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Division III
State of Washington
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NO. 36694-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

GUSTAVO TAPIA RODRIGUEZ,

Defendant/Appellant.

REPLY BRIEF,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES	ii
CONSTITUTIONAL PROVISIONS	ii
STATUTES	ii
RULES AND REGULATIONS	ii
ARGUMENT	1

TABLE OF AUTHORITIES

CASES

State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005) 2

State v. Garcia-Trujillo, 89 Wn. App. 203, 948 P.2d 390 (1997) 4

State v. Guevara-Diaz, 11 Wn. App. 2d, 843, 851-55 (2020) 6

State v. Huynh, 49 Wn. App. 192, 742 P.2d 160 (1987), *review denied*,
109 Wn.2d 1024 (1988) 5

State v. Ingels, 4 Wn.2d 676, 104 P.2d 944 (1940) 5, 6

State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010) 7

State v. Johnson, 113 Wn. App. 482, 54 P.3d 155 (2002) 3

State v. Lawler, 194 Wn. App. 275, 374 P.3d 278 (2016) 6

State v. Lopez, 29 Wn. App. 836, 631 P.2d 420 (1981) 5

State v. Powell, 35 Wn. App. 791, 664 P.2d 1 (1983) 2

State v. Smith, 162 Wn. App. 833, 262 P.3d 72 (2011) 7

CONSTITUTIONAL PROVISIONS

Const. art. I, § 3 5

Const. art. I, § 9 2

Const. art. I, § 22 5

United States Constitution, Fifth Amendment 2

United States Constitution, Sixth Amendment 5

United States Constitution, Fourteenth Amendment 5

STATUTES

RCW 9A.32.030 (1)(c)(5)..... 2
RCW 10.95.020 1
RCW 10.95.020 (7)..... 1, 2
RCW 10.95.020 (11)..... 1, 2

RULES AND REGULATIONS

RAP 10.3(a)(6)..... 3
RAP 10.3 (b)..... 3

ARGUMENT

I. Aggravated First-Degree Murder

The State's brief asserts that Mr. Tapia Rodriguez misinterprets RCW 10.95.020 and misstates the law. It is difficult to understand how the State arrived at that conclusion.

Aggravated first-degree murder is defined in RCW 10.95.020 as follows:

A person is guilty of aggravated first-degree murder ... if he or she commits first-degree murder **as defined by RCW 9A.32.030(1)(a)**, as now or hereafter amended, and one or more of the following aggravating circumstances exists:

...

(7) **The murder was committed during the course of or as a result of a shooting** where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge; ...

...

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

...

(d) Kidnapping in the first degree

(Emphasis supplied.)

Subparagraphs (7) and (11) define criminal offenses. Subparagraph (11) defines an offense that fits within the parameters of the felony-murder statute: *See*: RCW 9A.32.030 (1)(c)(5).

Subparagraph (7) is equivalent to drive-by shooting. Even though drive-by shooting is not one of the offenses included in the felony-murder statute, it is the only other subparagraph of the aggravated first-degree murder statute that is based upon a defined offense.

The jury determined that Mr. Tapia Rodriguez was guilty of both premeditated first degree murder and felony-murder. The two convictions arose from a single incident. *See*: *State v. Powell*, 35 Wn. App. 791, 794, 664 P.2d 1 (1983); *see also*, *State v. Gamble*, 154 Wn.2d 457, 468, 114 P.3d 646 (2005).

The State's argument that the Legislature's inclusion of subparagraph (11) in the aggravated murder statute does not raise double jeopardy issues is not reasonable.

The jury determined that Mr. Tapia Rodriguez was guilty of both premeditated first-degree murder and felony-murder. The double jeopardy provisions of the Fifth Amendment to the United States Constitution and Const. art I, § 9 control.

In *State v. Johnson*, 113 Wn. App. 482, 54 P.3d 155 (2002) the Court analyzed the issue of double jeopardy in connection with verdicts of second-degree murder and second-degree felony murder. Mr. Tapia Rodriguez contends that that analysis is equally applicable under the facts and circumstances of his case.

The *Johnson* Court stated at 489:

Here the court properly understood that because felony murder and intentional murder are alternative means, there could be only one conviction. The court chose its language not to invoke the merger doctrine but to create the effect of a merger. “Where offenses merge and the defendant is punished only once, there is no danger of a double jeopardy violation.” [The] ... double jeopardy claim fails because he did not receive multiple punishments.

(quoting *State v. Parmelee*, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001)).

The State’s contention that “because aggravated first-degree murder and felony murder do not have the same elements, they do not implicate double jeopardy concerns when charged as alternative means in the same count” is in error.

Moreover, the State fails to cite any authority for its position. As such, the argument should be disregarded. *See*: RAP 10.3(a)(6), (b).

II. Ineffective Assistance of Counsel

A. Officer as Interpreter

The State, in its brief, asserts that the use of a law enforcement officer as an interpreter when interviewing a suspect is not violative of the suspect's constitutional rights. The State relies upon *State v. Garcia-Trujillo*, 89 Wn. App. 203, 948 P.2d 390 (1997). The State's reliance is misplaced.

The *Garcia-Trujillo* Court stated at 208-09:

In this case, there is no basis for finding that Agent Bejar was an agent of Garcia or that he was authorized by Garcia to speak for him. Agent Bejar was present as an interpreter not because Garcia asked for his assistance but because Detective Moser brought him in to translate the questions he wanted to ask Garcia. **That the government supplies an interpreter is not necessarily dispositive in every case. But here the interpreter was himself an agent of the United States Border Patrol and in a position adversarial to that of Garcia** who was an illegal immigrant. Even if Garcia had not been an illegal immigrant, his immigration status would be affected by the outcome of this case. The issue is not whether Agent Bejar had a motive to lie or to deliberately mistranslate. **The issue is whether, under the circumstances, the facts support a finding that the interpreter was Garcia's agent or authorized by him to speak on his behalf.** Given Bejar's role as a border patrol officer and Garcia's status as an illegal immigrant, there is simply no basis for finding that either

was the case. The trial court did not abuse its discretion in excluding Detective Moser's testimony on direct examination about what Agent Bejar told him Garcia said during the interview.

(Emphasis supplied.) *See also: State v. Lopez*, 29 Wn. App. 836, 631 P.2d 420 (1981); and *State v. Huynh*, 49 Wn. App. 192, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988).

Deputy Delarosa was not an agent of the suspects who were interviewed. He was an agent of the State. Utilizing a law enforcement officer as an interpreter for a suspect in an aggravated first-degree murder case is beyond the pall of constitutionality. There is no fairness involved.

The Sixth Amendment to the United States Constitution and Const. art I, § 22, as well as the due process clauses of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3, all support Mr. Tapia Rodriguez's position.

B. Jury Issues

The State initially relies upon *State v. Ingels*, 4 Wn.2d 676, 104 P.2d 944 (1940) to support its argument that the trial court has broad discretion in connection with dismissing jurors based upon "undue hardship."

The *Ingels* Court dealt with grand juries. An entire different procedure was in effect for the selection of grand jurors in 1939 when the case was initiated.

The State proceeds to argue an impossibility. How the State could expect that Mr. Tapia Rodriguez can now identify better jurors from a discharged jury panel is inconceivable.

Mr. Tapia Rodriguez concedes that a trial judge must exercise caution in dismissing potential jurors. Nevertheless, this does not prevent the judge from acting *sua sponte*. See: *State v. Guevara-Diaz*, 11 Wn. App. 2d, 843, 851-55 (2020).

Both the State and Mr. Tapia Rodriguez rely upon *State v. Lawler*, 194 Wn. App. 275, 374 P.3d 278 (2016). It is Mr. Tapia Rodriguez's position that *Lawler* provides stronger support for his position than to the State's.

The trial court had *sua sponte* raised the issue concerning juror 44. The trial court did not raise the issue concerning the other jurors.

Defense counsel was truly ineffective in not removing jurors who did not want to serve or who had demonstrated at least an implied bias through his/her answers.

III. State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010).

Mr. Tapia Rodriguez has no argument with the fact that the *Ish* case was cited in connection with the State's motion in limine. Nevertheless, there does not appear to have been a challenge by defense counsel, until trial, as to whether or not the witness was testifying truthfully.

The State, in addition to *Ish*, also relies upon *State v. Smith*, 162 Wn. App. 833, 262 P.3d 72 (2011). In relying upon *Smith*, what the State does not mention, is that there was a failure to object to the testimony. Defense counsel objected when Julio was on the stand. No further objection was necessary when Chato and Chivo testified due to the trial court's ruling.

Mr. Tapia Rodriguez otherwise relies upon the argument contained in his original brief.

DATED this 13th day of April, 2020.

Respectfully submitted,

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DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)
) GRANT COUNTY
 Plaintiff,) NO. 17 1 00058 5
 Respondent,)
) **CERTIFICATE OF SERVICE**
 v.)
)
 GUSTAVO TAPIA RODRIGUEZ,)
)
 Defendant,)
 Appellant.)
 _____)

I certify under penalty of perjury under the laws of the State of Washington that on this 13th day of April, 2020, I caused a true and correct copy of the *REPLY BRIEF* to be served on:

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