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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES BUKOVSKY, APPELLANT
JOHN GORDON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 06-1-04227-3
No. 06-1-04228-1

BRIEF OF RESPONDENT

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

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B. STATEMENT OF THE CASE.

1. Procedure

On September 7, 2006, the Pierce County Prosecutor's Office filed an information charging appellant, John C. Gordon ("Defendant Gordon") with one count of murder in the second degree. CP 552, 553-554. The information indicated that several co-defendants, Charles Bukovsky, Jesie Puapuaga, and Anthony Knoefler, were also involved in this crime. *Id.* The State filed an Amended Information on July 10, 2007, to allege two aggravating circumstances regarding victim vulnerability and deliberate cruelty were applicable to defendant's crime. RP 665-666.

On September 7, 2006, the Pierce County Prosecutor's Office filed an information charging appellant, Charles A. Bukovsky ("Defendant Bukovsky") with one count of murder in the second degree. CP 1-2. The information indicated that several co-defendants, John Gordon, Jesie Puapuaga, and Anthony Knoefler, were also involved in this crime. *Id.* The State filed an Amended Information on July 10, 2007, to allege two aggravating circumstances regarding victim vulnerability and deliberate cruelty were applicable to defendant's crime. RP 45-46.

Both defendants sought to have their charges dismissed on the grounds that the felony murder statute violated equal protection when the predicate felony was assault. CP 571-581, 1055-1065; 4/6/07 RP 95-108.

After hearing argument, the court denied the motion. CP 34-35, 647-648; 4/6/07 RP 108.

Trial was held before the Honorable Brian Tollefson. RP 500. Anthony Knoefler entered into a plea agreement with the prosecution and testified at defendants' trial. RP 1385-1523. Jesie Puapuaga's trial was severed when his case went up on interlocutory appeal to the Washington Supreme Court. *See* ***State v. Puapuaga***, 164 Wn.2d 515, 192 P.3d 360 (2008). After hearing the evidence the jury found both defendants guilty as charged and returned a special verdict finding both of the alleged aggravating circumstances were applicable to both of the defendants' crimes. CP 300, 301, 970, 971.

At sentencing the State sought impositions of exceptional sentences. CP 304-306, 999-1001. The court agreed with the State and found, based upon the jury's finding of two aggravating circumstances, that there were substantial and compelling reasons to impose a sentence outside the standard range. RP 2325-2334, 2339-2352. The court imposed a total sentence of 388 months on Defendant Bukovsky based upon his offender score of "2." CP 309-320. The court imposed a total sentence of 364 months on Defendant Gordon based upon his offender score of "0." CP 1002-1013. Each of these sentences was 144 months above the high end of the standard range. CP 542-545, 1038-1041. The

court entered findings of fact and conclusions of law regarding the exceptional sentences. CP 542-545, 1038-1041.

Defendants entered timely notices of appeal from entry of their judgments. CP 534, 1018-1030.

2. Facts

Officers Brian Wurts and David Butts of the Lakewood police Department responded to the Lakewood Garden Apartments on September 5, 2006 at approximately 3:15 a.m. and found a man, later identified as Brian Lewis, severely injured and bloody on the ground between two vans. RP 996-1005, 1007, 1695-1698. Mr. Lewis did not appear to be conscious and his body was moving as if he was going into seizure; a large amount of blood was pooling under his body. RP 1003-1005, 1698-1700. Officer Wurts radioed for medical aid, which had been waiting nearby for a signal that the scene was safe, to get there quickly as the victim's situation looked grave. RP 1004-1006. Officer Wurts also radioed for backup and a supervisor as he thought that there was the potential for this to end up a death investigation and then went to see if he could locate any witnesses. RP 1006-1009. Officer Wurts spoke to three potential witnesses. RP 1008. He directed the cordoning off of the area with crime scene tape and took some digital photographs of the scene. RP 1009-1012.

The paramedic who responded to the scene testified that he found the victim lying on the ground with a significant amount of blood around his head and face; the blood had begun to coagulate. RP 1527-1528. The victim's eyes were completely swollen shut and his upper lip was split to the bottom of his nose so that his upper mandible was visible. RP 1528. The victim was combative and tried to fight the paramedics off mumbling "get the f*** off me." RP 1530. The paramedics could tell that the victim was having problems breathing but they were unable to intubate him to establish an airway. RP 1530-1533. The paramedics had initially planned to take the victim to Tacoma General Hospital, but when the victm's heart rate started to decline, they diverted to St Clare's Hospital which was only a few blocks away. RP 1533-1535. The victim went into cardiac arrest about six minutes before the ambulance arrived at the hospital. RP 1535.

A forensic officer was also dispatched to the crime scene; he documented the scene with photographs and took measurements for a diagram. RP 1016-1027. There were two vans, a Lumina and a Voyager, parked side by side in the parking lot with about four feet between them. RP 1022-1024. There was blood in the area between the vans, including spatter on the wheels. RP 1031-1033. The officer collected a red bandana that was on the ground near the vans. RP 1034-1036.

Shecola Thomas was living in Apartment 3 at the Lakewood Garden Apartments, Pierce County, Washington, on September 5, 2006. RP 1064-1065. She shared this apartment with Charlotte Songer and the

defendants. RP 1065-1067. She indicated she knew Defendant Bukovsky as "Andy" and that sometimes Defendant Gordon went by the name "Red." RP 1066-1068. Ms. Thomas testified that the defendants had been living at the apartment for a couple of months before the homicide. RP 1070. Ms. Thomas returned to her apartment around 2:00-3:00 a.m. on the morning of September 5, 2006. RP 1070-1071. When she arrived home, the defendants and an Indian male were in the living room, and Ms. Songer and the victim were in the back room. RP 1073. She testified that when she got home Defendant Gordon started yelling at her that she needed to leave – he was mad because she had called the police on him about a week earlier. RP 1074-1075. Ms. Thomas told Gordon to get out of her face. RP 1076. The victim and Ms. Songer came out of the back room and the victim told Gordon to keep it down because it was too early in the morning to be making so much noise. RP 1077. Ms. Thomas stated that the victim told her to go into the back room, that he had something for her; she went back hoping that the victim would give her some drugs to consume. RP 1078. She went to the back room, but Gordon came around the outside and climbed in through the back window shouting at her that she needed to leave. RP 1078-1079. Gordon also shouted that there was going to be blood on his rag tonight. RP 1079. Gordon continued to threaten Ms. Thomas saying that he was going to put hands on her if she didn't leave, calling her a snitch, and indicating that she needed to find another place to stay. RP 1080-1081. As it did not appear that Gordon

was going to calm down, the victim asked Ms. Thomas if she wanted to go for a ride with him and Ms. Songer; she accepted. RP 1080-1083. The three of them went out the front door and walked toward the victim's minivan in the courtyard. RP 1083-1084.

Both defendants and Anthony [Knoefler] followed them into the courtyard. RP 1084. Knoefler stood at one corner of the building and Bukovsky stood at the other as Gordon approached Ms. Thomas, Ms. Songer, and the victim. RP 1087-1088. Gordon went up to Thomas, reminded her of his threat to put "hands on" her that night; he also repeated the statement that blood would be on his rag tonight. RP 1089, 1108-1109. Gordon carried a red bandanna in his back pocket and he took it out at this time. RP 1108-1109. Gordon then punched her in the eye. RP 1089. Ms. Thomas fell back onto the hood of a cart parked next to the victim's van from the force of the blow. RP 1093. The victim then confronted Gordon about what he had just done; Gordon walked over to the victim and told him that he needed to stay out of it. RP 1095. The verbal confrontation soon escalated into physical violence when Gordon began punching the victim in the face. RP 1096-1097. Very shortly after Gordon started punching, Bukovsky and Knoefler came over and joined in punching the victim. RP 1097. Ms. Thomas testified that as all three were hitting the victim that the victim was not able to fight back. RP 1098. After a couple of minutes another person she knows as either "Jesie" or "Os" came around the corner of the building and also began hitting the

victim. RP 1098-1099. Ms. Thomas has heard Gordon refer to Jesie as being his blood brother. RP 1198. Ms. Thomas indicated that she and Ms. Songer retreated to the apartment and that she continued to watch the fight through the window blinds. RP 1099-1100. By this point, the victim was on the ground and all four men were "stomping him." RP 1100-1101. This fight was occurring between the two vans. RP 1103. Ms. Thomas estimates that each of the four assailants landed 12-20 blows or kicks on the victim. RP 1102-1104. She never saw the victim fight back in any way. RP 1104.

After a few minutes, Ms. Thomas could not watch and sat on the couch afraid to call for help. RP 1101-1102. After several minutes had elapsed, Ms. Thomas went outside to check on the victim; she saw him laying on the ground, unrecognizable; she describes seeing "nothing but red everywhere, everywhere." RP 1105-1106. She could hear the victim moaning. RP 1105-1106. Ms. Thomas went inside to call for help, but before she could, the phone rang; Ms. Songer answered the phone; Gordon was calling to say that Songer should get Ms. Thomas out of the apartment because the same thing that happened to Brian Lewis would happen to her. RP 1106-1107; 1122-1123. Ms. Songer told Ms. Thomas to leave. RP 1123. Ms. Thomas heard the police arrive a few minutes later. RP 1106-1107.

Ms. Thomas was later interviewed by police; she identified Gordon and Bukovsky from photo montages. RP 1111-1115. She also identified

them in court. RP 1066-1068. A short time after the incident, Ms. Thomas took a bus to a CPS office to visit her daughter; when she got off the bus, Gordon was at the bus stop; he made a gesture to her that she interpreted as a threat. RP 1116-1117. Gordon had made an earlier threat regarding Ms. Thomas's daughter on September 5, 2006. RP 1190-1191.

Junior Ioane testified that he was acquainted with Jesie Puapuaga and that he also knew Puapuaga to be called "Uso." RP 1224-1225. Ioane was also acquainted with Gordon and had heard him call Puapuaga by the name "Os." RP 1224-1227. Ioane knew that Gordon considered Puapuaga to be like a brother. RP 1227-1228. Ioane had seen Bukovsky a couple of times prior to September 5, 2006, usually with Puapuaga, and had heard Bukovsky referred to as "Black Mile." RP 1228-1229. On September 5, 2006, Ioane was at a barbeque at the Rainier Vista Apartments; Puapuaga was also there. RP 1232. Ioane, Puapuaga, and another man decided to walk to a nearby store to get some more beer. RP 1232-1234. As they were walking, Ioane heard a loud commotion coming from a nearby apartment complex. RP 1235. The voice was shouting something about "kicking your ass" and something about blood. RP 1235. Puapuaga ran toward the sound of this commotion. RP 1235. Ioane kept walking toward the store, but look toward the apartment where the commotion was occurring; he testified that it sounded like a riot and that there was "bone crushing." RP 1235-1236. Ioane went toward the commotion and could hear Puapuaga announcing that he was "here" and

asking what happened. RP 1238. Ioane could hear and see three people – Puapuaga, Gordon, and Bukovsky - punching and kicking a fourth person. RP 1236-1241. At one point, Puapuaga was holding the man so that everyone else could punch and kick. RP 1239. Ioane yelled out "police" so that the fight would stop and the assailants scattered. RP 1240-1242. Ioane went to the victim whose head was swelling to the size of a pumpkin and who was bleeding from his nose and mouth. RP 1242. Ioane made sure that he had a pulse and tried to keep the victim still. RP 1242. He saw Gordon and Bukovsky try to clean themselves off with a hose; Puapuaga, who was armed with a pistol, threatened Ioane with harm if he said anything. RP 1243, 1247- 1249. Ioane stayed until he saw an ambulance, then went home. RP 1242-1243. Ioane had contact with the police a few days later and told them what he had seen. RP 1244-1248.

Ms. Songer testified that Ms. Thomas, both defendants, and Mr. Lewis were at her apartment on September 5, 2006. RP 1555-1560. Ms Thomas and Gordon got into an argument and Mr. Lewis was going to give Ms. Thomas a ride to get her out of there. RP 1560- 1561. Ms. Songer recalled that Gordon hit Ms. Thomas and that this caused Mr. Lewis to start making threats. RP 1567. After initially not remembering much about that night, Ms. Songer recalled that the defendants and Tony had Lewis pinned between two vans and were punching and kicking him, and that then Jesie and another Samoan male arrived and got into the fight.

RP 1567-1572. At that point, Ms. Songer went back inside her apartment. RP 1572-1573.

Kindra Wiseman was dating Anthony Knoefler at the time of the homicide. RP 1731-1732. On that night, she was sleeping in the back bedroom of Knoefler's mother's apartment when she was awakened by Knoefler, pounding on the back window wanting in. RP 1737-1740. She let him in; he was scared, upset, and agitated. RP 1740-1741. Knoefler told her that "we beat some guy up" because his was "talking shit." RP 1753-1755. Knoefler indicated that Gordon, Uso [Puapuaga], and Poncho [Gisa] had participated in the beating. RP 1757.

John Vlahas was visiting his friend Charlotte Songer at her apartment on September 5, 2006. RP 1266-1269. He testified that he went to her apartment following a three day run of crack cocaine usage with no sleep so that his mind was "kind of delirious" at that time. RP 1269. Vlahas knew Brian Lewis for years and called him "Pops." RP 1269-1270. Mr. Vlahas indicated that Brian Lewis was at Conger's apartment that night and that Thomas and two men he didn't know were also staying there. RP 1270-1272. He identified Gordon as being one of these men but could not identify Bukovsky as being the other. RP 1273, 1277. Vlahas testified that Thomas arrived home that night and started to argue with Gordon. RP 1272-1274. He stated that he and Lewis tried to

calm the situation down and that Gordon left out the front door. RP 1274-1276. He testified that Lewis, Thomas, and Songer left a short time later; he then consumed some more drugs. RP 1276. Songer and Thomas came back into the apartment talking about a fight going on outside. RP 1278. At some point Vlahas went outside and saw Lewis -moaning, bloody, and unrecognizable – on the ground between the two vans. RP 1279-1281. Mr. Vlahas testified that his memory was pretty impaired by drug use on September 5, 2006. RP 1283-1284.

Defendant Gordon turned himself in at the police station after an article had been published identifying him as a suspect in the homicide. RP 1324-1326, 1344. On September 8, 2006, Detective Paynter with the Lakewood Police Department was dispatched to the Sheriff's Department offices at 930 Tacoma Avenue after Gordon turned himself in at that location. RP 1331- 1332. Det. Paynter advised Gordon of his ***Miranda*** rights and told him that he was under arrest for murder. RP 1332-1333. Det. Paynter noticed that Gordon's hand was swollen and injured and asked him how that happened. RP 1334-1335. Gordon told him that he had punched his car's windshield when he was angry. RP 1335. Gordon told Det. Paynter that between 11:00 p.m. and 2:00 a.m. on the night in question he was hanging around at an apartment complex with some of his associates, whom he refused to identify, when the victim approached his

group. RP 1335-1336, 1337. Gordon described the victim as a "crack head" who started making threatening statements to them; Gordon told the detective that victim represented that he had an associate nearby who was armed with a firearm and who would shoot anybody that messed with him. RP 1336. Gordon told the officer that he saw a red laser dot on one of his associates and became concerned that someone was pointing a firearm at his associate. RP 1338. Gordon represented that his associates got "freaked out" by the victim. RP 1338. Gordon told the officer that he had kicked the victim while he was standing up, but denied landing any other blows on the victim. RP 1339-1340. Det. Paynter indicated that he tried to direct Gordon to what happened when the victim was on the ground, but that Gordon did not want to discuss this portion of the incident. RP 1340-1341. After about half an hour, Sergeant Alwine came into the room and the interview rapidly deteriorated until Gordon asked for an attorney. RP 1341, 1350-1351, 1359. On September 25, 2006, Gordon was taken for treatment of his injured right hand. RP 1781-1784. An x-ray revealed that Gordon had fractured his hand about two to three weeks earlier. RP 1782-1783.

In September 2006, Anthony ("Tony") Knoefler was sixteen years old and living with his mom and step-dad at the Lakewood Garden Apartments in Apartment 5. RP 1379-1380. Mr. Knoefler knew both

defendants from living at the apartment complex. RP 1384-1385. He called Gordon by the name "Red" and he knew Bukovsky as "Andy Folks." RP 1385. Knoelfer also knew Puapuaga by the name "Trouble" and a person named Iosia Gisa, whom he called "Poncho." RP 1385-1386. Knoefler knew Ms. Songer and Ms. Thomas from the apartments but had not seen Brian Lewis prior to September 5, 2006. RP 1386-1388.

Knoefler spoke with the police on September 5, 2006; he was outside his apartment when the police contacted him and arrested him. RP 1393-1397. Knoefler testified that he felt awful about what had happened to Lewis and wanted to help. RP 1395. He was not given any promises about a plea offer prior to making his statement. RP 1394.

Mr. Knoefler testified that he was outside his apartment smoking, when he heard male and female voices yelling in Apartment 3. RP 1405. A short time later Bukovsky came outside and asked for a smoke, then Gordon came out; he was angry and yelling something to the effect "she messing with my money." RP 1406. Gordon began pacing. RP 1407. A short time later, Ms. Thomas and the victim came out of Apartment 3 and headed toward the vans. RP 1408. Gordon turned and asked Bukovsky and Knoefler if they had his back, then walked over to Thomas and Lewis. RP 1408-1410. Knoefler testified that Gordon hit Thomas which angered Lewis. RP 1410-1413. He described Lewis as making threats that he was

going to beat their asses and said that Lewis began talking about someone being in the van with a gun. RP 1411. Knoefler testified that even though there wasn't any one in the van, Lewis's comments angered everyone. RP 1411-1412. Knoefler testified that Gordon then hit Lewis and that Lewis turned and tried to run out from between the two vans. RP 1413, 1481. Knoefler testified that he ran to the back of the vans to keep Lewis from leaving and that he pushed him back. RP 1413, 1481. He testified that Lewis punched him so he punched Lewis back; Lewis then ran back toward Gordon. RP 1413-1414, 1481-1482. Knoefler testified that he went back toward the front of the vans where he was punched a second time by Lewis and that then Gordon hit Lewis several times again causing Lewis to fall to the ground. RP 1414-1416. Knoefler testified that he kicked Lewis once while Lewis was trying to get up and this caused Lewis to fall to the ground. RP 1416. Knoefler testified that Gordon and Bukovsky then began jumping on Lewis, punching and kicking him. RP 1416-1417. He indicated that it was not possible for Lewis to get up because he was being kicked, stomped, and punched. RP 1418-1419. At this point, Jesie Puapuaga came from around the corner by Apartment 1 and joined the fight. RP 1419. Knoefler testified that Puapuaga got Lewis into a choke hold and held him while Gordon and Bukovsky continued to kick the victim. RP 1419-1422, 1519. A short time late, Iosia Gisa joined

in the fight by delivering several kicks to the victim's body and head. RP 1422-1423, 1507-1508. The victim was between the two vans at the time he was beaten. RP 1481-1484. At this time Knoefler took up a position to watch for police. RP 1508. Knoefler testified that he saw a car coming and thought it might be the police so he yelled out and the beating stopped. RP 1423-1424, 1519-1520. Knoefler indicated that once the victim fell to the ground he never got to his feet again. RP 1510. Knoefler testified that his shoes were bloody so he washed them. RP 1426. He ended up speaking to the police later that same day, giving a taped statement; at the station he identified Gordon and Bukovsky from photomontages on the day he was arrested. RP 1390-1394, 1428. Knoelfer entered into a plea agreement in exchange for his testimony; he pleaded guilty to manslaughter in the first degree for his participation in this homicide and hoping for a sentence of 100 months. RP 1399-1400.

Detective Bunton of the Lakewood Police Department testified that he arrived at the Lakewood Garden Apartments at 5:23 a.m. on September 5, 2006. RP 1611- 1613. By the time he arrived the victim had been taken to the hospital; he reviewed the crime scene and saw a large pool of blood between two parked vans, blood on the vans, as well as a nearby red bandanna and backpack. RP 1613-1616. The pool of blood went from one tire of one van and spanned the four feet of space to the tire of the

other van parked next to it. RP 1615. The victim's identification was in the backpack. RP 1616-1617. Detective Bunton went to the hospital where he took photographs of the deceased victim to document his injuries. RP 1617-1619. After that he returned to the Lakewood Garden Apartments to locate and interview witnesses. RP 1619-1620. These interviews led him to identify the defendants and Anthony Knoefler as possible suspects in this homicide. RP 1620-1621.

Det. Bunton, along with Det. Hall, interviewed Bukovsky on September 7, 2006 at the Lakewood Police Station after his arrest. RP 1621, 1707. Both detectives noticed that Bukovsky's right hand was swollen. RP 1621-1622, 1710. Bukovsky initially denied being present at the fight that had occurred at the Lakewood Garden Apartments although he acknowledged hearing about it. RP 1623, 1708. Det. Hall testified that Bukovsky told him that he was with his girlfriend at the relevant time but did not provide any identifying information about his girlfriend. RP 1623. When the detectives indicated that other people had implicated him in the beating, Bukovsky changed his story and acknowledged that he was there but stated that nothing he did had caused the death of Mr. Lewis. RP 1624, 1709-1710. Bukovsky indicated that Lewis had died from a crack cocaine overdose. RP 1624, 1708. Both detectives testified that upon further questioning, Bukovsky admitted to punching the victim in the face

one time and then said that other people joined in. RP 1624, 1710-1711. Bukovsky told them that Lewis was saying that someone in the van had a laser sight focused on him so he had a red dot on his head. RP 1625, 1710. Bukovsky indicated that he did not believe this because he could see that no one was in the van, but that Lewis's statement made him angry. RP 1625-1626, 1710-1711. The detectives testified that Bukovsky told him that Lewis had taken a swing back at him but that he missed and fell to the ground; once Lewis was on the ground other people started punching and kicking. RP 1626-1627, 1711-1712. Detective Hall testified that Bukovsky described this as "stomping him out." RP 1711. Det. Hall described that when shown a photograph of the victim's injuries, Bukovsky smirked and stated that he didn't do all of that. RP 1712-1713. Bukovsky stated that Nick, Brandon, and Josh were the other people who "stomped the guy out." RP 1713-1714. Bukovsky told Det. Hall that he didn't feel bad for the victim or his family. RP 1715-1716.

The detectives showed Bukovsky several different photo montages that included pictures of Knoefler, Puapuaga, and Gisa. RP 1629- 1630. The first time he was shown these montages he did not identify any one from the first two montages and identified someone other than Gisa from the third montage. RP 1630-1632, 1653-1655, 1717. The detectives indicated that they thought he was trying to mislead them as to who was

involved in the beating; Bukovsky asked to see the montages again. RP 1632-1633, 1717. The second time he was shown the montages he identified Knoefler's photograph, but not Puapuaga's or Gisa's. RP 1633-1636, 1717-1718.

The defendants' hands were photographed at the time of their arrest. RP 1039-1040, 1041-1042, 1342, 1622. Bukovsky's and Gordon's shoes were also seized. RP 1343, 1637-1638. Tony Knoefler's shoes were taken into evidence when he was arrested and his hands were also photographed. RP 1037-1039, 1042-1043. The forensic officer recovered evidence recovered during the autopsy from the medical examiner's office, including a vial of the victim's blood and placed these items into evidence. RP 1044-1045.

A forensic scientist from the Washington State Crime Lab examined the shoes taken from Gordon (Hurricane brand), Bukovsky (FUBA), and Knoefler (Polo) for blood evidence to compare with the blood sample taken from the victim during the autopsy. RP 1590-1598. She recovered a partial DNA profile from a blood sample recovered from Gordon's shoes, but it did not come from the victim. RP 1598-1600. She found a mixed DNA sample, meaning that the DNA came from more than one person- on the blood found on Bukovsky's shoes; the victim was a possible contributor to the mixed DNA profile. RP 1601. She found a

single source DNA profile on Knoefler's shoe and positively matched it to the victim's DNA profile. RP 1601-1604.

An expert in blood stain pattern analysis examined the blood spatter on the two vans and formed the opinion that the source of the blood on these vehicles was from a point of origin nine to twelve inches out from the front wheel well of the Lumina and no higher than eight to fourteen inches above the ground. RP 1874-1912. There was nothing in the blood spatter to indicate that the source of the blood was from someone standing up. RP 1913.

Dr. Roberto Romoso, an associate medical examiner for Pierce County, performed an autopsy on the body of Brian Lewis on September 5, 2006. RP 1789-1792. From his autopsy, Dr. Romoso concluded that the cause of victim's death was due to multiple traumatic injuries. RP 1860. The majority of the victim's injuries were to his head. RP 1849, 1814-1815. Additionally, he had a minor abrasion on his upper chest, some abrasions on his knees and some defensive wounds to his hands and arms, but these did not cause his death. RP 1848-1852, 1852-1856.

The multiple blows of blunt force trauma to his head caused subgaleal and subarachnoid hemorrhages to the brain. RP 1822-1831. A substantial amount of force is necessary to cause a subarachnoid hemorrhage. RP 1832. The victim had multiple subarachnoid

hemorrhages. RP 1832-1833. He also sustained a one and half inch laceration to his upper lip due to blunt force trauma. RP 1816-1819. A substantial amount of force was necessary to cause this injury. RP 1818.

The autopsy revealed signs that the victim had been asphyxiated as well. RP 1811-1813. There were petechiae on both lower eyelids and the victim had a fracture to at the base of the thyroid cartilage. RP 1811-1812, 1834-1835. This type of fracture can be caused by compression to the neck, which can also cause the petechiae. RP 1836-1837. These injuries are consistent with the victim being placed in a choke hold. RP 1812, 1835-1836. Asphyxiation was a significant finding as a factor in the victim's death. RP 1869-1871.

Other factors that led to the victim's death included: 1) the aspiration of blood into the lungs, which prevents good oxygenation of the blood; 2) the hemorrhages in the brain which can cause dysfunction of bodily systems; and the loss of blood which can cause shock and heart failure. RP 1825-1826, 1845-1846. Dr. Ramoso reviewed the victim's medical records; these indicated that the victim was essentially dead when he arrived at the hospital. RP 1871-1873.

Defendant Bukovsky called a detective who had interviewed Ms. Thomas in an effort to impeach her with some inconsistent statements. RP 1980-1992. Defendant Gordon called a psychologist specializing in

research on mental health and chemical dependency issues to testify that drug addicts might not be reliable witnesses. RP 2029-2087. Neither defendant took the stand to testify.

C. ARGUMENT.

1. DEFENDANTS HAVE FAILED TO MEET THEIR HEAVY BURDEN OF PROVING THE FELONY MURDER STATUTE IS UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT.

A statute is presumed to be constitutional, and the party challenging it bears the burden to prove that it is unconstitutional beyond a reasonable doubt. ***State v. Hughes***, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), *overruled on other grounds by* ***Washington v. Recuenco***, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). An appellate court reviews the constitutionality of a statute de novo. *Id.* Both defendants challenge the constitutionality of the statute proscribing felony murder in the second degree, when the predicate felony is assault, as being violative of equal protection and unconstitutional as applied to the defendants. Defendants brought a pretrial motion to dismiss on the grounds that the statute violated equal protection. CP 571-581, 1055-1065; 4/6/07 RP 95-108. The court denied the motion. CP 34-35, 647-648; 4/6/07 RP 108.

a. Defendants Have Failed To Demonstrate That The Felony Murder Statute, When Predicated On Assault, Violates Equal Protection.

The Equal Protection Clause of the United States Constitution's Fourteenth Amendment requires that all persons "similarly circumstanced shall be treated alike." The equal protection clause of state constitution, Article I, § 12, provides the same protection as the federal constitution. ***State v. Manussier***, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); ***Tunstall v. Bergeson***, 141 Wn.2d 201, 225, n. 20, 5 P.3d 691 (2000). The equal protection clause does not require equal treatment under the law for things that are different in fact or opinion. State legislatures have the initial discretion to determine what is "different" and what is the "same." In exercising authority, states have substantial latitude to establish categories that roughly approximate the nature of the problem, where it is necessary for a state to balance competing public and private concerns and take into consideration the limited ability of the state to address every problem.

One of three standards of review is employed when analyzing equal protection claims. ***State v. Shawn***, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993).

> *Strict scrutiny* applies when a classification affects a suspect class or threatens a fundamental right. *Intermediate or heightened scrutiny*, used by this court in limited circumstances, applies when important rights or semisuspect classifications are affected. The most relaxed level of scrutiny, commonly referred to as the *rational basis or rational relationship test*, applies when a statutory

> classification does not involve a suspect or semisuspect class and does not threaten a fundamental right.

State v. Manussier, 129 Wn.2d at 672-673 (emphasis in original).

Normally, the equal protection clause merely requires that a classification in some state action bears some fair relationship to a legitimate public purpose. ***Plyler v. Doe***, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d. 786 (1982). Essentially this means the state action will be upheld unless it is wholly irrelevant to the achievement of a legitimate state objective. The equal protection clause generally prohibits government from engaging in intentional or purposeful discrimination by giving disparate treatment to classes of individuals. ***State v. Handley***, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). If there are reasonable grounds for distinguishing between those who are members of the class and those who are not, ***and*** the action applies equally to all members of the class, then the governmental action will be upheld unless the action is wholly irrelevant to the achievement of a legitimate state objective. If the action affects an inherently suspect class (race or religion) or a fundamental right, the state action will only be upheld if the State can demonstrate a compelling state interest. ***Plyler***, 457 U.S. at 217, n.16. Intermediate scrutiny has generally only been applied to discriminatory classifications based upon gender and legitimacy (of children). ***Clark v. Jeter***, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 456 (1988). Washington courts

have also considered socioeconomic status – the poor- to be a suspect class. *See* ***State v. Coria***, 120 Wn.2d 156, 170, 839 P.2d 890 (1992).

Intermediate scrutiny will not be applied in an equal protection challenge involving classification that is not gender based unless the statute implicates both an important right and a semi-suspect class not accountable for its status. ***City of Richland v. Michel***, 89 Wn. App. 765, 771, 950 P.2d 10 (1998); ***In Re. Pers. Restraint of Runyan***, 121 Wn.2d 432, 448, 853 P.2d 424 (1993). Under intermediate scrutiny, a statutory classification must be substantially related to an important government objective.

Here both defendants challenge the constitutionality of the felony murder statute, RCW 9A.32.050(1)(b)[1], claiming that it violates equal protection. The defendants disagree, however, as to the level of scrutiny that should be applied by the court. Defendant Gordon asserts that the rational basis test applies while Defendant Bukovsky asserts that intermediate scrutiny is the appropriate standard. The State asserts that the rational basis test is the appropriate test to apply.

Bukovsky claims he is a member of a quasi-suspect class – namely, defendants charged with felony murder predicated upon an assault. He provides no authority to support this claim that this group is a quasi-suspect class or any authority to show that the court have ever held

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[1] *See* Appendix A.

that a persons charged with a particular type of crime may constitute a quasi –suspect group. Case law indicates that such classes are not quasi-suspect groups. ***State v. Coria***, 120 Wn.2d at 171 (drug dealers not a semisuspect class); ***State v. Ward***, 123 Wn.2d 488, 516-17, 869 P.2d 1062 (1994)(sex offenders are not a suspect class for purposes of equal protection review). Specifically, he fails to show that persons who commit an assault resulting in the death of the victim have historically suffered a history of discrimination or that they exhibit "obvious immutable or distinguishing characteristics that define them as a discrete group." Division I of the Court of Appeals has addressed whether persons charged with felony murder predicated on assault constitute a "quasi-suspect class" and concluded that they do not. ***State v. Armstrong***, 143 Wn. App. 333, 178 P.3d 1048 (2008). The court found that as this statutory classification affects only a physical liberty interest that the rational relationship test is the appropriate standard to apply. *Id.* at 337-338.

Division I found that the inclusion of assault as a predicate felony on which the charge of felony murder may be brought was rationally related to a legitimate goal- punishing under the applicable murder statute those who commit a homicide in the course and in furtherance of a felony. ***Armstrong***, 143 Wn. App. at 339-340. The purpose of the felony murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. ***State v. Leech***, 114

Wn.2d 700, 708, 790 P.2d 160 (1990). Statutes that deter persons from committing felonies, in general, and homicides during the commission of a felony, in particular, promote the public peace and make the community safer for its citizens. This is a legitimate legislative goal and the felony murder statute is rationally related to this goal. Defendants' claim that the statute violates equal protection is without merit.

Defendants' further challenge the second degree felony murder statute on equal protection grounds, stating it gives the prosecution too much discretion in making a charging decision. The Washington Supreme Court rejected this challenge as it pertained to the pre-1975 felony murder statute. ***State v. Wanrow***, 91 Wn.2d 301, 312-313, 588 P.2d 1320 (1978). It held that there is no equal protection violation when the crimes that the prosecuting attorney has the discretion to charge require proof of different elements. ***State v. Leech***, 114 Wn.2d 700, 711, 790 P.2d 160 (1990); ***State v. Wanrow***, 91 Wn.2d at 311. As the elements of felony murder differ from those of first degree manslaughter there is no violation of equal protection. ***State v. Parr***, 93 Wn.2d 95, 97, 606 P.2d 263 (1980). Divisions I and III of the Court of Appeals rejected this claim as it pertained to the former felony murder statute in effect from 1975 until 2003. ***State v. Gilmer***, 96 Wn. App. 875, 981 P.2d 902(1999); ***State v. Goodrich***, 72 Wn. App. 71, 79, 863 P.2d 599 (1993). Division I of the Court of Appeals has rejected this claim as it pertains to the current felony murder statute. ***Armstrong***, 143 Wn. App. at 340-341. No Washington

court has ever found any merit to this contention and the court should reject defendants' argument.

Defendant Gordon argues that there is no difference in elements between manslaughter in the second degree and felony murder when it is predicated on assault in the third degree.[2] He argues that the jury was instructed on the elements of assault in the third degree that require proof that the defendant "with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering[,]" which are the same elements as manslaughter in the second degree. *See* Brief of Gordon at p. 27; CP 925-967, Instruction No. 19. Manslaughter in the second degree requires proof that the defendant: 1) engaged in conduct of criminal negligence, and 2) that a person died as a result of the defendant's negligent acts. RCW 9A.32.070(1); WPIC 28.06. The elements of manslaughter do not require proof of "bodily harm accompanied by substantial pain that extends for a

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[2] Defendant Gordon argues that the rule of lenity requires this court to assume that the jury convicted on the least serious degree of assault instructed upon, citing ***State v. Kier***, 164 Wn.2d 798, 194 P.3d 212 (2008). While the State will acknowledge that this case seems to stand for this proposition, it relies upon Kier's opening brief and a single case from Division I for its support. The Supreme Court has consistently held that the rule of lenity is a tool of statutory construction used when a criminal statute may be reasonably interpreted in two different ways. ***State v. Failey***, ___ Wn.2d ___, ___P.3d ___ (2009) (2009 Wash. LEXIS 77, decided 2/12/09); ***State v. Gonzales- Flores***, 164 Wn.2d 1, 186 P.3d 1038 (2008); ***State v. Watson***, 160 Wn.2d 1; 154 P.3d 909 (2007); ***State v. Jacobs***, 154 Wn.2d 596, 601, 115 P.3d 281 (2005); ***State v. Coria***, 146 Wn.2d 631, 48 P.3d 980(2002); ***In re Carle***, 93 Wn.2d 31, 604 P.2d 1293 (1980). The ***Kier*** decision appears to be an aberration as there is no historical support for the proposition that the rule of lenity is applicable to jury verdicts.

period sufficient to cause considerable suffering" which must be shown for a felony murder conviction predicated on assault in the third degree. The elements of the two offenses are not the same so there is no violation of equal protection.

Defendant Bukovsky argues that the use of felony murder statute is unconstitutional as it applies to him because it denies him his statutory right to instructions on lesser included offenses. A party may request instructions on necessarily included offenses under RCW 10.61.006. A party may request instructions on lower degree crimes under RCW 10.61.003. Manslaughter is not a lesser included offense or a lower degree of felony murder. ***State v. Tamalini***, 134 Wn.2d 725, 953 P.2d 450 (1998). Under ***Tamalini***, no one charged with felony murder in the second degree is entitled to an instruction on manslaughter as a lesser degree or a lesser included offense. Defendant Bukovsky fails to explain how he is being denied his statutory right to an instruction on manslaughter when no such right exists.

Finally, it is important to remember that a person who causes an unintentional death while in the course of committing a felony is not in the same position as a person who causes an unintentional death. A person who causes an unintentional death while engaged in felonious activity has a greater degree of culpability than someone who causes a death recklessly or negligently but is not engaged in felonious conduct. This is not a matter of differing punishments for similarly situated persons. The

Washington Supreme Court found the felony murder statue constitutional in ***Wanrow*** and the current version of this statute is the functional equivalent of the statute upheld in ***Wanrow***. Defendants' have failed to meet their burden of proving the statue is unconstitutional and their challenge must be rejected.

b. This Court Should Reject The Defendants' Invitation To Violate The Separation Of Powers By Asking This Court To Usurp Legislative Powers By Imposing The Merger Doctrine By Judicial Fiat.

Up until the decision in ***In Re Personal Restraint Petition of Andress***, 147 Wn.2d 602, 56 P.3d 981 (2002), the Washington State Supreme Court consistently rejected arguments that the merger doctrine should preclude the use of a felony assault as a predicate crime for felony murder. ***State v. Wanrow***, 91 Wn.2d 301, 588 P.2d 1320 (1978); ***State v. Roberts***, 88 Wn.2d 337, 344 n.4, 562 P.2d 1259 (1977); ***State v. Thompson***, 88 Wn.2d 13, 558 P.2d 202, *appeal dismissed for want of federal question*, 434 U.S. 898 (1977); ***State v. Harris***, 69 Wn.2d 928, 421 P.2d 662 (1966). These decisions made it clear that the use of assault as a predicate felony presented an issue that was a question of legislative intent rather than of a constitutional dimension. *See* ***Thompson***, 88 Wn.2d at 17-18.

Early Supreme Court cases indicated that the 1975 criminal code revisions (effective July 1, 1976) had not changed the Court's view on

whether the assault merger doctrine should be applied to Washington's felony murder statute. ***State v. Thompson***, *supra* at 17 ("... the statutory context in question here was left unchanged."); ***State v. Wanrow***, *supra* at 313 (Hicks, J., concurring) (Legislature did not modify ***Harris*** rule with the new 1976 criminal code). Later decisions likewise applied the ***Harris*** reasoning to the current felony murder statute. ***State v. Crane***, 116 Wn.2d 315, 333, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991) (citing ***Wanrow*** and ***Thompson*** and refusing to reconsider assault merger rule or constitutional challenges to felony murder); ***State v. Leech***, 114 Wn.2d 700, 712, 790 P.2d 160 (1990) (refusing to reconsider ***Wanrow*** and constitutional challenges to felony murder rule); ***State v. Johnson***, 92 Wn.2d 671, 681 n.6, 600 P.2d 1249 (1979) (recognizing that ***Harris*** interpretation applied to new statute because Legislature did not act to overrule it); ***State v. Davis***, 121 Wn.2d 1, 7, n.5, 846 P.2d 527 (1993) (recognizing third degree assault could be predicate for felony murder); ***State v. Tamalini***, 134 Wn.2d 725, 734, 953 P.2d 450 (1998) (recognizing second and third degree assault as predicate offenses for felony murder).

But in ***In Re Personal Restraint Petition of Andress***, the Court made it clear that the comments it had made in ***Wanrow***, ***Thompson***, and ***Roberts*** were not equivalent to actually analyzing the changes to the statutory language and held that it had not, in fact, previously analyzed whether the changes to the statue enacted in 1975 somehow signaled a legislative intent to exclude felony assault as a predicate for felony

murder. ***Andress***, 147 Wn.2d at 609-616. The Court in ***Andress*** interpreted that the legislative addition of the "in furtherance of" language to the felony murder statutes signaled an intent by the legislature to remove assault as a predicate felony from the felony murder rule. *Id.* at 616.

Following the ***Andress*** decision, the legislature amended the second degree felony murder statute, effective February 12, 2003, to expressly declare that assault is included among the predicate crimes under the second degree felony murder statute. Laws of 2003, ch. 3, § 2. The statute proscribing felony murder in the second degree now reads, in the relevant part:

> (1) A person is guilty of murder in the second degree when:
>
> (b) He or she commits or attempts to commit any felony, ***including assault***, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants;

RCW 9A.32.050 (emphasis added). At the same time the legislature enacted an intent statement; it stated, in part:

> The legislature finds that the 1975 legislature clearly and unambiguously stated that any felony, including assault, can be a predicate offense for felony murder. The intent was evident: Punish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony. This legislature reaffirms that original intent and further intends to honor and reinforce the court's decisions over the past twenty-eight years

> interpreting "in furtherance of" as requiring the death to be sufficiently close in time and proximity to the predicate felony. The legislature does not agree with or accept the court's findings of legislative intent in ***State v. Andress***,[sic] Docket No. 71170-4 (October 24, 2002), and reasserts that assault has always been and still remains a predicate offense for felony murder in the second degree.

Laws of 2003, ch. 3, § 1. Whether a felony assault can act as a predicate for felony murder is a question of legislative intent. For crimes committed after February 12, 2003, it is beyond dispute that the legislature intended felony assault to be a predicate crime for felony murder. It is also clear that the Legislature did not agree with the ***Andress*** court's interpretation of its prior intent and sought to nullify the impact of the ***Andress*** decision with the 2003 amendment. Thus, Defendant Gordon's argument, which seeks to interpret the current felony murder statute in accord with the principles stated in the ***Andress*** decision, ignores the legislative statement of intent. The legislature did not want to incorporate the principles announced in ***Andress***, it wanted to render them moot.

Essentially, defendants are now asking this court to find that the principles articulated in the majority opinion of ***Andress*** should be applied to their convictions despite the fact that their offense date was September 5, 2006, well after the legislative amendments designed to stop the impact of ***Andress*** went into effect. Defendants ask this court to hold that the merger doctrine should be the law in Washington so that the crime of assault cannot be a predicate for felony murder. This is asking the court to

usurp a legislative function and impose the merger doctrine by judicial fiat.

In Washington, the determination of whether felony assault can be a predicate felony for the felony murder statute has always been an issue of legislative intent rather than a constitutional question.

> [W]e are now firmly convinced that adoption of the merger doctrine is not compelled either by principles of sound statutory construction or by the state or federal constitutions, and that adoption of the doctrine by this court would be an unwarranted and insupportable invasion of the legislative function in defining crimes. We therefore reaffirm this court's refusal to apply the doctrine of merger to the crime of felony-murder in this state.

State v. Wanrow, 91 Wn.2d at 303. Apparently, the Legislature does not agree with the majority opinion in ***Andress*** that including assault as a predicate felony for felony murder leads to "absurd results." The "legislative branch has the power to define criminal conduct and assign punishment for such conduct." ***State v. Calle***, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing ***Whalen v. United States***, 445 U.S. 684, 689, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)). The Legislature has made its intent clear with regard to whether it wants felony assault to function as a predicate offense for the felony murder statue. Defendants ask this court to overstep its bounds by invading the province of the legislature. This court should decline such an invitation to violate the separation of powers.

2. THE JURY, UPON PROPER INSTRUCTION, FOUND TWO AGGRAVATING CIRCUMSTANCES THAT WERE EACH SUPPORTED BY THE EVIDENCE; THE TRIAL COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE BASED UPON THESE FINDINGS.

In most cases governed by the Sentencing Reform Act (SRA) a trial court is required to impose a sentence within the standard range. *See* RCW 9.94A.505(2)(a)(i). In order to depart from the standard range, the SRA indicates that a court may do so "if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. An appellate court will uphold a trial court's reasons for imposing an exceptional sentence so long as the reasons are not clearly erroneous. ***State v. Vaughn***, 83 Wn. App. 669, 675, 924 P.2d 27 (1996), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997); ***State v. Nordby***, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986). The reviewing court will reverse a trial court's findings only if substantial evidence does not support its conclusion. ***State v. Grewe***, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991). On the other hand, the appellate court independently determines as a matter of law whether the trial court's reasons justify imposing a sentence outside the standard range. ***State v. Fisher***, 108 Wn.2d 419, 423, 739 P.2d 683 (1987). The sentencing judge's reasons must be substantial and compelling and must take into account factors other than those which are necessarily considered in

computing the presumptive range for the offense. ***Nordby***, 106 Wn.2d at 516. A court cannot base an exceptional sentence on a factor that does not distinguish the defendant's behavior from that inherent in all crimes of that type. ***Vaughn***, 83 Wn. App. at 675.

The Legislature enacted several statutory aggravating circumstances, some of which may be considered by the court and others which must be found by a jury. RCW 9.94A.535(2) and (3). Included in the list that must be found by a jury are: 1) defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim, RCW 9.94A.535(3)(a); and, 2) defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, RCW 9.94A.535(3)(b).

In the defendants' case, the State alleged two statutory aggravating circumstances – deliberate cruelty and a particularly vulnerable victim- and the jury returned special verdicts finding both of these aggravating circumstances applicable to defendants' crimes. CP 301, 971. The trial court imposed an exceptional sentence on each of the defendants. CP 309-320, 542-545, 1002-1013, 1038-1041. Defendants now challenge the sufficiency of the evidence supporting the jury's special verdicts as well as the court's imposition of an exceptional sentence.

a. The Jury's Findings As To Both Aggravating Factors Are Supported By The Record.

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).

Particular vulnerability of the victim is a statutory aggravating factor that may justify an exceptional sentence. RCW 9.94A.535(3)(b) includes that "the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." Courts have upheld a finding a victim vulnerability based upon the small stature of the victim. *See* ***State v. Gore***, 143 Wn.2d 288; 21 P.3d 262 (2001) (upholding finding of a particular vulnerability based on small stature of victim); ***State v. Sweet***, 138 Wn.2d 466, 482, 483, 980 P.2d 1223 (1999) (trial court's finding of particular vulnerability justified exceptional sentence for first degree assault where the defendant knew the victim was particularly vulnerable and unable to defend herself because of her age and stature; victim was a small woman five feet, two inches tall and 52 years old); ***State v. Sly***, 58 Wn. App. 740, 748-49, 794 P.2d 1316 (1990) (trial court's finding of particular vulnerability justified exceptional sentence for three counts of second degree robbery where victims were small in stature, strangers to American customs, and easily frightened, *disapproved on other grounds by* ***State v. Kjorsvik***, 117 Wn.2d 93, 812 P.2d 86 (1991); ***State v. Holyoak***, 49 Wn. App. 691, 695, 745 P.2d 515

(1987) (trial court's finding of particular vulnerability justified exceptional sentence for first degree assault where the victim was only 14 years of age, approximately five feet tall, and weighed about 100 pounds). These cases focus on the fact that the victim was outmatched in size by her attacker and upheld this concept as meeting the criteria of a particularly vulnerable victim. A victim being outmatched by the *number* of his attackers is an analogous concept. Rather than the difference in height and weight between a single victim and a single attacker, there is the difference between the height and weight of a single person versus the combined height and weight of multiple attackers. In both situations, the victim is left in a particularly vulnerable position by being outmatched.

Courts have generally applied the particular vulnerability factor to victims who are vulnerable at the time the attack begins. ***State v. Bedker***, 74 Wn. App. 87, 94, 871 P.2d 673 (1994) (four- to five-year-old victim of child rape was vulnerable); ***State v. Scott***, 72 Wn. App. 207, 217, 866 P.2d 1258 (1993) (78-year-old victim who suffered from Alzheimer's disease was particularly vulnerable), *aff'd sub nom.* ***State v. Ritchie***, 126 Wn.2d 388, 894 P.2d 1308 (1995). This factor has also been upheld when victims were rendered particularly vulnerable by their attacker. ***State v. Ogden***, 102 Wn. App. 357, 367-68, 7 P.3d 839 (2000) (victim rendered unconscious by repeated blows to the head); ***State v. Baird***, 83 Wn. App. 477, 489, 922 P.2d 157 (1996) (victim became particularly vulnerable after being beaten unconscious).

Here the jury answered yes to the following question as to each defendant:

> Having found defendant [name] guilty of Murder In The Second Degree, did [defendant] know or should he have known that the victim of the offense was particularly vulnerable or incapable of resistance?

CP 301, 971. The evidence adduced a trial supports this finding. The facts of this case show that the victim was particularly vulnerable because he was outnumbered by his assailants and because his assailant used their numbers to keep him trapped and unable to escape. The evidence shows that three people acted in concert to keep the victim trapped in a confined space between two vans where they assaulted him in concert. The evidence shows that when the victim tried to escape, Knoefler changed his position so as to block the victim's pathway, thereby sending him back toward defendants Gordon and Bukovsky. RP 1413-144, 1481-1482. The victim was outnumbered throughout the attack; in the beginning he was outnumbered three to one and, by the end, it was five to one. Additionally, the evidence also shows that the defendants' repeated and frequent blows made it impossible for the victim to defend himself against their relentless attack rendering him incapable of resistence. Ms. Thomas testified that when Gordon, Bukovsky, and Knoefler were all hitting the victim, it was not possible for the victim to fight back. RP 1098. She never saw the victim fight back in any way. RP 1104. Junior Ioane and Knoefler both indicated that at one point Puapuaga was holding the victim

so that three others could punch and kick him. RP 1239, 1419-1422. Knoefler acknowledged that it was not possible for the victim to get up from the ground because he was being kicked and stomped and punched. RP 1418-1419. The jury's finding should be upheld.

The defendants asserts that the record did not support the jury and trial court finding that the victim was particularly vulnerable because as the victim was not extremely young, old, disabled, unconscious, or in ill health, that there was no way for the defendants to know that he was particularly vulnerable. Brief of Bukovsky at 30-31; Brief of Gordon at 50-53. This argument is without merit. A former version of the aggravating circumstance pertaining to the vulnerability of the victim indicated that the vulnerability had to be "due to extreme youth, advanced age, disability, or ill health;" this language was deleted in 2005. *See* Laws of 2005 Ch 68, §2. Even when the statute used this limiting language, the courts never found that the list was exclusive. ***State v. Gore***, 143 Wn.2d at 317. The legislature wanted a more expansive application of the term "vulnerable" than vulnerability caused by age, disability, or ill health. Defendants have failed to provide any authority that the legislature did not intend the term "vulnerable" to apply to a victim who was significantly outnumbered by his assailants -five to one - and who was rendered incapable of defending himself by being so outmatched.

The aggravating factor that the victim was particularly vulnerable and incapable of resistance is supported by the record and should be upheld by this court.

Defendants also challenge the evidence supporting the jury's finding of deliberate cruelty. 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). This finding is proper when the defendant inflicts more blows than are necessary to accomplish the underlying crime, or the method of the crime is particularly traumatic. ***State v. Sims***, 67 Wn. App. 50, 61, 834 P.2d 78 (1992), *review denied*, 120 Wn.2d 1028, 847 P.2d 481 (1993). The injury to the victim is not necessarily determinative as the intent of the defendant may also make this finding appropriate. See ***State v. Ferguson***, 142

Wn.2d 631, 634, 15 P.3d 1271 (2001), citing ***State v. Bartlett***, 128 Wn.2d 323, 333-34, 907 P.2d 1196 (1995).

The jury answered yes to the following question as to each defendant:

> Having found defendant [name] guilty of Murder In The Second Degree, did the [defendant's] conduct during the commission of the offense manifest deliberate cruelty to Brian Lewis?

CP 301, 971. In this case, there was sufficient evidence presented, when viewed in the light most favorable to State, that the defendants' conduct manifested deliberate cruelty toward the victim. Here the evidence shows that as the victim lay defenseless on the ground, the defendants continued to stomp on his head. The stomping on the victim's head was gratuitous as the defendants' punches had dropped the victim to the ground. The assault continued with two new accomplices joining in the attack even though neither had any idea why the fight had started. Defendants made no effort to deter any of their attack. One of the new assailants held the victim in a choke hold so that both defendants could continue their assaults more easily. The finding of deliberate cruelty is supported by this evidence. This factor should be upheld.

b. Defendant Gordon Did Not Preserve Any Claim Of Error As To The Sufficiency Of The Instructions On The Aggravating Circumstances And Fails To Show That His Claim Of Error Is Of Constitutional Magnitude; Thus This Claim Is Not Properly Preserved For Review.

An objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude. ***State v. Dent***, 123 Wn.2d 467, 869 P.2d 392 (1994); ***State v. Fowler***, 114 Wn.2d 59, 69, 785 P.2d 808 (1990). The Supreme Court has generally refused to review claims of error regarding instructions on sentencing factors when the issue was not preserved in the trial court. *See* ***State v. Eckenrode***, 159 Wn.2d 488, 491, 150 P.3d 1116 (2007); ***State v. Schelin***, 147 Wn.2d 562, 576-77, 55 P.3d 632 (2002)(Alexander, J. concurring); *see also* ***State v. Hickman***, 135 Wn.2d 97, 102 , 954 P.2d 900 (1998) (jury instructions not objected to become the law of the case); ***State v. Salas***, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) ("If no exception is taken to jury instructions, those instructions become the law of the case."); ***State v. Dent***, 123 Wn.2d 467, 869 P.2d 392 (1994) (parties must object to jury instructions before they are given on penalty of forfeiture of such objection); ***State v. Hames***, 74 Wn.2d 721, 725, 446 P.2d 344 (1968); ***Peters v. Union Gap Irr. Dist.***, 98 Wash. 412, 413, 167 P. 1085 (1917) (declaring the law of the case doctrine to be "so well established that the assembling of the cases is unnecessary.").

Defendant Gordon claims that the instructions given to the jury were constitutionally insufficient because they did not adequately convey the State's "constitutionally mandated burden of proof." Brief of Gordon at p. 35. The State disagrees. The jury was instructed that the State had to prove the aggravating circumstances "beyond a reasonable doubt." CP 925-967, Instructions 32 and 33 (*see* Appendix B). This is the burden of proof required by ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The instructions were not constitutionally deficient in instructing the jury on the State's burden of proof in proving the aggravating circumstances.

Defendant Gordon contends that recent changes in the law require this court to treat the aggravating circumstances set forth in RCW 9.94A. 535(3) as "elements" of an aggravated version of the crime of murder. Appellant Gordon's brief at p.36, citing ***Apprendi*** and ***State v. Recuenco***, 163 Wn.2d 428, 434, 180 P.3d 1276 (2007). Defendant's argument misconstrues the holdings of these cases.

In ***Apprendi***, the court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum," whether the statute calls it an element or a sentencing factor, "must be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi v. New Jersey***, 530 U.S. at 490. In ***Blakely v. Washington***, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the court made clear that for "***Apprendi*** purposes [, the statutory

maximum] is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant;" it did not matter that the legislature had enacted a longer term which it labeled the "statutory maximum" for the crime.

Nothing in ***Apprendi*** or its progeny holds that if a state legislature wants certain facts to affect the length of sentence, that it must include such facts within the elements of the substantive crime. Rather these cases hold that you cannot avoid the constitutional requirement that the jury determine, beyond a reasonable doubt, all relevant sentencing facts by labeling these determinations as "sentencing factors" rather than "elements" of the crime. The Washington Supreme Court has acknowledged this distinction:

> While an aggravating factor must be treated like an element for purposes of the Sixth Amendment to the United States Constitution, it is decidedly not an element needed to convict the defendant of the charged crime.

State v. Roswell, 165 Wn.2d 186, 194, 196 P.3d 705 (2008).

Under Washington's post- ***Blakely*** sentencing scheme, the jury determines whether the state has proved beyond a reasonable doubt: 1) the elements of the substantive crime of second degree [felony] murder; and, 2) the existence of an aggravating circumstance under RCW 9.94A.535(3). The court then decides whether an exceptional sentence is warranted. This statutory scheme comports with the constitutional requirements of ***Apprendi***, but it does not turn an aggravating

circumstance into an element of the crime. Thus, Defendant Gordon's efforts to rely on case law involving constitutional error regarding, deficient instructions on the elements of a crime is misplaced.

Defendant Gordon also seems to be arguing that the court should have given the jury additional instructions on the relevant legal standards regarding the nature of a aggravating factor. Gordon provides no authority that such instructions would be proper or necessary. Nor does he provide any authority that failure to give such instructions is an issue of constitutional magnitude. Examples of "manifest" constitutional errors in jury instructions are: 1) directing a verdict; 2) shifting the burden of proof to the defendant; 3) failing to define the "beyond a reasonable doubt" standard; 4) failing to require a unanimous verdict; and, 5) omitting an element of the crime charged. ***State v. Scott***, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988). Gordon's claimed error does not fall into any of these categories. "Instructional errors that do not fall within the scope of RAP 2.5(a)(3) include failure to instruct on a lesser included offense and failure to define individual terms." *Id.* (citations omitted). It would seem that Gordon is raising a claim regarding definitional instructions which may not be raised for the first time on appeal.

Here Defendant Gordon did not preserve any claim of error with regard to the issues he is raising on appeal as to the sufficiency of the instructions regarding the aggravating circumstances. RP 2145-2147. No such instructions were proposed below and Gordon does not suggest what

he believes would be appropriate wording of such instructions on appeal. In short, he asks this court to reverse the conviction below for failure to give sufficient instructions without ever articulating exactly what these "sufficient" instructions would be. In order to preserve this claim for review, instructions would have to be proposed by the defendant and rejected by the trial court, and then defendant would have to take exception to the court's refusal to give his instructions. This did not happen below and this issue is not properly before the court for review.

Finally, Gordon argues that if the court refuses to review this issue for failure to propose instructions in the trial court that this means his attorney was ineffective. Gordon asserts that this failure to propose some instruction on this topic is deficient performance. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to

find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decided and "so admissions of deficient performance by attorneys are not decisive." ***Harris v. Dugger***, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); ***Campbell v. Knicheloe***, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. ***Kimmelman***, 477 U.S. at 375; ***United States v. Molina***, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. ***Cuffle v. Goldsmith***, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the ***Strickland*** test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

As noted above, Gordon does not articulate what the wording of these missing instructions should have been and cites no authority that a jury should be given this type of instruction. Defendant cannot show deficient performance for failing to propose instructions when defendant cannot even articulate what instruction should have been given and show that had they been proposed that the court would have given them. Under

the statutory scheme, the jury makes a factual finding and the court determines whether that fact is a sufficient basis for an exceptional sentence. The court may impose an exceptional sentence "if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Thus it would appear that the "substantial and compelling reason" determination is made by the court and not the jury as counsel suggests. Instructions on this topic would be improper and properly refused Defendant cannot demonstrate deficient performance on this basis.

But to focus on this single claim of deficient performance is to lead the court away from the proper standard of review under ***Strickland*** and its progeny. The standard of review for effective assistance of counsel is whether, *after examining the whole record*, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). Defendant Gordon has failed to show that examining the record as a whole that he was denied his Sixth Amendment right to counsel. His claim must fail.

c. The Trial Court Properly Exercised Its Discretion In Imposing an Exceptional Sentences Based Upon The Jury's Findings And Bukovsky's Sentence Was Not Excessive.

The amendments to bring the SRA into compliance with ***Blakely v Washington***, contained in the Laws of 2005, chapter 68, required the State to prove facts supporting the aggravating circumstance to a jury beyond a reasonable doubt. Laws of 2005, ch. 68, §4(1), (2). The amendments authorize 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." As noted earlier, both deliberate cruelty and a particularly vulnerable victim are factors that will support an exceptional sentence.

Once the sentencing court finds substantial and compelling reasons for imposing an exceptional sentence, it is permitted to use its discretion to determine the precise length of that sentence. ***State v. Ritchie***, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995); ***State v. Ross***, 71 Wn. App. 556, 568, 861 P.2d 473, 883 P.2d 329 (1993). The length of an exceptional sentence is reviewed for abuse of discretion. ***State v. Branch***, 129 Wn.2d 635, 649, 919 P.2d 1228 (1996) (citing ***State v. Ritchie***, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995)). An exceptional sentence is clearly excessive if (1) it is imposed on untenable grounds or for untenable

reasons; (2) or it is an action no reasonable judge would have taken. ***Branch***, 129 Wn.2d at 650. "The practical effect of this standard is to guarantee that an appellate court will 'rarely, if ever' overturn an exceptional sentence because of its length." *Id.* at 864 (citing ***State v. Clinton***, 48 Wn. App. 671, 678, 741 P.2d 52 (1987)). The clearly excessive prong gives "courts near plenary discretion to affirm the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of sentence. *Id.* at 864; ***State v. Oxborrow***, 106 Wn.2d 525, 529-30, 723 P.2d 1123 (1986).

A sentence is clearly excessive only if its length, in light of the record, "shocks the conscience." ***State v. Vaughn***, 83 Wn. App. 669, 924 P.2d 27 (1996) (citing ***Ritchie***, 126 Wn.2d at 392-393).

The findings entered in defendants' cases reiterate the jury findings of aggravating circumstances, then articulate why the court found these findings provided substantial and compelling reasons for imposing an exception sentence. CP 542-545, 1038-1041. The jury's findings, which are supported by the record, justify the imposition of an exceptional sentence. The sentencing court properly sentenced both defendants to a sentence outside the standard range.

Bukovsky challenges the length of his sentence as being clearly excessive. In this case, the trial court's added an additional 144 months to the high end of Bukovsky's standard range for a total sentence of 388 months. This does not result in a sentence that shocks the conscience.

See, e.g., ***State v. Branch***, 129 Wn.2d 635, 650, 919 P.2d 1228 (1996) (upheld 48-month sentence for first degree theft, 16 times standard range of 90 days); ***State v. Oxborrow***, 106 Wn.2d 525, 535-36, 723 P.2d 1123 (1986) (upheld 10-year sentence for first degree theft, 10 times standard range); ***State v. Harmon***, 50 Wn. App. 755, 750 P.2d 664, *review denied*, 110 Wn.2d 1033 (1988) (upheld 648-month sentence for first degree murder, 315 months longer than standard range); ***State v. Creekmore***, 55 Wn. App. 852, 864, 783 P.2d 1068 (1989), *review denied*, 114 Wn.2d 1020, 792 P.2d 533 (1990) (court upheld a 720-month sentence for second degree murder, as compared with a standard range of 144-192 months). The sentence imposed on Bukovsky of 388 months is not clearly excessive, as the case law has applied that standard.

Both exceptional sentences should be affirmed.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgment and sentences entered below.

DATED: March 25, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

Kathleen Proctor

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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.

3/25/09 Johnson
Date Signature

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APPENDIX "A"

RCW 9A.32.050(1)(b)

§ 9A.32.050. Murder in the second degree

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony.

HISTORY: 2003 c 3 § 2; 1975-'76 2nd ex.s. c 38 § 4; 1975 1st ex.s. c 260 § 9A.32.050.

APPENDIX "B"

Jury Instruction Nos. 32 & 33

INSTRUCTION NO. 32

For purposes of special verdict Question One the State must prove beyond a reasonable doubt that the defendant's conduct during the commission of the offense manifested deliberate cruelty to the victim.

INSTRUCTION NO. 33

For purposes of special verdict Question Two the State must prove beyond a reasonable doubt that the defendant knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance.