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STATE OF WASHINGTON

Supreme Court No. (to be set)  
Court of Appeals No. 38104-4-II

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

vs.

**Christopher Olsen**

Appellant/Petitioner

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Thurston County Superior Court

Cause No. 07-1-01363-0

The Honorable Judge Christine A. Pomeroy

**PETITION FOR REVIEW**

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**I. IDENTITY OF PETITIONER**

Petitioner Christopher Olsen, the appellant below, asks this Court to review the decision of the Court of Appeals, see Section II, below.

**II. COURT OF APPEALS DECISION**

Christopher Olsen seeks review of the May 18, 2010 published Opinion of the Court of Appeals, and amended by an Order on Motion for Reconsideration entered on June 29, 2010. Copies of the Opinion and Order on Motion for Reconsideration are attached. Appendix A, B.

**III. ISSUES PRESENTED FOR REVIEW**

1. Is an accused person legally accountable for another person's crimes, completed before the accused became an accomplice of such other person?
2. Where burglars return to a burglarized residence with a new participant, is that person excused from liability for crimes previously completed by the other participants?
3. Is an accomplice not guilty of felony murder if s/he joins an ongoing felony after the decedent is killed or fatally wounded?
4. Did the court's instructions fail to make clear that Mr. Olsen was not guilty of felony murder if he joined Sublett and Frazier after they had already killed or fatally wounded Mr. Totten?
5. Does the Fourteenth Amendment's due process clause protect an accused person's right to have the jury consider lesser-included offenses?
6. Do Wash. Const. Article I, Sections 21 and 22 protect an accused person's right to have the jury consider lesser-included offenses?
7. Did the trial court violate Mr. Olsen's public trial right (under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 10 and 22) by hearing argument and ruling on a jury question in the privacy of the judge's chambers?

8. When a jury question reveals a material ambiguity in the court's instructions, must the trial court provide additional instructions to diminish the risk that the government will be relieved of its burden to prove all essential elements of the charged crime?

9. Was defense counsel ineffective for proposing nonstandard instructions on the lesser-included offense of Manslaughter in the Second Degree, and for unreasonably failing to request instructions on the inferior-degree offense of Murder in the Second Degree and the lesser-included offense of Manslaughter in the First Degree?

10. Did the trial judge erroneously deny Mr. Olsen's motion for a new trial based on newly discovered evidence?

11. Did the trial court erroneously admit unedited recordings and transcripts of telephone calls between Mr. Olsen and Frazier in violation of ER 401, ER 403 and ER 404(b)?

12. Did the trial judge violate Mr. Olsen's Sixth and Fourteenth Amendment right to present a defense by excluding evidence that was relevant and admissible?

13. Did the trial judge violate Mr. Olsen's Sixth and Fourteenth Amendment right to be present at trial by answering a jury question following an *in camera* hearing held in Mr. Olsen's absence?

#### **IV. STATEMENT OF THE CASE**

##### **A. Prior Proceedings**

The state charged Christopher Olsen with Murder in the First Degree. CP 3. His case was joined with Michael Sublett's. RP (5/8/08) 12-13. Following trial, Mr. Olsen was acquitted of premeditated intentional murder, but convicted of Felony Murder in the First Degree. CP 78. Mr. Olsen moved for a new trial; the court denied the motion. CP 83-85; RP (7/23/08) 1123. Mr. Olsen was sentenced to 500 months imprisonment,

and he timely appealed.<sup>1</sup> CP 7, 13. The Court of Appeals affirmed his conviction in a published opinion filed May 18, 2010. Appendix A. Mr. Olsen moved for reconsideration; the Court of Appeals granted the motion and amended its opinion on June 29, 2010. Appendix B.

#### B. Statement of Facts

In January of 2006, methamphetamine addict and convicted felon April Frazier was expelled from her clean-and-sober living house for violating house rules. RP (6/9/08) 567, 572; RP (6/10/08) 614; RP (6/12/08 am) 18-26. She had previously met Jerry Totten, a 69-year-old disabled veteran and recovered alcoholic, at an Alcoholics Anonymous meeting. RP (6/3/08) 32, 40; RP (6/9/08) 497. Mr. Totten gave Frazier the only key to a trailer on his property, and allowed her to stay there. RP (6/9/08) 497-499; RP (6/12/08 pm) 40. He also gave Frazier a key to his home. RP (6/9/08) 499-503, 573. Mr. Totten allowed Frazier and her boyfriend, Michael Sublett, to come and go freely. RP (6/4/08) 126; RP (6/9/08) 501, 503, 578.

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<sup>1</sup> Olsen's appeal was consolidated with Sublett's by order of the Court of Appeals.

Starting in November of 2006, Frazier and Sublett stole and pawned items from Mr. Totten.<sup>2</sup> RP (6/3/08) 85-87, 89-100, 102-106; RP (6/10/08) 616; RP (6/12/08 pm) 33-35, 47-48. Following an argument, Mr. Totten told Frazier and Sublett that the latter was no longer welcome in his house.<sup>3</sup> RP (6/9/08) 503-505. Frazier and Sublett went to Reno together. Frazier called Mr. Totten and persuaded him to wire them \$500 for non-existent car repairs. RP (6/9/08) 512. She gave him the false impression that Sublett had a job and would pay back the money. RP (6/9/08) 513. When they returned to Thurston County at the end of January, they “visited” Mr. Totten and stole his wallet, cell phone, and checkbook. RP (6/9/08) 509, 513-516.

While in Reno, Frazier spoke on the phone with Christopher Olsen, whom she’d met two months prior. Mr. Olsen called her from the Thurston County Jail. RP (6/9/08) 580. After returning to Thurston County, Frazier and Sublett bailed Mr. Olsen out of jail, using \$1000 that belonged to Mr. Totten.<sup>4</sup> RP (6/9/08) 508-509.

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<sup>2</sup> Frazier and Sublett made money two ways during this time period: selling drugs and selling items Sublett had stolen. RP (6/10/08) 615.

<sup>3</sup> According to Frazier, after a couple of months, things returned to normal. RP (6/9/08) 504.

<sup>4</sup> Mr. Olsen’s mother signed the bond. RP (6/9/08) 506-510; RP (6/11/08) 792.

Frazier and Sublett took Mr. Olsen to their room at Little Creek Casino Hotel, and all three used methamphetamine. RP (6/9/08) 446, 521; RP (6/11/08) 794-795. According to Mr. Olsen, Frazier and Sublett left for some time. RP (6/11/08) 796. Later that same day (or possibly the next day), he accompanied them to Mr. Totten's home. RP (6/11/08) 796-797.

Subsequently, Frazier and Sublett used Mr. Totten's access cards to make purchases at Target and withdraw cash at ATM machines; the total amount exceeded \$51,000. RP (6/10/08) 686-699, 703-709, 712-741. They drove to Las Vegas in a friend's Suburban, and gambled with money stolen from Mr. Totten. RP (6/9/08) 439-442, 450-461, 464-472.

Responding to a call from Mr. Totten's sister, police officers entered his home on February 8, 2007 and found it in disarray. RP (6/3/08) 41, 46. A friend of Sublett's contacted police at this time, reporting that Frazier had confessed involvement in a murder, and that a truck containing Mr. Totten's body had been abandoned in a ditch and towed. RP (6/3/08) 56-63, 65; RP (6/4/08) 124, 127, 129-130, 139, 141, 150-151, 160-161, 169. On February 10, 2007, officers again entered Mr. Totten's home, noting a chair in front of a door and an opened safe. RP (6/3/08) 36, 48-50. The police searched the truck that day, and found Mr. Totten's bound and gagged body. RP (6/3/08) 60-61, 63; RP (6/4/08) 119, 241. It was

later established that Mr. Totten had been bound and beaten prior to his death. RP (6/5/08) 353, 363, 370-372.

Las Vegas police arrested Frazier and Sublett. RP (6/5/08) 409. In the couple's Suburban, police found Mr. Totten's disabled parking placard, a loaded gun, and various items from Mr. Totten, including his wallet, checkbook and social security card. RP (6/9/08) 479-487. The police searched Mr. Totten's home on February 11, 2007. RP (6/4/08) 196. Among other items, they found a rubber glove in the utility room. RP (6/4/08) 211, 213.

From this glove, the police obtained the only physical evidence tying Mr. Olsen to the crime scene.<sup>5,6</sup> Christopher Olsen was arrested on February 22, 2007, and he ultimately gave two statements. RP (6/11/08) 788, 791, 807. The statements were transcribed and admitted into evidence. Exhibits 179, 179A and 179B. Mr. Olsen told the police that Sublett had pointed a gun at him and told him, "You work for me," and had threatened him and his family.<sup>7</sup> RP (6/11/08) 809, 836-837; RP (6/16/08) 854-857. He admitted that he had been inside Mr. Totten's

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<sup>5</sup> DNA analysis later identified Mr. Olsen's DNA in the glove. RP (6/5/08) 337-338.

<sup>6</sup> According to one officer, Mr. Olsen's name also came up in the investigation on February 12, 2007. RP (6/11/08) 773. No clarification was provided.

<sup>7</sup> Mr. Olsen's mother later confirmed that Frazier had threatened her as well as Mr. Olsen. RP (6/12/08 pm) 20-22.

house. RP (6/11/08) 796-798. He said that Frazier and Sublett told him that Mr. Totten was a child molester who had a jar of his victims' teeth. RP (6/11/08) 830.

Mr. Olsen explained to the police that he had planned to help Sublett and Frazier steal from Mr. Totten, but that he did not participate in the murder, and that Mr. Totten was already dead or fatally injured when he arrived at the house. RP (6/11/08) 792-810. He acknowledged that he helped steal items from the house, and helped move Mr. Totten's body.<sup>8</sup> RP (6/11/08) 801-804.

Sublett, Frazier, and Mr. Olsen were all charged with first-degree murder. CP 2. Frazier made a deal to testify against her codefendants. In exchange, her charges were reduced significantly, and the state agreed to recommend a total of 54 months in prison.<sup>9</sup> RP (6/9/08) 564-565. At trial, Frazier claimed that she and Sublett bailed out Mr. Olsen to help rob Mr. Totten. RP (6/9/08) 519. She claimed that Sublett and Mr. Olsen made specific plans for the robbery outside of her hearing. RP (6/9/08) 522, 583; RP (6/10/08) 662. She also testified that she saw Mr. Olsen grab an

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<sup>8</sup> Mr. Olsen did not keep any items from Mr. Totten's home for himself. RP (6/10/08) 644-646.

<sup>9</sup> Ultimately, the sentencing court did not follow this agreed recommendation, but gave Frazier a longer sentence.

aluminum bat on the way into the house; however, evidence later established that the bat was not moved from the utility room, and was not used in the assault. RP (6/4/08) 211; RP (6/9/08) 528, 585; RP (6/10/08) 666.

Frazier claimed she was not involved in the actual killing, but only saw Mr. Totten's dead body when she walked through the living room. RP (6/9/08) 530-531. According to Frazier, Mr. Olsen was upset, and crouched under a table, crying. RP (6/10/08) 628. Sublett took Mr. Olsen for a ride to calm him down. RP (6/9/08) 532, 587. While they were gone, Frazier went through the house and gathered items of value, but did nothing to help Mr. Totten. RP (6/9/08) 533, 586. When she left the house, she and Sublett took bags of stolen items, including credit cards, a laptop computer, and documents from Mr. Totten's desk. RP (6/9/08) 537.

Frazier testified that Sublett had pointed his gun at Mr. Olsen, both in the house, and later in their hotel room. RP (6/10/08) 629, 642. Frazier also asserted for the first time at trial that Mr. Olsen had told her that he had enjoyed the killing and would do it again. RP (6/9/08) 543, 591; RP (6/10/08) 626-631.

Mr. Olsen testified at trial. He said that while in jail, he was willing to say anything to get bailed out, but that he did not agree to hurt anyone or commit a robbery. RP (6/16/08) 855, 872, 875, 878. He acknowledged

going to Mr. Totten's house, which he described as having a terrible smell. RP (6/16/08) 853, 855. When he got there, he did not know if Mr. Totten was dead or alive. RP (6/16/08) 855. He admitted helping to move Mr. Totten's body. RP (6/16/08) 853. He did not take or receive any money or property from the incident. RP (6/16/08) 857. Mr. Olsen's testimony was generally consistent with his prior statements to the police. RP (6/16/08) 852-927; Exhibits 179, 179A, 179B.

Mr. Olsen's counsel proposed a lesser-included instruction on Manslaughter in the Second Degree, but did not offer any other lesser-included or inferior-degree instructions. CP 29-45. The trial court did not instruct the jury on any lesser-included or inferior-degree offenses. RP (6/17/08) 956-957; CP 46-77. Defense counsel did not object to the instructions defining murder or accomplice liability, and did not ask for instructions explaining that Mr. Olsen could be convicted of felony murder only if he were involved in a burglary or robbery that was in progress at the time Mr. Totten was killed or fatally wounded. RP (6/17/08) 956-957; CP 29-45.

During deliberations, the jury submitted a question about accomplice liability. CP (Sublett) 129.<sup>10</sup> Excluding the defendants, the court met with counsel in chambers. CP (Sublett) 71. The court then instructed the jurors to re-read their instructions. CP (Sublett) 129.

The jury acquitted Mr. Olsen of premeditated first-degree murder, and found him guilty of felony first-degree murder. CP 3-12, 78. After denying Mr. Olsen's motion for a new trial, the court sentenced Mr. Olsen to 500 months in prison, and he appealed. RP (7/23/08) 1123; CP 7, 13.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED<sup>11</sup>

A. The Supreme Court should accept review and require jury instructions to make clear that accomplice liability does not attach for crimes completed before a person joins an ongoing crime spree. The Court of Appeals' published decision conflicts with this Court's decisions in *Cronin* and *Roberts*. RAP 13.4(b)(1). Furthermore, this case raises a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

**Summary of Argument:** The court's instructions on felony murder and accomplice liability violated Mr. Olsen's Fourteenth Amendment right to

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<sup>10</sup> This citation is to the clerk's papers in codefendant Sublett's case, which was consolidated with Mr. Olsen's case on appeal. The Court of Appeals granted Mr. Olsen's motion to file a supplemental brief, incorporating Mr. Sublett's argument on this issue.

<sup>11</sup> Petitioner understands that his argument should focus on the factors set out in RAP 13.4(b). Unfortunately, he must also satisfy the federal courts' requirements for exhaustion of state remedies. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). In part for this reason, he has filed a motion seeking permission to file an overlength petition.

due process by allowing conviction even if Frazier and Sublett recruited Mr. Olsen after they had already killed or fatally wounded Mr. Totten.

Due process requires the state to prove every element of an offense. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions that relieve the state of this burden are unconstitutional. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). Because juries lack tools of statutory construction,<sup>12</sup> jury instructions must more than adequately convey the law; instead, they must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

A person is guilty of first-degree felony murder when s/he “commits or attempts to commit *the crime* of either (1) robbery in the first or second degree... [or] (3) burglary in the first degree... and in the course of or 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.32.030(c) (emphasis added). The phrases “the crime” and “such crime” (rather than “a” or “any” crime) in RCW 9A.32.030(c) indicate the legislature’s intent to punish those who are involved in the specific underlying crime causally connected to the

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<sup>12</sup> See, e.g., *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

death.<sup>13</sup> In other words, a killing that occurs in the course of one crime does not make co-participants in a subsequent crime guilty of felony murder, if they were not also participants in or accomplices to the first crime. RCW 9A.32.030(c).

Mr. Olsen's theory at trial was that Sublett and Frazier caused Mr. Totten's death while engaged in a burglary/robbery that was completed before they recruited Mr. Olsen.<sup>14</sup> Under the statute, this should have resulted in acquittal, whether Mr. Totten died during the initial burglary/robbery or at a later time. RCW 9A.32.030(c). However, under the court's instructions, a reasonable juror could have voted to convict Mr. Olsen even if Sublett and Frazier killed or fatally wounded Mr. Totten during the course of earlier felonies, already completed when they recruited Mr. Olsen. CP 59, 64, 71; Appendix D.

The court's instructions failed to make clear that Mr. Olsen was guilty of felony murder only if he was an accomplice to the specific burglary or robbery in progress when Mr. Totten was killed or fatally wounded. CP 59, 64, 71; Appendix D. Without an instruction explaining

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<sup>13</sup> See, e.g., *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000) (legislature's choice of the phrase "the crime" over the phrase "a crime" is significant), and *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) (same).

<sup>14</sup> For the purpose of the felony murder statute, a burglary (and presumably a robbery) is considered to be in progress until after the burglar (or robber) flees the scene. *State v. Dennison*, 115 Wn.2d 609, 616, 801 P.2d 193 (1990).

this limitation (and a supplemental instruction outlining when a burglary or robbery terminates), jurors could have concluded that Mr. Olsen was an accomplice to a single burglary/robbery that started when Frazier and Sublett first attacked Totten (without Mr. Olsen's help), and concluded when Frazier and Sublett left the residence for the last time (after Mr. Olsen became involved). CP 59, 64, 71; Appendix D.

A reasonable juror could have interpreted the court's instructions to require a guilty verdict on felony murder if Mr. Olsen participated in *any* burglary or robbery at Mr. Totten's house, even if Mr. Totten had already been killed or fatally wounded during an earlier burglary/robbery completed before Mr. Olsen's participation commenced. *See* Instructions Nos. 11, 15 and 21, CP 59, 64, 71; Appendix D. Alternatively, a reasonable juror could have considered Sublett and Frazier's multiple burglaries, thefts, and robberies to be a single ongoing crime for purposes of Instruction No. 21, making Mr. Olsen an accomplice to the entire criminal enterprise—including the murder—even if he agreed to join Sublett and Frazier after they had already killed or fatally wounded Mr. Totten. CP 59, 64, 71; Appendix D.

The court's instructions did not make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, at 864. The instructions allowed conviction even if the state failed to prove that Mr. Olsen was an

accomplice to felony murder. The Court of Appeals' Opinion conflicts with the Supreme Court's decisions in *Roberts, supra*, and *Cronin, supra*, and is appropriate for review under RAP 13.4(b)(1). In addition, this case raises a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4). The Court should accept review, reverse Mr. Olsen's conviction, and remand for a new trial with instructions to clarify for the jury that Mr. Olsen must be acquitted of felony murder if Mr. Totten was killed or fatally wounded prior to Mr. Olsen's involvement in Sublett and Frazier's crimes. *Winship, supra; Thomas, supra; Randhawa, supra*.

B. The Supreme Court should accept review and hold that a trial court's failure to instruct on a lesser-included offense violates the Fourteenth Amendment right to due process and the state constitutional right to have the jury consider applicable lesser-included offenses. This is a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

1. The trial judge's refusal to instruct on Manslaughter in the Second Degree denied Mr. Olsen his constitutional right to due process under the Fourteenth Amendment.

Refusal to instruct on a lesser-included offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988); *see also Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, "providing the jury with the 'third option' of convicting on a

lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...”).<sup>15</sup> The constitutional right to such an instruction stems from “the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free.” *Vujosevic*, at 1027.

An accused person is entitled to an instruction on a lesser-included offense if (1) each element of the lesser offense is a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed. RCW 10.61.006; *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008) (citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978)). In evaluating whether a lesser-included instruction is appropriate, the trial judge takes the evidence in a light most favorable to the defendant. *State v. Pittman*, 134 Wn. App. 376, 385, 166 P.3d 720 (2006) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000)).

A person commits Manslaughter in the Second Degree “when, with criminal negligence, he causes the death of another person.” RCW

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<sup>15</sup> The Court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck*, at 638, n.14. Some federal courts only review a state court’s failure to give a lesser-included instruction in noncapital cases when the failure “threatens a fundamental miscarriage of justice...” *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990)

9A.32.070. A manslaughter charge can be based on the defendant's failure to summon aid, where the defendant has a legal duty to do so. *See State v. Morgan*, 86 Wn. App. 74, 81, 936 P.2d 20 (1997). RCW 9.69.100 imposes such a duty on anyone who witnesses a violent offense.

In this case, Mr. Olsen was entitled to instructions on the lesser-included offense of Manslaughter in the Second Degree. Under the legal prong of the *Workman* test, manslaughter is a lesser-included offense to a charge of premeditated murder. *State v. Schaffer*, 135 Wn.2d 355, 357-358, 957 P.2d 214 (1998). Under *Workman's* factual prong, the evidence (when taken in a light most favorable to Mr. Olsen) established that he was guilty of the lesser offense and not guilty of the greater offense.

First, under his version of events, Mr. Olsen was not guilty of Felony Murder in the First Degree. According to Mr. Olsen, he accompanied Frazier and Sublett to Mr. Totten's residence after Frazier and Sublett had already killed or fatally wounded Totten. RP (6/11/08) 792-810; Exhibit 179A. When he arrived at the house, the earlier robbery and burglary—committed without Mr. Olsen's involvement—were complete. *See, e.g., Dennison*, at 616 (for the purpose of the felony murder statute, a burglary is considered to be in progress until after the burglar flees the scene.)

Second, under his version of events, Mr. Olsen was guilty of Manslaughter in the Second Degree. He testified that Mr. Totten—who was tied up in a chair, with only a foot protruding—may still have been alive when Mr. Olsen got to the house. RP (6/16/08) 855; Exhibit 179A, p. 11, 18, CP. Under these circumstances, Mr. Olsen was a witness to an ongoing violent offense: a kidnapping in the first or second degree.<sup>16</sup> RCW 9.94A.030. As a witness to the ongoing kidnapping offense, Mr. Olsen had a duty to summon medical aid under RCW 9.69.100.<sup>17</sup> His breach of this statutory duty was reckless or criminally negligent, and was a cause of Totten's death. *Morgan, supra*. A rational jury could have accepted Mr. Olsen's version of events and found him guilty of manslaughter instead of intentional murder.

Because the trial judge refused to instruct the jury on the lesser-included offense of Manslaughter in the Second Degree, Mr. Olsen was denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic*. This Court should accept review

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<sup>16</sup> Kidnapping in the First Degree occurs when a person “intentionally abducts another person with intent: ... (b) To facilitate commission of any felony or flight thereafter; or (c) To inflict bodily injury on him...” RCW 9A.40.020. Kidnapping in the Second Degree occurs when a person “intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.” RCW 9A.40.030.

<sup>17</sup> Even if Mr. Olsen were an accomplice to the kidnapping, he could not be found guilty of felony murder based on kidnapping, because the state failed to charge him with that offense.

pursuant to RAP 13.4(b)(3) and (4), reverse Mr. Olsen's conviction, and remand his case to the superior court for a new trial.<sup>18</sup> *Schaffer, supra*.

2. Even if the trial judge's refusal to instruct on Manslaughter in the Second Degree did not violate Mr. Olsen's Fourteenth Amendment right to due process, it nonetheless violated Mr. Olsen's state constitutional right (under Wash. Const. Article I, Sections 21 and 22) to have the jury consider applicable lesser-included offenses.

The right to a jury trial under the Washington constitution is broader than the corresponding federal right. *State v. Hobble*, 126 Wn.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Analysis<sup>19</sup> of Wash. Const. Article I, Sections 21 and 22 reveals a state constitutional right to have the jury instructed on applicable lesser-included offenses.

The first *Gunwall* factor requires examination of the text of the state constitutional provisions. Article I, Section 21 provides that "[t]he right of trial by jury *shall remain inviolate...*" (emphasis added). "The term 'inviolable' connotes deserving of the highest protection... For [the right to a jury trial] to remain inviolate, it must not diminish over time." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d

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<sup>18</sup> On retrial, Mr. Olsen is entitled to an instruction on manslaughter, even though the jury found him not guilty of intentional murder. *Schaffer*, at 358-359.

<sup>19</sup> Six nonexclusive factors are used to analyze state constitutional provisions. *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

260 (1989). Article I, Section 22 provides that “the accused shall have the right to. . . a speedy public trial by an impartial jury...” The direct and mandatory language (“shall have the right”) implies a high level of protection. Thus an accused person’s right to have the jury consider a lesser-included offense remains the same as it existed in 1889, and “must not diminish over time,” *Sofie v. Fibreboard Corp.*, at 656.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Article I, Section 21 has no federal counterpart. This difference between the two constitutions is significant. *Pasco v. Mace*, *supra*.

The third *Gunwall* factor requires analysis of state constitutional and common law history. Article I, Section 21 “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *Hobble*, *supra*; *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003). In 1889, the lesser-included offense doctrine was well-established under the common law. *See Beck v. Alabama*, at 635 n. 9 (citing 2 M. Hale, *Pleas of the Crown* 301-302 (1736); 2 W. Hawkins, *Pleas of the Crown* 623 (6th ed. 1787); 1 J. Chitty, *Criminal Law* 250 (5th Am. ed. 1847); T. Starkie, *Treatise on Criminal Pleading* 351-352 (2d ed. 1822)).

Thirty years prior to the adoption of the state constitution in 1889, the Court for Washington Territory addressed the parallel doctrine relating to inferior degree offenses, and declared that “There is no better settled principle of criminal jurisprudence than that under an indictment for a crime of a high degree, a crime of the same character, of an inferior degree, necessarily involved in the commission of the higher offense charged, may be found.” *Clarke v. Washington Territory*, 1 Wash. Terr. 68, 69 (1859). It was against this backdrop that the framers adopted the state provisions.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62). Just one year prior to adoption, the Court noted that a statute allowing conviction “‘of any offense, the commission of which is necessarily included within that with which he is charged in the indictment.’” *Timmerman v. Territory*, 3 Wash. Terr. 445, 449 (1888) (quoting Territorial Code of 1881, Section 1098.) This language endures in the current statutory provision, and supports Mr. Olsen’s position. See RCW 10.61.006.

The fifth *Gunwall* “always point[s] toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State’s power.” *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

The sixth *Gunwall* factor—whether the issue is a matter of particular state interest or local concern—supports Mr. Olsen’s position, because there is no need for national uniformity on the issue. *Smith*, at 152.

All six *Gunwall* factors suggest that the Washington Constitution protects an accused person’s right to have the jury consider lesser-included offenses. Accordingly, the trial judge’s failure to instruct on the lesser-included offense of Manslaughter in the Second Degree violated Mr. Olsen’s rights under Wash. Const. Article I, Sections 21 and 22. This Court should accept review (under RAP 13.4(b)(3) and (4)), hold that the state constitution protects an accused person’s right to have the jury consider lesser-included offenses, reverse Mr. Olsen’s conviction, and remand the case for a new trial with appropriate instructions.

C. The Supreme Court should accept review and hold that Mr. Olsen was denied his Sixth Amendment right to the effective assistance of counsel when his attorney failed to properly propose instructions on applicable lesser-included and inferior degree offenses. This is a significant question

of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, and (2) that the deficient performance prejudiced the defendant. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. Amend. VI; U.S. Const. Amend. XIV. Failure to pursue an inferior-degree or lesser-included offense constitutes ineffective assistance if: (1) there is a significant difference in the penalty between the greater and the inferior degree, (2) the defense strategy would be the same for both crimes, and (3) sole reliance on the defense strategy in hopes of outright acquittal is risky. *State v. Grier*, 150 Wn.App. 619, 635, 208 P.3d 1221 (2009), *review granted at* 167 Wn.2d 1017, 224 P.3d 773 (2010).

Here, defense counsel proposed a nonstandard "to convict" instruction for the lesser-included offense of Manslaughter in the Second Degree. CP 40-41. If the trial court's failure to instruct the jury on manslaughter is attributable to defense counsel, then Mr. Olsen was denied the effective assistance of counsel. *Grier, supra*.

Defense counsel also failed to request instructions on Murder in the Second Degree and Manslaughter in the First Degree. Mr. Olsen was

entitled to these instructions, and his attorney should have requested them for three reasons. First, an all-or-nothing strategy exposed Mr. Olsen to enormous potential jeopardy. Second, Mr. Olsen's defense—that he arrived at the house after Mr. Totten had been fatally assaulted (and possibly after his death)—would have been the same, regardless of the combination of inferior degree and/or lesser-included charges he proposed. Third, the strategy of seeking an outright acquittal was extremely risky, since Mr. Olsen was plainly guilty of some offense, since acquittal would rest entirely on Mr. Olsen's own testimony, and since his credibility was damaged.

Mr. Olsen was prejudiced by his lawyer's failure to request these instructions: there is a reasonable probability that the jury would have convicted Mr. Olsen of only a lower charge, if given appropriate instructions. The Court has already accepted review of a similar issue,<sup>20</sup> and should accept review in this case. RAP 13.4(b)(3), (4). Mr. Olsen was denied the effective assistance of counsel; his conviction must be reversed and the case remanded for a new trial. *Grier, supra*; *Reichenbach, supra*.

D. The Supreme Court should accept review and hold that the trial court violated Mr. Olsen's state and federal public trial right by conducting an *in camera* hearing on a jury question. The Court of Appeals' published

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<sup>20</sup> See *Grier, supra*.

Opinion conflicts with this Court's decision in *Bone-Club*. RAP 13.4(b)(1). Furthermore, this case raises a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).<sup>21</sup>

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The public trial right attaches to any adversarial—as opposed to ministerial—proceeding.<sup>22</sup> *State v. Sadler*, 147 Wn.App. 97, 114, 193 P.3d 1108 (2008).<sup>23</sup> Adversarial proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259. Failure to conduct the analysis requires reversal. *Id.*, at 261-262.

A trial court has discretion whether to give further instructions to a jury after it has begun deliberations. CrR 6.15(f)(1); *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). The court's discretion should be exercised only after hearing from both parties. CrR 6.15(f)(1) (requiring the court to provide the parties an “opportunity to comment upon an

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<sup>21</sup> Mr. Olsen also incorporates any relevant argument made in Mr. Sublett's Petition for Review.

<sup>22</sup> A proceeding that is merely ministerial need not be conducted in public. *See, e.g., State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001).

<sup>23</sup> In *dicta*, the *Sadler* court appeared to create an exception for purely legal issues.

appropriate response.”)<sup>24</sup> A hearing on the necessity of further instructions may be adversarial. *See, e.g., Becklin*, at 524 (trial court gave further instruction “[a]fter considering arguments from both sides.”)

In this case, the trial judge conducted an *in camera* hearing to determine how best to respond to a jury question. Appendix C. This *in camera* proceeding, conducted outside the public’s eye without the required analysis and findings, violated Mr. Olsen’s constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club*, *supra*.

The Court of Appeals found *Bone-Club* analysis unnecessary because the *in camera* hearing dealt solely with legal issues, resulted in a written answer to the jury’s question, and concerned only “jury deliberations, [which] are not historically a public part of the trial.” P. 14, Appendix A. The Supreme Court has not recognized these as exceptions to the requirements of *Bone-Club*. Accordingly, the Court of Appeals’ published decision conflicts with *Bone-Club*, and the Supreme Court should accept review under RAP 13.4(b)(1). Furthermore, this case raises significant questions of constitutional law that are of substantial public

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<sup>24</sup> The rule requires the court to respond to the question in open court or in writing. CrR 6.15(f)(1). It does not purport to authorize closure of the courtroom while the court determines how to respond. CrR 6.15.

interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

The Supreme Court should accept review, hold that the *in camera* hearing violated Mr. Olsen's public trial right under the state and federal constitutions, reverse Mr. Olsen's conviction, and remand the case for a new trial. RAP 13.4(b)(1), (3), (4); *Bone-Club, supra*.

E. The Supreme Court should accept review and hold that the Fourteenth Amendment right to due process requires a trial court to provide supplemental instructions whenever a jury question reveals an actual misunderstanding of the prosecution's burden to prove the elements of an offense. This is a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).<sup>25</sup>

A trial court must fully and accurately instruct a jury on the law of accomplice liability. *Roberts*, at 513; *Cronin*, at 579. Any possibility that the jury convicted based on an incorrect understanding of the law taints the verdict and requires a new trial. *State v. Carter*, 154 Wn.2d 71, 84-85, 109 P.3d 823 (2005).

In this case, the trial judge was faced with a jury question revealing an ambiguity in the court's original instructions. CP (Sublett) 71; Appendix C; CP 59, 64, 71, Appendix D. The jury presented two reasonable interpretations of the court's instructions, one of which allowed

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<sup>25</sup> Mr. Olsen also incorporates any relevant argument made in Mr. Sublett's Petition.

conviction even if Mr. Olsen lacked the mental state necessary for accomplice liability. CP (Sublett) 129, Appendix C; CP 59, 64, 71, Appendix D. This interpretation relieved the prosecution of its burden to prove the elements of accomplice liability, in violation of *Roberts, supra*, and *Cronin, supra*.

The trial court should have exercised its discretion to provide supplemental instructions. CrR 6.15(f)(1); *Becklin*, at 529. Here, the court abused its discretion: given the jury's question, the refusal to provide supplemental instruction was "manifestly unreasonable." *See, e.g., State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). The trial court could have corrected the jury's misunderstanding; instead, it instructed the jury to guess at the law. Appendix C; CP 59, 64, 71, Appendix D.

This case involves a significant constitutional issue that is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4). The Supreme Court should accept review and hold that a trial court abuses its discretion by refusing to provide supplemental instructions whenever a jury question reveals instructional ambiguity that creates a risk of conviction upon a lesser showing than that required by due process.

F. This Court should accept review of Issues 10-13, which involve significant constitutional claims that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

The trial judge erroneously denied Mr. Olsen's motion for a new trial based on newly discovered evidence, and thereby infringed his Fourteenth Amendment right to due process. The trial court also violated Mr. Olsen's Fourteenth Amendment right to due process by erroneously admitting unredacted recordings and telephone calls that contained irrelevant and prejudicial information and painted him in a bad light. Furthermore, the trial court violated Mr. Olsen's Sixth and Fourteenth Amendment right to present a defense by excluding evidence that was relevant and admissible. Finally, the trial judge violated Mr. Olsen's Sixth and Fourteenth Amendment right to be present for trial by answering a jury question following an *in camera* hearing.

Additional argument on these points is presented in the briefs below, and is incorporated into this Petition by reference. These claims involve significant constitutional issues that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

**VI. CONCLUSION**

The Supreme Court should accept review, reverse Mr. Olsen's conviction, and remand the case for a new trial.

Respectfully submitted July 26, 2010.

**BACKLUND AND MISTRY**

  
\_\_\_\_\_  
Jodi R. Backlund, No. 22917  
Attorney for the Appellant

  
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Manek R. Mistry, No. 22922  
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Christopher Olsen, DOC #831898  
Washington Corrections Center  
P. O. Box 900  
Shelton, WA 98584

and to:

Jeffrey Erwin Ellis  
Ellis Holmes & Witchley PLLC  
705 2nd Ave Ste 401  
Seattle, WA 98104-1718

and that I personally delivered a copy to:

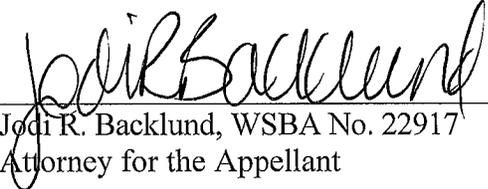
Thurston County Prosecuting Attorney  
2000 Lakeridge Dr. S.W., Building 2  
Olympia, WA 98502

and that I personally hand-delivered the original and one copy to the  
Supreme Court of the State of Washington.

All postage prepaid, on July 26, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF  
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE  
AND CORRECT.

Signed at Olympia, Washington on July 26, 2010.

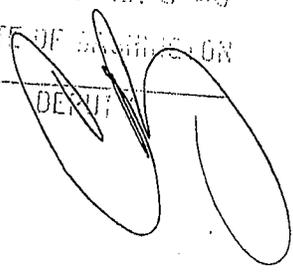
  
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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

**APPENDIX A:**  
**Court of Appeals Opinion**

FILE  
COURT OF APPEALS  
DIVISION II

10 MAY 18 AM 9:40

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY



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

STATE OF WASHINGTON,  
Respondent,

v.

MICHAEL LYNN SUBLETT,  
Appellant.

No. 38034-0-II

Consolidated with No. 38104-4-II

STATE OF WASHINGTON,  
Respondent,

v.

CHRISTOPHER LEE OLSEN,  
Appellant.

PUBLISHED OPINION

QUINN-BRINTNALL, J. — A jury entered verdicts finding co-defendants Michael Sublett and Christopher Olsen guilty of first degree murder. Sublett and Olsen appeal, asserting that the trial court violated their public trial rights and their right to be present by holding an in-chambers conference to address a question submitted by the jury during its deliberations and that the trial court violated their due process rights by refusing to answer the jury's question.

Additionally, Sublett contends that the trial court erred by refusing to sever the co-defendants' trial and in calculating his offender score. Sublett also contends that the prosecutor

committed misconduct in closing argument by misstating the probative value of the deoxyribonucleic acid (DNA) evidence and by showing a photograph of the defendants with the word "guilty" superimposed over their faces. Last, Sublett asserts in his statement of additional grounds (SAG)<sup>1</sup> that the State committed a *Brady*<sup>2</sup> violation by suppressing exculpatory evidence and he raises a number of issues we cannot address in his direct appeal on the record provided.

Olsen also contends that (1) the trial court's felony murder instruction violated his due process rights, (2) his counsel was ineffective for proposing a nonstandard lesser included second degree manslaughter instruction, (3) his counsel was ineffective for not proposing the standard first and second degree manslaughter instructions, (4) the trial court erred by denying his motion for a new trial, (5) the trial court erred by admitting evidence of prior bad acts under ER 404(b), and (6) the trial court violated his due process right to present a defense by excluding relevant admissible evidence. Finding no merit in any of the appellants' contentions, we affirm.

## FACTS

### BACKGROUND FACTS

In 2005, April Frazier met Jerry Totten at an Alcoholics Anonymous meeting. Totten befriended Frazier and allowed her to stay in a trailer on his property in Tumwater, Washington. He gave Frazier the only key to the trailer; Totten also gave Frazier a key to his house. Totten allowed Frazier's boyfriend, Sublett, to visit freely with Frazier in the trailer and in his house.

In November 2006, Frazier stole coins from Totten and had a friend pawn them for \$200. On January 10, 2007, Sublett pawned more of Totten's coins for \$115. On January 16, 2007,

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<sup>1</sup> RAP 10.10.

<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Sublett pawned Totten's generator for \$150. On January 27, 2007, Sublett pawned a second generator belonging to Totten for \$234.

Frazier and Sublett traveled together to Reno, Nevada. In late January of 2007, while the couple were in Reno, Frazier's friend, Olsen, called her from the Thurston County Jail. Frazier told Olsen that she would bail him out of jail. Frazier called Totten from Reno and convinced him to wire her \$500 for nonexistent car repairs. When Frazier and Sublett returned to Washington at the end of January 2007, they visited Totten and stole his wallet, cell phone, and checkbook. On January 29, 2007, Frazier and Sublett bailed Olsen out of jail using \$1,000 they had stolen from Totten. Olsen's mother signed the bond.

After Frazier and Sublett bailed Olsen out of jail, the group went to the Little Creek Casino Hotel in Shelton, Washington, and used methamphetamine. Later that same day or the next day, all three went to Totten's home.

On January 30, 2007, Matthew Gantenbein saw a pickup truck over an embankment of Old Olympic Highway in Thurston County. Gantenbein approached the truck and saw that the driver's side door was open, the truck was in neutral, and the engine was running. He did not see anybody in or near the truck. When Gantenbein looked in the canopy of the truck, he saw "a bunch of boxes" and "stuffed animals." 2 Report of Proceedings (RP) at 72. The Washington State Patrol arrived and impounded the truck.

On February 4, 2007, Tumwater Police Detective Charles Liska responded to a domestic violence incident at a Tumwater hotel room where Frazier and Sublett were staying; Frazier was alone in the room when Liska arrived. Frazier told Liska that Sublett had physically assaulted her over the last few days. Frazier allowed Liska to photograph her injuries but she was

otherwise uncooperative and declined medical attention. Liska observed methamphetamine and a butane torch in the motel room but he did not make an arrest.

That same day, Sublett called his friend, Elsie Pray. Sublett told Pray that he and Frazier had gotten into a fight and that he wanted Pray to speak with her. Later that evening, Frazier told Pray that she and two other people had killed Totten on January 29, 2007. According to Pray, Frazier said that she knocked on Totten's door and, when he answered the door, the two others pushed him into a recliner, beat him with a baseball bat, and shot him with her gun. Frazier told Pray that she was in another room of the house listening to music while the two others killed Totten. Frazier told Pray that the group had wrapped up Totten's body, placed it in one of his trucks, and then rolled the truck down an embankment near Mud Bay in Thurston County. Frazier showed Totten's checkbook and driver's license to Pray. On February 10, 2007, Pray contacted the police and reported this conversation.

On February 5, 2007, Frazier and Sublett asked Peter Landstad to loan them his vehicle so they could move into a new residence. Landstad agreed to loan them his vehicle and the couple left Sublett's car with Landstad. Frazier and Sublett did not return Landstad's car on the agreed date and instead called him and offered to buy the vehicle for \$2,500. Landstad spoke with Sublett three times about Sublett wiring the money owed to him, but Sublett did not send him any money.

On February 8, 2007, Totten's sister, Shirley Inman, contacted the Tumwater Police Department to request that they perform a welfare check on Totten. Inman was concerned because she had not been able to contact her brother since January 15, 2007, when he had left after visiting Oregon for their mother's 90th birthday. Tumwater Police Officer Tim Eikum

went to Totten's house and entered through an open door; Eikum noticed that the house was in disarray, but he did not see any obvious signs that a crime had been committed.

On February 10, 2007, Inman and her mother went to Totten's house to check on him. When they could not find Totten, they called the Tumwater Police Department. Officer Eikum went to Totten's house and saw that nothing had changed since his February 8, 2007 welfare check. Eikum checked to see if Totten had any vehicles registered in his name. Later that evening, Eikum discovered that the Sheriff's Department had impounded Totten's 1989 Ford pickup truck. After receiving a search warrant, Thurston County Sheriff's Deputy Michael Stewart searched the back of the pickup truck and, after removing a number of blankets, saw Totten's body "gagged across the mouth and across the top of the head . . . laying [sic] on a picnic table." 2 RP at 63.

On February 14, 2007, police arrested Frazier and Sublett in Las Vegas, Nevada. In the couple's Suburban, police found Totten's disabled parking placard, a loaded gun, and various items belonging to Totten, including his wallet, checkbook, and social security card. On February 22, 2007, Olympia police officers arrested Olsen. When officers confronted Olsen, he gave them a false name but later he admitted his identity.

Olsen gave law enforcement two statements that were later admitted into evidence at trial. In his statements, Olsen admitted that he had been inside Totten's house and that he had planned to help Frazier and Sublett steal from him, but he denied participating in Totten's murder. Olsen stated that Totten was already dead or fatally injured when he arrived at the house. Olsen also admitted to stealing items from Totten's home and to helping move Totten's body.

PROCEDURAL FACTS

The State charged Sublett and Olsen with premeditated first degree murder and, in the alternative, first degree felony murder. In exchange for her testimony against Sublett and Olsen, the State allowed Frazier to plead guilty to second degree manslaughter, first degree burglary, and rendering criminal assistance, and it agreed to recommend a 54-month prison sentence.

On January 7, 2008, the State filed a CrR 4.3(b) motion to join the defendants for trial. Sublett opposed the State's motion to join, asserting that the defendants had antagonistic defenses. On May 8, 2008, the trial court consolidated the cases for trial.

A jury trial began on June 2, 2008. At trial, forensic scientist Karen Green testified that she had obtained a partial DNA profile from the handle of a wooden bat found at the crime scene. Green further testified that, based on the partial DNA sample, she could not rule out Sublett and Totten as possible contributors and that one in every 130 individuals in the United States population could be a possible contributor. She also testified that a DNA sample taken from a latex glove found at the scene matched Olsen's profile and that "the estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile to that glove is one in six quadrillion." 4 RP at 338. The State also presented evidence that, in the days following Totten's death, Frazier and Sublett made several purchases using Totten's credit cards.

At trial, Frazier testified that she and Sublett had bailed Olsen out of jail so that he could help them rob Totten. Frazier stated that after the group had ingested methamphetamine at a hotel, Sublett drove the three of them to Totten's home. She stated that after Totten let her into his house, she let Sublett and Olsen in through a back door. She further stated that she saw Olsen grab an aluminum bat from the utility room on his way into the house. Frazier claimed

that she stayed in the laundry room while the two men beat Totten and that, after she heard Totten moan loudly, she turned up the music on her cell phone so she could not hear anything else. She testified that Sublett then came into the utility room and took an extension cord.

Frazier further testified that Sublett had told her to get blankets and that she had seen Totten's dead body as she walked through the living room. Frazier stated that Olsen was upset after the killing and that Sublett took Olsen for a drive to calm him down, leaving her alone at the house for an hour. Frazier testified that while she was alone, she collected valuables and stored them in a spare bedroom. Frazier also testified that she and Sublett took bags of stolen items from the house, including credit cards, a laptop computer, and documents from Totten's desk. She stated that the three of them returned the next day to dispose of Totten's body. She testified that after they loaded Totten's body into the back of one of his trucks, she stayed at the house while Olsen drove the truck away with Sublett following him in another car. Frazier stated that after the men returned from moving Totten's body, Olsen remarked that he had enjoyed what he had done and would do it again.

On cross examination, Frazier admitted that during her interviews with the police, she had not mentioned Olsen's remarks regarding enjoying what he had done to Totten. She also testified that sometime after Olsen made this statement, he sat under a kitchen table with his knees drawn up and was crying. She further testified on cross examination that Sublett had pointed his gun at Olsen in Totten's house and later in the motel room. Frazier also admitted on cross examination that she had told several lies in the days surrounding Totten's death, including that Totten was a child molester with a jar of his victims' teeth, that she needed to borrow her friend's Suburban because she and Sublett were moving to a new residence, that she needed money to repair a broken car, and that she knew Sublett had not killed Totten.

The State sought to introduce tape recordings of two phone calls Olsen made to Frazier while Olsen was in jail on an unrelated charge. Olsen objected to the evidence, asserting that it was cumulative because Frazier had already testified as to the nature of her phone conversations with him; Olsen also objected because he claimed that portions of the calls contained offensive terms and evidence of prior bad acts in violation of ER 404(b). The trial court allowed the State to play the entire audio recordings of the phone calls over Olsen's objections.

Olsen's defense counsel sought to elicit testimony from Totten's neighbor, an attorney named Todd Rayan. Rayan's proffered testimony was that Totten had asked him about obtaining a restraining order against Frazier and that Totten had stated to him that Frazier had overstayed her welcome and that he had asked her to leave. The State objected to Rayan's proffered testimony, asserting that it was inadmissible hearsay. The trial court sustained the State's objection in part; it allowed Rayan to testify that Totten sought his advice on obtaining a restraining order but it did not allow him to testify as to whom Totten sought the restraining order against or that Totten suspected Frazier had been stealing from him. The trial court also allowed Rayan to testify that he had heard Totten and Sublett arguing in Totten's carport approximately two weeks before police came to the property to investigate Totten's disappearance.

Olsen testified in his defense. He stated that when he spoke to Frazier while he was in jail, he was willing to say anything to have her bail him out, but he denied making an agreement to rob or hurt anyone. Olsen admitted that he went to Totten's house but stated that he was unsure whether Totten was already dead when he arrived. Olsen also admitted that he helped to move Totten's body. Olsen further testified that he did not receive any money or property for his participation in the incident. Olsen also testified that after the group moved Totten's body,

Sublett forced him to cooperate by threatening him with a gun and by threatening to hurt his family.

At closing, the prosecutor made the following argument:

That bat was wiped for DNA. Mr. Sublett was not excluded as a DNA contributor, and the probability that he was the contributor to that DNA found on that bat was one in 130. Now, you know, you take that number, one in 130, and consider it in a vacuum, that's a low number, especially when you consider what was the -- Mr. Olsen's DNA was one in six I don't know how many gazillions; a lot. So in light of that, one out of 130, that's a low number, but when you consider that evidence, ladies and gentlemen, one in 130, when you consider that evidence in light of all of the evidence in the case, that was Mr. Sublett's DNA because Mr. Sublett was at that house. Mr. Sublett was at that house on January 29th. He was the guy that stole the credit cards. He was the guy that had the credit cards stolen from Jerry Totten. His fingerprints were in the utility room. April Frazier put him there and Christopher Olsen. So ladies and gentlemen, I submit the totality of the evidence, Sublett had that bat.

9 RP at 997. Later, in closing, the prosecutor remarked, "Turns out that Mr. Sublett's DNA is on a wooden bat." 9 RP at 1074.

Defense counsel objected to the prosecutor's use of an image during its closing argument that apparently depicted the defendants with the word "guilty" superimposed over their photos. The trial court sustained the objection and had the State remove the image.

Olsen's defense counsel proposed the following lesser included second degree manslaughter instruction:

To convict the defendant of the crime of manslaughter in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 19th day of January, 2007, the defendant failed to summon aid after illegally entering Jerry Totten's residence;
- (2) That the defendant's conduct was criminal negligence;
- (3) That Jerry Totten died as a result of the defendant's acts; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) (Olsen) at 40.

The trial court refused to give this proposed instruction but the record does not include the reasons for the trial court's refusal. Defense counsel did not propose any other lesser included jury instructions and the trial court did not provide any to the jury.

The trial court gave the following accomplice liability jury instruction (instruction no. 21):

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP (Sublett) at 156; CP (Olsen) at 71.

During its deliberations, the jury submitted the following question to the court:

Clarification of Instruction 21. The structuring of the 2nd sentence in the 1st paragraph is unclear. Which of the following is correct for intent? A person (X) is legally accountable for the conduct of another person (Y) when he or she (X) is an accomplice of such other person (Y) in the commission of the crime. - OR - A person (X) is legally accountable for the conduct of another person (Y) when he

or she (Y) is an accomplice of such other person (X) in the commission of the crime.

CP (Sublett) at 129.

Counsel met with the trial court in chambers to address the jury's question. Counsel agreed to the trial court's answer to the jury question, which stated, "I cannot answer your question please re-read your instructions." CP (Sublett) at 129. The jury found Sublett guilty of first degree murder by premeditation and in the course of a felony and it found Olsen guilty of first degree murder in the course of a felony but not by premeditation.

Olsen moved for a new trial, asserting that he had discovered new evidence of a witness that he could have used to impeach Frazier's testimony. The State opposed the motion for a new trial, arguing that the newly discovered evidence was merely cumulative or impeaching. The trial court denied Olsen's motion for a new trial.

At sentencing, the State sought a life sentence for Sublett under the Persistent Offenders Accountability Act (POAA), RCW 9.94A.555, based on his prior California robbery convictions. The trial court found that Sublett's prior out-of-state convictions were comparable to Washington strike offenses under the POAA and sentenced him to life in prison without the possibility of parole. The trial court sentenced Olsen to a standard range sentence, 500 months of incarceration, based on his offender score of nine. Sublett and Olsen timely appeal.

## ANALYSIS

### SUBLETT

#### A. DENIAL OF MOTION TO SEVER TRIALS

Sublett first contends that the trial court erred by denying his motion to sever his trial from Olsen's trial, asserting that Olsen's antagonistic defense unfairly prejudiced his right to a

fair trial. The State asserts that the trial court properly denied the motion to sever because Sublett and Olsen did not have mutually inconsistent defenses. We agree with the State.

Separate trials are not favored in Washington. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994) (citing *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982), *cert denied*, 459 U.S. 1211 (1983)). We review a trial court's denial of a motion to sever for manifest abuse of discretion. *Dent*, 123 Wn.2d at 484. Defendants seeking severance have the burden of demonstrating that a joint trial "would be so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Medina*, 112 Wn. App. 40, 52, 48 P.3d 1005 (quoting *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990)), *review denied*, 147 Wn.2d 1025 (2002).

A defendant may demonstrate prejudice by showing "antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive." *State v. Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985)), *review denied*, 128 Wn.2d 1025 (1996). "But mutually antagonistic defenses are not per se prejudicial as a matter of law." *State v. Johnson*, 147 Wn. App. 276, 284, 194 P.3d 1009 (2008) (citing *Grisby*, 97 Wn.2d at 507); *review denied*, 165 Wn.2d 1050 (2009). And "[t]he mere existence of antagonism between defenses 'or the desire of one defendant to exculpate himself by inculcating a codefendant . . . is insufficient to [compel separate trials]." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 712, 101 P.3d 1 (2004) (alterations in original) (quoting *United States v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996), *cert. denied*, 519 U.S. 1132 (1997)). Instead, a defendant must "demonstrate[] that the conflict is so prejudicial that . . . the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *Grisby*, 97 Wn.2d at 508 (quoting *United States v. Davis*, 623 F.2d 188, 194-95 (1st Cir. 1980)).

Here, Olsen's defense was that Totten's murder had occurred before he participated in the robbery of the home and in the disposal of his body, whereas Sublett's defense was a general denial of any involvement in the crime. Although Olsen's defense attempted to shift the blame to Sublett and Frazier, this conflict alone did not rise to the level that a jury would unjustifiably infer that both Olsen and Sublett were guilty. *Grisby*, 97 Wn.2d at 508. Further, the defenses were not irreconcilable because the jury was free to disbelieve both versions of the events. "For defenses to be irreconcilable, they must be 'mutually exclusive to the extent that one [defense] must be believed if the other [defense] is disbelieved.'" *Johnson*, 147 Wn. App. at 285 (alterations in original) (quoting *State v. McKinzy*, 72 Wn. App. 85, 90, 863 P.2d 594 (1993)). Accordingly, the trial court did not err by denying Sublett's motion to sever his trial from Olsen's.

B. RIGHT TO A PUBLIC TRIAL/RIGHT TO BE PRESENT

Sublett next contends that the trial court erred when it held an in-chambers conference in response to a question the jury submitted during its deliberations.<sup>3</sup> Specifically, Sublett contends that the trial court's in-chambers conference violated his right to an open and public trial and violated his right to be present. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. *State v. Wise*, 148 Wn. App. 425, 433, 200 P.3d 266 (2009). We review de novo whether a trial court has violated a defendant's public trial right. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

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<sup>3</sup> Olsen joins Sublett's arguments on this issue.

Whether a defendant's public trial right applies in the context of an in-chambers conference to answer a question the jury submitted during its deliberations appears to be an issue of first impression in Washington. In *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008), this court recognized that the public trial right applies to evidentiary phases of the trial as well as other "adversary proceedings," including suppression hearings, during voir dire, and during the jury selection process. But this court also determined that "[a] defendant does not . . . have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." *Sadler*, 147 Wn. App. at 114.

Here, the trial court's in-chambers conference addressed a jury question regarding one of the trial court's instructions, a purely legal issue that arose during deliberations and that did not require the resolution of disputed facts. Thus, under this court's decision in *Sadler*, the defendants' right to a public trial did not apply in this context. Further, CrR 6.15(f) provides in part that "[the trial] court shall respond to all questions from a deliberating jury in open court *or in writing*." (Emphasis added.) More important, questions from the jury to the trial court regarding the trial court's instructions are part of jury deliberations and, as such, are not historically a public part of the trial. See, e.g., *Clark v. United States*, 289 U.S. 1, 12-13, 53 S. Ct. 465, 77 L. Ed. 993 (1933) (citing *Woodward v. Leavitt*, 107 Mass. 453, 460, 9 Am. Rep. 49 (1871)); *In re Matter of Cochran*, 237 N.Y. 336, 340, 143 N.E. 212 (1924); *In re Matter of Nunns*, 188 A.D. 424, 430, 176 N.Y.S. 858 (N.Y. App. Div. 1919)); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989); *Crowe v. County of San Diego*, 210 F. Supp.2d 1189, 1196 (S.D. Cal. 2002). Because the public trial right does not apply to a trial court's conference with counsel on how to resolve a purely legal question which the jury submitted

during its deliberations, we hold that the trial court did not violate the appellants' public trial right by responding to the jury's question in writing as CrR 6.15(f) provided.

Similarly, because the in-chambers conference held in response to a jury question was not a critical stage of the proceedings, we hold that the trial court did not violate the appellants' right to be present. A criminal defendant has a constitutional right to be present at every critical stage of the criminal proceedings against him. *State v. Pruitt*, 145 Wn. App. 784, 798, 187 P.3d 326 (2008). A critical stage is one where the defendant's presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the charge. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). But in general, in-chambers conferences between the court and counsel on legal matters are not critical stages of the proceedings except when the issues involve disputed facts. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). The in-chambers conference here was not a critical stage of the proceedings because it involved only the purely legal issue of how to respond to the jury's request for a clarification in one of the trial court's instructions. Accordingly, the appellants' right to be present did not apply in this context.

C. TRIAL COURT'S REFUSAL TO CLARIFY A JURY INSTRUCTION

Next, Sublett asserts that the trial court abused its discretion by refusing to answer the jury's question during deliberations because the instruction at issue was ambiguous and misstated the applicable law.<sup>4</sup> The State responds that the jury instruction accurately stated the law. We agree with the State.

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<sup>4</sup> Olsen joins Sublett's arguments on this issue.

A trial court has discretion whether to give further instructions to a jury after it has begun deliberations. *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). But we review claimed errors of law in a jury instruction de novo, evaluating the instruction “in the context of the instructions as a whole.” *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521, 158 P.3d 1193 (2007) (quoting *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993)). Jury instructions as a whole must provide an accurate statement of the law and must allow each party to argue its theory of the case to the extent the evidence supports. *Benn*, 120 Wn.2d at 654. Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary mind. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

Here, the jury’s question to the trial court indicated that it could interpret the sentence, “A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime,” in two ways. CP (Sublett) at 156; CP (Olsen) at 71. The jury indicated that it could interpret “he or she” as referring to the person who may be legally accountable for another person’s conduct or it could interpret “he or she” as referring to the person for whom a person may be legally accountable.

Sublett asserts that only the first interpretation is a correct statement of the law, whereas the State asserts that either interpretation is correct. Even assuming without deciding that only the first interpretation is a correct statement of the law, the trial court properly responded to the jury’s question by telling them to reread the instruction at issue because a careful reading of the instruction supports only the jury’s first interpretation. Here, the second part of the instruction at issue reads, “[W]hen *he or she* is an accomplice of *such other person*.” CP (Sublett) at 156; CP (Olsen) at 71 (emphasis added). The instruction’s use of the phrase “such other person” following “he or she” clearly indicates that “he or she” refers to the “*person* [who may be]

legally accountable for the conduct of *another person*.” Because the instruction at issue is not ambiguous and supports only the interpretation that Sublett concedes on appeal is a correct statement of law, the trial court did not abuse its discretion by refusing to further clarify the instruction for the jury.

D. PROSECUTORIAL MISCONDUCT/CUMULATIVE ERROR

Next, Sublett contends that the State committed prosecutorial misconduct during closing argument by misstating the probative value of the DNA evidence and by using a visual aid that misstated the evidence and misled the jury. Sublett asserts that the cumulative effect of these alleged instances of prosecutorial misconduct merits a new trial. We disagree.

A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). We review a prosecutor’s allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

In determining whether prosecutorial misconduct occurred, we first evaluate whether the prosecuting attorney’s comments were improper. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the prosecuting attorney’s statements were improper and the defendant made a proper objection to the statements, then we consider whether there was a substantial likelihood that the statements affected the jury’s verdict. *Reed*, 102 Wn.2d at 145. Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). In reviewing a

prosecutorial misconduct claim, we generally afford the State great latitude in making arguments to the jury. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006).

Sublett first contends that the prosecutor committed misconduct by misstating the probative value of the DNA evidence at closing. Specifically, Sublett contends that the prosecutor's remark that there was a one in 130 chance that Sublett contributed the DNA sample found on the bat misstated the evidence because the expert witness testified that one in every 130 individuals in the United States population could be a possible contributor. Because Sublett did not object to this remark and did not ask for a curative instruction, he waives any prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *Charlton*, 90 Wn.2d at 661. Even assuming that the prosecutor's remark at closing was improper, Sublett does not argue that a curative instruction would have been insufficient to cure any resulting prejudice. He thus fails to meet his burden of establishing prosecutorial misconduct. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

Sublett next contends that the prosecutor committed misconduct by using a visual aid that "apparently altered a photograph [of the defendants]; inserting the word guilty." Br. of Appellant (Sublett) at 24. Defense counsel objected. The trial court sustained the objection and excluded the image. Sublett has not provided this court with the visual aid and the record is insufficient to allow further review.<sup>5</sup> RAP 9.2(b); *see also State v. Rienks*, 46 Wn. App. 537, 544-45, 731 P.2d 1116 (1987) (Appellant has the burden of perfecting the record so that the

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<sup>5</sup> The record of proceedings contains no indication as to the nature of the allegedly improper visual aid apart from Sublett's statement at sentencing that he was going to appeal his conviction based in part on the "[prosecutor's] use of visual graphics that displayed my image with a red circle around that image with arrows pointing to me with the word guilty in bold red letters across my face." 11 RP at 1151-52.

reviewing court has before it all of the evidence relevant to the issue and matters not in the record will not be considered on appeal.). Moreover, Sublett provides no legal argument or citations to authority to support this claim that the excluded photos irreparably precluded a fair trial.<sup>6</sup> Without argument or authority to support it, an assignment of error is waived. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986)). Because Sublett has failed to establish prosecutorial misconduct, we do not address his cumulative error claim.

E. OFFENDER SCORE CALCULATION

Last, Sublett contends that the trial court erred at sentencing when calculating his offender score. Specifically, Sublett argues that the trial court erred when it found that his prior out-of-state convictions were comparable to strike offenses for purposes of the POAA. RCW 9.94A.570; former RCW 9.94A.030(29) (2006). Because the elements of Sublett's out-of-state convictions are substantially similar to the elements of a Washington strike offense under the POAA, we disagree and affirm Sublett's sentence.

A sentencing court may not count an offender's out-of-state conviction as a strike offense unless the State proves by a preponderance of the evidence that the conviction would be a strike offense under the POAA. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); *State v. Ruldolph*, 141 Wn. App. 59, 71-72, 168 P.3d 430 (2007) (defendant does not have a right to have a jury determine fact of prior conviction for POAA sentence), *review denied*, 163 Wn.2d 1045

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<sup>6</sup> The entirety of Sublett's argument on this issue reads:

In addition, the prosecutor used inadmissible visual aids—misstating the evidence and misleading the jury. For example, the prosecutor apparently altered a photograph, inserting the word guilty. Taken as a whole, these improper tactics rendered Sublett's trial unfair.

Br. of Appellant (Sublett) at 24.

(2008). Washington courts employ a two-part test to determine whether foreign convictions are comparable to Washington strike offenses. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the trial court must compare the elements of the foreign crime to determine if they are substantially similar to the elements of a Washington criminal statute in effect when the foreign crime was committed. *In re Lavery*, 154 Wn.2d at 255 (citing *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998)). If the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign conviction counts toward the defendant's offender score. *In re Lavery*, 154 Wn.2d at 255. If the elements of the Washington crime and the foreign crime are not substantially similar, the trial court may "look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute." *In re Lavery*, 154 Wn.2d at 255.

Here, the trial court based Sublett's offender score calculation on his prior California second degree robbery convictions; Sublett was convicted of three counts of second degree robbery on January 28, 1994, and he was convicted of two counts of second degree robbery on March 17, 1997. The trial court found Sublett's prior California second degree robbery convictions comparable to the elements of second degree robbery in Washington, which is a strike offense under the POAA. RCW 9.94A.570; former RCW 9.94A.030(29)(o).

California Penal Code section 211 provides:

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

California Penal Code section 212.5 defines second degree robbery as any robbery other than those listed in sections 212.5(a) and (b). Washington courts have interpreted "feloniously"

to mean “with intent to commit a crime.” *State v. Nieblas-Duarte*, 55 Wn. App. 376, 381, 777 P.2d 583 (quoting *State v. Smith*, 31 Wash. 245, 248, 71 P. 767 (1903)), *review denied*, 113 Wn.2d 1030 (1989).

At the time of Sublett’s California convictions for second degree robbery, the Washington statute defining robbery required (1) the unlawful taking (2) of personal property (3) from the person of another or in his presence (4) against his will (5) by the use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. RCW 9A.56.190. RCW 9A.56.210 provides that a person commits second degree robbery if he commits robbery as defined in RCW 9A.56.190. Additionally, in order to convict a defendant of second degree robbery in Washington, the State must prove the nonstatutory element of a specific intent to steal. *See In re Lavery*, 154 Wn.2d at 255-56 (“our settled case law is clear that “intent to steal” is an essential element of the crime of robbery” (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991))).

A legal comparison of the elements of second degree robbery in California and Washington illustrates that the two appear essentially identical. Both require (1) a taking (2) of personal property (3) from another person or his immediate presence (4) against his will (5) by use of force or fear. Both also require a specific intent to steal. It thus appears that the elements of California and Washington second degree robbery are substantially equivalent for purposes of the POAA.

OLSEN

A. “TO-CONVICT” FELONY MURDER JURY INSTRUCTION (INSTRUCTION NO. 15)

Olsen first contends that the trial court’s “to-convict” felony murder jury instruction violated his due process rights by misstating the elements of the offense, thus relieving the State

of its burden of proving every element of the offense beyond a reasonable doubt. Specifically, Olsen contends that the challenged jury instruction allowed the jury to find him guilty of felony murder even if it believed that Frazier and Sublett killed or fatally wounded Totten during the course of felonies no longer in progress when they recruited him to help. We disagree.

Due process requires the State to prove every element of an offense beyond a reasonable doubt. U.S. CONST. amend. XIV; *In re Matter of Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Jury instructions that relieve the State of its burden to prove every element of an offense violate due process. *Thomas*, 150 Wn.2d at 844. Because jury instructions that omit elements of the crime charged constitute a “manifest error affecting a constitutional right,” we may consider the issue for the first time on appeal. RAP 2.5(a)(3); *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003). Jury instructions that misstate an element of the charged offense may be harmless if the element is supported by uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

The trial court gave the following jury instruction regarding the elements required to convict Olsen of first degree felony murder:

(ALTERNATIVE [sic] B)

- (1) That on or about January 29, 2007, Jerry Totten was killed;
- (2) That the defendant or an accomplice was committing or attempting to commit the crime of burglary in the first degree or robbery in the first or second degree.
- (3) That the defendant, or another participant, caused the death of Jerry Totten in the course of or in furtherance of such crime or in immediate flight from such crime;
- (4) That Jerry Totten was not a participant in the crime; and
- (5) That the acts occurred in the State of Washington.

CP (Olsen) at 64.

Olsen contends for the first time on appeal that the trial court should have explained to the jury that it could find him guilty of felony murder only if he was an accomplice to the specific burglary or robbery in progress when Totten was killed or fatally wounded. Olsen further contends that the trial court should have instructed the jury on when a burglary or robbery terminates. But Olsen's contentions fail for three reasons. First, Olsen did not object to the giving of this instruction as CrR 6.15(c) requires.<sup>7</sup> *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980). Second, there was no evidence at trial that Totten was killed during the course of a burglary or robbery that had terminated before Olsen's participation in a separate burglary or robbery. And third, a trial court errs by giving a jury instruction not supported by the evidence. *State v. Hunter*, 152 Wn. App. 30, 44, 216 P.3d 421 (2009) (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)), *review denied*, 168 Wn.2d 1008 (2010).

There was no evidence that Totten was killed during or in immediate flight from a completed robbery or burglary before Olsen's participation. Thus, the trial court's "to-convict" instruction accurately stated the elements required for the jury to convict Olsen of felony murder. Accordingly, the trial court's jury instructions did not violate Olsen's due process rights by misstating an element of the offense charged.

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<sup>7</sup> CrR 6.15(c) states:

Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

B. TRIAL COURT'S FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSE OF SECOND DEGREE MANSLAUGHTER/INEFFECTIVE ASSISTANCE OF COUNSEL

Next Olsen contends that the trial court's refusal to instruct the jury on the lesser included offense of second degree manslaughter violated Olsen's due process rights under the State and Federal constitution. We disagree.

A criminal defendant is entitled to a jury instruction on a lesser included offense if (1) each element of the lesser offense is a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed. *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008). In determining whether it is appropriate to give an instruction on a lesser included offense, the trial court views the evidence in a light most favorable to the defendant. *State v. Pittman*, 134 Wn. App. 376, 385, 166 P.3d 720 (2006) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)). Manslaughter is a lesser included offense of premeditated murder. *State v. Schaffer*, 135 Wn.2d 355, 357-58, 957 P.2d 214 (1998). A person commits second degree manslaughter when, with criminal negligence, he causes the death of another person. RCW 9A.32.070.

Olsen asserts that he was entitled to a jury instruction on second degree manslaughter because his testimony at trial established that he was unsure whether Totten was already dead or still alive when he joined in the robbery. Olsen contends that, based on this testimony, a jury could find him guilty of second degree manslaughter based on his failure to summon aid under RCW 9.69.100.<sup>8</sup> But even viewing the evidence in a light most favorable to Olsen, he did not

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<sup>8</sup> RCW 9.69.100 imposes a legal duty on people who witness a violent offense and provides in part that any person "who witnesses the actual commission of [a] violent offense as defined in RCW 9.94A.030 . . . shall as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public officials."

demonstrate that he was entitled to the lesser included instruction. Olsen did not provide any evidence that Totten was alive when he first saw him tied to a chair with only his foot protruding through a blanket. Instead, Olsen testified that he did not participate in any assault against Totten and that he did not know whether Totten was dead or alive when he joined in the robbery. Because Olsen did not testify that Totten was alive when he participated in the robbery and did not present any other evidence establishing that Totten was alive before his participation in the crime, his testimony was essentially a denial that he participated in Totten's murder. Accordingly he was not entitled to a jury instruction on the lesser included offense of second degree manslaughter.<sup>9</sup>

Moreover, even if Olsen presented some evidence that Totten had been assaulted by others but was still alive when he began to participate in the first degree robbery or first degree burglary, he would still not be entitled to a second degree manslaughter instruction. By Olsen's account, Totten died as a result of Olsen's accomplices' conduct while he participated in an ongoing first degree robbery or burglary occurring at some time between when he first saw Totten tied to a chair under a blanket and when he helped to dispose of Totten's body. But manslaughter is not a lesser included offense of felony murder. *State v. Berlin*, 133 Wn.2d 541, 550, 947 P.2d 700 (1997). The record reveals no basis for the trial court giving a second degree manslaughter instruction.

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<sup>9</sup> Because Olsen was not entitled to a second degree manslaughter jury instruction, we need not address his argument that his defense counsel was ineffective for proposing a nonstandard second degree manslaughter instruction or his argument that the trial court violated his due process rights by failing to give the instruction.

C. NEWLY DISCOVERED EVIDENCE

Next, Olsen asserts that the trial court erred by denying his CrR 7.5 motion for a new trial based on newly discovered evidence. We disagree.

CrR 7.5(a) provides in part:

**Grounds for New Trial.** The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

....  
(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

....  
When the motion is based on matters outside the record, the facts shall be shown by affidavit.

We review a trial court's denial of a motion for a new trial for an abuse of discretion. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008). To obtain a new trial based on newly discovered evidence, a defendant must demonstrate that the evidence (1) will probably change the result of the trial, (2) was discovered after the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *State v. Roche*, 114 Wn. App. 424, 435, 59 P.3d 682 (2002) (citing *State v. Swan*, 114 Wn.2d 613, 641-42, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991)). The absence of any of these five factors is grounds to deny a new trial. *Roche*, 114 Wn. App. at 435 (citing *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)).

To support his motion for a new trial, Olsen presented the affidavit of Katrina Berchtold (also known as Alexis Cox). In her affidavit, Berchtold asserts that Frazier had told her about her and Sublett's plans to kill Totten because Totten was involved with child pornography.

Berchtold also denied that Olsen and Sublett came to her apartment on January 29, 2008,<sup>10</sup> and smoked methamphetamine.

Here, Berchtold's affidavit does not support a motion for a new trial because the purported evidence does nothing more than impeach Frazier's testimony. Further, because defense counsel thoroughly impeached Frazier during its cross examination, it is unlikely that any additional attack on Frazier's credibility would have changed the result of the trial. Here, defense counsel's cross examination of Frazier revealed that she told several lies in the days surrounding Totten's murder, including accusing Totten of being a child molester. Because Olsen fails to demonstrate how this newly discovered evidence would change the result of his trial and fails to show how the evidence is not merely cumulative or impeaching, the trial court did not err in denying his motion for a new trial.

D. ER 404(B) EVIDENCE

Next, Olsen contends that the trial court violated ER 404(b) by admitting unedited recordings of telephone calls between him and Frazier. The State concedes that the trial court erred by failing to conduct an analysis on the record when it found the evidence admissible under ER 404(b) but asserts that the error was harmless. We agree with the State.

We will not disturb a trial court's ruling under ER 404(b) absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007), *cert. denied*, 128 S. Ct. 2430 (2008). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

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<sup>10</sup> Olsen's defense attorney at trial asserted that this date was a typographical error.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with it. ER 404(b). It may be admissible for other purposes, such as proof of motive, plan, preparation, intent, or identity, but before a trial court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The trial court must conduct this analysis on the record. *State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969 (2004) (citing *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984)), *review denied*, 154 Wn.2d 1002 (2005).

Although Olsen does not specifically identify which bad acts were contained in the phone conversations that he objected to, a review of the phone transcript shows that the following was discussed:

[Olsen]: Oh, I didn't believe he was getting her, but I thought for real, that I mean, the way he was acting was a little bit on the questionable side.

[Frazier]: Do something (inaudible)

[Olsen]: If I'd a done something to that boy that night, I'd a blown that mother fucker's brains out all over that motel room.

[Frazier]: I had the fucking bullets. Hello?

[Olsen]: Check this out. I try, I tried to stab that son-of-a-bitch in the Super 8 Motel room the night before I got arrested.

Ex. 178A at 9.

The transcript of the telephone calls also showed Olsen and Frazier discussing past drug use and plans to use drugs in conjunction with the "job" Frazier was offering Olsen. Here, the trial court erred by failing to conduct the ER 404(b) balancing analysis on the record. But where the trial court fails to conduct an ER 404(b) analysis on the record, the error is harmless unless

the failure to do the balancing, within reasonable probability, materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (citing *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Here, the trial court's failure to conduct a balancing analysis on the record was harmless because the evidence was admissible under the ER 404(b) res gestae exception. Under the res gestae exception to ER 404(b), "evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." *Lillard*, 122 Wn. App. at 432. Unlike most ER 404(b) evidence, res gestae evidence is not evidence of unrelated prior criminal activity but is itself a part of the crime charged. Here, Olsen's telephone conversation with Frazier was evidence of the preparation, intent, and Olsen's motive (to get bail money).

At issue were Olsen's statements in the phone conversation in which the State alleged Frazier recruited Olsen. The conversation took place one day before Olsen was bailed out and Totten murdered; it appears that Olsen was boasting about his past criminal activity to induce Frazier to bail him out and let him work on a "job" for her and Sublett. Under the State's theory of the case, the "job" being discussed involved the robbery or burglary of Totten. The conversation thus constituted planning evidence relevant to establish an essential element of the State's case. "ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

Under the State's theory of the case, Olsen agreed to participate in a "job" to rob or burglarize Totten in order to get Frazier to bail him out of jail; Olsen's specific statement that he tried to stab someone the night before he was arrested was admissible to rebut his defense that he believed Frazier was offering him a legitimate construction job. *See, e.g., United States v. Keeper*, 977 F.2d 1238, 1241 (8th Cir. 1992) (evidence of two earlier searches that revealed cocaine relevant to rebut Keeper's defenses he did not possess or intend to distribute cocaine found in bedroom of his residence and that police had targeted wrong person); *State v. Wilson*, 60 Wn. App. 887, 891, 808 P.2d 754 (evidence of defendant's alleged prior assaults on victim admissible not only to explain victim's delay in reporting sexual abuse but also to rebut implication that molestation did not occur), *review denied*, 117 Wn.2d 1010 (1991).

Additionally, any reference to Olsen's drug use did not, within a reasonable probability, materially affect the outcome of the trial because Olsen admitted to his extensive drug use in his interviews to police as well as in his testimony at trial. Accordingly, we hold that the trial court's failure to conduct an ER 404(b) analysis on the record was harmless error.

E. DUE PROCESS RIGHT TO PRESENT A DEFENSE

Last, Olsen asserts that the trial court violated his due process right to present a defense by excluding portions of the proffered testimony of Totten's former neighbor, Rayan. The State responds that the trial court properly excluded portions of Rayan's testimony because they were not relevant and were inadmissible hearsay. We agree with the State.

A criminal defendant has a constitutional right to present relevant, admissible evidence in his defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). The United States Supreme Court has stated, "Just as an accused has the right to confront the prosecution's witnesses for the purpose of

challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). But the right of a criminal defendant to present evidence is not unfettered and the refusal to admit evidence lies largely within the sound discretion of the trial court. *Rehak*, 67 Wn. App. at 162. We review a trial court’s decision to admit or refuse evidence under an abuse of discretion standard. *Powell*, 126 Wn.2d at 258. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Powell*, 126 Wn.2d at 258.

Here, the trial court allowed Rayan to testify regarding Totten asking him for advice on obtaining a restraining order but did not allow him to testify that Totten sought the restraining order against Frazier because he suspected she had been stealing from him. Olsen asserts that this evidence was admissible under the state of mind hearsay exception to show the plan to evict Frazier from his property and, thus, was relevant to show Frazier’s plan to murder Totten. ER 803(a)(3).

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. ER 401. ER 402 provides, “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.” Here, Totten’s plan to evict Frazier was not relevant to any fact of consequence because, absent evidence that he had communicated his intention to Frazier, it does not provide any motive for Frazier to murder him and, thus, does not support the defense’s theory that Frazier and Sublett had murdered Totten before Olsen participated in the robbery. Moreover,

even if Totten's state of mind were relevant, statements discussing the conduct of another person that may have created the declarant's state of mind are inadmissible under ER 803(a)(3). *State v. Parr*, 93 Wn.2d 95, 104, 606 P.2d 263 (1980). Thus, under the state of mind hearsay exception, Totten's statements regarding his suspicions that Frazier had been stealing from him were not admissible. Accordingly, the trial court did not err by excluding portions of Rayan's testimony that were not relevant and it did not violate Olsen's due process right to present a defense.

#### SUBLETT'S SAG

In his SAG, Sublett presents a number of arguments that we cannot address in his direct appeal because they require examination of matters outside the record. For instance, Sublett asserts that the trial court erred by refusing to admit a January 25, 2007 and January 27, 2007 phone conversation between Olsen and Frazier while Olsen was incarcerated on an unrelated charge. But the content of these conversations was not made part of the trial record. For this same reason, we cannot address Sublett's claims that (1) his attorney did not allow him to testify, (2) that his attorney was ineffective for failing to admit a signed statement by Olsen's cellmate that implicated Olsen in Totten's murder, and (3) that the prosecutor committed misconduct at closing by showing the jury the defendants' photos with the word "guilty" superimposed over their faces.

Sublett also contends that we should reverse his conviction because the State failed to inform his defense counsel about Berchtold, which Sublett claims was a "potential critical witness." SAG at 1. To the extent that Sublett is arguing that the State committed a *Brady* violation by suppressing exculpatory evidence, his claim lacks merit.

In *Brady v. Maryland*, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that a prosecutor's suppression of an accomplice's confession

to murder violated the defendant's due process rights under the Fourteenth Amendment. In holding that the prosecution deprived the defendant of due process, the Supreme Court announced the rule that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

There are three components to a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material, meaning that the evidence must have resulted in prejudice to the accused. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Prejudice occurs "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). Prejudice is determined by analyzing the evidence withheld in light of the entire record. *In re Pers. Restraint of Sherwood*, 118 Wn. App. 267, 270, 76 P.3d 269 (2003) (citing *Benn v. Lambert*, 283 F.3d 1040, 1053 (9th Cir.), *cert denied*, 537 U.S. 942 (2002)). "A *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information' at issue." *In re Benn*, 134 Wn.2d at 916 (quoting *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994)).

As we noted above, Berchtold's affidavit indicates that had the defense called her as a witness, she would have testified that Frazier had told her that she and Sublett were planning to kill Totten. Because this purported evidence implicates Sublett in the premeditated murder of

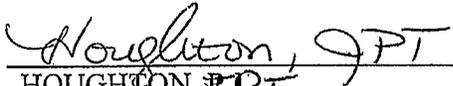
Consol. Nos. 38034-0-II / 38104-4-II

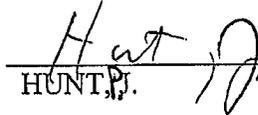
Totten, it is not favorable to his defense. Thus, even assuming that he can demonstrate the remaining *Brady* violation components, his claim fails.

Affirmed.

  
\_\_\_\_\_  
QUINN-BRINTNALL, J.

We concur:

  
\_\_\_\_\_  
HOUGHTON, J.P.T.

  
\_\_\_\_\_  
HUNT, J.

**APPENDIX B:**  
**Order on Motion for Reconsideration**

FILED  
COURT OF APPEALS  
DIVISION II

10 JUN 20 11:22

BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,  
Respondent,

v.

MICHAEL LYNN SUBLETT,  
Appellant.

No. 38034-0-II

Consolidated with No. 38104-4-II

STATE OF WASHINGTON,  
Respondent,

v.

CHRISTOPHER LEE OLSEN,  
Appellant.

**ORDER GRANTING MOTION FOR  
RECONSIDERATION AND AMENDING  
OPINION**

This matter having come before this court on appellant Christopher Lee Olsen's motion for reconsideration of the published opinion filed May 18, 2010, and the court having considered the motion, the files, and the record herein, the motion for reconsideration is granted and the opinion is amended as follows:

A new paragraph is added after the last full paragraph on page 25 of the opinion. The new paragraph shall state,

Olsen also contends that his counsel was ineffective for failing to request an instruction on the inferior degree offense of second degree murder. We disagree. Olsen did not claim that he intentionally killed Totten but did not premeditate the killing and no other evidence supports such analysis. Olsen denied any participation in Totten's murder and asserted as a defense his negligent or reckless failure to provide medical

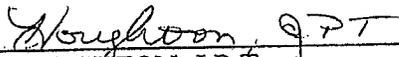
aid. Accordingly, the evidence did not support a second degree murder instruction and Olsen's defense counsel was not ineffective for failing to request it. *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (jury instruction on inferior degree offense not warranted unless there is evidence that defendant committed only the inferior offense).

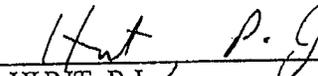
IT IS SO ORDERED.

DATED this 29<sup>TH</sup> day of JUNE, 2010.

  
\_\_\_\_\_  
QUINN-BRINTNALL, J.

We concur:

  
\_\_\_\_\_  
HOUGHTON, J.P.T.

  
\_\_\_\_\_  
HUNT, P.J.

**APPENDIX C:**  
**Jury Question and Court's Response**

FILED  
SUPERIOR COURT  
THURSTON

'08 JUN 18 P 4:58

BY \_\_\_\_\_ DEPUTY

Copy Received

Clerk's Stamp

SUPERIOR COURT OF WASHINGTON  
IN AND FOR THURSTON COUNTY

State of Washington Plaintiff,  
vs.  
Michael Lynn Sablett and  
Christopher Lee Dean Defendant.

No. 07-1-003120 +  
07-1-013630  
QUESTION FROM  
JURY

Question: Clarification of Instruction 21. The structuring of the 2nd sentence in the 1st paragraph is unclear. Which of the following is correct for intent? A person (X) is legally accountable for the conduct of another person (Y) when he or she (X) is an accomplice of such other person (Y) in the commission of the crime. -OR- A person (X) is legally accountable for the conduct of another person (Y) when he or she (Y) is an accomplice of such other person (X) in the commission of the crime.

----- DO NOT WRITE BELOW THIS LINE -----

Date: 6/18/07 Time: 12:05 pm

Plaintiff: \_\_\_\_\_ Defendant: \_\_\_\_\_

Court Action: I can not answer your question please re-read your instructions. Judge Tomeray  
W. J. ...

**APPENDIX D:**  
**Court's Instructions to the Jury**  
**Nos. 11, 15, and 21**

INSTRUCTION NO. 11

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person.

A person also commits the crime of murder in the first degree when he or she attempts to commit burglary in the first degree or robbery in the first or second degree, and in the course of and in furtherance of such crime or in immediate flight from such crime he or another participant causes the death of a person other than one of the participants.

INSTRUCTION NO. 15

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

(ALTERNATIVE A)

- (1) That on or about January 29, 2007, the defendant and/or an accomplice caused the death of Jerry Totten;
- (2) That the defendant or an accomplice acted with intent to cause the death of Jerry Totten;
- (3) That the intent to cause the death was premeditated;
- (4) That Jerry Totten died as a result of the defendant's and/or an accomplice's acts; and
- (5) That the acts occurred in the State of Washington.

- OR -

(ALTERNATIVE B)

- (1) That on or about January 29, 2007, Jerry Totten was killed;
- (2) That the defendant or an accomplice was committing or attempting to commit the crime of burglary in the first degree or robbery in the first or second degree;
- (3) That the defendant, or another participant, caused the death of Jerry Totten in the course of or in furtherance of such crime or in immediate flight from such crime;
- (4) That Jerry Totten was not a participant in the crime; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of the elements in Alternative A or each of the elements in Alternative B has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. All of the elements of only one alternative need be proved. You must unanimously agree as to which one or more of the alternatives, A or B, has been proved beyond a reasonable doubt.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of the elements in Alternative A, or as to any one of the elements in Alternative B, then it will be your duty to return a verdict of not guilty on that alternative.

INSTRUCTION NO. 21

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.