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Division III
State of Washington
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No. 361322

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

MARTIE MARIE SODERBERG,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

1. The evidence was insufficient to prove that Martie Soderberg took a “substantial step” beyond “mere preparation” to commit the crime of attempted murder. 1

2. The conviction for first-degree attempted murder should be reversed and the case remanded for a new trial because the “to convict” instruction omitted the element of premeditated intent. 1

3. The definitional instruction, Instruction No. 8, incorrectly defines the offense of attempted first degree murder and therefore violates Martie Soderberg’s right to due process. 1

4. The Jury Instructions for both the attempted murder and criminal solicitation charges deprived Martie Soderberg of her constitutional right to unanimous verdicts. 1

5. The trial court erred by imposing mandatory legal financial obligations without making the adequate individualized inquiry as to Ms. Soderberg’s present or future ability to pay. 1

Issues Pertaining to Assignments of Error

1. Did the State present sufficient evidence to prove beyond a reasonable doubt that Martie Soderberg’s intent and actions went beyond mere preparation and constituted a substantial step toward the murder of Russell Soderberg. 1

2. Was the “to convict” instruction deficient for failing to require the jury to find that Ms. Soderberg acted with premeditated intent. 2

3. Was the definitional instruction for attempted murder constitutionally deficient because it failed to correctly define the crime of attempted murder. 2

4.	Was Ms. Soderberg denied her right to due process by the failure to instruct the jury it must be unanimous as to which acts constituted the “substantial step” for attempted murder or the “money or other thing of value” for the criminal solicitation charge.	2
5.	If the convictions are affirmed; should this case be remanded to the superior court for an individualized inquiry as to Ms. Soderberg’s present or future ability to pay mandatory legal and financial obligations.	2
II.	STATEMENT OF THE CASE	2
III.	SUMMARY OF ARGUMENT	23
IV.	ARGUMENT	24
1.	The evidence was insufficient to prove that Martie Soderberg took a “substantial step” beyond “mere preparation” to commit the crime of attempted murder.	24
a.	Standard of Review.	24
b.	Analysis.	26
2.	The conviction for first-degree attempted murder should be reversed and the case remanded for a new trial because the “to convict” instruction omitted the element of premeditated intent.	31
3.	The definitional instruction, Instruction No. 8, incorrectly defines the offense of attempted first degree murder and therefore violates Martie Soderberg’s right to due process.	33
4.	The Jury Instructions for both the attempted murder and criminal solicitation charges deprived Martie Soderberg of her constitutional right to unanimous verdicts.	36
5.	The trial court erred by imposing mandatory legal financial obligations without making the adequate individualized inquiry as to Ms. Soderberg’s present or future ability to pay.	38

V. CONCLUSION	39
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TABLE OF AUTHORITIES

Table of Cases:

United States Supreme Court

<i>In re Winship</i> , 397 U.S. 358, 364, 90 S.Ct. 1068, (1970)	24,31
<i>Jackson v. Virginia</i> , 443 U.S. 307, 317-18, 99 S.Ct. 2781 (1979)	24
<i>Smalis v. Pennsylvania</i> , 476 U.S. 140, 106 S. Ct. 1745 (1986)	26
<i>Thompson v. Louisville</i> , 362 U.S.199, 80 S.Ct. 624 (1960)	25

Washington State Cases

<i>In re A.V.D.</i> , 62 Wash.App. 562, 815 P.2d 277 (1991)	26
<i>Rogers Potato v. Countrywide Potato</i> , 152 Wash.2d 387, 97 P.3d 745 (2004)	25
<i>State v. Aumick</i> , 126 Wash.2d 422, 894 P.2d 1325 (1995)	31,32, 33,35
<i>State v. Carlson</i> , 130 Wash. App. 589, 123 P.3d 891 (2005)	25
<i>State v. Colquitt</i> , 133 Wash.App. 789, 137 P.3d 892 (2006)	25, 26
<i>State v. Crane</i> , 116 Wash.2d 315, 804 P.2d 10, <i>cert. denied</i> , 501 U.S. 1237, 111 S.Ct. 2867 (1991)	36

<i>State v. DeRyke</i> , 149 Wash.2d 906, 73 P.3d 1000 (2003)	32,
<i>State v. DeVries</i> , 149 Wash.2d 842, 72 P.3d 748 (2003)	25
<i>State v. Grundy</i> , 76 Wash. App. 335, 886 P.2d 208 (Div. 3, 1994)	26
<i>State v. Johnson</i> , 173 Wash.2d 895, 270 P.3d 591 (2012)	26
<i>State v. Kitchen</i> , 110 Wash.2d 403, 756 P.2d 105 (1988)	36,37 38
<i>State v. Lewis</i> , 69 Wash.2d 120, 417 P.2d 618, 621 (1966)	26,30
<i>State v. Petrich</i> , 101 Wash.2d 566, 683 P.2d 173 (1984)	36,37
<i>State v. Ramirez</i> , 191 Wash.2d 732, 426 P.3d 714 (2018)	39
<i>State v. Smith</i> , 131 Wash 2d 258, 930 P.2d 917 (1997)	31,32 34,35
<i>State v Workman</i> , 90 Wash.2d 443, 584 P.2d 443 (1978)	22
Constitutional Provisions:	
U.S. Const. Amend. VI	36
U.S. Const. Amend. XIV.....	24
Wash. Const. Art. 1 § 21	36
Wash. Const. Art. 1 § 22	36
Statutes	
RCW 9A.28.020.....	26,33
RCW 9A.32.030	33

RCW 10.01.160	38
RCW 10.101.010	38
Court Rule	
RAP 2.5	37
Secondary Sources	
WPIC 100.01 (4th Ed. 2015)	34
WPIC 4.25 (4th Ed. 2016)	37
WPIC 4.26 (4th Ed. 2016)	37

I. ASSIGNMENTS OF ERROR

Assignments of Error

1. The evidence was insufficient to prove that Martie Soderberg took a “substantial step” beyond “mere preparation” to commit the crime of attempted murder.
2. The conviction for first-degree attempted murder should be reversed and the case remanded for a new trial because the “to convict” instruction omitted the element of premeditated intent.
3. The definitional instruction, Instruction No. 8, incorrectly defines the offense of attempted first degree murder and therefore violates Martie Soderberg’s right to due process.
4. The Jury Instructions for both the attempted murder and criminal solicitation charges deprived Martie Soderberg of her constitutional right to unanimous verdicts.
5. The trial court erred by imposing mandatory legal financial obligations without making the adequate individualized inquiry as to Ms. Soderberg’s present or future ability to pay.

Issues Pertaining to Assignments of Error

1. Did the State present sufficient evidence to prove beyond a reasonable doubt that Martie Soderberg’s intent and actions went beyond

mere preparation and constituted a substantial step toward the murder of Russell Soderberg.

2. Was the “to convict” instruction deficient for failing to require the jury to find that Ms. Soderberg acted with premeditated intent.

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4. Was Ms. Soderberg denied her right to due process by the failure to instruct the jury it must be unanimous as to which acts constituted the “substantial step” for attempted murder or the “money or other thing of value” for the criminal solicitation charge.

5. If the convictions are affirmed; should this case be remanded to the superior court for an individualized inquiry as to Ms. Soderberg’s present or future ability to pay mandatory legal and financial obligations.

II. STATEMENT OF THE CASE

Martie Soderberg was arrested in a Walmart parking lot and taken in to custody by Spokane County Sheriff’s Deputies on October 17, 2016. She had just given a Martin Drake, a confidential informant acting under the direction of Spokane County Sheriff detectives, \$50 for the purchase of a gun that would ostensibly be used at some undetermined date in the

future to kill Ms. Soderberg's husband. Ms. Soderberg's arrest was the consummation of an investigation that began less than a week earlier.

The investigation began on October 11, 2016 at 3:28 pm after an anonymous male called law enforcement asking to speak with homicide detectives about a murder. Deputy Gavin Pratt was dispatched to the caller's location behind the Walmart at 15727 East Broadway in Spokane Valley. RP 8-9.

He met Martin Drake sitting on pallets near the loading docks. Drake told Dep. Pratt he wanted to report a murder that had not happened yet. RP 10. The Deputy noted that Drake was extremely nervous and scared. Deputy Pratt noted that, "[b]y his actions his demeanor, it created a lot of validity to his statement" RP 10.

Dep. Pratt took Mr. Drake to the Valley Precinct to obtain a more detailed statement from him. RP 12. Sergeant Matt Smith overheard Dep. Pratt's conversation with Mr. Drake and assigned two detectives, Det. John Oliphant and Det. Mark Melville, to continue with the investigation. RP 12.

Det. Oliphant and Det. Melville carried on with the interview. RP 19. They showed Mr. Drake a photo montage that included Ms. Soderberg's image. Drake identified Ms. Soderberg from the montage as the person he had been speaking with. RP 20. The Detectives continued the interview and determined that the information Drake gave them "was

important enough to act on it ...” and they decided to “make sure nothing happened.” RP 22-23.

The Detectives then set about preparing an order to intercept and record future conversations between Ms. Soderberg and Mr. Drake. They completed the paperwork and a warrant was approved [by Judge Triplet] the next morning, October 12, 2016. RP 23.

The Detectives met Mr. Drake that morning and gave him the “wire.” The device looks the same and can be used as a cell phone. It records the sounds it can “hear” which are monitored by a second cell phone linked to the device. RP 24-25.

Ms. Soderberg and Mr. Drake had made plans the day before to meet at the Spokane Valley Walmart mid-morning on October 12, 2016. The Detectives dropped Drake off in the Walmart parking lot at the appointed time, and then waited nearby. RP 27. Ms. Soderberg showed up, picked up Drake in a Camry convertible, and drove off. The Detectives followed in a “rolling surveillance” with five or six other detectives in other vehicles and the Sheriff Department’s helicopter in the sky above. RP 29.

The officers followed Ms. Soderberg’s vehicle to several locations maintaining continuous contact until she returned Drake to the Walmart where she had picked him up. RP 29-30. Det. Melville contacted Drake inside the store and the Detectives and Drake returned to the Valley

Precinct for a debrief with Drake, and to listen to the recording of the conversations between Drake and Ms. Soderberg. RP 31.

During his testimony, Det. Oliphant was asked to recount the conversations between Mr. Drake and Ms. Soderberg. Ms. Soderberg's attorney objected that the recording was the best evidence of the conversations and that the Detective's testimony about the conversations impermissibly cumulative. RP 32. The Court agreed but permitted Det. Oliphant to recount some of the conversations. RP 33. Dep. Oliphant then went on to outline the various facets of Ms. Soderberg's alleged plan to kill her husband. RP 33-35.

After interviewing Drake and listening to the recording of the conversations the Detectives concluded that Ms. Soderberg had devised a plan to shoot her husband. They decided, in the interests of safety, to set up a "reverse controlled buy" in a manner similar to an undercover controlled buy of drugs, where she would show up to buy a handgun. RP 35-36.¹ They planned that the "reverse controlled buy" would occur on October 17, 2016. RP 37-38.

¹ Det. Oliphant explained this a "reverse controlled buy" because in the typical "controlled buy" of illegal drugs, the informant is purchasing the contraband from the accused. Here the roles are reversed, and the accused is the purchaser.

Det. Oliphant was asked to explain why they decided to conduct the "reverse controlled buy" and arrest of Ms. Soderberg on October 17, 2017:

Q Okay. We were talking about how the -- the plan for the 14th of October had fallen through. What -- what did you target as your -- the next date to try to go through with that plan?

A The next date would have been Monday morning, October 17th.

Q Were you -- were you concerned about -- about waiting over that weekend period and not being able to act quicker?

A Yeah. Those thoughts did cross my mind. You know, I wanted -- for sure didn't want anything to happened to Mr. Soderberg. But all the information that we had told us that the people that she was conspiring with was, one, Mr. Bjerke in the past, two, Mr. Drake, who was currently working with us, and there was no information that led us to believe there was a third party. That was information had crossed our mind. We knew that she said she wasn't going to do it. She said that on the recording. So we didn't have to really worry about her so much. So the next opportunity for all of us to get back together and put this plan in place would have been Monday morning.

Q And the date for her plan or the earliest date that she had planned on acting on all this would have been when?

A From what we learned, would have been Halloween. But then that she threw out the month of November and then the month of January too. So it was all within a couple-month time span here -- time span here.

Q But not immediately, not October 17th?

A No.

RP 45-46.

As stated, The Detectives chose October 17, 2016 in an abundance of caution for the Russell Soderberg's safety -- even though they knew from listening to the recordings that Ms. Soderberg did not intend for Mr. Soderberg to be killed immediately; that she believed she needed to make additional preparations; that she had no intentions of doing it herself; and that there was no other third party beyond Dennis Bjerke or Martin Drake involved in her plan.

On the appointed date, Mr. Drake and the Detectives met to implement their plan to lure Ms. Soderberg into believing that Drake was going to purchase a firearm. RP 46. Mr. Drake called Ms. Soderberg and told her to meet him at the Hico on Sprague and Mullan. He said he had good news and asked her to bring \$50. RP 46.

The Detectives gave Drake the "wire" and dropped him off several blocks east of Hico, then drove to Walmart to set up their surveillance. In the meantime, another detective who was monitoring the wire relayed what Drake was doing. RP 47.

Detectives, Oliphant and Melville parked their undercover vehicle at the easternmost row of parking spots in the Walmart parking lot. They watched Ms. Soderberg arrive in her pickup truck and park about 20 to 25 spots south of them. Mr. Drake then got out of the truck and walked over to the Detectives' vehicle. RP 48. As he approached the Detectives, Drake fanned the US currency in his hands, then got into the rear seat of the

Detectives' car. He handed the currency to them and told them the money was from Ms. Soderberg. One of the Detectives then radioed other detectives nearby to arrest Ms. Soderberg. RP 49.

After that, the Detectives and Drake returned to the Valley Precinct where the Detectives drafted affidavits and search warrants for Ms. Soderberg's residence and her truck, which had been towed to the Valley Precinct, and her Camry. RP 50.

The search warrants were executed by the court and served the next day. Russell Soderberg was also informed of the events when the search warrant for the residence was executed. RP 57.

Martin Drake testified after Det. Oliphant. He stated he met Ms. Soderberg (fka Maxwell) in high school and they associated together for two or three weeks during one summer about 20 years earlier. RP 76-77.

Then, in July 2016, Ms. Soderberg reached out to him on Facebook Messenger. Mr. Drake replied some weeks later in September 2016. RP 78. They messaged small talk back and forth and then set up their first meeting at the restaurant in the Rosauers at University and Sprague sometime between October 8 and 10, 2016. RP 78-79.

At that time, Mr. Drake was only able to communicate on his cell phone using the Messenger App, and only then, when he was connected to Wi-Fi. He had no cellular service at the time and he was homeless and

camping outside under a picnic table in a vacant lot near the Valley Hospital. RP 81-82.

Mr. Drake was also a Meth addict and his most recent relapse was approximately six weeks before the trial in March 2018. RP 117.

Drake testified that their first meeting at Rosauers was very brief. They made small talk about what they were doing the last 20 years while they walked around the store shopping. They also made plans to have coffee soon. RP 80.

They met the next day, October 11, 2016, outside a fast food restaurant. Ms. Soderberg picked him up there and they drove around Spokane and to the Coeur d'Alene Casino and back to North Spokane. RP 81-82. During their day together Ms. Soderberg told Mr. Drake about wanting her husband, Richard Russell, "to be gone." RP 83-84.

Drake was asked if she had a plan to get out of the relationship that involved him. He testified, "[t]here were a couple different plans, scenarios of me killing her husband for her." One involved shooting Russell Soderberg on Halloween while he was trick-or-treating with their children. RP 85. However, Drake told her " she was crazy for thinking having somebody killed in front of the kids. ..." and at that moment he decided to himself he was not "doing any of this." RP 86.

Drake was then asked if Ms. Soderberg mentioned that Drake and she would have a future together after Russell Soderberg was gone. He

answered that they did not discuss having any kind of relationship at the October 10, 2018 meeting but they talked about that during later meetings. RP 87.

At the end of their day, Ms. Soderberg dropped Drake off at the Valley Walmart. He went inside and collected his thoughts, then called the Valley police. He arranged to meet them behind the nearby Lowes.² A patrol officer arrived and took Drake to the Valley Precinct where he later met with Det. Oliphant and Det. Melville. Mr. Drake told them what just happened during his day with Ms. Soderberg. He also agreed to wear a wire for subsequent meetings with her. RP 90-91.

Drake's next meeting with Ms. Soderberg was the next day, October 12, 2016. RP 92. Ms. Soderberg picked him up in her car at a fast food restaurant and drove away with Mr. Drake and the wire. RP 94.

They drove to the vacant lot where Drake was staying, and he picked up his bags from under the picnic table and then they drove to Dennis' house. RP 95. Drake stated that they discussed "this plan" but Drake did not commit to it and he just let her talk about it. RP 95-96.

Drake was asked if Ms. Soderberg and he discussed obtaining a firearm. Her attorney objected it was a leading question, which was overruled by the court. Drake answered that they discussed firearms, but

² Dep. Drake testified earlier that they met behind the Walmart at 15727 East Broadway.

he did not recall if they talked about that on October 11, 2016 or during subsequent meetings. However, they did talk about where to get a handgun, whether they would get a revolver or automatic, and where they would store it. RP 96-97.

Drake did state he would need to have time to practice firing the gun and become familiar with it [before using it to shoot Russell Soderberg]. RP 97.

Ms. Soderberg drove to Dennis [Bjerke's] house. She gave Dennis \$200 and he agreed to let Mr. Drake stay at his house. Mr. Drake understood he would have to pay Ms. Soderberg back once he got a job and he was working. RP 100. He stated later that he did not believe that the \$200 payment for killing Russell Soderberg. RP 120.³

Mr. Drake testified that he did not have possession of the wire all the time. The Drake/Soderberg meetings were carefully planned and monitored from beginning to end by the Detectives. Drake would go to the Valley Precinct before each scheduled meeting where he was "wired up" and then he would go meet her at the appointed location with the Detectives following and other Detectives listening to the wire. RP 102.

However, there was an unscheduled meeting on October 13, 2016. Mr. Drake did not have the wire and the Detectives were unable to

monitor Ms. Soderberg and Drake. On that date, Ms. Soderberg “swung by surprised picked me up” and they went to the Shari’s restaurant on Division. RP 102. However, Drake stated they did not talk about Russell Soderberg or about anything else of any consequence. . RP 103-104.

The next meeting was carefully organized. On the evening before or the morning of October 17, 2016 Drake sent a message to Ms. Soderberg to the effect of “hey, you got 50 bucks.” They arranged for Ms. Soderberg to pick him up at Hico. She did and they drove to the Valley Walmart. Mr. Drake had the wire on him while they discussed their plan to devise a plan in the future to kill Russell Soderberg. She gave him \$50 and he walked over to the car occupied by the Detectives, pretending to purchase a firearm. He gave the money to them and Ms. Soderberg was immediately arrested. RP 105.

Drake was asked if he did anything to encourage Ms. Soderberg to kill her husband. He denied saying anything to lead her to say something. However, he did state he “obviously initiated” the conversation about her obtaining \$50 to buy a gun. RP 121-122.

The State’s next witness was to be Detective Melville. The prosecuting attorney informed the court that the audio recordings of the October 11, 2016 and October 17, 2019 meetings would be played while

³ Mr. Drake testified on redirect that the payment he would receive for killing Russell Soderberg would be “a place to live, relationship with

Det. Melville was on the stand and moved for the admission of exhibits P-6, P-7, and P-8. RP 126.

Ms. Soderberg's attorney objected that the State had not presented the proper foundation to admit the recordings and could not do so because Drake is the only one who can authenticate the recordings and he did not have sufficient recollection of the context or when the conversations took place. RP 127.

The court ruled that Drake adequately provided the foundation for the authenticity of the recordings but that his testimony failed to provide a foundation for when the recorded conversations took place. RP 129. The court later admitted the recordings of the October 12, 2016 conversations after Det. Melville's testimony. RP 138.

The October 12, 2016 recordings, State's Exhibits 6 and 7, were then played to the jury. RP 139.⁴

The recordings reveal an extraordinarily frank and matter-of-fact dialog between Martie Soderberg and Martin Drake about preparations that must be made to implement a plan to have her husband killed. Drake was "in character" the whole time and readily offered suggestions about

her, and wouldn't have to worry about many bills." RP 126.

⁴ Exhibits 6 and 7 are recordings of the dialog between Drake and Ms. Soderberg while they were alone on October 12, 2016. They went to a mutual friend's home during that day, but the recording of their conversations there were not included in Exhibit 6 and 7. RP 138. The trial

what information and tools he would need to complete the task. The recordings also clearly depict this scheme as very much a work in progress and that it would take time -- months, to develop a foolproof plan.

Following are some excerpts from the October 12, 2016 dialog:⁵

States Exhibit P-6. First recording of October 12, 2016 conversations.

6:00 MS: ... but, that's what I'm saying, I want at least another month or two to go by before any accident type fuckin' shit happens, you know what I'm sayin?

MD: Right.

9:40 MS: It's just something we have to think ...

MD: Well, yeah, yeah

MS: ... really hard on ...

MD: ... well, it's got to be ...

MS: ... that's why I said ...

MD: ... meticulously planned out...

MS: ... we need ...

MD: ... so we're not ...

MS: ... yes, exactly ...

MD: ... there's no-no way to get caught ...

judge earlier ruled that the court reporter would not be in the courtroom while the recordings were played. RP 74.

⁵ The number on the left margin is the time of the start of the excerpt. MS is Martie Soderberg. MD is Martin Drake.

MS: ... nope-no, yeah, not even the slightest hair!

9:55 MS: ... it's gonna take ...

MD: ... I can't, I can't get caught doing this cause ...

MS: ... to me, it's gonna take two to four months at least to plan this all the way.

10:50 MS: ... I don't know, there's-there's lots of thought to go into it and what not...

MD: ... yeah, I'm not doing this tomorrow ... hehehe

MS: No, like I said, it is months out ... it has to be ...

27:30 MS: See and he's supposed to have ... he's supposed to-he's supposed to be able to know people to where he can buy one ... but I don't even know if I want to use him to buy one ... I mean ... I don't want nothing fucked up ...

MD: Well, I want ... I probably want to get this a little ahead of time so I can go out and use ... I want to be able ...

MS: ... practice and whatnot ...

MD: ... be familiar with it...

30:40 MS: ... exactly! I don't know ... and it's also one of those things where you kind of wait for another disaster to happen ... in your community ... because like ... say the right disaster happened tomorrow it could very easily go down tomorrow ... but it has to be the right disaster ... do you see what I'm saying ... everything always falls into its own little places ...

MD: Yeah.

MS: I mean ... you don't just frickin' out of the blue ... there's ... no ... that's-th-that's how people totally get ... (unintelligible}

MD: That's why, yeah, that's why I said I'm not doin' this tomorrow ...

MS: No!

MD: Damn sure ain't doin' it on Halloween! Heh

MS: No! I totally agree because there is that (unintelligible) some of these little kids ... but I'm ... plus you got a lot of parents out there frickin' trick or treating with their kids, so, what if one grabbed ya ...

MD: Huh ... right.

MS: ... I mean, that would be stupid ... and I'm not stupid ...

MD: No.

34:00

MS: You know what my theory is ... my theory is ... you're gonna end up keepin' the fucker on ya ... but not like that ... when I say keep it on you I mean like ... whatever vehicle that I can come up with to get you to point A to point B ... have like a bucket in the back, a bag of concrete, heh, a fuckin' gallon of water ...

MD: Mix that and ...

MS: No! I'm serious!

MD: Yeah, yeah, that's good thinkin' ...

MS: And I mean after it's done ... get away so far and then ...

MD: (Unintelligible)

MS: ... pull over somewhere and fuckin' mix a batch up real quick and make it look like you're frickin' do in' a-a concrete job or whatever you see what I'm sayin'?

MD: Right ...

37:00

MS: It's stupid! That's why I was surprised he let me frickin' (unintelligible) on him ... (unintelligible) cause it's one of those things where I'm not in a total big hurry ...

MD: Right.

MS: As long as it's done before summer ... but I mean ... months ...

MD: What's summer?

MS: ... months and months can go by ... summer? Is like June ...

States Exhibit P-7. Second recording of October 12, 2016 conversations.

:45

MS: Yeah ... now I just have to worry about buying my thing and fuckin' ... cause everything else we frickin' worked out before, way before

MD: What thing?

MS: A"G" ...

MD: Oh ... heh

MS: See what I'm sayin'?

MD: Yeah.

MS: It's gotta ... I mean ... if you went and got it two, three, four months prior then ...

MD: Well I-I don't need it ... that, that soon ... I just want it a week or so ...

MS: ... but do you see ...

MD: ... before so I can shoot it and be able to ...

MS: ... but do you see what I'm sayin'? The sooner I can get my hands on somethin' like that, the better

3:30 MD: Well I can even meet ...

MS: ... somehow ...

MD: ... meet somebody ...

MS: ... some way ...

MD: in the parking lot of 7 ll's up here or wherever and fuckin' buy the gun an ...

MS: ... well and I want to buy you ... I want to buy you a wig too ... cause when you do it you don't want to be in your full regular appearance ...

**State's Exhibit P-8. Recording of October 17, 2016
conversation: RP 151.**

:45 MD: Winco ... I think I got, uh, fu-ni-it's nights but, uh, did you bring fifty bucks?

MS: For what?

MD: For the gun ... I found this revolver, we won't have to worry about the shell casings nothin', dude's goin' back to North Dakota, and he's sellin' it, he's got a couple rifles, couple other wi-for fifty bucks if we need any ...

MS: (unintelligible)

MD: ... it's quiet, it's-don't have to worry about the casings and but you' re gonna have to hang onto it, put it in your safe or whatever, cause I can't be packin' that around ...

MS: Yes.

2:25

MD: ... ok, so we definitely wantta wait at least another ...

MS: ... two, three months ...

MD: Yeah. Value, uh, let's see, (unintelligible) ...

MS: I figured sometime probably January ... that way enough time has gone by and everything ...

MD: Through the holidays ...

MS: Yep.

11:00

MS: Um, I'm really thinking his job ... cause I mean, it's just one of those things where you'll have to stake it out, but he like leaves the house about six six-twenty ...

MD: Right.

MS: And he doesn't go to the shop all the time ...

MD: Is there a lot of people at the shop?

MS: That's the thing, in the morning there's like I'll-I'll drive you up, well, I won't drive you by his shop today ...

MD: Heh,heh ...

MS: When I find out the next time when I hear that he's workin' out of town, I'll drive you by his

shop and I'll show you what's around in the area ...

MD: Cause if he ...

MS: It's just down the street from where you worked fuckin' at, um, Cascade ...

MD: Ok ... so it could be like I burglarized the shop, he shows up, boom, and then ...

MS: Mm, hmm ...

MD: ... that'd cover it ...

MS: ... yes!

MD: Awesome.

MS: I mean, you got, next door you have ...

MD: Is it ... where I can get the fuck outta there though?

MS: That's what I'm saying, you'll have to look at the area, but, um, yeah, so like if you had ...

MD: ... and then he's at work, and you will get that other policy ...

MS: If you had a, exactly! I mean, yeah, that would work out just, that would work out really good, I mean, being right there, just because ... but see the thing is I don't know if there is cameras throughout other businesses, you see what I'm sayin' ...

MD: Well, it'd be cold ...

MS: I mean, outside and what not ...

MD: ... I'll just have a ski mask on ... I mean ...

MS: So ...

MD: ... whole-whole time ...

MS: Yeah, it will be, yeah, that would work too ...

MD: But we'll have to figure out some place to make sure that morning that you're at Tony's or, you know, somewhere that ...

MS: Yeah, so that I'm nowhere around ...

MD: Or that early, the kids would be home, you'll have-they'll know mom was home all morn in' ...

MS: Yeah, but still...

MD: Yeah ... have the son-in-law stay the night that night or somethin' yeah, we'll figure somethin' out ... I just gotta find out, hopefully, fuckin' were in - I gotta have an alibi for this case too ...

MS: Yep!

MD: We'll figure that out ...

15:50 MD: No, right. I'll be right back (Witness leaves vehicle, walks to undercover vehicle).

As can be seen, the talk about the need and intent for further preparation continued until minutes before Ms. Soderberg's arrest.

The State's next witness was Dennis Bjerke. RP 153. In his brief testimony on direct Mr. Bjerke testified that Martie Soderberg tried to conscript him to kill Russell Soderberg and that he responded to her:

I said you're out of your mind, this is not like you, this is not normal. It put me in an uncomfortable position because I work with your husband.

RP 163.

On cross, Bjerke agreed he had reservations about Ms. Soderberg's sincerity about killing her husband because she was a "big talker" and that she always seemed to talk about things that were beyond her capacity during the entire 16 years he knew her. RP 165 -166.

After the State rested, Ms. Soderberg's counsel made half time motions to dismiss. Citing *State v Workman*, 90 Wash.2d 443, 584 P.2d 443 (1978), counsel argued that Ms. Soderberg's and Drake's dialog and her giving him \$50 for the fictitious purchase of a gun were preparations, and without more, did not constitute the "substantial step" necessary to commit the crime of attempted murder. RP 193-194.

The State conceded it was relying on the act of giving Drake money for the purchase of a gun as the "substantial step" arguing it was the last step Ms. Soderberg needed to take to have Russell Soderberg killed. That is because, hypothetically, if Drake actually bought a gun and took a cab to Russell's work and killed him, Martie Soderberg would be an accomplice to first-degree murder. RP 202-203.

The trial court ruled that giving Drake the money for a gun was the "substantial step" beyond mere preparation because the "when, where, and how" Mr. Soderberg could be killed was discussed by Ms. Soderberg and Drake. And the "when, where, and how" had been completed when Drake

exited the vehicle with Ms. Soderberg's money to make the [fictitious] purchase. The court stated:

At that point Ms. Soderberg had completed her substantial step in this, and then it was up to Mr. Drake to complete the crime.

RP 211-212.

III. SUMMARY OF ARGUMENT

Uncontroverted evidence showed that on October 17, 2016 Ms. Soderberg believed she needed to complete her preparations and wanted to wait for at least several months before the plan to kill her husband would be consummated. Therefore, she had not yet completed the "substantial step" that must be proven to convict her of attempted murder.

The first-degree attempted murder "to convict" instruction failed to instruct that the State must prove "premeditated intent" and the definitional instruction improperly instructed that the jury could convict if it found that Ms. Soderberg took a "substantial step" toward a "substantial step" toward murder. These errors deprived Ms. Soderberg of her right to due process.

The jury instructions for both the attempted murder and criminal solicitation charges deprived Ms. Soderberg of her right to unanimous verdicts.

The court must remand to the superior court for an inquiry and determination of legal and financial obligations.

IV. ARGUMENT

1. The evidence was insufficient to prove that Martie Soderberg took a “substantial step” beyond “mere preparation” to commit the crime of attempted murder.

a. Standard of Review. The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, (1970).

The analytic formula for the beyond a reasonable doubt has been written in many hundreds of appellate courts at all levels. In *Jackson v. Virginia*, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 2787 (1979), the Court stated:

[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.

The *Jackson* Court also recognized, “ ... that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm.” 443 U.S. at 314, 99

S.Ct. at 2786, Citing; *Thompson v. Louisville*, 362 U.S.199, 80 S.Ct. 624 (1960).

The Washington appellate courts have similarly formulated the beyond a reasonable doubt standard. Evidence is insufficient unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wash.App. 789, 796, 137 P.3d 892 (2006). The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *State v. DeVries*, 149 Wash.2d 842, 849, 72 P.3d 748 (2003).

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wash.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wash. App. 589, 592, 123 P.3d 891 (2005).

The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough to allow the

[reviewing] court to conclude that the allegations are ‘highly probable.’”
In re A.V.D., 62 Wash.App. 562, 568, 815 P.2d 277 (1991).

The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

b. Analysis.

“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1).

The intent required is the intent to accomplish the criminal result of the base crime. *State v. Johnson*, 173 Wash.2d 895, 899, 270 P.3d 591, 594 (2012). The appellate court looks to the definition of the base crime to determine what specific criminal result must be proven. *Id.*

A substantial step is an overt act that is “strongly corroborative of the defendant’s criminal purpose. *Johnson, Id., State v. Grundy*, 76 Wash. App. 335, 337, 886 P.2d 208, 209 (Div. 3, 1994) (agreeing to buy drugs, without more, is mere preparation and not the requisite substantial step for the crime of attempting to possess illegal drugs).

What constitutes a “substantial step,” as opposed to “mere preparation” was examined in *State v. Lewis*, 69 Wash.2d 120, 124-25, 417 P.2d 618, 621 (1966):

Intent alone, of course, is not punishable. It must coincide with some Overt act adapted to, approximating and which, in the ordinary and likely course of events, will result in the commission of the target crime, reaching far enough toward its accomplishment to amount to the commencement of the consummation. Mere preparation is not indictable. The conduct of the accused, while it need not be the last act necessary to the consummation of the intended crime, must approach sufficiently near it to stand as a direct movement toward the commission of the offense after the preparations are made. In determining just where preparation ceases and attempt begins, we can be aided by no rigid formula. Each case hinges upon its own facts and circumstances.

Washington courts have also adopted the Model Penal Code approach to define “substantial step, *State v. Workman*, 90 Wash.2d 443, 451-52, 584 P.2d 382, 387 (1978). The *Workman* court cited with approval examples of conduct that is “strongly corroborative of the actor’s criminal purpose, shall not be held insufficient as a matter of law:” *Id.*

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
- (e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

Finally, the attempt statute, expressly states: “If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was abandoned, or, under the attendant circumstances, factually or legally impossible of commission.” RCW 9A.28.020(2).

The *Workman* court explains:

Furthermore, an instruction relating to abandonment is neither necessary nor even particularly helpful in defining the meaning of a substantial step. Once a substantial step has been taken, and the crime of attempt is accomplished, the crime cannot be abandoned. [*Cites Omitted*]. The defendants’ attempt to show they abandoned their plan is thus relevant only if the abandonment occurred before a substantial step was taken.

90 Wash.2d at 450, 584 P.2d at 386.

In the present case, Martie Soderberg’s intent is plainly and repeatedly revealed in her recorded conversations with Martin Drake. That is -- she intended for Martin Drake to shoot and kill Russell Soderberg sometime in the *future* and after additional *specified preparations* were

completed. This is illustrated during their final conversation on October 17, 2016:

2:25⁶ Martin Drake: ... ok, so we definitely wantta wait at least another ...

Martie Soderberg: ... two, three months ...

Martin Drake: Yeah. Value, uh, let's see, (unintelligible) ...

Martie Soderberg: I figured sometime probably January ... that way enough time has gone by and everything ...

The trial court erred by disregarding Ms. Soderberg's stated intent to wait at least another "... two, three months" in order to devise a meticulous plan for the deed and complete preparations such as: for Drake to practice shooting and become familiar with the gun; buy Drake a wig to wear when he purchases a gun; stake out Russell Soderberg's workplace in the future when he is working out of town; buy Drake a car so he can get from A to B; buy a bucket, a sack of concrete, water and tools to put in the car's trunk and use to mix up concrete to dispose the gun. Ms. Soderberg also intended to wait for several months in order to make her purchase of life insurance less suspicious.

Further, the intended purchase of the gun, by itself, would not present any risk of harm to Russell Soderberg. As far as Martie Soderberg

⁶ This segment of the conversation is at the 2 minute 25 second point of State's Exhibit P-8 which was played at RP 151.

knew, they were just buying an unloaded gun. An unloaded gun is useless when it comes to shooting and killing someone. Buying ammunition was yet another critical task to perform before Ms. Soderberg's efforts would have gone from "mere preparation" to "substantial step" to commit the crime of attempted murder.

The formula for determination of a "substantial step" in *State v. Lewis*, *infra* and the discussion of "abandonment" in *State v. Workman*, *infra*, are particularly instructive here. The supreme court in *Lewis* described "substantial step" as "some Overt act ... reaching far enough toward its accomplishment to amount to the commencement of the consummation" and "while it need not be the last act necessary to the consummation of the intended crime, must approach sufficiently near it to stand as direct movement toward the commission of the offense." 69 Wash.2d 120, 124-25, 417 P.2d 618, 621 (1966).

Thus, as noted by the supreme court in *Workman*, "once the substantial step has been taken ...the crime cannot be abandoned." 90 Wash.2d at 450, 584 P.2d at 386. Or, in other words, the "substantial step" is the point along the continuum of intent and preparation when you have gone too far to be able to turn back.

In this case there are endless permutations of events that could have occurred during the intended several months of preparations that would have presented opportunities to abandon the plan to kill Russell

Soderberg.⁷ And, It is clear from the recordings that since Martie Soderberg intended to continue with preparations over the next months, Russell Soderberg was not under threat of imminent harm on October 17, 2016.

2. The conviction for first-degree attempted murder should be reversed and the case remanded for a new trial because the “to convict” instruction omitted the element of premeditated intent.

If this Court does not dismiss the first-degree attempted murder charge for insufficient evidence, it should reverse the conviction and remand for a new trial. The “to convict” instruction given to the jury omitted the essential element of premeditated intent, and the State cannot prove beyond a reasonable doubt that the error was harmless.

The “to convict” instruction must contain all of the elements of the crime because it serves as the “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Smith*, 131 Wash 2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995); see also *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

⁷ Even including the direct intervention by law enforcement with Ms. Soderberg.

1068, (1970). Accordingly, this error may be raised for the first time on appeal. *Aumick*, 126 Wash.2d at 430, 894 P.2d at 1329-1330.

Also, jurors must not be required to supply an element omitted from the “to convict” instruction by referring to other jury instructions. *Smith*, 131 Wash.2d at 262-63. “It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” *Smith*, 131 Wash.2d at 263. The appellate court reviews a challenged jury instruction de novo. *State v. DeRyke*, 149 Wash.2d 906, 910, 73 P.3d 1000 (2003).

Here, the trial court’s “to convict” Instruction No.9, states:

To convict the defendant of the crime of attempted murder in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about between October 11, 2016 and October 17, 2016, the defendant did an act that was a substantial step toward the commission of murder in the first degree;
- (2) That the act was done with the intent to commit murder in the first degree; and
- (3) That the act occurred in the State of Washington.

CP 117.

The “to convict” instruction violates Ms. Soderberg’s right to due process because it describes the mental element as “intent” instead

of “premeditated intent,” thus conflating first-degree attempted murder with second-degree attempted murder that is committed with the lesser *mens rea* of “intent”.

There were other instructions explaining that premeditation was an element of the crime of first-degree murder. However, this does not make up for its absence from the “to convict” instruction, and the error cannot be harmless error. As the supreme court in *Aumick* explained:

We agree with the Court of Appeals that the trial court's failure to include intent in the elements of attempt was not rendered harmless by these instructions. In short, we are not convinced beyond a reasonable doubt that the jury would have reached the same result had the proper instruction been given. ... A jury is not required to search other instructions to see if another element should have been included in the instruction defining the crime.

126 Wash.2d at 430-31, 894 P.2d at 1330-31.

3. The definitional instruction, Instruction No. 8, incorrectly defines the offense of attempted first degree murder and therefore violates Martie Soderberg’s right to due process.

Again, a person is guilty of attempted murder in the first degree if, with premeditated intent to commit murder in the first degree, she does any act that is a substantial step toward commission of murder in the first degree. See RCW 9A.28.020(1); RCW 9A.32.030(1)(a).

The State provided a proposed instruction defining the crime of attempted murder in the first degree. This became Court’s Instruction No.

8. The instruction is based on Pattern Jury. Instr. WPIC 100.01 (4th Ed. 2015) and states.

A person commits the crime of attempted murder in the first degree when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of *that crime*. (emphasis added)

CP 116.

Grammatically -- “that crime” at the end of the instruction is attempted murder in the first degree. Therefore, the instruction must be read as:

A person commits the crime of attempted murder in the first degree when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of *attempted murder in the first degree*. (emphasis added).

Accordingly, the jury was not instructed that to be found guilty, Ms. Soderberg must have intended and took a substantial step to commit murder. Instead, the jury was instructed it only needed to find that Ms. Soderberg intended to attempt to commit murder to be guilty. Or, stated another way, rather than requiring Ms. Soderberg to take a substantial step to commit murder, she only needed to take a substantial step toward an attempt to commit murder to be guilty.

The supreme court in *State v. Smith*, addressed this issue in the context of the inchoate crime of conspiracy. In that case the instruction read:

Commencing on a date unknown, but between 1990, through November 1992, the defendant agreed with Marjorie Franklin and James Jeffers to engage in or cause the performance of conduct constituting the crime of conspiracy to commit murder in the first degree.

131 Wash.2d at 262, 930 P.2d at 918-919.

The supreme court stated that the instruction failed to list the elements of conspiracy to commit first degree murder, and that it “described the even more inchoate crime *of conspiracy to commit conspiracy to commit murder.*” *Id* (Emphasis added).

The court determined this instruction was constitutionally defective because it stated the wrong crime “as the underlying crime which the conspirators agreed to commit:

The jury simply found, according to its instructions, that the Defendant and others agreed to conspire to commit murder, not that they agreed to commit murder.

31 Wash.2d at 263, 930 P.2d at 919.

The *Smith* court then stated that *Aumick* was directly on point (131 Wash.2d at 264, 930 P.2d at 919) and determined that the erroneous instruction produced a “fatal error” and “automatic reversible error” by releasing the State from its burden to prove every element of the crime beyond a reasonable doubt. 131 Wash.2d at 265, 930 P.2d at 920.

The same result should apply here because the State cannot demonstrate that the instructional error was harmless. It is easily conceivable the jury could find that Ms. Soderberg satisfied the *actus reus*

for attempted murder in the absence of a substantial step to commit murder because Instruction No. 8 only required a substantial step toward an attempt to commit murder.

4. The Jury Instructions for both the attempted murder and criminal solicitation charges deprived Martie Soderberg of her constitutional right to unanimous verdicts.

The constitutional validity of a conviction is dependent on whether “a unanimous jury concludes the criminal act charged in the information has been committed.” U.S. Const. Amend VI, Wash. Const. Art. 1 §§ 21, 22; *State v. Crane*, 116 Wash.2d 315, 324-25, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867 (1991) (citing *State v. Petrich*, 101 Wash.2d 566, 569, 683 P.2d 173 (1984)).

Where the prosecution presents evidence of multiple acts, any of which could form the basis for the charges, the prosecutor must either elect which act it is to base the verdict, or the court must instruct the jury that it must agree on a specific act to support the charge. *Crane*, 116 Wash.2d at 325 (citing *State v. Kitchen*, 110 Wash2d 403, 409, 756 P.2d 105, 108 (1988)). If the jury is not so instructed by the court, and the prosecutor fails to “elect” the means by which the crime was committed, the error is considered harmless “only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” *Crane*, 116 Wash.2d at 325.

An error regarding juror unanimity is of constitutional magnitude, and therefore, it may be raised for the first time on appeal. *Kitchen*, 110 Wash.2d at 411; RAP 2.5(a). Further, the error will be deemed to be harmless only “if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.”

In the present case, Defendant was charged with attempted murder and solicitation to commit murder for conduct that occurred “on or about between October 11, 2016 and October 17, 2016”. CP 99. The jury was never instructed that it had to be unanimous as to which of Ms. Soderberg’s specific actions during that period constituted the “substantial step” or what constituted “money or another thing of value” required to convict her of attempted murder or solicitation.⁸

Also, the State never identified which specific acts were the “substantial step” or “money or other thing of value” in the Amended Information (RP 99) or in any instruction.⁹

Instead, all of the events and Ms. Soderberg’s acts during the time period were subject to scrutiny and there is no way to know that she was convicted by a unanimous jury. This amounts to constitutional error because, “some jurors may have relied on one act or incident and some

⁸ The appropriate instruction is the “Petrich Instruction” WPIC 4.25.

⁹ The appropriate instruction would have been WPIC 4.26.

another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Kitchen*, 110 Wash.2d at 411, 756 P. 2d at 109.

The error is presumed to be prejudicial and this presumption cannot be overcome unless no rational juror could have a reasonable doubt as to any one of the incidents alleged. *Id.* Ms. Soderberg submits it is impossible to rule out all but one possibility as to what was the “money or other thing of value” she gave Drake, or what specific acts added up to be the “substantial step” toward the murder of Russell Soderberg.

5. The trial court erred by imposing mandatory legal financial obligations without making the adequate individualized inquiry as to Ms. Soderberg’s present or future ability to pay.

The trial court imposed a \$500 Crime Victim Assessment, \$100 Domestic Violence assessment, \$200 in Court Costs, and \$100 Felony DNA Collection Fee. CP 189. The Court made no inquiry into Martie Soderberg’s financial resources or present or future ability to pay at the May 11, 2017 sentencing hearing. RP 20.

RCW 10.01.160(3) was amended by the Legislature in 2018 and now provides:

(3) The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

The Washington Supreme Court recently ruled that the statute applies prospectively to cases on appeal. *State v. Ramirez*, 191 Wash.2d 732, 748, 426 P.3d 714, 722 (2018).

If defendant's convictions are upheld, then this court should either remand the case to the trial court for resentencing or strike the legal financial obligations from Martie Soderberg's Judgment and Sentence.

CONCLUSION

For the reasons stated, this Court should reverse and dismiss the Information, or in the alternative, remand to the trial court for a new trial.

DATED this 21st day of February, 2019.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert M. Seines", written over a horizontal line.

Robert M. Seines, WSBA 16046
Attorney for Martie M. Soderberg

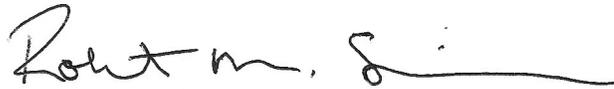
CERTIFICATE OF SERVICE

I, Robert M. Seines, do hereby certify under penalty of perjury that on February 21, 2019 I provided by e-mail service, a true and correct copy of the annexed Appellant's Opening Brief to:

scpaappeals@spokanecounty.org
KCORNELIUS@spokanecounty.org

I also personally delivered Appellant's Opening Brief to:

Martie M. Maxwell
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s/Robert M. Seines

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