 265 P.3d 853 (2011) (evidence of subsequent arson was too removed from false accusation of charged rape to necessarily be probative of a motive regarding charged offense). Second, this is particularly true because Ramirez interacted with his relatives in person between July and November and did not follow through on this supposed threat. Ramirez also exchanged text messages with his relatives between July and November and did not make any threats during that time. Third, the July message was sent to other relatives in addition to Arturo and Juan and Ramirez neither killed nor harmed them. Thus, the context as well as the content indicates the July text message was not probative of premeditated intent to kill Arturo and Juan Gallegos.

Even if the evidence was minimally relevant, its probative value was outweighed substantially by the risk of unfair prejudice. Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational decision by the jury. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). Unfair prejudice also arises if the jury makes erroneous inferences from the evidence, and those inferences undermine the fairness and accuracy of the fact-finding process. *Id.* at 654-55. As the prosecution conceded, the message carried gang-related overtones. Even though the State agreed not to emphasize this potential connection, nothing prevented the jury from making the connection itself. *See State v. DeLeon*, 185 Wn.2d 478, 488, 374 P.3d 95 (2016) (noting prejudicial value of an accused’s own statements demonstrating gang affiliation).

The evidence was also prejudicial because the State was then able to admit Ramirez’s subsequent explanation of the message—that he was trying to “veer off the police.” RP 379.

Angel Valerio testified Ramirez explained to him,

the test [sic] message that he was just trying to veer off police and other -- I am not sure who he was talking about, but I’m assuming secret type of service for the government following him. And he said he was trying to veer him off so that they -- he said he sent this to everybody so nobody would mess with his family.

Id. This nonsensical explanation exposed to the jury competency concerns that had been resolved pretrial and should have been excluded from the jury’s purview. *See* CP 13-16 (agreed order for competency evaluation), 61-63 (order staying proceedings for competency restoration), 64-65 (order finding competency restored).

In sum, the July text message should have been excluded under ER 404(b) because it was not probative of motive or intent in November, because was substantially more prejudicial than probative, and because the trial court failed to conduct the thorough analysis required.

c. Admission of the text message requires reversal.

As set forth above, the State lacked evidence demonstrating Ramirez premeditated the murder of Arturo or Juan Gallegos. The State relied on this July 2014 text message to establish premeditation, even though the message was sent months before the murders and the relatives had exchanged innocent text messages and seen each other in the intervening months. It is therefore reasonably probable that the erroneously admitted evidence affected the outcome, and reversal and remand for a new trial is necessary. *See Guloy*, 104 Wn.2d at 426.

8. Cumulative trial errors denied Ramirez a constitutionally fair trial.

Each of the above trial errors independently requires reversal. In the alternative, however, the aggregate effect of these trial court errors denied Ramirez a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that, together, the combined errors denied the defendant a constitutionally fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel’s errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); *State v. Coe*, 101 Wn.2d

772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010).

The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Viewed together, the errors addressed above created a cumulative and enduring prejudice that likely materially affected the jury's verdict. Due process requires the convictions be reversed and remanded for a new trial.

9. The aggravating circumstance findings must be stricken because they were neither pleaded nor proved beyond a reasonable doubt.

The procedural due process protections of the Washington and United States constitutions require the prosecution to provide notice of any aggravators or enhancements. Const. art. I, §§ 3, 22; U.S. Const. amend. VI, XIV. If properly pleaded and subject to submission to the jury, the prosecution must prove aggravating circumstances beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Const. art. I, § 3; U.S. Const. amend. XIV.

The jury was instructed on an aggravated circumstance listed in RCW 10.95.020(10): “There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person.” CP 271-72. Although the State proposed this jury instruction, the information does not contain a citation to any provision of Chapter 10.95 RCW and the language of the aggravating circumstance is not set forth. CP 1-2 (information), 232-33 (amended information). Prior to trial, the State provided no other notice that it would seek

imposition of the aggravating circumstance at RCW 10.95.020(10), or of any other aggravating circumstance found in that chapter. Due to the lack of notice, the aggravating circumstance should not have been submitted to the jury and should be stricken. In the alternative, the evidence was insufficient to prove the aggravating circumstance.

This Court reviews these constitutional issues de novo. *State v. Siers*, 174 Wn.2d 269, 273-74, 283, 274 P.3d 358 (2012).

The error can be raised for the first time on appeal. *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008) (manifest constitutional error to try and convict of a crime not charged). Because the error affects the constitutional rights to due process and to present a defense, the error is constitutional. RAP 2.5(a)(3). The error is also manifest because the error is practical and identifiable—“given what the trial court knew at the time, the court could have corrected the error” simply by comparing the amended information with the jury instructions. *Id.*; *State v. O’Hara*, 167 Wn.2d 91, 98, 100, 217 P.3d 756 (2009).

- a. The aggravating circumstance must be stricken because Ramirez was not provided with notice of the circumstance that was submitted to the jury.

The prosecution cannot seek enhanced penalties unless “notice of their intent [is] set forth in the information” or notice is otherwise provided prior to trial. *Siers*, 174 Wn.2d at 277; *State v. Theroff*, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980) (remanding to strike enhancement where jury found by special interrogatory that defendant was armed with deadly weapon but prosecutor had neglected to file notice advising defendant that the State intended to seek an enhanced penalty). Notice should be provided by including the statutory language and citation to the

statute or statutes in the charging documents. *Theroff*, 95 Wn.2d at 392; *State v. Cosner*, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975); see *State v. Recuenco*, 163 Wn.2d 428, 440-41, 180 P.3d 1276 (2008) (to ensure due process, notice must be provided prior to opening statements of the trial); *State v. Dictado*, 102 Wn.2d 277, 284–85, 687 P.2d 172 (1984), *abrogated on other grounds by State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986) (“An accused has a due process right to know the charge he must defend against at trial [including aggravating factors for aggravated first degree murder]; he cannot be tried for an unstated offense.”).

Notice is critical to an accused person’s opportunity to prepare an adequate defense and the right to decide whether to enter into a plea agreement to a lesser charge if one is offered. *Theroff*, 95 Wn.2d at 392-93 (quoting *State v. Frazier*, 81 Wn.2d 628, 634, 503 P.2d 1073 (1972)); *Siers*, 174 Wn.2d at 277 (relying on Const. art. I, § 22; U.S. Const. amend. VI).

The record contains no evidence that Ramirez received notice of the prosecution’s intent to seek an aggravated murder conviction under Chapter 10.95 RCW. The information and amended information do not provide the statutory citation for the aggravating circumstance ultimately submitted to the jury. Compare CP 1-2 (information), 232-33 (amended information) with CP 271-72 (jury instructions for aggravating circumstance to counts one and two). At the State’s request, the jury was directed to consider whether “There was more than one person murdered and the murders were a part of a common scheme or plan or the result of a single act of the person.” CP 271-72. The State filed its proposed instructions after the start of trial. Supp. CP __ (Sub 71 (plaintiff’s proposed jury instructions, filed Oct. 11, 2016)); RP 228 (jury panel sworn Oct. 5, 2016). This language mirrors the aggravating circumstance found at RCW

10.95.020(10). Yet, that language is not in the amended information or the initial information. CP 1-2, 232-33. There, the State simply stated that each murder “was part of a common scheme or plan” without citation to any aggravating factor or circumstance. CP 1-2, 232-33. The “common scheme or plan” language, accordingly, indicates the basis for joinder of the charges. *See* CrR 4.3 (two or more offenses may be joined when part of a single scheme or plan).

Although the language of RCW 10.95.020(10) was submitted to the jury, the records indicate the prosecution did not in fact intend to prosecute Ramirez for aggravated murder as the State never cited to Chapter 10.95 RCW, never uttered the words “aggravated murder,” did not seek a sentence under Chapter 10.95 RCW, and actually sought and received a sentence under the Sentencing Reform Act (SRA), Chapter 9.94A RCW. CP 306 (State’s sentencing brief calculating offender score and sentence under SRA and citing to the SRA); CP 311-25 (judgment and sentence cites SRA and sentences Ramirez to term of months sentence).¹⁶ The jury instructions were the only documents that reflected the aggravating factor at RCW 10.95.020(10).

In *Theroff*, the prosecution charged two count of first degree murder. 95 Wn.2d at 386. Alongside the information, the prosecution filed a separate notice advising Theroff that it intended to seek a finding that Theroff was armed with a deadly weapon or firearm, citing to the

¹⁶ That this was not a Chapter 10.95 RCW case is further supported by the fact that Ramirez’s assigned counsel is not on the SPRC 2 approved appointment list for death-penalty cases, available here: https://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&fileID=attorney

statutory provisions for those sentencing enhancements. *Id.* at 386-87. However, when the prosecution filed an amended information adding a charge of felony murder, the prosecution did not file another notice of intent to seek enhanced penalties. *Id.* at 387. Nonetheless, a special interrogatory was submitted to the jury, which found Theroff armed with a deadly weapon, a firearm. *Id.* Our Supreme Court reversed the special verdict because Theroff was not provided notice of the enhancement in the amended information. *Id.* at 392-93.

Theroff sets forth a simple rule: “When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information.” *Id.* at 392. The result there was likewise clear: “Because the prosecutor here did not follow the rule, he may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant.” *Id.* at 393.

Ramirez was charged with premeditated first degree murder, not with aggravated murder. There was no basis upon which to submit aggravating factors from RCW 10.95.020 to the jury. The aggravating circumstance should be stricken.

- b. Alternatively, the aggravating circumstance must be stricken because alternative means were submitted to the jury but not set forth in the charging documents.

Alternatively, if the “common scheme or plan” language in the information provided sufficient notice that Ramirez was subject to aggravated murder charges, the jury should have been instructed only on that ground and not on the alternative means that the murder was a “single act committed by same person.”

As discussed, an accused has a constitutional right to be informed of the charges he or she will face at trial. U.S. Const. amend. VI; Const. art. I, § 22. “It is fundamental that under

our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged.” *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). A charging document is adequate only if it includes all essential elements of a crime—statutory and nonstatutory—so as to inform the defendant of the charges and to allow the defendant to prepare a defense. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

If a statute sets forth alternative means by which a crime may be committed, the information may charge one or all of the alternatives, provided the alternatives are not inconsistent with each other. *State v. Chino*, 117 Wn. App. 531, 539, 72 P.3d 256 (2003) (quoting *State v. Williamson*, 84 Wn. App. 37, 42, 924 P.2d 960 (1996)). But the jury can only be instructed on the offense as charged in the information, unless it is a lesser included or inferior degree offense. *Chino*, 117 Wn. App. at 539.

“It is error to instruct the jury on alternative means that are not contained in the charging document.” *State v. Brewczynski*, 173 Wn. App. 541, 549, 294 P.3d 825 (2013) (citing *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); *Chino*, 117 Wn. App. at 540). The error is presumed prejudicial and may be found harmless only if other instructions clearly limit the jury’s consideration to only the charged alternative. *Id.*; *Chino*, 117 Wn. App. at 540.

The differentiation between the “common scheme” aggravator and the “single act” aggravator as distinct means justifying an aggravating circumstance was recognized in *In re Benn*, 161 Wn.2d 256, 165 P.3d 1232 (2007). There, the jury voted in favor of a “common scheme” aggravator but left a separate line blank for a “single act” aggravator under RCW

10.95.020(10). *Id.* at 259-60. Benn argued that he had been implicitly acquitted of the “single act” alternative by the blank verdict form, but the Supreme Court disagreed and allowed the prosecution to re-try Benn based on this alternative aggravator upon which no verdict had been rendered. *Id.* at 261. The analysis in Benn acknowledges and treats the “common scheme” and “single act” aggravators as independent alternative grounds for establishing an aggravating circumstance as required for a conviction of aggravated first degree murder. *Id.* at 261-64; *accord State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (An alternative means crime is one where the legislature has provided that the State may prove the proscribed criminal conduct in a variety of ways).

Our Supreme Court similarly treated the “multiple victims” aggravator as having two alternative components both of which are set forth in RCW 10.95.020(10), in *State v. Woods*, 143 Wn.2d 561, 574, 23 P.3d 1046 (2001); *id.* at 623 (Sanders, J., dissenting).

On the other hand, in an earlier case, the court found that the disjunctive aggravating circumstance of more than one killing with either a “common scheme” or “single act” are not alternative means per se, but “means within a means” that need not be separately instructed in a jury verdict. *In re Pers. Restraint of Jeffries*, 110 Wn.2d 326, 349, 752 P.2d 1338 (1988). But there the court also found sufficient evidence supported each aggravating circumstance, which is not true here. *Id.* at 347.

At most here, the information included only that the murders were part of a common scheme or plan. CP 1-2, 232-33. However, the jury instructions included an alternative means not set forth in the charging document: that the murders were “the result of a single act of the

person.” CP 271-72; RCW 10.95.020(10). No other instruction limited the jury’s consideration to the alternative charged—common scheme or plan. *See Brewczynski*, 173 Wn. App. at 549.

In *Vangerpen*, the State intended to charge attempted first degree murder but inadvertently omitted the essential element of premeditation and therefore charged only the crime of attempted second degree murder. 125 Wn.2d at 791. Nonetheless, the trial court instructed the jury on the elements of attempted first degree murder and the jury found the defendant guilty of that crime. *Id.* at 786. The Supreme Court reversed. *Id.* at 791-92. Instructing the jury on the uncharged crime, which was not a lesser crime of the offense charged, violated the accused person’s constitutional right to advance notice of the charge. *Id.*

As set forth in the prior section, Ramirez did not receive adequate notice of the uncharged alternative means that the murders were “the result of a single act of the person” because that alternative did not appear in the charging documents, did not appear in any other notice to Ramirez, and was not otherwise discussed until the State filed its proposed jury instructions during trial. Because the notice was constitutionally deficient, the aggravating circumstance must be reversed. *Williamson*, 84 Wn. App. at 45.

- c. Even if the aggravating circumstance was sufficiently pleaded, it still must be stricken because the State failed to prove each alternative means beyond a reasonable doubt.

The jury’s verdict must be based on its unanimous agreement as to all essential elements of an offense, including aggravating circumstances. When a statute includes more than one means of committing an offense, there must be sufficient evidence to support each alternative.

E.g., *State v. Armstrong*, 188 Wn.2d 333, 343-44, 394 P.3d 373 (2017); *State v. Arndt*, 87 Wn.2d 374, 377-78, 553 P.2d 1328 (1976); *see Jeffries*, 110 Wn.2d at 339.

A “common scheme or plan” has been held to exist “when there are multiple murders with a nexus connecting them, such as an overarching purpose.” *State v. Cross*, 156 Wn.2d 580, 628-29, 132 P.3d 80 (2006); *accord Pirtle*, 127 Wn.2d at 661-62. There was not substantial evidence supporting the “single act” alternative but there is no explanation as to whether some jurors rested their verdict on this portion of the aggravating circumstance and the court did not instruct them that their verdict should be unanimous in regard to either part of this aggravating circumstance.

The State could not present clear evidence about what occurred at the time of Arturo and Juan’s deaths. However, it was clear that separate shots were fired to kill each of them—a single shot killed Arturo but Juan received more than 11 gunshot wounds—and they died in distinct places—Arturo died in his bedroom and Juan died outside the doorway of a neighboring apartment. *E.g.*, RP 544, 730-36, 892-96. Accordingly, the State failed to present sufficient evidence that the murders were part of a single act by a single person. Because no timeline was established and the terms in the aggravating circumstance were not defined, one or more jurors could have believed the single act alternative means applied while others believed only the common scheme or plan had been proved. Because of the insufficient evidence of the “single act” alternative and the lack of a clearly unanimous verdict underlying the “common scheme” alternative, this portion of the verdict violates due process and the right to a unanimous jury verdict.

On this independent basis, the aggravating circumstances should be reversed.

10. Because the sentencing court erroneously believed it was required to impose consecutive sentences for the two serious violent offenses, the matter should be remanded for resentencing for the court to consider a mitigated concurrent sentence.

Ramirez was sentenced to 988 months of incarceration after the sentencing court twice indicated it was “required” to run the sentences for the two serious violent offenses concurrently under RCW 9.94A.589(1)(b). Because the court failed to recognize its discretion to impose a mitigated concurrent sentence under RCW 9.94A.535, the matter should be remanded for resentencing. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 331, 166 P.3d 677 (2007); *State v. McFarland*, No. 92947-5, Slip Op. 10 (Aug. 3, 2017). This issue can be raised and addressed for the first time on appeal, as it was in *Mulholland*, 161 Wn.2d at 325-26, and *McFarland*, Slip Op. at 2, 12 (“What the Court of Appeals did not consider is the authority of an appellate court to address arguments belatedly raised when necessary to produce a just resolution.”).

The SRA sentencing provisions at RCW 9.94A.589 and RCW 9.94A.535 must be read together. *Mulholland*, 161 Wn.2d at 327-28. While .589(1)(b) indicates that sentences for serious violent offenses shall run consecutively, that provision is subject to the exceptional sentencing statute at RCW 9.94A.535. *Id.* This latter provision provides a sentencing court discretion to impose an exceptional sentence whereby the serious violent offenses run concurrently (instead of consecutively). *Id.* Where a sentencing court that imposes consecutive sentences under RCW 9.94A.589(1)(b) indicates a “possibility” that it “would have imposed a

mitigated exceptional sentence if it had been aware that such a sentence was an option,” the matter should be remanded for resentencing. *Id.* at 334-35.

In *Mulholland*, the defendant was convicted of six counts of assault and each count included a finding that the defendant was armed with a firearm. 161 Wn.2d at 324-25. The sentencing court ordered each count to be served consecutively under RCW 9.94A.589(1)(b), indicating the court was without authority to consider running the sentences concurrently. *Id.* at 325. Our Supreme Court affirmed the Court of Appeals in holding, “notwithstanding the language of [RCW 9.94A.589(1)(b)], a sentencing court may order that multiple sentences for serious violent offenses run concurrently as an exceptional sentence if it finds there are mitigating factors justifying such a sentence.” *Id.* at 327-38; *accord id.* at 331 (“the plain language of RCW 9.94A.589(1) and RCW 9.94A.535 support the Court of Appeals’ determination that the trial court had the discretion to impose an exceptional sentence). Relief was required even under the stricter standards applied to personal restraint petitions because “an erroneous sentence, imposed without due consideration of an authorized mitigated sentence, constitutes a ‘fundamental defect’ resulting in a miscarriage of justice.” *Id.* at 332. The Court remanded for resentencing because the record indicated “that it was a possibility”—although “not . . . a certainty”—the court would have imposed a mitigated sentence had it recognized its discretion to do so. *Id.* at 334-35. Where the appellate court “cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option,” remand is proper. *Id.* at 335 (quoting *State v. McGill*, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002)).

Recently, the Supreme Court reaffirmed *Mulholland* and extended its holding to subsection (1)(c) of RCW 9.94A.589 in *McFarland*. McFarland contended on appeal that her sentencing court erred by not running her firearm-related sentences concurrently as an exceptional sentence because the court erroneously believed it lacked discretion. Slip Op. at 4. The Supreme Court confirmed the discretionary authority to run sentences concurrently,

The SRA operates to provide structure to sentencing, "but does not eliminate[] discretionary decisions affecting [offender] sentences." RCW 9.94.010. Consistent with the SRA, a court "may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

Id. at 5. It held that remand for resentencing was required: "we conclude that McFarland should be resentenced because the sentencing court erroneously believed it could not impose concurrent sentences, and the record demonstrates that it might have done so had it recognized its discretion under RCW 9.94A.535." *Id.* at 10. Although the record "did not reflect the same level of sympathy or discomfort with the sentence as expressed by the court in *Mulholland*," the Court held the sentencing court's indication of "some discomfort with his apparent lack of discretion" and apparent concern for the length of the sentence was sufficient to demonstrate the possibility that it would have considered an exceptional concurrent sentence. *Id.* at 14.

Like the individuals remanded for resentencing in *Mulholland* and *McFarland*, Ramirez's sentence should be reversed and remanded for the court to consider mitigating evidence. The sentencing court here believed it was "required" to run the sentences for each count concurrently. RP 1230, 1231. The judgment and sentence indicates the court imposed "mandatory consecutive

sentences” for counts one and two. CP 316. This was error. As *Mulholland* and *McFarland* make plain, the court had discretion to impose an exceptional concurrent sentence. *Mulholland*, 161 Wn.2d at 327-28; *McFarland*, Slip Op. at 10-11.

Mulholland and *McFarland* also make plain that the proper remedy is to remand for resentencing if the sentencing court indicated any possibility it would consider a mitigated sentence if it believed it had the authority to do so. *Mulholland*, 161 Wn.2d at 334-35; *McFarland*, Slip Op. at 14; *see* Slip Op. at 30 (Yu, J. dissenting) (sentencing court’s indication that it is “required” to impose consecutive sentence is enough to necessitate remand where court in fact had discretion). The sentencing court here indicated a possibility that it would have considered a lesser sentence if it was within its power. For example, the court remarked: “It’s stunning to me to have to make this [sentencing] decision. It’s weighed heavily on me since the jury came back with its verdict.” RP 1231-32. And the court specifically asked Ramirez to speak to leniency, describing allocution as “an opportunity for you to speak to the court about what you think the just sentence should be and the kind have of things [sic] the court should weigh in choosing a lower sentence rather than a higher one.” RP 1226. Finally, the court did not impose an increased sentence for the unlawful possession of a firearm count, indicating its openness to mitigation. RP 1222, 1231.

Because the court misunderstood its discretionary authority to consider a mitigated concurrent sentence, the Court should remand for resentencing. *Mulholland*, 161 Wn.2d at 334-35.

F. CONCLUSION

The Court should reverse the convictions and dismiss the charges because the State presented insufficient evidence to prove beyond a reasonable doubt that Christopher Ramirez premeditated the murders of Arturo Gallegos and Juan Gallegos or possessed a firearm.

Alternative bases for a new trial or resentencing are set forth above. Further, because the State failed to provide Ramirez with notice of the aggravating circumstance, they must be stricken.

DATED this 30th day of August, 2017.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 34872-5-III
)	
CHRISTOPHER RAMIREZ,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **CORRECTED 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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Comments:

***This corrected opening brief makes a single change to a typographical error on page 49 of the opening brief, inserting the accidentally omitted word **not** into the sentence that now reads Ramirez also exchanged test messages with his relatives between July and November and did not make any threats during that time.

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