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State of Washington

No. 96345-2
(consolidated with No. 96344-4
NO. 74519-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BIENHOFF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglass A. North, Judge

BRIEF OF APPELLANT

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INTRODUCTION

This case involves the shooting death of Precious Reed during a drug deal gone bad, charged as a first-degree felony murder predicated on robbery. Michael Bienhoff and his codefendant Karl Pierce admitted participating in the drug deal but denied any intent to rob. The issue at trial was who pulled the gun, Bienhoff or Reed? If it was Bienhoff, he is guilty. If it was Reed, Bienhoff is not guilty. The State claimed it was Bienhoff, theorizing he had no drugs to sell, intending only to rob Reed. The defense claimed it was Reed who tried to rob Bienhoff after he refused to “front” Reed the drugs. Numerous errors warrant a new trial.

A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding relevant defense evidence.
2. The trial court erred by not instructing on excusable homicide.
3. The trial court erred by informing the jury the death penalty was not a punishment option if they convicted Bienhoff.
4. The trial court erred by commenting on the evidence.
5. The trial court violated the appearance of fairness doctrine.
6. The trial court failed to properly instruct the jury on how to deliberate.

7. The trial court failed to ensure the alternate juror ultimately seated was still qualified to serve.

8. Cumulative error deprived Bienhoff of a fair trial.

Issues pertaining to assignments of error

1. Did the trial court deprive Bienhoff of his right to present a defense by: (a) refusing to admit evidence showing Reed had robbed before and had a financial motive to rob Bienhoff; and/or (b) refusing to admit evidence of Demetrius Bibb's (Reed's companion) past ownership of guns of the same caliber discharged at the incident?

2. Did the trial court err in refusing to instruct the jury on excusable homicide when there was evidence Bienhoff was acting in lawful self-defense and that Reed's death was an accident?

3. Did the trial court deny Bienhoff a fair trial by informing the jury the he would not face the death penalty if convicted?

4. Did the trial court comment on the evidence in violation of Wash. Const. article 4, § 16, when it instructed the jury certain conversation had in fact occurred when whether they had was a significantly disputed factual issue at trial?

5. Did the trial court violate the appearance of fairness doctrine when it revealed it considered a threat less concerning coming from a "some white guy like me" as opposed to "somebody who's

actually, you know, more likely to be a gangster,” thereby revealing racial bias?

6. Was Bienhoff deprived of his constitutional right to unanimous jury verdict where the court failed to instruct that all deliberations must always involve all jurors, and was this error structural, such that reversal is required even without a showing of actual prejudice?

7. In replacing a juror with an alternate juror, did the trial court’s failure to ensure the alternate was still fit to serve deprive Bienhoff of his constitutional right to a fair and impartial jury?

8. Did cumulative error deprive Bienhoff of a fair trial?

Potential Issue Presented¹

In the event Bienhoff does not substantially prevail on appeal, should this Court exercise its discretion to deny a State's motion for costs?

B. STATEMENT OF THE CASE

1. Procedural History

In March 2012, the King County Prosecutor charged Bienhoff with the second-degree felony murder of Reed, alleging Reed died during an assault by Bienhoff. CP 1-6. In August 2012, the prosecution added three co-defendants; Scott Barnes, Ramon Lyons and Karl Pierce. CP 7-24. In September 2015, the prosecution amended the charge to first degree

¹ The second argument presented herein pertains to the potential for the assessment of the costs of the appeal under RCW 10.73.160 and RAP 14.4.

felony murder predicated on first degree robbery, with a deadly weapon allegation, and eliminated Barnes and Lyons as co-defendants, who had pled guilty to lesser charges in exchange for their testimony at the Pierce/Bienhoff trial. CP 411-12; 1RP 2155-56², 2235; 1RP 2610³.

Bienhoff and Pierce were tried by a jury before the Honorable Douglass A. North, September 14, 2015, through November 4, 2015, and convicted as charged. CP 475-76; 1RP-5RP⁴. Both appeal, but the cases are not consolidated. CP 508-18; State v. Pierce, COA No. 74363-5-I.

2. Substantive Facts

Many witnesses at trial were directly involved with the incident resulting in Reed's death, including Bienhoff, Pierce, Lyons, Barnes and Demetrius Bibb (Reeds companion at the incident). There were also several testifying eye witnesses. Each gave slightly different accounts of what occurred, as set forth below.

² Barnes pled guilty to first-degree robbery and received 41-month sentence.

³ Lyons pleaded guilty to first-degree manslaughter and received a standard range sentence between 102 months to 136 months.

⁴ There are 33 volumes of verbatim report of proceedings referenced as follows: **1RP** – 25-volume consecutively paginated set for the dates of September 14-15, 21-24, 28-30, 2015, October 1, 5, 8, 12-14, 15 (p.m.), 19-21, 27-29, 2015 and November 2 & 4, 2015; **2RP** – October 6, 2015; **3RP** – October 7, 2015; **4RP** – two-volume consecutively paginated set for the dates of October 15 (a.m.), 2015 and October 26 (p.m.), 2015; **5RP** – October 26 (a.m.), 2015; **6RP** – November 17, 2015; **7RP**- December 1, 2015; and **8RP** – December 3, 2015 (sentencing).

(a) *Bienhoff's testimony*

At trial, Bienhoff was 37 years old. 1RP 3441. He met Reed in 1996. 1RP 3346. They became friends, each selling marijuana to the other. 1RP 3347-48. They grew apart, but reconnected in December 2011, when Reed called "Cedric," a mutual friend who Bienhoff supplied marijuana to at a discount. 1RP 3349-50. Thereafter they talked at least weekly. 1RP 3352-53. Sometime in mid-February 2011, Reed asked Bienhoff to sell him marijuana at the price he gave Cedric. 1RP 3353. A couple of days before the incident Reed informed Bienhoff he wanted to purchase "a couple pounds" of marijuana, but needed to raise money. Id.

Bienhoff had no marijuana, but texted his girlfriend, Chamise Wax; "I need to find a ride later today. Somebody I know, they got big money, thinks I got pounds for sale. This is guaranteed money, anywhere from 25 to 4,000. I need that. We need that." 1RP 3355. Bienhoff's was to be a "middleman," using third-party marijuana to sell Reed. Id.

The next day Bienhoff texted Reed asking if he could complete the transaction that day, but got no response. 1RP 3359, 3426. The next morning, February 20, 2012, Bienhoff called Reed, who still wanted the marijuana, but needed more time to raise money for the two pounds Bienhoff agreed to sell for him \$2200 per pound. 1RP 3359-60, 3426-28.

Bienhoff got marijuana for \$1800 a pound. 1RP 3428. After Reed confirmed he wanted to make the purchase, Bienhoff contacted his supplier, "Vlady," who told Bienhoff to make sure it was a sure thing, apparently not wanting another failed deal as had happened with Bienhoff in the past. 1RP 3430, 3485.

Bienhoff got 2.5 pounds of marijuana from Vlady separated into three ziplock freezer bags, two one-pound bags and one half-pound bag. 1RP 3431-32, 3509. Bienhoff got the marijuana from Vlady near the Jack-in-the-Box restaurant at 85th & Aurora, and then made his way to the Bitter Lake community, where he met up with Ramon Lyons, who lived in the area, and Scott Barnes, who had agreed to give Bienhoff a ride. 1RP 3431-33.

Lyons was dropped off at his house and Bienhoff and Barnes headed towards the meeting with Reed at a park near Green Lake. 1RP 3433-34. On the way, however, Reed called wanting to change plans, suggesting he pick up Bienhoff and complete the sale in the Central District where Reed had family. 1RP 3434. Bienhoff declined both that and Reed's later suggestion they go to the "U District." Id. Bienhoff and Barnes returned to Lyons' house, where Bienhoff asked Lyons to accompany him to the transaction as "insurance," fearing Reed might be up to no good with his attempt to change the meeting place. 1RP 3434-35.

Lyons agreed, but first wanted a ride for something, to which Barnes agreed. Id. Lyons was let out a few blocks from his house, and returned a few minutes later with Karl Pierce, who Bienhoff had never met. Id. After Lyons introduced them, Bienhoff noted they needed another bag, which Pierce agreed to supply and did. 1RP 3436. Bienhoff placed the half-pound of marijuana he planned to keep in one pack and the two pounds he was selling in the other. 1RP 3437, 3493-94.

After picking up Pierce, they returned to Lyons' house, where both Lyons and Pierce got out, returning several minutes later, and from there they headed to Green Lake, stopping at a store along the way. 1RP 3438-39. Despite contrary testimony by Lyons, Bienhoff denied ever asking Lyons for a weapon. 1RP 2539-41, 3435, 3438-39. Bienhoff also denied being aware that both Lyons and Pierce were armed with guns. 1RP 3444. Bienhoff denied discussing a robbery with them. 1RP 3448.

Once they reached Green Lake, they ended up in the parking lot where the incident occurred. 1RP 3440-41. Bienhoff later had Barnes move his car to a lower lot, explaining Reed was only expecting Bienhoff, and he did not want to scared him off by seeing Pierce, Lyons or Barnes. 1RP 3442-43. Before Barnes moved the car, Bienhoff removed the pack containing the two pounds of marijuana and hid it in bushes. 1RP 3443. Bienhoff asked Lyons to remain out of sight but within earshot in case

anything went wrong. 1RP 3443-44. Bienhoff did not ask Pierce to do anything specific, assuming he and Lyons were together. 1RP 3444.

When Reed notified Bienhoff he was close to the park, Bienhoff informed Lyons and told him to be patient, and that he would complete the transaction and then they could leave. 1RP 3444. As Reed got closer, he and Bienhoff spoke over the phone until Reed saw Bienhoff and pulled into the lot, followed by a white Cadillac. 1RP 3446-47.

Reed drove a “gray van,” and it and the white Cadillac parked about seven to eight spaces away. 1RP 3446, 3449. Reed got out of the van and as he and Bienhoff greeted, the Cadillac driver approached. 1RP 3450. When Bienhoff asked who he was, Reed introduced him as “My boy.” Id. Bienhoff turned to Reed’s “boy” and introduced himself as, “Casper.” Reed’s “boy” said he was “Goldie” (a.k.a. “Demetrius Bibb,” 1RP 1610, 1631), and then said nothing else. 1RP 3450.

When Reed asked where the marijuana was, Bienhoff told him he had stashed it in some nearby bushes. 1RP 3450-51. Reed and Bibb needed to urinate, so Bienhoff recovered the marijuana while they did. Id. All three then returned to the parking lot. Bibb got in his Cadillac, Bienhoff got in the front passenger seat of Reed’s van, Reed got in the driver’s seat. 1RP 3451-52, 3525.

After Bienhoff showed Reed the marijuana, Reed informed him he did not have all the money, having only about “half of the half he was originally supposed to bring.”⁵ 1RP 3452. Reed asked Bienhoff to accept what he had in exchange for the marijuana, with a promise to pay the balance in the future. 1RP 3452-53, 3524-25. Bienhoff refused, explaining the marijuana was not his to front. 1RP 3453-54, 3525.

As Bienhoff started to leave he saw Bibb out of his car walking towards Reed’s van. At about the same time he saw Reed reaching quickly to his left with his right hand for something – initially Bienhoff thought Reed was getting his money out – but then saw the butt of a gun. 1RP 3454-55, 3525-26. Fearing the gun was meant to be used against him, Bienhoff grabbed Reed’s hands, which led to a struggle over the gun, a large revolver (approximately a 10-inch barrel), and despite both pleading not to pull the trigger, the gun discharged into Reed’s shoulder, with the bullet logging in his brain and leading to his death. 1RP 3042-43, 3050-51, 3455, 3470, 3523, 3527-29.

Temporarily deafened by the shot, Bienhoff released his grip on the gun, grabbed the marijuana and ran towards Barnes’s car, passing Lyons or Pierce on the way. 1RP 3456, 3530. As Bienhoff ran, he saw

⁵ Undersigned counsel assumes Bienhoff meant Reed only brought about a quarter of the \$4400 purchase price, *i.e.*, approximately \$1100, which is about how much was found on Reed’s person by the first responders to the incident. 1RP 1142.

Bibb between the van and his car trying to figure out what to do. 1RP 3457. Bienhoff did not see if Bibb had a gun or fired any shots. Id.

Once Bienhoff, Lyons and Pierce were back in Barnes' car they left the park. 1RP 3458-59. As they drove, Bienhoff removed clothes fearing he had been seen involved gun fire. 1RP 3459. Bienhoff also put all the marijuana in one pack and stuffed his discarded clothes into the other. 1RP 3459-60. Bienhoff recalled the only discussion of guns was that was someone had shot at them. 1RP 3460.

Bienhoff had Barnes to pull into the Jack-in-the-Box where he got the marijuana, having seen a guy he could give it to. 1RP 3461. Bienhoff gave away the marijuana and they left. Id. Barnes dropped Bienhoff near Wax's work and took the pack with discarded clothes with him. 1RP 3461-62. Bienhoff eventually ended up at his aunt's home, where he disposed of the pack of clothes in a dumpster and then went to another relative's home in Tacoma. 1RP 3462-63.

Bienhoff was arrested about a week later. 1RP 3463. He admitted giving an untruthful statement denying any involvement, and later claiming he was the only one involved, purposefully omitting the participation of Lyons, Barnes and Pierce. 1RP 3464-65. Bienhoff explained he was responsible for the transaction, so he was compelled not to get them involved. 1RP 3465.

Bienhoff was questioned about his relationships with other witnesses, including Barnes and Lyons. Bienhoff agreed there was tension between he and Barnes because Barnes was attracted to Wax. 1RP 3476. Bienhoff noted, however, that Wax and her girlfriends would keep Barnes “battered up so they can get what they want from him.” 1RP 3477. Bienhoff and Barnes did not get along. 1RP 3513.

Bienhoff met Lyons through Hiram Warrington, who was living below the mother of Bienhoff’s son when Bienhoff and her briefly rekindled their relationship in 2011. 1RP 3419. After Bienhoff and her had falling out after Thanksgiving 2011, Warrington took Bienhoff to Lyons’ house, who lived nearby and introduced them, and thereafter the three of them would get high together. 1RP 3420. Warrington allowed Bienhoff to live with him and his wife and kids for the month of December 2011, but they had a falling out when Bienhoff learned Warrington failed to protect Bienhoff’s son. 1RP 3421-22. This also led to conflict between the Warringtons and Lyons. Id.

Bienhoff met Wax through Lyons when she lived with him. 1RP 3476. Prior to Christmas 2011, Wax and the Lyons had a falling out, due at least in part to money Wax owed, so Wax moved out. 1RP 3425. Thereafter, Lyons’ wife Pam would not welcome Bienhoff or Wax into their home. 1RP 3425-26. Pam blocked Lyons’ cell phone from

accepting calls from Bienhoff or Wax. 1RP 3426. Bienhoff and Lyons remained acquaintances, but did not meet at his home. 1RP 3514.

Bienhoff also recalled he and Lyons having a misunderstanding at some point about rumors Bienhoff wanting to harm him. 1RP 3514-15. Bienhoff thought they resolved it, but was not sure when. 1RP 3415-16.

(b) *Pierce's testimony*

Pierce was arrested in July 2012, and initially denied any involvement, claiming he had an alibi. 1RP 1981, 1983-86, 3219, 3286. In April 2015, however, Pierce admitted his involvement and eventually testified he was armed at the park, but fired no shots. 1RP 3216, 3218, 3221, 3285; 4RP 45.

Pierce had known Lyons for years, and considered him family. 1RP 3223. Pierce met Barnes only once before at a barbecue hosted by Lyons. 1RP 3223-24. Pierce recalled admonishing Barnes for using drugs in Lyons' front yard, which could jeopardize their housing. 1RP 3224, 3291. Pierce took the drugs from Barnes, at which point Lyons asked Pierce to leave. 1RP 3225. Pierce admitted later assaulting Barnes in jail, claiming he did so because Barnes was lying about what happened. Id.

Pierce met Warrington about a month before the incident. 1RP 3229. He denied ever meeting Reed or Bibb. 1RP 3230.

On the day of the incident, Lyons came by and asked Pierce if he could help with a “weed deal” and “make 50 bucks real quick.” 1RP 3233-34, 3293. Assuming it would occur locally and only for an ounce or two of marijuana, Pierce agreed and went outside with Lyons. 1RP 3234, 3241. Once outside, however, he saw Barnes parked in his car with another person and he realized Lyons had not been clear about what he wanted Pierce to do. 1RP 3234-35. After they were in the car, someone asked Pierce if he could supply a bag. 1RP 3236. Pierce agreed, and retrieved a backpack from his apartment and returned. 1RP 3237. They then drove to Lyons’ house. 1RP 3239. On the way, Pierce learned the “weed deal” was for more and an ounce or two when he saw Bienhoff transferring bags of marijuana between the two backpacks and he could smell its pungent aroma. 1RP 3241-42, 3298-99.

Once at Lyons, Pierce and Lyons got out and Lyons went inside for about 10 minutes. 1RP 3239-40. Pierce stood outside because he did not trust Barnes, and did not know Bienhoff, although he was aware of his ongoing dispute with Lyons. 1RP 3240, 3289. When Lyons returned, both got back in the car and they drove towards Green Lake, eventually stopping at a 76 station where Bienhoff got out to talk on the phone and Barnes went in the store. 1RP 3243-45. With Bienhoff and Barnes out of the car, Lyons handed Pierce a gun and advised him to “watch out for the

big white guy,” meaning Bienhoff. 1RP 3244-46, 3301. Pierce recalled it was a “small chrome gun” that he did not think was .45 caliber. 1RP 3247, 3285. Pierce saw no other guns, and heard no other discussion about guns that day. 1RP 3247, 3300, 3302. Once at the park, Lyons told Pierce to “back up the big white boy” because he “don’t want to get robbed.” 1RP 3250.

Pierce found a vantage point over the parking lot where he could see Reed’s van and Bibb’s Cadillac. 1RP 3252-58. Lyons location was unknown. 1RP 3258. Pierce noted both Bibb and Reed were “[b]ig” and “black,” with one Bienhoff’s size, and the other a little shorter. 1RP 3259.

Pierce watched Bibb and Reed headed towards some nearby bathrooms and stop to urinate. 1RP 3258-59. Pierce could not see Bienhoff, but assumed he was retrieving the marijuana. 1RP 3259. When Bibb and Reed headed back towards their cars, Pierce moved closer to the parking lot until he could see Bienhoff standing by Reed’s van. 1RP 3259-61. Pierce saw Bibb get into his car. 1RP 3260.

Pierce stayed put for about two minutes, until he saw the van start to rock. Assuming there was a struggle, he quickly made his way there. 1RP 3262-63. As he approached, the front passenger door flew open, Bienhoff jump out and ran past Pierce announcing they had tried to rob

him. 1RP 3264. When Pierced looked towards the van, he saw “a big black guy coming around the front, and then I hear a boom.” 1RP 3265.

Pierce was being shot at, so he turned and ran back towards Barnes’ car, never pulling his gun. 1RP 3265-67. Pierce met up with Bienhoff and they made their way to Barnes’s car, got in and told Barnes to go. 1RP 3267-68. Pierce commented to the others, “Man, I think the guy in the white Cadillac just lit us up.” 1RP 3268.

Pierce was concerned when they stopped at the Jack-in-the-Box, fearing the shooter was still after them. 1RP 3271-72. Bienhoff talked to someone briefly before they left. 1RP 3272.

Pierce did not recall Bienhoff taking a backpack with him when he got out, but he was unsure what happened to either pack. 1RP 3273-74. He recalled Bienhoff removing clothes and putting them into one of them. 1RP 3274. Pierce also recalled leaving the gun he had on the floor of Barnes’ car. 1RP 3275. After Bienhoff got out they went to Lyons, where both Pierce and Lyons got out and Pierce walked home. 1RP 3276.

Pierce learned someone had been shot watching the news that night. 1RP 3277. Fearing retaliation, Pierce hid out at a friend’s for about a month. 1RP 3279-81. Pierce denied he and Lyons discussed the incident at Lyons’ house on February 22, 2012. Pierce denied being at Lyons’ that day. 1RP 3281. Pierce also denied reports he disposed of or

destroyed the gun or any of the cell phones linked to the incident. 1RP 3281-83. Pierce denied supplying the guns or any intent to rob. 4RP 59.

(c) *Lyons' testimony*

In return for a promise to testify, 38-year old Ramon Lyons pleaded guilty to first degree manslaughter. 1RP 2511, 2612-16. Lyons has mental health issues for which he is medicated, and has lived with his girlfriend "Pam" since 2003, with whom he has children. 1RP 2511, 2609. They live near the Bitter Lake Community Center. 1RP 2516-17.

Lyons knew Bienhoff in 2012, and was aware he was dating Wax, who Lyons had known since about 2004, and who lived with him and his family for 4-5 months. 1RP 2512, 2515. Lyons knew Wax was also surreptitiously involved with Scott Barnes, who he met in late 2011 and who would often visit when Wax lived with Lyons. 1RP 2513-15, 2607.

Months before Reed's death, Lyons heard rumors Bienhoff was after him because of how he treated Pam and Wax. 1RP 2518-20. Lyons said he then ended all communications with Bienhoff. 1RP 2520.

Lyons had known Pierce for about 10 years. 1RP 2516. Pierce was staying with a friend in February 2012, near Lyons. 1RP 2518.

Lyons recalled Bienhoff contacting him unexpectedly the morning of February 20, 2012, asking for help contacting Barnes for a ride. 1RP 2521-22. Lyons said Bienhoff acknowledged Wax owed Lyons money,

and offered to “take care of it.” 1RP 2522. Lyons said Bienhoff never said why he needed the ride. 1RP 2522. Bienhoff did, however, tell Lyons he thought Barnes was ignoring his calls because he was jealous about Wax. 1RP 2523.

Lyons called Barnes and told him he needed a ride, to which Barnes agreed. 1RP 2524-27. Lyons was in his bedroom smoking marijuana and “perc 30s” when Barnes arrived. 1RP 2527. Lyons shared marijuana with Barnes. 1RP 2620. Barnes also smoked his own marijuana. 1RP 2620-21.

Bienhoff eventually called and told Lyons he was waiting at the Bitter Lake Community Center, so Lyons and Barnes picked him up. 1RP 2527-28, 2621-22. Once together, Lyons confronted Bienhoff about the rumors, who denied any ill intentions towards Lyons. 1RP 2529. Lyons said Bienhoff called Wax, put her on speaker phone, and got her to admit it was she who started the rumor. 1RP 2530. Lyons considered the matter resolved. 1RP 2531.

Lyons eventually left Barnes and Bienhoff in the car and walked home, where he got high again on Percocet and marijuana and was listening to music when 20 minutes later Barnes and Bienhoff unexpectedly returned. 1RP 2532-33, 2624-26.

Lyons said he became “skeptical” of the entire enterprise at that point, which inspired him to contact Pierce, but was unable to connect by phone. 1RP 2534-35, 2627-28. Lyons wanted Pierce to join in out of concern about what Bienhoff and Barnes were up to and he did not know either of them well. 1RP 2535-36, 2627-28. He had Barnes drive him to where Pierce was staying. 1RP 2536-37, 2629.

When they arrived, Lyons left Bienhoff and Barnes in the car while he contacted Pierce, asking him without explanation to go with him, to which Pierce agreed, put on some shoes and went to Barnes’ car. 1RP 2538-39, 2629-30. Lyons claims Pierce brought a pack with him, rather than returning later as other had testified. 1RP 2630-31, 2673. After Pierce joined the group, all four drove back to Lyons’ home, and along the way Bienhoff allegedly told Lyons he did not feel safe and asked, “[H]ey, can I borrow one of your things.” 1RP 2539-41, 2674-75. Lyons testified “things” means guns. 1RP 2540.

When Lyons got out at his house, Barnes, Bienhoff and Pierce drove away. 1RP 2542. Lyons went inside and selected two hand guns, “[o]ne was a .45, and another one was a revolver.” 1RP 2543. The .45 was “Grayish chrome-ish” and loaded. 1RP 2544. Lyons could not recall the caliber of the revolver, but said it was also chrome-colored and loaded. 1RP 2545-46.

Lyons put the guns in his waistband after Barnes, Bienhoff and Pierce returned, and then debated whether to just give them the guns or ride along. 1RP 2546. He did not want to lose the guns because they were borrowed, and the other three seemed to be getting along, so he decided to go. 1RP 2546-47. They stopped at a 76 station on the way, where Barnes bought cigarettes and a drink. 1RP 2548, 2638-39. Before they got there, however, Lyons gave the revolver to Bienhoff by sliding it across the back seat to him, despite his skepticism about what Bienhoff was up to. 1RP 2548-50, 2554, 2639-40. Lyons claimed he still had no idea what they were up to. 1RP 2551-52. Only after they left the 76 station was it revealed they were going to a meeting near Green Lake. 1RP 2552. That is when Lyons passed the .45 caliber gun to Pierce. 1RP 2640-41. Lyons said he “slipped it to him” without explanation, leaving himself unarmed. 1RP 2553-55. Once at the park, they spent the next 60-90 minutes milling about, talking on phones and smoking. 1RP 2556-57, 2646.

Lyons recalled Bienhoff directing Barnes to move his car out of sight to a lower lot. 1RP 2557-60. Bienhoff had removed the backpack and stashed it in some bushes. 1RP 2561. Then they “all scattered up,” with Barnes in the lower lot and Lyons headed towards the lake to wait for the meeting to occur. 1RP 2562, 2565.

Lyons got impatient, so he headed towards the upper lot until he heard gunfire. 1RP 2565-66. Lyons “hit the ground.” 1RP 2566-67, 2582, 2648-49. When he got up, he saw Pierce running towards the parking lot without a gun in his hands, and then heard more gunfire, so he turned and ran to Barnes’s car. 1RP 2567-70, 2583, 2650-51. Lyons heard tires squeal after the gun fire ended. 1RP 2651. Bienhoff and Pierce arrived at the car moments later with a backpack. 1RP 2571-72, 2585-86, 2652.

As they drove away Lyons recalled Pierce saying something about a “white car” and “lit up” or “light up,” but could not recall exactly what, and Bienhoff was “crying frantically” and said something to the effect of “he tried to rob me” and having to leave town. 1RP 2573-76, 2586-87, 2589, 2590-91, 2653-54. Bienhoff was shedding clothes and putting them in a pack. 1RP 2590-91. Lyons did not see any guns once in the car. 1RP 2588. Lyons recalled Bienhoff being the first to get out, somewhere near Ballard. 1RP 2591-92. Lyons could not recall if Bienhoff took a backpack with him. 1RP 2592, 2655. Bienhoff said nothing about the revolver, and Lyons did not ask for it back. 1RP 2592. Lyons could not recall a discussion about gun disposal. 1RP 2656. Barnes then dropped Lyons off near his home and drove off with Pierce. 1RP 2594-95. Lyons got high when he got home. 1RP 2656.

Lyons denied Warrington was at his house when he returned, and denied speaking to Warrington about the incident. 1RP 2512, 2659. Lyons also denied claims that he, Pierce and Warrington talked about it on his front porch a few days after it happened. 1RP 2660.

Lyons denied seeing or smelling any marijuana during the incident, although he admitted his sense of smell was compromised from smoked marijuana earlier, and from he and others smoking in the car. 1RP 2597, 2642-43. Lyons never saw any money. 1RP 2598. Lyons admitted he never knew who Bienhoff was meeting, or why. 1RP 2598, 2645. Lyons lied to police after his arrest, denying any involvement. 1RP 2679-80.

(d) ***Bibb's testimony***

31-year old Demetrius Bibb and Reed met five to seven years before he died, and became "pretty good friends." 1RP 1612, 1720. They lived near each other in the Kent area. 1RP 1613.

Bibb repeatedly claimed he could not remember much about the incident because it had occurred so long ago. See e.g. 1RP 1615-16, 1624, 1671-73, 1769, 1775, 1804, 1811, 1814, 1822, 1824-26, 1893-94. Yet when offered his statements to refresh his memories, Bibb declined, "Because I don't need to look at it. I know what happened, and I know what I said, so there ain't no reason for me to sit here and read this and

read anything that – you know, pretty much whatever.” 1RP 1672. Bibb’s claimed, “I have no reason to lie about anything.” 1RP 1889.

Bibb said Reed came by the afternoon of February 20, 2012, to talk about a friend who could provide “a pretty good deal on some bud, some marijuana.” 1RP 1614-15, 1619, 1671, 1723. Bibb could not recall the price Reed quoted, but thought it was for about two pounds. 1RP 1615-17, 1775. Bibb agreed to split it with Reed. 1RP 1616, 1620. He thought his share was about \$1,000. 1RP 1724.

Bibb knew the sale was to occur somewhere in Seattle, but not who from. 1RP 1620. Bibb stopped at an ATM in Kent before they headed to Seattle to withdraw money for his portion of the purchase. 1RP 1621. Bibb only had some money for his share, but had arranged to borrow \$500 to \$600 dollars from an unnamed woman who brought her ATM card to him to use. 1RP 1673-75, 1724-25, 1775.

After withdrawing money, Reed told Bibb the seller’s ride had left so they needed to head to Seattle. 1RP 1677. Bibb followed Reed’s van in his white Cadillac to a park somewhere in Seattle. 1RP 1622-23. Bibb initially would not explain why they took two cars, claiming he could not recall. 1RP 1622, 1676. When confronted with one of his statements, however, Bibb admitted Reed was “adamant” about taking two cars. 1RP 1679, 1725, 1849-50.

When Bibb was asked whether he thought they were getting any of the marijuana “fronted,” he replied, “No. It wasn’t a front. It wasn’t a front. It was pretty much we had all the cash, and it was just a little bit of a front or whatever. It was supposed to be.” 1RP 1678, see also 1RP 1702 (Bibb claims his statement that seller was fronting them all the marijuana was in error). Bibb later agreed, however, that he and Reed were purchasing two to four pounds of marijuana for \$4,000, with \$2,000 of the purchase price to be paid once they sold some of the marijuana. 1RP 1776-79; 1836-37. Bibb denied having a gun that day, and did not think Reed had one. 1RP 1648, 1667, 1805. Bibb did, however, admit to some gun knowledge, including the difference between revolvers and semi-automatics. 1RP 1805.

Bibb explained they backed their cars in a few parking spaces apart, with Reed parked to Bibb’s right as viewed from his driver’s seat. 1RP 1624-25, 1640, 1680-81, 1730. When they arrived, both had to urinate. 1RP 1626. Before they could, however, they met up with a “[b]ig guy,” about Bibb’s size - who is 6’4”, who appeared to be of mixed ethnicity. 1RP 1628-29. The “guy” did not have a backpack with him at the time. 1RP 1631.

Bibb would not identify Bienhoff or Pierce as the “guy” they met at the park. 1RP 1630. Nor could Bibb recall what the “guy” was wearing

other than a hat or beanie. Id. Bibb thought the “guy” introduced himself as “Casper,” and he introduced himself as “Goldie.” 1RP 1631, 1838. Then Bibb and Reed went to urinate. 1RP 1632, 1838. Bibb did not know what the “guy” was doing at the time. 1RP 1635.

Bibb claimed that while urinating he saw a person crouched in nearby bushes. 1RP 1635, 1683-84, 1839. As he and Reed headed back to their cars, Bibb advised Reed, “Hey, there’s a nigga behind the building. Something ain’t right. Come on, let’s cut out.” 1RP 1633-34, 1684, 1696, 1839-40. Reed responded that he wanted to “bust a move,” which Bibb claimed meant “to go forward with the deal.” 1RP 1780, 1846-47, 1866-67. Bibb said he would have loaned Reed his \$1,000 if he had wanted it, but he made no such a request. 1RP 1781, 1783, 1874.

As they returned to their cars they met up with the “guy” again, who now had a backpack. 1RP 1635, 1683. Reed confronted the “guy” about the person crouched in the bushes, but he just “played stupid.” 1RP 1636, 1684, 1845.

When they got back to the parking lot, Bibb got in his car, started it and then waited. 1RP 1638-39, 1703, 1741-42, 1847. Bibb saw Reed get in the driver’s seat of his van and the “guy” got in the front passenger seat. 1RP 1639-40, 1847.

Bibb kept a watch on Reed, but never got out of his car again. 1RP 1657, 1746. He noticed no unusual activity, no raised voices, no gun shots. 1RP 1658. Bibb claimed nothing of significance happened until some other “guy” ran between the two cars, turned, stood for a moment, and then started shooting at Bibb, causing Bibb’s to duck down, put his car in gear and “kind of like tanked it” and drive away. 1RP 1640-45, 1659, 1705-14, 1746-50, 1760-61, 1786-88. Bibb was not struck by bullets, but claimed he heard and felt them strike the car. 1RP 1646-47, 1762-63. Bibb’s was positive the gun used by the shooter was not chrome colored, but may have been dark or even black. 1RP 1789-90. Bibb claimed he continued to get shot at as he drove away. 1RP 1817.

Bibb recalled that as he made his escape he made a left into a dead end and ended up stalling his car just before he would have struck some poles blocking the roadway. 1RP 1644-45, 1713-15, 1764-67. Bibb restarted the car, drove around the poles and then fled at “a high rate of speed” out of the park to his home without any stops. 1RP 1646-48, 1766.

Once home, Bibb had his wife Brenda try to contact Reed’s wife, Monique Reed, to inform her “that it was pretty much a set up.” 1RP 1649, 1717, 1767-68. He said he first saw the bullet holes in his Cadillac after he got home. 1RP 1650. He learned at some point that evening or early morning that Reed had died. 1RP 1661-62, 1716-17.

Bibb never called police. 1RP 1650, 1716. But the police found him the next day at his house. 1RP 1650-51, 1769. Bibb provided a recorded statement in which he described the shooter as about 5'8" or 5'9" with a slender build, and gave permission for police to confiscate the Cadillac. 1RP 1651-52, 1769-70; 1810-11, 1849; 1828-29, 1849.

Bibb was shown photo montages, from which he tentatively identified both the "guy" who they were supposed to get the marijuana from and the other "guy" who allegedly shot at him, but admitted he was not confident in his selections. 1RP 1652-56, 1718-19.

(e) *Barnes' testimony*

In 2012, then 30-year old Scott Barnes stocked store shelves at night and considered himself a "dependable person" and was often called on by others to provide rides. 1RP 2088-90. Barnes knew Bienhoff through Chamise Wax, with whom he had been intimate in the past but were now just friends. 1RP 2090-91. Barnes said he was uncertain whether Bienhoff and Wax were involved, but thought they may have broken up on Valentine's Day 2012. 1RP 2092.

Barnes knew Lyons through Wax, and would visit Wax at Lyons' home. 1RP 2092-93. Barnes knew Pierce through Lyons, having seen him once at a barbeque, but claimed they had no interaction. 1RP 2064.

Barnes testified that on February 20, 2012, Lyons, Wax and Bienhoff had all been trying to contact him about a ride for Bienhoff. 1RP 2095-2105. Barnes agreed to provide the ride and went to Lyons' house, where he met up with Lyons, his wife Pamela, and Wax. 1RP 2105. Barnes said that when he arrived "[a] piece of weaponry was being cleansed." 1RP 2105-06. Barnes said Lyons was on the front porch "using Clorox and a white wash rag to wipe down a firearm, a handheld pistol." 1RP 2106. Barnes recognized it as a revolver. Id.

Bienhoff showing up after him, and then he, Bienhoff and Lyons left to pick up Pierce. 1RP 2107. While Lyons was getting Pierce, Barnes claims he overheard Bienhoff's phone discussion about a transaction that included a comment about "a square," which Barnes assumed meant him. 1RP 2109. Barnes claims he confronted Bienhoff after the call, called him a "liar" and let him know he was "privy" to Bienhoff lies to whoever he was talking to on the phone. 1RP 2110. Barnes claimed that it was at that point he suspected the plan was to rob whoever Bienhoff talked to of "several hundred dollars' worth of marijuana and pills." 1RP 2214.

When Lyons returned with Pierce, they all discussed the need for another container, so Pierce left and returned with a backpack. 1RP 2111-12, 2214. All four then drove to Green Lake, arriving at about 3:00 p.m.

1RP 2112-13. Barnes insisted that once they picked up Pierce they did not return to Lyons' or make any stops before getting to the park. 1RP 2114.

Once there, Barnes noticed Pierce "had a handgun on his persona, and I observed Lyons handing a revolver that I had seen earlier being cleaned to Mr. Bienhoff." 1RP 2124. Barnes was positive the gun Pierce had was black. 1RP 2124, 2295.

Eventually everyone got out of Barnes' car, started smoking, and then Bienhoff, Lyons and Pierce walked off together, only gesturing later for him to follow. 1RP 2115-18. Barnes said the three others seemed to be "assessing the territories." 1RP 2116. Barnes recalled that at some point Bienhoff removed a backpack from his car, in which he had earlier seen Pierce shuffling clothes "[m]aking room," and stashed it in nearby bushes. 1RP 2134-35, 2153. Barnes admitted he did not know what was in the pack, but it looked full. 1RP 2135, 2153. He said he never saw any marijuana in the pack, never smelled any marijuana, and never saw any of the others with marijuana that day. 1RP 2153-55. Barnes parked his car in a lower lot per Bienhoff's order. 1RP 2120-21.

Thereafter, Barnes remained in his car and played with his phone and texted with Wax. 1RP 2122. In one of those texts, Barnes told Wax, "It bout to go deep." 1RP 2123. When asked what he meant, Barnes explained, "I had a strong suspicion that something very wrong was about

to occur, and I was warning her for her own safety.” Id. When asked to elaborate, Barnes claimed, “I anticipated a robbery gone wrong with firearms involved.” Id. Yet on cross examination Barnes agreed that while at the park he had no expectations for violent incident to occur. 1RP 2182-83, 2201.

After exchanging texts with Wax, the next thing Barnes remembers was hearing five gunshots in “rapid succession.” 1RP 2130. He later told detectives he thought he could hear the shots striking a “metallic object.” Id. After hearing shots, Lyons, Pierce and Bienhoff carrying the backpack, all came running back to the car. 1RP 2131-34. Once they were in, Barnes drove them out of the park. 1RP 2136.

As they drove away Barnes recalls Bienhoff saying he thought he may have “killed him” and that he needed to return to California. 1RP 2137. Barnes claimed Bienhoff also said he may have been shot twice in the arm and neck. 1RP 2321. Pierce allegedly agreed that the guy looked dead because he had “slumped.” 1RP 2138. Pierce allegedly stated, “I was busting at the caddy.” Lyons apparently said, “Nobody say anything, or we’re all screwed.” 1RP 2138. Barnes also claimed Pierce implied he would drill out the gun barrels for “disposal of the weaponry,” an idea Barnes admitted he “picked up from the media.” 1RP 2225-26, 2294.

Barnes did not recall Bienhoff giving a pack to anyone after they fled the park. 1RP 2139. Instead he claimed he dropped Bienhoff off first, “Somewhere within the municipal residency between the lake and Mr. Lyons’ residence.” Id. He then drove to Lyons’ house, where Lyons and Pierce got out, and then went home. Id. Barnes said he learned from Wax within a couple of days that someone had died. 1RP 2141, 2152.

After the incident, Barnes said he severed ties with Bienhoff and Lyons, changed his phone number and traded in his car. RP 2142. Barnes was not contacted by police about the incident until his arrest on July 24, 2012. 1RP 2143; 3RP 147. Despite claiming only “inadvertent” involvement, he pleaded guilty to first degree robbery in exchange for his testimony at the Bienhoff/Pierce trial. 1RP 2155, 2170. Barnes admitted that until his arrest, he was not sure anyone had died, and only learned they had when told by a detective. 1RP 2181. He was upset “somebody got killed over marijuana.” Id.

Barnes agreed that after the incident he obtained information from various sources which he pieced together to come up with what he thought happened. 1RP 2273-74. Barnes also agreed that after his arrest he provided a detective with his conclusions about what happened based upon his piecing together of information. 1RP 2274. Barnes said he presented these conclusions to police with “authority,” as if he knew what

had occurred, when he really did not, because that was what he believed happened. 1RP 2277, 2326-27.

(f) *Cadaret's testimony*

70-year old retired long-haul truck driver Earl Cadaret lives in his 20' RV, which he parks each day in the same parking lot near Green Lake where the incident occurred and was parked there on the afternoon of February 20, 2012, at the south end of the lot. 1RP 1333-36, 1347. Cadaret's RV has a kitchen in the middle on the right side. Above the sink is a three-pane window, approximately 18 by 20 inches, with a screen outside. 1RP 1336-39. Cadaret wears prescription bifocals, suffers from some high frequency hearing loss, and is a recovering alcoholic. 1RP 1343, 1417.

On February 20, 2012, Cadaret had backed his RV into a space in a manner that gave a view through the kitchen window of the rest of the lot as it gently slopes down away to the north. 1RP 1344, 1346-48. Cadaret recalled waking up from a nap at about 4:30 p.m. 1RP 1341-43. He looked out the kitchen window without his glasses and could see two cars, a light-colored Cadillac and another car he did not recognize, parked at the opposite end of the lot. 1RP 1344-47. Both cars were backed in and parked a couple of spaces apart, with the Cadillac parked closest to

Cadaret, some 200 to 300 feet away. 1RP 1345, 1368. He could not see any other cars in the lot at the time. 1RP 1485.

Cadaret next saw two black men walking towards the parked cars, one was taller (6'2" to 6'6") with a stocking cap, glasses and a dark overcoat, the other was shorter (5'9" to 5'10"), stouter and wore a gray jacket and denim pants, with the taller one walking about 20 to 30 feet ahead of the other. 1RP 1348-51, 1379-80. Cadaret returned to making coffee and getting dressed. 1RP 1352. When he looked again several minutes later he saw the taller man sitting in the driver's seat of the Cadillac. 1RP 1353-54. A few minutes later he saw the same man now standing outside the Cadillac looking over its hood at the car parked next to him. 1RP 1354-55, 1381. A few minutes after that, Cadaret looked out and saw the taller man had moved around the front of his Cadillac and was now standing in front of the other car with his with his arm extended out as if pointing or wagging his finger at the other car, as if shooting a gun. 1RP 1355-57, 1382-84.

Cadaret was certain the person wagging his finger at the other car was the same person he saw earlier looking over the Cadillac hood. 1RP 1363. The next thing Cadaret saw out his window was the Cadillac screech its tires and pull to the left out of its parking space and drive uphill towards Cadaret's RV, and as it opened Cadaret's view of the other car he

could see the other man he had seen earlier slowly falling to the ground out of the driver's seat and curl into a fetal position. 1RP 1361, 1365, 1394. Cadaret remembered the Cadillac "very slowly" drove past his RV, so he ducked down behind the sink. 1RP 1366-67, 1387. No one was shooting at the Cadillac as it pulled out. 1RP 1387. There was no one else in the parking lot. 1RP 1395.

After the Cadillac left, Cadaret made his way to the man on the ground, who was unresponsive, and called 911 to report seeing the Cadillac driver shoot another person and drive away. 1RP 1369-71, 1389-90, 1490. After police arrived, Cadaret showed them shell casings he noticed on the ground and then waited in his RV to be interviewed by police. 1RP 1392, 1413. When interviewed later that evening, Cadaret told a detective the man from the Cadillac looked like he had a gun and had shot the man in the other car. 1RP 1438, 1477.

Cadaret distinctly recalled hearing a series of "bangs, pops or rattles" at some time during the incident, but he could not specify when. 1RP 1433. At trial, Cadaret expressed his firm belief it was the Cadillac driver who killed the man in the other car. 1RP 1491.

(g) *Howard's testimony*

On February 20, 2012, carpenter Mark Howard was on his way home sometime around 4:30 to 5:00 p.m., and he parked his white Chevy

truck with a canopy in the same lot where Cadaret's RV was parked to call his wife. 1RP 1515-16, 1547. There were no other cars in the lot when he pulled in. 1RP 1520. Howard said he pulled into the lot past the RV and parked front-end in at the opposite end of the lot. 1RP 1516, 1556-57.

As he spoke to his wife, Howard notice two more cars enter the lot and back into parking spaces about 30 to 40 feet behind where he sat in his truck. 1RP 1519-22. Parked closest to Howards was a silver or blue minivan. The other car was a light-colored sedan. 1RP 1521, 1527.

Howard paid little attention to the two cars until he saw three men milling about, two black and one white, who he assumed had been in the cars. 1RP 1522-23, 1527-28. He paid them no more attention until they wandered back into his view and he saw the white man retrieve "a light-blue, silver-ish" backpack from some bushes near the parking lot and headed towards the parked cars, which peaked Howard's interest. 1RP 1529-30. The two black men had headed towards the minivan and sedan. 1RP 1530-31.

Within a minute, Howard heard "multiple popping sound" and saw a man running from somewhere towards him and firing a gun towards the minivan and sedan, although he admitted he saw no muzzel flashes or shell casings discharged and that he could not see the minivan or the sedan as he watched the man shoot. 1RP 1530-31, 1535-36, 1580. Howard

described the shooter as “grunge-looking character” with a beard, wool hat and checkered shirt. 1RP 1532. Howard did not think the gun was a revolver, but instead “an automatic weapon with some kind of a light, like silver plating.” 1RP 1534-35. He never heard the impact of bullets. 1RP 1537. Howard said he was surprised at the lack of noise generated by the shots, noting they were just loud enough to draw his attention. Id.

Howard thought he also may have seen another man armed with a gun, some 10-30 feet behind the grunge-looking man during the shooting. 1RP 1537-38. Howard did not think the other man was one of the three men he had seen earlier milling around. 1RP 1539. It seemed to Howard, that the two armed men were together. 1RP 1539. Howard never saw the grunge—looking man in the parking lot at any time. 1RP 1578.

Howard recalled that within seconds of the shooting, he started his car and fled the parking lot. 1RP 1540-41, 1565. No one followed him. 1RP 1541. After seeing a report about the incident on TV when he got home, he returned to the parking lot and told police he witnessed the event and provided a recorded statement. 1RP 1545.

(g) ***Other Eyewitness testimony***

Two others at the park during the February 20, 2012 incident were 22-year old Bravilio Leon Rojas and his friend, Ismail Tetik, who were near the south end of the lot when the shooting occurred. 1RP 3362; 4RP

78, 82, 90. Rojas reported hearing four to six gunshots and then immediately thereafter seeing a Cadillac drive down a dead-end lane before turning around and leaving. 4RP 78-79, 91. The Cadillac came within 30-40 yards of Rojas as it left, and was driving “[p]retty fast.” 4RP 79, 92. Rojas did not recall seeing any bullet holes on the Cadillac’s passenger side, which he could see as it drove by. 4RP 81.

Tetik, who had suffered head injuries since the incident, was unable to provide any useful testimony other than he remembered hearing loud noises and seeing a body on the ground in the parking lot near a car. 1RP 3364-67.

C. ARGUMENTS

1. THE TRIAL COURT’S EXCLUSION OF EVIDENCE DEPRIVED BIENHOFF OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

The trial court excluded defense evidence showing that prior to the incident Reed was in growing financial distress, was being threatened with physical harm by a creditor, and had robbed an acquaintance before and therefore had the motive and skill to rob Bienhoff on February 20, 2012. Similarly, the trial court excluded evidence of Bibb’s prior gun ownership before the incident, including those of the same caliber used in the incident, which the defense sought in order to show it was Bibb and Reed who brought and fired guns at the incident instead of Bienhoff or Pierce. The

exclusion of this evidence deprived Bienhoff of his right to present a defense and therefore reversal is required.

Criminal defendants have the constitutional right to present a defense and to confront their accusers. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); U.S. Const. amend. V, VI, XIV; Const. art. 1, § 22. Claimed violations of this right are reviewed de novo. Jones, 168 Wn.2d at 719. While the decision to exclude evidence is generally discretionary, that standard only applies if the court has correctly interpreted the evidence rules. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Moreover, a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

The primary and most important component of confrontation is the right to conduct a meaningful cross-examination of adverse witnesses. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). This right also includes the right to impeach a prosecution witness with evidence of bias. Davis v. Alaska, 415 U.S. 308, 315-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). To secure this right, this Court has explained, “[i]t is fundamental that a

defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.” State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319 (1971).

These important due process protections may not be restricted based solely on procedural and evidentiary rules. State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157, 160 (1996). If the court believes defense evidence is barred by such rules, “the court must evaluate whether the interests served by the rule justify the limitation.” Id. (citing Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)). The restriction on defense evidence must not be arbitrary or disproportionate to its purpose. Baird, 83 Wn. App. at 482. So long as the evidence is relevant, the jury must be permitted to hear it unless the State can show “the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Jones, 168 Wn. 2d at 720 (quoting Darden, 145 Wn.2d at 622). Relevant defense evidence is admissible unless the State can show a compelling interest to exclude it. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983); Darden, 145 Wn.2d at 621.

A person accused of a crime must be permitted to cross-examine crucial State’s witnesses on issues affecting their credibility. State v. McSorley, 128 Wn. App. 598, 613-14, 116 P.3d 431 (2005). ER 608(b) specifically permits that “specific instances of the conduct of a witness, for

the purpose of attacking or supporting the witness' credibility" may be inquired into on cross-examination so long as they are probative of truthfulness or untruthfulness. ER 608(b). Precluding such cross examination is an abuse of discretion when the witness is essential and the excluded incident is the only available impeachment. McSorley, 128 Wn. App. at 611 (quoting State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001)).

"It is well established that a criminal defendant is given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to the State's case." McSorley, 128 Wn. App. at 612-13 (quoting State v. York, 28 Wn. App. 33, 36-37, 621 P.2d 784 (1980)). A defendant's right to cross-examine witnesses is "fundamental" and any "diminution calls into question the integrity of the fact-finding process and requires the competing interests be closely examined." McSorley, 128 Wn. App. at 613 (quoting York, 28 Wn. App. at 36-37).

Here, Bienhoff sought to introduce evidence through Monique Reed of the Reeds' financial troubles at the time of the incident to show Reed had a financial motive to rob Bienhoff. CP 79-151 (Motion and supporting affidavit and documentation). This included evidence that neither of the Reeds had work income, had been on public assistance since 2010, had recently pawned numerous valuables to make ends meet, were threatened by

one creditor (“Karisma”) days before the incident and were taking expensive trips despite mounting debt. Id. The State objected, claiming Bienhoff could not show the Reeds were living beyond their means, and to the extent the evidence was relevant, its prejudice to truth-finding outweighed any probative value. Supp CP __ (sub no. 167, State’s Response to Defendant Bienhoff’s Motions, filed 04/10/15); 1RP 118.

Ultimately, the court held it would not exclude evidence tending to show the Reeds were “under enormous financial pressure” at the time of the incident. 1RP 127. The court held Bienhoff could introduce evidence that neither of the Reeds had a regular paying job between December 2011 and February 20, 2012, Reed had pawned a ring for \$800 for which repayment was due within a few days of the incident or he would lose the ring, and “that he had borrowed money from Charisma [sic],” but not that Karisma, in text message responses, threatened Reed with harm if the debt was not paid soon.⁶ 1RP 127, 2909-23; see also, 4RP 64-65⁷.

⁶ The defense sought to introduce the text message exchange between Reed and Karisma regarding \$300 Reed owed Karisma, that extended from January 1, 2012, until February 17, 2012. Karisma text to Reed start with, “Its a whole new year my brotha way more then enough time i need that 300,” and ending with “I should be getting a tip for the wait see us og’s got sportin blood hope i get that soon I been way pass patiecnt.” CP 116-22. Bienhoff’s counsel offered that “og’s” refers to “original gangsters,” and thought the lead detective in the case would confirm that interpretation. 1RP 2914.

⁷ Prosecutor states his understanding of the trial court’s ruling was to restrict financial evidence regarding the Reeds to the pawn slip that came due a few days after the incident, the fact he had borrowed money from Karisma, and that neither Reed had a job at the time of the incident.

Bienhoff's counsel later sought to introduce six more pawn slips Reed had from jewelry pawned on December 27, 2011, totaling \$840 in loans to show additional financial distress at the time of the incident. 4RP 101-05. The court denied the request, concluding they were "[n]ot relevant to acute financial distress, which is what my touchstone for this is." 4RP 106. The court concluded the only pawn slip indicating "acute financial distress" was the one that came due four days after Reed's death. 4RP 107.

Bienhoff also sought to admit evidence that Reed had been charged with armed robbery against an acquaintance in 2006, but the charge was dismissed without prejudice after the complaining witness failed to appear. CP 152-77; 1RP 233-45, 254-58. Bienhoff sought its admission as evidence of Reed's intent to rob him, as allowed under ER 404(b).⁸ 1RP 255. The State argued this was mere "propensity evidence" that should be deemed inadmissible. 1RP 246-53. The trial court denied Bienhoff's request, concluding that it was "classic propensity evidence" that had no "bearing on [Reed's] intent" on February 20, 2012. 1RP 258-59.

⁸ ER 404(b) provides;

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Finally, Bienhoff sought to introduce evidence that in November 2011, Bibb reported a .45 caliber gun stolen, and that in a 2007 incident Bibb admitted possessing two guns, a .40 caliber and a .38 caliber. Bienhoff argued this evidence was admissible under ER 608(b)⁹ to impeach Bibb's failure to acknowledge prior ownership of a .45 caliber gun during a defense interview, and under ER 404(b) to show motive and opportunity to have possessed the caliber of guns discharged at the incident, which were a .38 caliber gun that killed Reed, and a .45 caliber gun that was discharged and left six, .45 caliber shell casing in the parking lot. CP 413-21; 1RP 204-33, 1272, 1585-1608, 1798-1803, 3050, 3100, 3119. The trial court denied the motion to admit the evidence, finding "that there isn't really any relevance to it" and that it was "purely being offered for propensity purposes." 1RP 1606, 1801.

The trial court's rulings are based on misapplication of the law and an overly myopic view of relevance.

⁹ ER 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Evidence is relevant if it makes “the existence of any fact that is of consequence to the determination of the action more probable or less probable.” ER 401.

Evidence that Reed had ever increasing debt at the time of the incident is relevant to show he had a motive to rob Bienhoff, particularly when considered with Bibb’s inconsistent testimony about whether he and Reed were to getting all the marijuana fronted, half fronted, “a little bit of a front or whatever,” or to pay the entire price upon delivery. 1RP 1678, 1702, 1776-79, 1836-37. That Reed had been experiencing growing financial woes in the two years preceding his death, was on financial assistance, had no job, had to routinely pawn personal items to make ends meet, was being threatened physical harm by at least one creditor, yet was still taking family vacations in February, April and August 2011 to Las Vegas and Great Wolf Lodge, makes it more probable that he had a financial motive to rob Bienhoff. Thus, it was relevant to an issue of consequence; if Reed had a motive to rob Bienhoff, it supports Bienhoff claim it was Reed who tried to rob him and not the other way around.

Unfortunately, the trial court insisted that absent showing the Reeds were “under enormous financial pressure right at the time that the crime is committed,” it is “not particularly relevant” to what happened on February 20, 2012. 1RP 103. This is not the correct standard.

“Evidence of poverty is generally not admissible to show motive” or to “create an inference that a defendant's financial status alone would suggest that he or she is more likely to commit a financially-motivated offense.” State v. Kennard, 101 Wn. App. 533, 541, 6 P.3d 38 (2000) (citing United States v. Mitchell, 172 F.3d 1104, 1108 (9th Cir.1999)); State v. Jones, 93 Wn .App. 166, 174, 968 P.2d 888 (1998). Proof of poverty or desire for money, without more, “is likely to amount to a great deal of unfair prejudice with little probative value.” Mitchell, 172 F.3d at 1109. Evidence of financial status, however, may be admissible to show that a person was living beyond his or her means. State v. Matthews, 75 Wn. App. 278, 287, 877 P.2d 252 (1994) (evidence that defendant's lifestyle seemingly exceeded his income “established a link between [his] financial condition and a motive to commit robbery”); Kennard, 101 Wn. App. at 543 (evidence of bankruptcy was relevant because defendant was delinquent during the time of the robberies and the first creditor's meeting occurred shortly before the first robbery); cf., Mitchell, 172 F.3d at 1109 (not appropriate to admit evidence that did not show “more than the mere fact that the defendant is poor”). Additionally, an “unexplained and abrupt change in that status for the better” might indicate a motive to commit a crime. U.S. v. Jackson, 882 F.2d 1444, 1450 (9th Cir.1989) (where testimony that witness was surprised when defendant paid \$100 because he never had any money was admitted).

Moreover, the right to present a defense may trump rules of evidence. For example, in State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) (Jones II), the Court addressed the intersection of the rape shield statute and the right to present a defense. 168 Wn.2d at 717. Jones wished to testify the complainant consented to sex during a "sex party" at which drugs were consumed. The trial court refused, finding it inadmissible under RCW 9A.44.020, the so-called "rape shield statute." Id. at 717-18, 721. The Supreme Court reversed, noting:

This is not marginally relevant evidence that a court should balance against the State's interest in excluding the evidence. Instead, it is evidence of extremely high probative value; it is Jones's entire defense. Jones's evidence, if believed, would prove consent and would provide a defense to the charge of second degree rape. Since no State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value, the trial court violated the Sixth Amendment when it barred such evidence.

Id.

The Court recognized the rape shield statute serves to protect complaining witnesses in rape prosecutions from having their credibility unfairly disparaged by evidence of past sexual conduct. It noted, however, that when evidence is relevant and highly probative of whether the alleged rape occurred, the rape shield must give way to the defendant's Sixth Amendment right to present a defense. 168 Wn.2d at 723.

When the law is correctly applied here, it becomes apparent the trial court erred in excluding evidence the Reeds had been on public assistance since 2010, were being threatened by a creditor, had suddenly pawned numerous personal items totaling \$1640 in December 2011 to make ends meet, and were in jeopardy of losing those items forever if they could not pay off the loans, yet were taking family vacations in and out-of-state. This provided a basis to conclude they were living beyond their means, giving Reed a motive to rob Bienhoff. It was therefore relevant and necessary for Bienhoff to fully present his defense and should have been admitted. As in Jones (II), that Reed tried to rob him was Bienhoff's "entire defense," and evidence of Reed's financial woes constitutes motive "evidence of extremely high probative value" for which "no State interest can possibly be compelling enough to preclude" from trial. 168 Wn.2d at 721.

Similarly, evidence that Bibb owned guns of the same caliber as those used at the incident should have been admitted. Contrary to the trial court's conclusions, this evidence was relevant and was not "purely being offered for propensity purposes." 1RP 1606, 1801. That Bibb had recently possessed a gun of the same caliber as discharged at the incident, and failed to acknowledge that fact during a defense interview, calls into question Bibb's veracity and therefore his claim that neither he nor Reed were armed on February 20, 2012, and that he had "no reason to lie about anything."

1RP 1648, 1667, 1805, 1889. That eyewitness Rojas saw no bullet holes in the passenger side of the Cadillac as it fled the park supports an inference that it was Bibb who put several bullet holes in the Cadillac after the incident to make it look like he was a victim instead of one of the robbers, in that he shot up his own car after the incident. 4RP 81. In addition, evidence that Bibb had also previously possessed a gun of the same caliber (.38) that killed Reed was relevant, particularly when viewed in the context of Bibb's failure to acknowledge more recent gun ownership, his inconsistent testimony about the nature of the transaction, and his claim he had no reason to lie.

Like the evidence showing Reed had a motive to rob Bienhoff, evidence of Bibb's past gun ownership made it more likely Bibb fired the .45 caliber gun in the parking lot instead of Pierce, and that it was Reed who pulled the .38 on Bienhoff, not the other way around.

This is not just marginally relevant evidence. Instead, it is evidence of extremely high probative value; it is Bienhoff's entire defense. This evidence, if believed, would be support at least one juror's conclusions the State failed to meet its burden of proof because it failed to establish beyond a reasonable doubt who pulled the .38, Reed or Bienhoff? Since no State interest can possibly be compelling enough to preclude the introduction of evidence of such high probative value, the trial court violated Bienhoff's

rights under the Sixth Amendment when it barred such evidence. This Court should therefore reverse Bienhoff's conviction.

2. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON SELF-DEFENSE AND EXCUSABLE HOMICIDE REQUIRES REVERSAL.

A defendant is entitled to have the jury fully instructed on the defense theory of the case when there is evidence to support that theory. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U. S. Const. amend. XIV; Const. art I, § 3. Failure to so instruct is prejudicial error. State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999).

“It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970). It is reversible error to instruct in a manner that relieves the prosecution of that burden. Brown, 147 Wn.2d at 339.

a. The standard of review is de novo

A trial court's refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). When an otherwise discretionary decision is based solely on

application of a court rule or statute to particular facts, the issue is also one of law reviewed de novo. See Fernandez-Medina, 141 Wn.2d at 454 (test to be employed includes legal and factual components); State v. Dearbone, 125 Wn.2d 173, 178, 883 P.2d 303 (1994) (noting that mixed questions of law and fact are reviewed de novo).

De novo review is appropriate here because the court refused to grant Bienhoff's request to instruct the jury on self-defense and excusable homicide for two legally incorrect reasons. CP 427¹⁰; 1RP 3647-48. First, it erroneously concluded that because the predicate offense for the felony murder was robbery under the State's theory of the case, and because self-defense is not a defense to robbery, Bienhoff was not entitled to have the jury instructed on his theory of self-defense/excusable homicide. 1RP 3677. Second, the trial court reasoned that if the State failed to prove Bienhoff had intent to rob, then the jury would necessarily acquit. 1RP 3678. These errors require reversal.

The self-defense instruction proposed by Bienhoff provides:

It is a defense to a charge of murder that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that

¹⁰ Bienhoff written proposed instructions included only WPIC 17.02 (self-defense), and WPIC 16.05 (defining "Necessary"). CP 427-28. The record is clear, however, that Bienhoff's counsel also sought WPIC 15.01, the excusable homicide instruction. 1RP 3647-49.

he is about to be injured by someone in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 427. This constitutes a correct statement of the law. See WPIC 17.02 (self-defense/defense of others instruction).

“Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.” RCW 9A.16.030. Thus, WPIC 15.01 reads:

It is a defense to a charge of [murder] [manslaughter] that the homicide was excusable as defined in this instruction.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

The State has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Although Bienhoff did not submit a proposed excusable homicide instruction, the record is clear that one was sought. 1RP 3646-52.

In determining whether the evidence supports giving an instruction, appellate courts view the evidence in the light most favorable to the requesting party. Fernandez-Medina, 141 Wn.2d at 455-56. The evidence must affirmatively establish the theory. Fernandez-Medina, 141 Wn.2d at 455-56.

Here, there was ample evidence to affirmatively establish Bienhoff acted in lawful self-defense and Reed's death was excusable under the circumstances. For example, Bienhoff testified he had two pounds of marijuana with him in the van to sell Reed, and Pierce corroborated this claim when he testified he saw bags and could smelled the marijuana Bienhoff was stuffing into a backpack. 1RP 3241-42, 3431, 3452. If believed, this evidence negates the State's claim Bienhoff had no marijuana and only intended to rob Reed, because if he had marijuana to sell he did not need to rob Reed to get his money.

Bienhoff also testified Reed lacked the funds necessary to complete the purchase, having only "half of the half of what he was originally supposed to bring." 1RP 3452. The physical evidence corroborates this claim, as just over \$1,200 was found on Reed's body, as does Bibb's testimony, in which he admits he never gave Reed his share of

the purchase money (approximately \$1,000), and that his understanding all along was that part of the marijuana would be “fronted.” 1RP 1678, 1776-79, 1836-37; 2RP 146. If believed, it supports Bienhoff’s claim Reed tried to renegotiate the terms before resorting to robbery to get the marijuana.

Finally, Bienhoff testified that when Reed went for his gun, the ensuing struggle resulted in the accidental discharge of the weapon into Reed’s arm. 1RP 3454-55. This testimony is corroborated by Pierce’s testimony that he saw Reed’s van start to rock, as if a struggle were underway. 1RP 3262-63. It is also supported by the medical examiner’s testimony, who testified Reed’s wounds suggested “one gunshot that had entered the right shoulder and then gone upwards or through the shoulder,” exiting briefly before re-entering Reed’s neck and then lodging in his brain. 1RP 3042-43. If believed, this evidence supports Bienhoff’s claim Reed was killed by an accidently discharged bullet in the manner Bienhoff described the struggle.

There was sufficient affirmative evidence to support the self-defense and excusable homicide instructions sought by Bienhoff. The trial court, however, refused, finding because the predicate offense was robbery, and there is no valid self-defense claim for robbery, neither instruction was warranted. 1RP 3677. This rationale completely ignores the defense theory of the case, and conflicts with established caselaw.

The Washington Supreme Court noted its approval of instructing the jury on self-defense and excusable homicide in a trial for felony murder predicated on robbery, provided the record affirmatively supports those defense theories. State v. Brightman, 155 Wn.2d 506, 526, 122 P.3d 150, 160 (2005). Brightman was charge with in the alternative with first degree felony murder predicated on robbery, in the alternative to premeditated first degree murder, having allegedly killed a man while stealing his car. 155 Wn.2d at 511. Following his jury conviction for second degree murder, he appealed, arguing he trial court erred in failing to give his proposed justifiable homicide instruction. 155 Wn.2d at 513.

The Court rejected Brightman's claim, noting he failed to "show that he *intentionally* used deadly force . . . or that *deadly* force was necessary to defend himself." Id. at 526. Having reversed on other grounds, however, the court addressed how Brightman might be entitled to instruction on self-defense and excusable homicide on retrial:

Fundamentally, Brightman's theory of the case was that he was using reasonable force to defend himself against Villa by striking him with the butt of a gun. As a result, the gun accidentally went off, killing Villa. Thus, Brightman's theory of the case involved self-defense, followed by excusable homicide. But Brightman did not present evidence to show that the homicide was justifiable. Brightman did not show that he intentionally used deadly force against Villa or that deadly force was necessary to defend himself. Thus, the trial court did not err in refusing to instruct the jury on justifiable homicide. If, on remand,

Brightman argues that he committed an excusable homicide that was precipitated by an act of self-defense, then the trial court will have to evaluate whether he has raised sufficient evidence to support jury instructions on those issues.

155 Wn.2d at 526 (footnote omitted).

Here there was abundant evidence to support Bienhoff's claim Reed's death was excusable because it occurred while Bienhoff lawfully defended himself against Reed's attempt to rob him at gunpoint. It was the defense theory from beginning to end. Yet the jury was never instructed how to consider it in the context of the evidence presented. Instead the jury was faced with convicting Bienhoff as charged, or entering a verdict of 'not guilty' despite the death of a person by gunshot without any legal basis provided to conclude the death was excusable. This is likely an unsavory choice for any juror under the circumstances.

Reed's death occurred when both he and Bienhoff were engaged in what was supposed to be a delivery of marijuana. Reed died in the process. Absent a legal basis to conclude Bienhoff acted with lawful authority to defend himself at the meeting, any jury would likely find him guilty, even if it believed he never intended to rob Reed. Someone needed to be held responsible, and Bienhoff and Pierce were the only options.

The failure to instruct on the defense of excusable homicide when the record supports it constitutes reversible error. State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983).

3. LETTING JURORS KNOW THE DEATH PENALTY WAS NOT A POTENTIAL PUNISHMENT REQUIRES REVERSAL.

"The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases." State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). Consequently, in a first-degree murder case, it is error to tell jurors the death penalty is not involved. State v. Townsend, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001); State v. Hicks, 163 Wn.2d 477, 481, 181 P.3d 831 (2008). This is a "strict prohibition" that "ensures impartial juries and prevents unfair influence on a jury's deliberations." Townsend, 142 Wn.2d at 846. Specifically, "if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Id. at 847.

Prior to voir dire, the trial court rejected Bienhoff's request to inform the jury he was facing a "Third Strike" if convicted, arguing it was relevant to his state of mind at the incident and when he spoke to police after his arrest. CP 178-91; 1RP 269-74. The trial court found that

because it was a murder charge the jury would necessarily understand conviction would result in a long sentence, which it deemed sufficient for Bienhoff to advance his claims. 1RP 274.

Despite the above ruling, the trial informed the jury the death penalty was not a potential punishment if they convicted Bienhoff. It began when the prosecution inquired how the trial court wanted to handle any juror questions about whether the death penalty was in play. 1RP 405-06. The prosecution stated its preference was to address such questions “head on,” by informing them that the “state Supreme Court has decided that that is not something that they are privy to, or we cannot tell them if this is a death penalty case or not,” and then apparently to follow up that admonishment by asking, “does that cause you concern as to whether or not you could be a fair and/or impartial juror in this case.” 1RP 406. The court indicated it would prefer the proposed follow-up question not be asked, but did not preclude it. 1RP 406-07.

During the third round of voir dire the prosecutor raised the issue of punishment in the context of the weighty responsibility of being a juror. 1RP 824-25. The prosecutor informed the venire that “[t]he judge will instruct you that you have nothing to do with punishment or what occurs after [the jury reaches a verdict].” 1RP 825. When the only response

from the venire was head nodding, even from those seated in the jury box, the prosecutor persisted, asking;

Anybody have a concern about that or think that doesn't make sense? Anybody? No one?

What about over here? Everyone okay with that? Does that cause you any concern about being a juror in this case where the charge is murder in the first degree? Anybody?

1RP 825.

This finally generated a response from Juror No. 1 (presumably in the jury box), stating, "Is there a death penalty in Washington? That might bother me." 1RP 825. When the prosecution deferred to the court for a response, it followed the prosecution's recommendation and informed the venire, "The Washington Supreme Court has said that I can't tell you whether the death sentence is involved or not." 1RP 825-26. This was not the correct response, which should have been something like, "You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful." WPIC 1.02 (suggested language). This failure constitutes error.

To make matters even worse, however, the prosecution persisted with its focus on punishment, in which several potential jurors expressed

positions against the death penalty and concerns about rendering a verdict of guilty without knowing whether it was in play. Juror No. 5 noted that if it the death penalty was in play then the State's burden should be higher, opining that the State would "have to convince me 100 percent they were guilty." 1RP 826-38.

During this discussion, Juror No. 20 asked whether if some of the jurors knew how the death penalty worked in Washington, they could explain it to the others. When the prosecutor deferred to the court, the court replied, "I don't know how to answer that question, because the Washington Supreme Court's decision I find very difficult, so I can't – I don't know what to say about that." 1RP 830. The court never provided a definitive answer to Juror No. 20's question.

At the break, Bienhoff's counsel moved for a mistrial, arguing the prosecution was "attempting to death-qualify" the panel. 1RP 838-39. Counsel's position was that the prosecution had goaded the venire into bringing up the death penalty and then used that opening to figure out which jurors were anti or pro death penalty. 1RP 845. Pierce's counsel joined in the motion, noting the venire must already realize the death penalty was not in play because it had been revealed to them that a death penalty case involves a bifurcated process, one to determine guilt and another to determine whether to impose death. 1RP 844. Because the

venire had been advised its responsibilities would conclude with a verdict, it necessarily knew it was not a death penalty case. Id.

The court denied the motion, finding it was a juror, not the prosecution, who introduced the death penalty into the discussion. The court also opined that even if they started with a new venire, the same issue would likely arise. 1RP 846. The trial court erred in denying the motion for a mistrial, and in how it interacted with the jury regarding the death penalty issue.

“[I]n response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing.” Hicks, 163 Wn.2d at 487. Unfortunately, Bienhoff’s court did not do so, and instead informed the jury the State’s highest court had precluded it from informing the jury whether the death penalty was in play. 1RP 825-26.

This err was exacerbated by subsequent voir dire discussion. First, the court failed to admonish Juror No. 20 not to inform his fellow jurors about his knowledge of death penalty proceedings. 1RP 830. The court then informed the venire that once it rendered a verdict, the jury duty would be complete and it would be the court’s responsibility to impose any punishment. 1RP 836-37. As Pierce’s counsel argued, there were clearly jurors in the venire who knew the death penalty cases are bifurcated, and having been informed they would only engage in the guilty

phase of the trial, they must realize the death penalty is not in play. 1RP 844. But even if those knowledgeable jurors had not passed on this information to others, the trial court made it abundantly clear to some jurors during individual questioning, and to the entire venire end of the day. 1RP 871-72, 883, 887.

Bienhoff suffered prejudice. There is a reasonable probability knowing the death penalty was not a punishment option affected the jury's verdict. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland v. Washington, 466 U.S. 668, 693-94, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

Had the jury not known whether the death penalty was in play, Bienhoff jury may have been more discriminating about how it viewed the evidence, set the burden beyond a reasonable doubt at a higher level, and enforced the presumption of innocence to its fullest, which would have created a better chance of acquittal, or at least a hung jury. See Townsend, 142 Wn.2d at 847 ("if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility. ").

Although there was no doubt Bienhoff was involved in Reed's death, who was culpable for that death was not an easy question. There was ample evidence Reed introduced the gun instead of Bienhoff, and that it was Bibb who fired numerous .45 caliber rounds at the scene instead of Pierce. Evidence of Bienhoff's guilt was far from overwhelming. Knowing Bienhoff would not be put to death if they convicted, there is a reasonable probability at least jurors decided to convict because there was evidence supporting his guilt, Reed had died, and someone should be punished. Each deliberating juror's decision to convict was made easier by the trial court's mishandling of the punishment issue during voir dire. This Court should therefore reverse.

4. AN UNCONSTITUTIONAL JUDICIAL COMMENT ON THE EVIDENCE DENIED BIENHOFF A FAIR TRIAL.

At trial, Lyons' denied speaking to Hiram Warrington about the incident, either the day of or days later. 1RP 2659-60. Over defense objection, the State impeached Lyons with Warrington's contrary testimony. 1RP 2696-2706. Also over defense objection on grounds it constituted an improper judicial comment on the evidence, the court gave the following prosecution-crafted limiting instruction when Warrington's testimony turned to his alleged conversations with Lyons and Pierce:

And. Ladies and gentlemen, some of this evidence here, evidence that Mr. Warrington's testified to is being admitted by the Court for a limited purpose.

Testimony regarding any oral assertion made by Ray Lyons to Hiram Warrington may be considered by you only for the purpose of impeaching Ray Lyons' credibility. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

1RP 2783.

As correctly noted by the defense, this advisement constitutes a judicial comment on the evidence because it informs the jury that "Ray Lyons" did in fact make "oral assertions" to Warrington. 1RP 2713-14. The defense proposed curing the problem by adding "alleged" before "oral assertions," or "allegedly" after. 1RP 2714-15. The prosecution objected and the court refused to add the word, preferring instead to give the prosecution's version. 1RP 2716-17, 2622-23.

The court's limiting instruction constitutes a judicial comment on the evidence in violation of article 4, § 16 of the Washington Constitution. Because the prosecution cannot show this error was harmless beyond a reasonable doubt, reversal is required.

Article 4, § 16 of Washington's constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the

court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Moreover, this constitutional violation may be raised for the first time on appeal. The failure to object or move for mistrial at the trial level is not a bar to appellate review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

A comment on the evidence in violation of article 4, § 16 is presumed prejudicial, and the prosecution bears the burden to show an absence of prejudice. Levy, 156 Wn.2d at 723-25. That jurors may have been instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the evidence is harmless, the Washington Supreme Court has looked to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed

important and disputed issue; reversed); Levy, 156 Wn.2d at 726 (subject of comment “never challenged in any way by defendant”; harmless).

Bienhoff denied ever intending to rob Reed. Rather it was Reed who tried to rob him at gunpoint, and in a struggle to control Reed’s gun, Reed was accidentally shot and killed. 1RP 3452-55, 3523-30, 3536-37. Lyons, testified he never knew what the plan was that evening. 1RP 2597-98. Lyons also denied talking to Warrington about the incident that night, or a couple of days later with Pierce and Warrington, as did Pierce. 1RP 2512, 2659-60, 3281.

Despite a factual dispute over whether the conversations ever occurred, the court gave told the jury they had. This improperly interfered with the jury’s duty to resolve factual issues. By doing so, the court essentially told the jury Lyons and Pierce were lying when they denied the conversations occurred, and so was Bienhoff by extension when he denied any intent to rob Reed. 1RP 3536.

With conflicting evidence about who intended to rob who, resolving a disputed factual issue by judicial fiat was error. This error struck at the heart of the defense because it unfairly discredited the testimony of Lyons, Pierce and Bienhoff. The State cannot prove this

error was harmless. This violation of Article 4, § 16 requires reversal of Bienhoff's conviction. Becker, 132 Wn.2d at 65.

5. BIENHOFF WAS DENIED A FAIR TRIAL WHERE THE COURT'S IMPLICITLY RACIST COMMENT COMPROMISED ITS APPEARANCE OF FAIRNESS AND IMPARTIALITY.

Our state and federal constitutions guarantee the due process right to a fair trial by an impartial judge. Const. art. I, §§ 3, 21, 28; U.S. Const. amends. VI, XIV. The Code of Judicial Conduct, Rule 2.11 and the appearance of fairness doctrine require judges to disqualify themselves whenever they have actual bias against a party, or even when their impartiality may reasonably be questioned. In re Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010) (citing State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996)).

Impartial means the absence of actual or apparent bias. Swenson, 158 Wn. App. at 818 (citing State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002)). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (quoting State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)).

The appearance of fairness doctrine, in its current form, is a judicially created doctrine. Hoquiam v. PERC, 97 Wn.2d 481, 487, 646 P.2d 129

(1982). The doctrine found its origins in the due process clause of the Fourteenth Amendment, which guarantees accused persons a fair trial. In re Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955). The appearance of fairness doctrine is “directed at the evil of a biased or potentially interested judge or quasi-judicial decisionmaker.” Post, 118 Wn.2d at 618–19. “The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice.” Madry, 8 Wn. App. at 70.

The test for determining whether a judge’s impartiality might reasonably be questioned is an objective one. State v. Leon, 133 Wn. App. 810, 812, 138 P.3d 159 (2006). A court must determine “whether a reasonably prudent and disinterested observer would conclude [the defendant] obtained a fair, impartial, and neutral [hearing].” Dominguez, 81 Wn. App. at 330. A trial court’s conduct violates the appearance of fairness, when there is evidence of either “actual or potential bias.” Post, 118 Wn.2d at 619.

To avoid the appearance of bias, judges must “exercise self-restraint and preserve an atmosphere of impartiality.” Anderson v. Sheppard, 856 F.2d 741, 745 (6th Cir. 1988) (quoting Knapp v. Kinsey, 232 F.2d 458, 465-67 (6th Cir. 1956)). They must always take care to remain “calmly judicial [and] dispassionate,” and to “sedulously avoid all appearances of

advocacy.’” Anderson, 856 F.2d at 745 (quoting United States v. Hickman, 592 F.2d 931, 933 (6th Cir. 1979)). When a judge’s handling of the trial suggests an alignment with one of the parties, any resulting judgment in favor of that party is rendered invalid. Anderson, 856 F.2d at 745. A judge should not “enter into the ‘fray of combat’ or assume the role of counsel.” State v. Ra, 144 Wn. App. 688, 705, 175 P.3d 609 (2008). Nor should a judge act as an advocate or “cross[] the line that separates an impartial tribunal from a zealous advocate.” State v. Dugan, 96 Wn. App. 346, 354-55, 979 P.2d 885 (1999).

The appearance of fairness doctrine was violated by Bienhoff’s trial court when it revealed racial bias. It did so during a discussing regarding the admissibility of text messages from Karisma to Reed found on Reed’s cell phone, which started with, “Its a whole new year my brotha way more then enough time i need that 300,” and ending with “I should be getting a tip for the wait see us og’s got sportin blood hope i get that soon I been way pass patiecnt.” CP 116-22. In assessing whether the final text constituted a threat of harm, which the defense claimed it did and should be introduced to show further financial distress for Reed, the court remarked, “But we don’t have any information, of course, about Mr. [sic] Charisma [sic]. So we don’t know if he’s [sic] some white guy like me making a threat or somebody who’s actually, you know, more likely to be

a gangster.” 1RP 2915. This comment reveals at least latent racial bias on the part of the court. It reflects a belief that “white guy[s]” are less likely to be gangsters than men of color. Although the comment was not made in front of the jury, the courtroom was open to spectators, and the remark was made in front of everyone, including the attorneys and defendants.

The right to an impartial judge is among the “constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.” Chapman v. California, 386 U.S. 18, 23 n.8, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The racial bias revealed by the trial court undermines the fairness and integrity of Bienhoff’s trial, and therefore warrants reversal.

6. THE TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY ON HOW TO DELIBERATE DEPRIVED BIENHOFF OF A FAIR TRIAL AND UNANIMOUS JURY VERDICT.

The trial court failed to instruct jurors about the constitutional dictated framework it must follow to reach a constitutionally unanimous verdict. This violated Bienhoff’s right to a fair trial and unanimous verdicts. This Court should reverse.

In Washington, criminal defendants have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22¹¹; State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential element of this right is that the jurors reach unanimous verdicts, and that the deliberations leading to those verdicts be "the common experience of all of them." State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979) (citing People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976)). Thus, constitutional "unanimity" is not just all twelve jurors coming to agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is insufficient.

¹¹ Wash. Const. art I, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash Const. art I, § 22 provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: . . .

The Washington Supreme Court concurs with the California Supreme Court's description of how a constitutionally correct unanimous jury verdict is reached, and how it is not:

"The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint."

State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting Collins, 17 Cal.3d at 693).

This heightened degree of unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew. State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60, 70 (1993) (citing CrR 6.5). Failure to so instruct deprives a criminal defendant of his right to a unanimous jury verdict and requires reversal. Lamar, 180 Wn.2d at 587-89; State v. Blancaflor, 183 Wn. App. 215, 221, 334 P.3d 46 (2014); Ashcraft 71 Wn. App. at 464. A trial court's failure to properly instruct the jury on the constitutionally required format for deliberating towards a unanimous verdict is error of

constitutional magnitude that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

Sometimes jurors receive instruction that at least touches on the need for this heightened degree of unanimity, such as in California, where at least one jury was instructed they "'must not discuss with anyone any subject connected with this trial,' and 'must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.'" Bormann v. Chevron USA, Inc., 56 Cal. App. 4th 260, 263, 65 Cal. Rptr. 2d 321, 323 (1997) (quoting BAJI No. 1540, a standardized jury instruction); see also, United States v. Doles, 453 F. App'x 805, 810 (10th Cir. 2011) ("court instructed the jury to confine its deliberations to the jury room and specifically not to discuss the case on breaks or during lunch."). In this regard, the Washington Supreme Court Committee (Committee) on Jury Instructions recommends trial courts provide an instruction at each recess that includes:

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well — you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

WPIC 4.61 (emphasis added).

The Committee also recommends an oral instruction following jury selection explaining the trial process, and includes the following admonishment about the process after closing arguments are made:

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. "No discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

WPIC 1.01, Part 2.

The same instruction also provides:

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

Id.

The Committee has also prepared a Juror Handbook. WPIC Appendix A. It advises readers that as jurors, "DON'T talk about the case with anyone while the trial is going on. Not even other jurors." Id., at 9.

These WPIC-based admonishments, if provided, make clear that deliberations may only occur after all the evidence is in, and only then

when jurors are in the jury room. What they fail to make clear, however, is that any deliberations must always involve all twelve jurors. Thus, there is no instruction informing the jury that it must suspend deliberations whenever one of them is absent. Without such instruction, there is no valid basis to assume the verdicts rendered were the result of "the common experience of all of [the jurors]," which our State constitution requires. State v. Fisch, 22 Wn. App. at 383.

Here, what instructions the court did provide failed to make clear the constitutional unanimity requirement that deliberation occur in the jury room, only then when all twelve jurors are present.

The trial court's first on-the-record admonishment of Bienhoff's jury venire was prior to voir dire. 1RP 372-78. The court informed the venire that "in a criminal case such as this one, the law requires that all jurors agree [to reach a verdict]." 1RP 375. Once a jury was chosen, the court did not give WPIC 1.01, Part 2, as recommended by the Committee, instead providing a modified version that included an admonishment against discussing the case with each other or sharing notes until deliberations begin. 1RP 1032-40.

Despite the Committee's recommendation to give the full WPIC 4.61 before every recess, it was never provided during Bienhoff's four-

week trial, in which there were 73 recesses.¹² This is not to say the court never admonished the jury not to discuss the case. It did before each weekend recess, but not as recommended by the Committee. 1RP 1790-91, 2070, 2576, 3329. For example, at the end of the first week of trial, the court reminded the jurors, "don't discuss the case with anyone, don't do any research on you own, please don't comment on social media or anything like that about the case." 1RP 1791.

Prior to closing arguments, the court read its instructions on the law to the jury. 1RP 3732 (noted but not transcribed); see CP 440-74. These written instructions informed the jury "During your deliberations, you must consider the instructions as a whole." CP 443 (last page of Instruction 1). The next instruction informs the jury they "have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 444 (Instruction 2).

Instruction 25 instructed the jury how to initiate and carry out the deliberative process. CP 67-68. Like the first two instructions, Instruction 25 also reminds the jurors they each have the right to be heard. CP 67.

¹² The trial court sent the jury to recess with no admonishment whatsoever on 69 of the 73 recesses. 1RP 1097, 1122, 1162, 1213, 1253, 1312, 1362, 1397, 1446, 1496, 1549, 1582, 1656, 1689, 1860, 1894, 1933, 1976, 2030, 2144, 2190, 2228, 2277, 2360, 2390, 2425, 2435, 2436, 2440, 2488, 2509, 2641, 2688, 2697, 2770, 2829, 2856, 2885, 2906, 2951, 2990, 3051, 3081, 3151, 3201, 3255, 3401; 2RP 73, 109, 152, 193; 3RP 65, 108, 154, 197; 4RP30, 63, 100, 115; 5RP 120. The court only admonished jurors not to discuss the case with anyone prior to each weekend recess. 1RP 1790-91, 2070, 2576, 3329.

Missing, however, are any written or oral instructions informing the jury of its constitutional duty to deliberate only when all 12 jurors are present. Nor did the court ever admonish jurors they were precluded from discussing the case with anyone during any recess, as recommended by WPIC 4.61 ("During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends.").

The court's failure to instruct the jury that deliberation may only occur when all twelve jurors are present constitute manifest constitutional error. Lamar, 180 Wn.2d at 585-86. The Lamar Court held this type of error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. 180 Wn.2d at 588 (citing State v. Lynch, 178 Wn.2d 487, 494, 309 P.3d 482 (2013)).

The test for determining whether a constitutional error is harmless is "[w]hether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Restated, "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different but for the error. A reasonable probability exists when

confidence in the outcome of the trial is undermined." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). It is undermined here and the prosecution cannot show harmlessness.

That Bienhoff's jurors had opportunities for improper deliberations is not just theoretical. The record shows the jury began deliberations shortly before 10:40 a.m. on Monday, November 2nd, and did not return with verdicts until Wednesday, November 4th. 1RP 3937, 3939. It is safe to assume one or more jurors left the jury room during deliberations during this three-day period, if for no other reason than to use a bathroom. If other jurors continued deliberations in that juror's absence, it violated the "common experience" requirement for constitutional unanimity, but not the instructions provided by the court. Lamar, 180 Wn.2d at 585. The jury was never instructed not to engage in such improper deliberations.

The court's written and oral instructions only limited the jurors' ability to discuss the case with fellow jurors. There is a reasonable probability some jurors discussed the case in the absence of other jurors, whether over lunch, walking to and from the jury room, or waiting for other jurors to arrive in the jury room following a break. Nothing informed them such discussions were not allowed. There was nothing provided to inform them their verdicts must be the product of "the common experience of all of them." Fisch, 22 Wn. App. at 383. If even

just one of the jurors was deprived of deliberations shared by others, then the resulting verdict is not constitutionally "unanimous." Lamar, 180 Wn.2d at 585; Collins, 17 Cal.3d at 693. Because the State cannot prove this error was harmless beyond a reasonable doubt, this Court should reverse and remand for a new trial. Lamar, 180 Wn.2d at 588.

In the event this Court concludes Bienhoff fails to show actual prejudice arising from this error, reversal is still warranted. The failure to instruct a jury in a criminal trial how to achieve constitutional unanimity constitutes structural error for which reversal is required without the need to show actual prejudice because it renders the entire proceeding fundamentally flawed.

“Structural error is a special category of constitutional error that ‘affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” State v. Wise, 176 Wn.2d 1, 13–14, 288 P.3d 1113 (2012) (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

Where there is structural error, “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” Rose v. Clark, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). Structural error is not subject to harmless error analysis. Fulminante, 499

U.S. at 309-10. Nor is a defendant required to show specific prejudice to obtain relief. Waller v. Georgia, 467 U.S. 39, 49, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

There can be no confidence in the constitutionality of Bienhoff's conviction. It is fundamentally flawed because there is no basis to assume the verdict rendered was unanimous as required by our State's constitution and as interpreted by our Supreme Court. Lamar, 180 Wn.2d at 585.

Although we assume jurors following the instructions given, there is no basis to assume they know what to do in the absence of instruction. State v. Smith, 181 Wn.2d 508, 519 n.13, 334 P.3d 1049 (2014); State v. Emery, 174 Wn.2d 741, 764 n.14, 278 P.3d 653 (2012). To the contrary, we assume the citizenry needs to be informed in certain contexts the specifics of the constitutional framework involved. Miranda v. Arizona, 383 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)¹³; State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927 (1998)¹⁴.

¹³ The Fifth Amendment requires that a person interrogated in custody by a state agent must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda, 383 U.S. at 444; also State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988) (finding Miranda warnings are required to overcome presumption that self-incriminating statements are involuntary when obtained by custodial interrogation). Where Miranda warnings are not provided, statements elicited from custodial interrogation are not admissible as evidence at trial. Miranda, 383 U.S. at 444, 476-77.

¹⁴ A warrantless search based on consent is constitutional only when the consent is knowingly and voluntarily given.

The same is true in the context of jury trials. Certain concepts a criminal jury must understand to properly deliberate are so important to the framework of a criminal trial that the failure to properly instruct on them requires reversal. For example, the failure to correctly instruct a criminal jury on the “reasonable doubt” standard constitutes structural error for which reversal is automatic. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Although most constitutional errors have been held amenable to harmless-error analysis, see Arizona v. Fulminante, 499 U.S. 279, 306–307, 111 S. Ct. 1246, 1263, 113 L. Ed.2d 302 (1991) (opinion of REHNQUIST, C.J., for the Court) (collecting examples), some will always invalidate the conviction. Id., at 309–310, 111 S. Ct. at 1264–1265 (citing, inter alia, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963) (total deprivation of the right to counsel); Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (trial by a biased judge); McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed.2d 122 (1984) (right to self-representation)). The question in the present case is to which category the present error belongs.

Sullivan v. Louisiana, 508 U.S. at 279.

This Court should conclude that the failure to adequately instruct a jury in a criminal trial on how to reach a constitutionally unanimous verdict constitutes structural error. The same reasons a flawed reasonable doubt instruction requires automatic reversal also apply here.

The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been

rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

508 U.S. at 279.

Just as “a misdescription of the burden of proof . . . vitiates all the jury's findings” because it renders the mechanism by which guilty is determined fundamentally flawed, so too does the failure to educate a jury that its deliberations must comply with the constitutional requirement that they occur only when all 12 jurors are assembled in the jury room. *Id.*, at 281; *Lamar*, 180 Wn.2d at 585. The failure to instruct Bienhoff’s jury on how to structure deliberations to achieve constitutional unanimity vitiates all of its findings. It constitutes structural error requiring reversal.

7. THE TRIAL COURT’S FAILURE TO PROPERLY INSTRUCT THE ALTERNATE JURORS AND ENSURE THEY WERE STILL FIT TO SERVE DEPRIVED BIENHOFF OF A FAIR TRIAL.

Following closing argument, the trial court released the alternate jurors from service, but failed to properly instruct them about their continued obligations not to research the case or expose themselves to media accounts. It then had to recall one of the alternates to deliberate, and failed to conduct any inquiry to ensure that alternate had not

conducted any research on the case or been exposed to any improper outside influences. This warrants reversal.

During trial the court admonished the jury prior to each weekend recess against conducting any “research” about the case. 1RP 1791, 2070, 2576, 3329. Closing arguments were heard Thursday, October 29, 2015. 1RP 3732-3897. The alternate jurors were then told “[i]t won’t be necessary for you to serve further,” but they should still not talk about the case with anyone until a verdict was reached. 1RP 3898. The rest of the jurors were instructed to return the following Monday to deliberate. Id. When the parties gathered the following Monday, one of the seated jurors had to be dismissed, necessitating seating one of the alternates. 1RP 3924. After the court informed the one juror of her dismissal, it summoned the remaining jurors from the jury room, which included both alternates, informed them of the change, seated one of them, and then sent the reconstituted jury back to the jury room to begin deliberations once the bailiff brought the exhibits. 1RP 3928-29. Three days later, on November 4, 2015, the jury returned with guilty verdicts. 1RP 3939.

The trial court’s post-closing argument admonishment of the alternate jurors falls far short of that recommended by the Committee, which advises court to reminds alternates they are only temporarily excused from serving, could be called back to deliberate if another juror

can no longer serve, and should therefore continue to follow the court's prior admonishments, including not discussing the case with anyone and not allowing themselves to be exposed to any information about the case until a verdict is reached. WPIC 4.69; see also CrR 6.5 ("the trial court shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect the juror's ability to remain impartial"). The admonishment given failed to ensure the alternates did not conduct research or expose themselves to media accounts about the incident or trial. Nor did the court ask the alternate if they had conducted any research or been exposed to any media accounts of the incident or trial since being released.

The lack of a proper admonishment from the court before dismissing the alternates at the weekend recess preceding deliberations is significant. Although told not to discuss the case with anyone until a verdict was rendered, they were free watch media accounts or otherwise research the case as much as they wanted.

The court failed to instruct the alternate jurors not to conduct any research or expose themselves to improper outside influence regarding the case. Thus, there is no basis to assume they did not do so. Smith, 181 Wn.2d at 519 n.13. The court's subsequent failure to inquire of the seated alternate whether that occurred leaves no factual basis to conclude it did

not occur. This violated Bienhoff's constitutional guarantee of a fair and impartial jury under Wash. Const. art. I, § 22. State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321, 327 (2009). This Court should reverse.

8. CUMULATIVE ERROR DEPRIVED BIENHOFF OF A FAIR TRIAL.

Even if the individual errors described above do not warrant reversal, this Court should reverse because, taken cumulatively, they deprived Bienhoff of a fair trial. The combined adverse effect of the trial court's errors of excluded defense evidence, failing to properly instruct the jury in several key areas, informing the jury it did not need to worry Bienhoff would be put to death if convicted, commenting on the evidence and violating the appearance of fairness doctrine combine to rendered the trial fundamentally unfair.

Reversal is required when the cumulative effect of errors produces a trial that is fundamentally unfair. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2011). Even errors that were unpreserved at trial may accumulate to render the trial unfair. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). This Court may exercise its discretion to review the claims, despite the failure to raise the issue in the trial court. Id.

In Alexander, the defense argued cumulative error required reversal because damaging hearsay was improperly admitted and an expert was permitted to opine regarding Alexander's guilt, thereby invading the province of the jury. 64 Wn. App. at 151-54. This Court reversed and remanded for a new trial, concluding, "the vouching and hearsay testimony of [the expert and the victim's mother], when combined with the prosecutor's improper questions and closing remarks, prevented Alexander from obtaining a fair trial." Id. at 158.

A new trial is required here as well. The errors discussed above involve multiple violations of Bienhoff's constitutional rights, call into question the impartiality of both the court and the jury, call into doubt the validity of the verdict rendered, and lead to the inescapable conclusion that Bienhoff did not receive a constitutionally compliant trial. The scale upon which the suspect jury weighed the evidence was not balanced. The multiple errors at trial placed a thumb on the prosecution's side of the scale of justice. Bienhoff requests this Court reverse his conviction because the cumulative effect of trial errors denied him a fair trial.

9. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Bienhoff indigent and entitled to appointment of appellate counsel at public expense. CP 519-20. If Bienhoff does not prevail on appeal, he asks that no appellate costs be authorized under title 14

RAP. RCW 10.73.160 (1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Bienhoff’s ability to pay must be determined before discretionary costs are imposed. His financial declaration listed no assets and no income. Supp CP ___ (sub no. 245, Motion and Declaration for Order Authorizing . . . Review at Public Expense, filed 12/29/15). The court waived all non-mandatory legal financial obligations and found him indigent for purposes of the appeal. CP 502. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Bienhoff has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

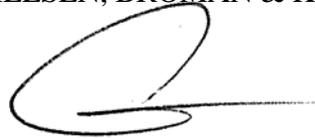
D. CONCLUSION

For the reasons stated, this Court should reverse Bienhoff's judgment and sentence and remand for a new trial.

DATED this 30th day of January 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH PLLC

A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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