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NO. 36325-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FAULOLUA FAAGATA, JR., APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 06-1-03067-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When taken in the light most favorable to the State, could a rational trier of fact have found that there was sufficient evidence presented that the defendant's actions manifested deliberate cruelty to the victim when the defendant shot the victim twice in the back, then repositioned himself and fired two shots into the victim's buttocks near the anus before shooting the victim in the head, and therefore did the trial court properly impose an exceptional sentence? (Appellant's Assignment of Error No. 2).

2. When the defendant was found guilty of both murder in the first degree and second degree felony murder, is the trial court required to vacate the second degree felony murder matter when the judgment and sentence is silent as to that finding? (Appellant's Assignment of Error No. 1).

B. STATEMENT OF THE CASE.

1. Procedure

On August 16, 2006, Faulolua Faagata, Jr., hereinafter "defendant," was charged by amended information with murder in the first degree and murder in the second degree. CP 5-6. On March 21, 2007,

both parties appeared for trial. RP[1] 16. A CrR 3.5 hearing was held and the court ruled that the defendant's statements were admissible. RP 52, 138-139.

On April 2, 2007, the defendant was found guilty of murder in the first degree and murder in the second degree. CP 78, 80. The jury also found that the defendant was armed with a firearm during the commission of the murder, and that his conduct manifested deliberate cruelty to the victim. CP 81-84.

On May 4, 2007, the court imposed an exceptional sentence of 450 months on the murder in the first degree conviction. CP 107-118. The court's sentence included 90 months for an exceptional sentence and 60 months for a firearm enhancement. (5/4/07) RP 72.

The court made the following ruling with respect to the deliberate cruelty finding:

> . . .
>
> Well, there was a struggle, but as Mr. Outler was on the ground, beaten, and crawling away, you shot him in the back twice. You then repositioned yourself, shot him in the anus, I think shooting for his genital area, and then repositioned yourself and shot him in the head, deliberately and intentionally killing him. You knew he was going to die when you shot him in the head.

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[1] All volumes of the verbatim report of proceedings are numbered consecutively, except for the volume containing the report of the sentencing, which occurred on May 4, 2007. In the State's brief, all volumes will be referred to by page number, and the verbatim report of proceedings from May 4, 2007, will be referred to by date and page number.

The first two shots to the back that Dr. Howard said might have resulted in paralysis. Maybe in some sense that's anger from the fight. I don't know. But he was no threat to you at all. Mr. Milhan, I think, was a witness who called 911 and was on the phone when you shot him, and I won't use the phrase he used, but again, he thought you were shooting him in the anus area intentionally.

The standard on deliberate cruelty is gratuitous violence inflicted as an end in itself, and the cases cited by Mr. Sepe are different. Those are physical cruelty and physical pain, but there's also the psychological cruelty and humiliation, and I think that's what Mr. Faagata was doing here. He had beaten Jason in the fight. He shot him twice in the back, and he may have survived.

My understanding of Dr. Howard was that those first two shots probably wouldn't have killed him had he gotten adequate medical care quickly. But that wasn't enough. Mr. Faagata made a conscious decision to teach this guy a lesson: I'll show him that he can't mess with me. I'm not going to shoot him, I'm going to shoot him where it really hurts and where it will humiliate him and embarrass him. And he shot him twice, one from touching his body. And after that he then says, Well, I'll show this guy again, and he shot him in the head and deliberately killed him.

. . .

. . . But in this case the jurors were asked did this manifest deliberate cruelty. They found that it did. I think the issue for me is, is there evidence to support that? And I think there is. As I said, the positioning of these shots, the pausing to reposition, this wasn't part of the fight. He paused, repositioned himself and shot him towards the genitals simply to humiliate and embarrass Mr. Outler and cause psychological pain to him. That's why he did it.

> So I think there are grounds under RCW 9.94A.530 and .535 to support the jury's finding, and under 537(2) that there was gratuitous violence here.

(5/4/07) RP 69-71.

The defendant filed a timely notice of appeal. RP 123.

2. Facts

On July 3, 2006, Jason Outler, the victim, was with Gina Allen and Dayna Casseday. RP 173, 191. The group was at a co-workers residence for a barbeque, and then went to the Hob-Nob bar together. RP 173, 193. At the time the victim did not have a car. RP 174. At the Hob-Nob, the victim met a friend named Kenneth Legary, and began talking with him and chatting with other people. RP 177, 406-407, 410.

Legary and the victim were like brothers. RP 405. Legary and the victim were together for an hour and a half. RP 408. Outside the bar was a smoking area where Legary saw a car pull in. RP 412. The driver of the car was Pacific Islander with braided hair. RP 413. Legary identified the driver of the car as the defendant. RP 416. The victim complimented the defendant on the car. RP 414.

The victim began asking people for a ride home. RP 414-415. The victim ultimately got the defendant to give him a ride. RP 415. The victim left with the defendant at approximately 1:30 a.m. RP 418. No one other than the victim and the defendant were in the car. RP 417.

Allen went out of the Hob-Nob to check on the victim a couple of times because the victim was intoxicated and Allen wanted to make sure he was alright. RP 179. The victim had been in the outdoor smoking area of the bar, and the last time Allen went to check on the victim was at approximately 1:15 a.m. RP 179-180. When he went to check on the victim, the victim was gone. Id.

On July 3, 2006, Anna Steele was in her home located near the intersection of North 8th and Alder. RP 228-229. At approximately 1:45 a.m., Steele was awoken to a "scurry" taking place outside her bedroom window. RP 229-230. She heard wrestling or struggling, then "pop, pop." RP 230-231. In between the "pops" she heard someone say "Oh my God." RP 231.

William Meeks was living at North 8th and Alder on July 3rd. RP 246. Meeks lived with several roommates. RP 246. Meeks was at his car when he observed two people standing outside of a car with one of the doors open. RP 251. The conversation between the two people began get more heated. RP 252. Meeks heard one of the people push the other one. RP 252. He heard someone say, "Look who's got the gun now, mother fucker." RP 253. From inside his apartment, Meeks saw the two people rolling around on the ground. RP 254. Within a few minutes, Meeks heard gunfire. RP 255. He saw a man with a gun standing and the other man who was involved in the fight on the ground. RP 256. Meeks heard a total of five shots. Id.

Lauren Carpenter was at the apartment that Meeks shared with his roommate Alex Milham. RP 272-23. Milham's roommate, presumably Meeks, pointed out to her that there were two men arguing across the street from the apartment. RP 274. She saw one of the men who was involved in the fight standing over another man. RP 277. The man who was standing pulled out a gun. RP 278. Carpenter observed five shots fired. Id. There were three shots fast at the body, and then the shooter moved over the body and "placed the gun close up to his butt and then fired a shot." RP 279. While still leaning over the body the shooter put the gun the victim's head and fired. Id. There was some time that elapsed between the first three shots, the shots to the buttocks area, and the shot to the head. RP 279. After being shot, the victim was in pain. Id. He was screaming. Id. The shooter got into the car and drove away. Id.

Milham was also in the apartment. RP 287. Milham saw to men fighting on the ground across the street from the apartment. RP 291. One of the men was crawling away and the other man stood up and pulled out a gun. RP 293. Milham saw the man with the gun shoot the other man three times in the back. RP 295. He then saw the man shoot the victim in the buttocks area, then the back of the head. Id. The shooter had time to reposition himself between the shot to the buttocks area and the shot to the head. RP 295.

On July 3rd and 4th, James Meyer and Theresa Connick were at Meyer's apartment located at 3104 North 8th Street. RP 312. Meyer and

Connick were sitting on the front steps when a car pulled up. RP 312-313, 340. The driver of the car got out and was yelling. RP 315. The driver went to the passenger in the car and said, "Damn it, I want my money." RP 315-316. The driver opened the door and forced the passenger out of the vehicle. RP 315. The driver struck the passenger. Id. The driver was yelling that he wanted his money and that he was tired of being ripped off. Id. Connick heard someone say "Now I've got the gun" or "I've got the gun now." RP 349.

Meyer called 911, and while he was on the phone he heard the driver indicated that he had a gun. RP 317. After Meyer talked to 911, he yelled outside that the police had been called. RP 317. Richard Palladino, who was watching the struggle from his residence, heard a voice yell out that the police had been called. RP 432-433. Meyer heard the victim say, "Come on, man. Didn't you hear him? The police have been called. Let's just stop. Let's get in the car and let's go. Let's just go. You're the man. Don't worry about it; you're the man. Let's just go." RP 317. The driver became more brutal and the victim was unable to defend himself further. RP 318. The driver "pile-drived" the victim into the ground, and shot him three times. RP 319.

The defendant was interviewed by Detective DeVault. RP 475. The defendant admitted that he had been at the Hob-Nob with two other

Samoans. RP 477. The defendant indicated that he was approached by an individual, later identified as the victim, who had offered him $80 for a ride home. RP 478. The defendant accepted the victim's offer. Id. The victim threw some money on the dash of the car. RP 479. The victim directed the defendant to pull over, and the victim got out. RP 480. The defendant then counted the money that the victim had given him, and found that it was only $15 or $16. Id. The defendant confronted the victim and they began to argue over the money. Id. The defendant told Detective DeVault that the victim had produced a gun and that it had gone off three times while they were wrestling. RP 481-482.

Detective DeVault observed wounds to the victim's body. RP 483. He observed a bullet wound to the back of the victim's head, a bullet wound to the small of the victim's back, and two bullet wounds on the right buttock cheek area toward the anus. Id. Dr. John Howard, the chief medical examiner, responded to the scene. RP 534-535. Dr. Howard ultimately performed the autopsy on the victim. RP 536. Dr. Howard observed a combination of bruises and abrasions on the victim's neck. RP 543. The victim had blunt force trauma consistent with being struck by a handgun. RP 545. Dr. Howard observed five separate gunshot wounds. RP 557. One bullet entered the upper area on the back and passed through the skin, through the muscle of the back, through the lumbar spine causing

fractures of the spine and tearing of the nerve roots, through the abdomen, through the intestines, and exited the skin of the abdomen. RP 574-575. Another bullet entered the victim's back, passed through the skin, lumbar spine, and abdomen, and came to rest in the abdominal wall. RP 575. The two gunshot wounds to the victim's back would not have been immediately fatal. Id.

There were two shots to the victim's buttock area. RP 576. Both of those bullets entered the buttock, passed through the skin and muscle of the buttock, through the pelvic area, through the lower abdomen, and exited through the skin of the abdomen. RP 577. The gunshots wounds to the buttock would not have been immediately fatal. Id.

The victim sustained a gunshot would to the back of the head. RP 578. Dr. Howard was able to determine that the wound to the victim's head was a contact wound, which meant that the muzzle of the gun was in direct contact with the skin at the time it was fired. RP 579. The bullet passed through the scalp, struck the base of the skull causing fractures of the skull and tearing of the spinal cord. RP 580. The spinal cord was completely cut in two. Id. The gunshot to the victim's head was fatal. Id. It would have caused the victim to become immobilized and completely paralyzed from the base of the skull down. RP 581.

Dr. Howard found that the victim's death was caused by multiple gunshot wounds. RP 586. The injuries the victim sustained to his spinal cord and lumbar areas would have been painful injuries. RP 587.

The defendant testified on his own behalf. RP 634. The defendant was angry and lost control of his temper. RP 645-646. He stated that he was angry when he shot the victim because the victim shot at him first and bit his arm. RP 655. The defendant indicated that the victim shot at him in the direction of a certain residence. RP 671. Detective Miller, however, examined nearby residences to determine if there were any bullet holes in the residence and none were observed. RP 681-682.

The defendant stated that he stood up, fired three times, and fled in his car. RP 646. At the time the defendant shot the victim three times, he had the only gun in the fight. RP 654. He stated that he was mad that the victim had lied to him. RP 669.

C. ARGUMENT.

1. WHEN TAKEN IN THE LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THERE WAS SUFFICIENT EVIDENCE PRESENTED THAT THE DEFENDANT'S CONDUCT MANIFESTED DELIBERATE CRUELTY TO THE VICTIM WHEN HE SHOT THE VICTIM TWICE IN THE BACK, THEN REPOSITIONED HIMSELF AND FIRED TWO SHOTS INTO THE VICTIM'S BUTTOCKS NEAR THE ANUS BEFORE SHOOTING THE VICTIM IN THE HEAD AND THE TRIAL COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE.[2]

The amendments contained in the Laws of 2005, chapter 68, required the State to provide notice that it would seek a sentence above the standard range and prove facts supporting the aggravating circumstance to a jury beyond a reasonable doubt. Laws of 2005, ch. 68, §4(1), (2). Laws of 2005, chapter 68, section 4(5) authorizes the trial court to impose an exceptional sentence if the jury finds that the State has proved "one or more of the facts alleged . . . in support of an aggravated sentence" and if "the facts found are substantial and compelling reasons justifying an exceptional sentence." Deliberate cruelty during the commission of the

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[2] There were no findings of fact and conclusions of law entered following the court's imposition of an exceptional sentence. This court should therefore affirm the defendant's conviction, but remand for entry of the findings of fact and conclusions of law. See In re Breedlove, 138 Wn.2d 298, 313, 979 P.2d 417 (1999).

offense is included in a list of factors that support an exceptional sentence under the Laws of 2005, chapter 68, section 3(a). The aggravating factor of deliberate cruelty is a factor that must be determined by a jury under the Sixth Amendment. RCW 9.94A.537(3); State v. Borboa, 157 Wn.2d 108, 118, 135 P.3d 469 (2006), citing Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Deliberate cruelty is defined as "gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." State v. Strauss, 54 Wn. App. 408, 418, 773 P.2d 898 (1989), appeal after remand, 119 Wn.2d 401, 832 P.2d 78 (1992); State v. Kidd, 57 Wn. App. 95, 106, 786 P.2d 847, review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990). "The extreme conduct must be significantly more serious than typical in order to support an exceptional sentence." State v. Scott, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993)(citing, State v. Holyoak, 49 Wn. App. 691, 696, 745 P.2d 515 (1987), review denied, 110 Wn.2d 1007 (1988)). Deliberate cruelty is behavior that is not usually associated with simply committing the crime. State v. Payne, 45 Wn. App. 528, 726 P.2d 997 (1986).

In this case, the State was required to prove the existence of the charged aggravating factor of deliberate cruelty beyond a reasonable doubt. CP 48-77 (Instruction #26). A challenge to the sufficiency of the

evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Anderson, 72 Wn. App. 453, 458, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). This is because the written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations. The trier of fact, who is best able to observe the witnesses and evaluate their testimony, should make these determinations. On this issue, the Supreme Court of Washington said:

> great deference . . . is to be given the trial courts factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It,

> alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

In this case, there was sufficient evidence presented, when viewed in the light most favorable to State, that the defendant's conduct manifested deliberate cruelty toward the victim. Testimony was presented that the defendant, after shooting the victim in the back, placed the gun next to the victim's buttocks and fired. RP 278-279, 295.

Two eyewitnesses saw the victim get shot in the buttocks area Lauren Carpenter indicated that there were a total of five shots fired—three fast shots to the body, one to the buttocks, and one to the head. RP 279. Carpenter indicated that time had elapsed between the first three shots, the shot to the buttocks, and the shot to the head. RP 279. After the first three shots, the defendant moved over the victim's body and placed the gun close to the victim's buttock. RP 279.

Alex Milham also witnessed the incident, and saw the victim get shot three times to the back, once to the buttock, and finally to the head. RP 295. Milham also noted that approximately one and one half to two seconds elapsed between the first sequence of shots and the shot to the victim's buttock. RP 295.

At the scene, Detective DeVault observed bullet wounds on the victim's right buttock check, toward the anus. RP 483. Dr. Howard

testified that the gunshots to the victim's back and buttocks would not have been immediately fatal. RP 575, 577. Dr. Howard also stated that the victim could have been paralyzed after the gunshots to the victim's back. RP 614.

When taken in the light most favorable to the State, the defendant shot the victim in the buttock for no reason other than to inflict physical, psychological, or emotional pain. After being shot in the back, the victim would still have been able to talk. RP 576. Even after the shots to the buttock area, the victim would still have been able to talk. RP 577. The victim expressed pain after being shot with the first series of shots. RP 279. He was screaming and was not making any defensive moves. Id. It was after the victim was not making any defensive moves and was lying on the ground that the defendant purposefully put the gun to the victim's buttock and fired the gun. Clearly such act was done to inflict physical, psychological, or emotional pain. The cruelty of intentionally shooting the victim in the buttocks was not needed to commit first degree murder. When taken in the light most favorable to the State, there was sufficient evidence presented for a rational trier of fact to find that the defendant's conduct manifested a deliberate cruelty to the victim.

In State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987), the court upheld the defendant's exceptional sentence based upon a finding of

deliberate cruelty and multiple incidents where the defendant shot the victim, partially left the room, and then returned to shoot the victim again. Id. at 218-219. In the present case, while the defendant did not leave the area where the victim was, he did pause between the shots to the victim's back, the shots to the victim's buttocks, and the shot to the victim's head. RP 279, 295. The defendant even moved over the victim's body and placed the gun next to the victim's buttocks. RP 279. The defendant clearly repositioned himself in order to fire at the victim's buttocks.

In State v. Franklin, 56 Wn. App. 915, 786 P.2d 795, review denied, 114 Wn.2d 1004 (1990), the defendant robbed a pizza employee at gunpoint, made her kneel as if he was going to tie her up, and instead stabbed her in the back. Id. at 917. The first stab wound was not immediately effective, so the defendant stabbed her in the back again. Id. The victim then escaped. Id. The court found that a finding of deliberate cruelty was supported, based on the fact the fact that the repeated stabbing was gratuitous and therefore aggravating. Id. at 919. The present case is similar to Franklin. As argued above, the defendant in this case did not merely try to kill the victim, but inflicted gratuitous injuries on him by firing into the victim's back at least two times and then intentionally firing into the victim's buttocks.

The defendant analogizes the case at bar to State v. Serrano, 95 Wn. App. 700, 977 P.2d 47 (1999). Brief of Appellant at page 16. In Serrano, the court found that a finding of deliberate cruelty was not supported where the defendant shot the victim five times in the back, holding that shooting the victim five times did not suggest that the defendant gratuitously inflicted pain as an end in itself. Id. at 712-713. The case at bar, however, is distinguishable from Serrano. In the present case, the defendant did not shoot the victim five times in the same location. Rather, the defendant deliberately repositioned the gun against the victim's buttocks and fired two shots before shooting the victim in the head.

Unlike Serrano, where the gunshot locations were not significant as a means of inflicting additional pain, the defendant in this case deliberately fired next to the victim's anus causing additional physical, emotional, or psychological pain before pausing and firing the fatal shot. The defendant himself admitted that he fired at the victim in anger. RP 655. The defendant suggests that his actions did not cause the victim additional pain because he could have been paralyzed from the shots to his back. Brief of Appellant at page 16. First, it is pure speculation that the victim was paralyzed. RP 614. Dr. Howard's testimony was only that it was possible that the victim was paralyzed after the first two shots. Id.

Second, there is evidence that the victim was in considerable pain. Dr. Howard testified that the injuries to the spinal cord and lumbar areas would have been painful injuries. RP 587. Lauren Carpenter heard the victim screaming in pain. RP 279. Clearly, the victim felt pain during the attack. Finally, even if the victim was paralyzed at the time the defendant shot him in the buttocks, the victim would still have been subjected to emotional or psychological pain from the injury. Testimony was elicited that the defendant actually put the gun up close to the victim's buttocks and fired. RP 279. The defendant's intention in firing at the victim's buttocks was to inflict gratuitous pain, not merely to kill the victim.

2. THE DEFENDANT WAS FOUND GUILTY OF BOTH FIRST DEGREE MURDER AND SECOND DEGREE FELONY MURDER, BUT THE JUDGMENT AND SENTENCE IS SILENT AS TO SECOND DEGREE FELONY MURDER, AND THEREFORE, THERE IS NO DOUBLE JEOPARDY VIOLATION AND THE COURT IS NOT REQUIRED TO VACATE THAT FINDING.

Under State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the court held that a sentencing court has no authority to take a verdict on a separate charge, find that it violates double jeopardy, not sentence the defendant on that charge, and to conditionally dismiss the charge for use at a later time. Id. at 659. In Womac, the defendant was charged with homicide by abuse and assault in the second degree. Id. at 660. All of

Womac's convictions were listed on the judgment and sentence. Id. The sentencing court specifically entered judgments on the additional charges finding that they were valid charges, but that to impose separate punishments would violate double jeopardy provisions. Id. at 658.

The Womac court, however, distinguishes State v. Ward, 125 Wn. App. 138, 104 P.3d 61 (2005). In Ward, the defendant was convicted of second degree felony murder and first degree manslaughter. Id. at 141. At sentencing, the defendant moved to vacate the first degree manslaughter conviction. Id. at 142. The court denied the motion and sentenced the defendant *only* on second degree felony murder. Id. The judgment and sentence entered by the court did not mention the jury's finding that the defendant was guilty of first degree manslaughter. Id. The court, in affirming the trial court, held:

> But Ward was not convicted and sentenced to both second degree felony murder and first degree manslaughter. Instead, the judge entered judgment and sentenced Ward only on the second degree felony murder charge; therefore there was no violation of double jeopardy. Because there was no violation of double jeopardy, the court was not required to vacate the manslaughter charge.

Id. at 144.

The present case is similar to Ward. In the case at bar, the defendant was convicted of murder in the first degree and second degree felony murder. CP 78, 80. The State concedes that the defendant cannot not be sentenced on both first degree murder and second degree felony

murder. The State also concedes that the trial court below improperly relied on the Court of Appeals' decision in Womac[3] which was ultimately reversed by the Washington Supreme Court. However, because the trial court did not include the second degree murder conviction on the defendant's judgment and sentence, there is no double jeopardy violation. See Ward, 125 Wn. App. 138 at 144.

The defendant asserts "The [Womac] Court reasoned that because Womac was charged with three separate offenses, and judgments on all three offenses violated double jeopardy, the appropriate remedy was to vacate two of the three counts." Brief of Appellant at page 10 (emphasis added). In this case, the court did not enter judgment on both first and second degree murder. CP 107-118. Because the judgment and sentence is silent as to the second degree felony murder conviction, vacation is not necessary on double jeopardy grounds.

The defendant further asserts that because the trial court made an oral ruling conditionally dismissing the second degree murder charge, that such oral ruling is violative of Womac. Brief of Appellant at page 11. The judgment and sentence, however, remains silent regarding murder in the second degree. Under Ward, if the judgment and sentence is silent as to the additional count, vacation of that count is not required, and double

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[3] State v. Womac, 130 Wn. App. 450, 123 P.3d 528 (2005), reversed by State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007).

jeopardy is not violated.[4] Whether or not the trial court made an oral ruling stated that it was conditionally dismissing the murder in the second degree count is irrelevant because the judgment and sentence is silent. Vacation of murder in the second degree is not required because the defendant was not sentenced on that crime.

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[4] The court in Ward acknowledges that it may be possible for the secondary charge to be "revived" if the charge on which the defendant was sentenced was vacated. Ward, 125 Wn. App. 138 at 146-147. The court stated that "Ward would receive a large windfall if we vacated his felony murder conviction *and* ignored the guilty verdict on the charge of manslaughter. Instead, the appellate court may seek to place the defendant 'in exactly the same position in which he would have been had there been no error in the first instance.'" Id. at 146, citing State v. Silvers, 90 F.3d 95, 99 (4th Cir. 1996). The issue of whether a conviction previously vacated because of a double jeopardy violation can later be revived is currently before the Washington Supreme Court. See State v. Schwab, 134 Wn. App. 635 (2006), review granted, 160 Wn.2d 1017, 163 P.3d 793 (2007)(The double jeopardy doctrine does not preclude reinstating Schwab's manslaughter conviction because it was vacated solely to prevent double punishment for the same crime, not because the jury's verdict was somehow in error.)

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that this court affirm the defendant's conviction and sentence, including the aggravating factor of deliberate cruelty.

DATED: FEBRUARY 13, 2008

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/14/08 Johnson
Date Signature

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