

62864-0

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NO. 62864-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

STEVEN L. LEE,  
TSEGAZEAB ZERAHAIMANOT,

Appellants.

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BRIEF OF RESPONDENT

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## I. ISSUES

1. Was the defendants' right to be tried fairly violated when jury selection was conducted in an open courtroom but after the jury was selected the trial judge sealed juror information sheets without conducting the necessary analysis beforehand?

2. Prior to trial the State gave the defendants notice it intended to introduce cell phone records and authenticate those records with certifications from the custodians of record pursuant to RCW 10.96.030. The defendants did not raise any objection to this procedure.

a. Did the defendants waive any argument that the certifications violated their confrontation rights?

b. Was introduction of the certifications a manifest constitutional error?

c. Do the certifications from the records custodians fall within the traditional exception to the right to confrontation?

3. Was the trial court's answer to jurors questions regarding the elements of premeditated first degree murder an incorrect statement of the law so as to deprive the defendants of due process of law?

4. Are the elements of the predicate offense for first degree felony murder essential elements of first degree felony murder so that they should have been pled in the Information?

5. When first degree murder and unlawful possession of firearm neither share the same victim nor the same criminal intent did the defendants receive ineffective assistance of counsel because neither counsel argued the two offenses constituted same criminal conduct?

6. Were the defendants subject to multiple punishment for a single offense when on the judgment and sentence the court acknowledged the jury returned guilty verdicts on alternative charges but stated count II merged into count I and only sentenced the defendants on count I?

7. A witness who saw the murder happen spoke to Zerhaimanot after the fact about the murder. The witness told Zerhaimanot that Lee shot the victim in the head. The witness testified without objection that Zerhaimanot did not take issue with this statement.

a. Was evidence that Zerhaimanot did not disagree with the witness a manifest constitutional error which can be raised for the first time on appeal?

b. Did Lee receive ineffective assistance of counsel when his attorney did not object to that evidence?

## **II. STATEMENT OF THE CASE**

Forrest Starrett was married to Victoria Starrett for nine years by August 2007. He had worked at Boeing until June 2007 when he took a vacation and extended medical leave. Up until December 2006 Starrett had been a good husband, father, grandfather, and employee. In December 2006 Starrett's personality changed when he began to use drugs and disappear for days at a time. By August 21, 2007 Starrett was dead, the victim of a murder. 2 RP 225-233.

On August 20, 2007 Starrett showed up at Michelle Walker's south Everett apartment on Holly Drive. James Howell was renting a room from Walker, and spent most of the time with Starrett in an upstairs bedroom that had been turned into a den. Leroy Holt (aka Pakey) was downstairs with his friend Aaron Hill (aka Capone). Holt had been dealing drugs all afternoon and into the evening from Walker's apartment. Walker and another woman Tesha Mitchell (aka Security or T) were upstairs for the most part, but did come downstairs periodically. 2 RP 274-275, 280; 3 RP 471, 474-482; 5 RP 691-695, 784-799, 807-808; 8 RP 1562.

Sometime before 2 a.m. on August 21 Holt called Zerhaimanot (aka Keylo) in order to get more drugs to sell and to get a ride. Zerhaimanot agreed to come over. Sometime later Zerhaimanot arrived at Walker's apartment with Steven Lee. Zerhaimanot and Lee brought a bottle of liquor with them, and appeared intoxicated. Walker was surprised to see Zerhaimanot and Lee. After awhile Walker called Holt from upstairs using Starrett's cell phone and directed him to leave and take Zerhaimanot and Lee with him. 3 RP 483-488; 5 RP 802-808.

Holt, Zerhaimanot, and Lee did not leave. Walker, Mitchell, and Starrett went downstairs. When they got there Starrett asked Holt for some drugs. Zerhaimanot confronted Starrett demanding to know who he was and if Starrett was a police officer. Zerhaimanot directed Starrett into the kitchen where they were joined by Walker and Mitchell. Lee stayed in the living room with Holt, but eventually joined them in the kitchen where Zerhaimanot and Lee patted Starrett down and made him empty his pockets. Both Zerhaimanot and Lee pointed guns at Starrett. Starrett panicked and Walker was screaming. Walker raced upstairs calling to Howell to call 911. 3 RP 488-493; 5 RP 704-705, 808-815.

Zerahaimanot told Starrett he had to leave. Zerahaimanot and Lee then took Starrett out into the parking lot in front of the apartment building. Hill followed them. Holt heard a gunshot. Holt then went outside and saw Starrett sitting in the passenger side of his truck. Zerahaimanot and Lee were standing next to Starrett. Holt thought there was a fight over the gun. Holt saw Zerahaimanot shoot downward at Starrett. Starrett jerked back. Zerahaimanot ran off toward his car. Lee then shot Starrett in the head and ran off toward Zerahaimanot. Starrett jerked again, and then slumped over partially falling out of his truck. Zerahaimanot and Lee drove off. 3 RP 494-496; 5 RP 710, 816-818, 824-829; 6 RP 1075-1079.

Meanwhile Walker and Howell had called 911. Police received the dispatch at 4:37 a.m. Holt ran off ultimately finding his way to an apartment building at 203 Dorn Ave. While at that apartment building Holt called Zerahaimanot. Lee was with Zerahaimanot and asked if Holt had grabbed Lee's cell phone from Walker's apartment. Later Hill called Holt using Lee's cell phone. In the early morning Holt called a cab from the apartment building and went to Hill's in Silver Lake. 2 RP 337; 3 RP 368, 493-495; 5 RP

707, 830-834. 860; 6 RP 1049-1052; 7 RP 1183-1184; 8 RP 1560-1561.

When police arrived at the scene Starrett was dead. An autopsy was performed. The autopsy revealed Starrett suffered a gunshot wound to the head and two gunshot wounds to his leg. Stippling evidence indicated the gun was fired at close range. The cause of death was determined to be a gunshot wound to the head. 2 RP 248-249; 8 RP 1427-1449.

As a result of these events Zerhaimanot and Lee were both charged with first degree murder with a firearm with alternative theories alleging felony murder and premeditated intentional murder. They were also each charged with unlawful possession of a firearm. The defendants waived jury on the unlawful possession of firearm charge. A jury convicted both defendants under both theories. The trial judge convicted the defendants of the unlawful possession of firearm charge. At sentencing the trial judge merged the premeditated intentional first degree murder count with the felony murder count on each case. The defendants were then sentenced on the first degree felony murder count and the unlawful possession of firearms count. 1 CP 5-19, 64, 103-104 (Zerhaimanot), 1 CP 20-38, 96, 103-104 (Lee).

### **III. ARGUMENT**

#### **ISSUES RAISED BY STEVEN LEE AND TSEGAZEAB ZERAHAIMANOT**

##### **A. THE ORDER SEALING THE JUROR QUESTIONNAIRES IS NOT A STRUCTURAL DEFECT WHICH REQUIRES A NEW TRIAL.**

On the first day jurors were introduced to the case the trial court had the jurors fill out a juror questionnaire and biographical forms. Jurors were excused for the remainder of the day. The trial court provided copies of the completed questionnaires to all of the parties. Counsel for Zerahaimanot asked if the attorneys could remove the questionnaires from the courtroom. Counsel indicated that if the court did allow it he would keep the questionnaires confidential. The court did not rule on that request except to state that it would not allow the parties to make copies of the questionnaires. 1 RP 2-5; 2 RP 160.

The jurors were questioned on November 17 and 18, 2008. Jury selection was complete by November 18. On November 19 the trial court signed an order sealing the juror questionnaires, biographical forms, and letters from employers of prospective jurors

pursuant to GR 31(j)<sup>1</sup>. 2 CP 149, 160-172. There is no record the court conducted a hearing before signing the order sealing the juror information sheets. The defendant's now allege they are entitled to a new trial because before entering the order to seal those documents the trial court did not conduct an analysis or enter findings as required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).<sup>2</sup>

Washington Constitution art. 1, §10 provides that "justice in all cases shall be administered openly, and without unnecessary delay." Similarly, criminal defendants are afforded the specific right to a "public trial." Washington constitution art. 1 §22. Those provisions apply to court records as well as court proceedings.

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<sup>1</sup> The order was entered in Zerahimanot's case but not in Lee's case.

<sup>2</sup> This analysis was originally articulated in Seattle Times v. Ishikawa, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982). It includes:

1. The proponent of closure must make some showing of a compelling interest and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a serious and imminent threat to that right.

2. anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. the court must weigh the competing interests of the proponent of closure and the public.

5. the order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d at 258-59.

State v. Waldon, 148 Wn. App. 952, 957, 202 P.2d 325, review denied, 166 Wn.2d 1026, 217 P.3d 338 (2009), Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). It likewise applies to jury selection. In re Orange, 152 Wn.2d 795, 805, 100 P.3d 291 (2004).

The public trial and records right serves several purposes. It benefits the accused in that it allows the public to see that he is fairly dealt with and not unjustly condemned. Bone-Club, 128 Wn.2d at 259. It is intended to ensure that those persons participating in the trial, including judges, lawyers for the parties, and jurors, all perform their respective function responsibly. Estes v. Texas, 381 U.S. 532, 588, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965). It has been called an effective restraint on the possible abuse of judicial power. In re Oliver, 333 U.S. 257, 270, 68 S.Ct. 499, 92 L.Ed.2d 682 (1948). It is thought to encourage witnesses to come forward and discourages perjury. Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). It fosters the public understanding and trust in the judicial system. State v. Duckett, 141 Wn. App. 797, 803, 173 P.3d 948 (2007). It also permits the defendant's family and friends the opportunity to contribute their

knowledge or insight into jury selection. Orange, 152 Wn.2d at 812.

Although the Washington constitution art. 1, §10 and §22 and the Sixth Amendment provide for a right to an open trial, that right may give way to other important interests. Waller, 467 U.S. at 45, Bone-Club, 128 Wn.2d at 259. The court is required to perform the analysis before sealing any court record. Waldon, 148 Wn. App. at 966.

The trial court relied on GR 31(j). 2 CP 149. GR 31(j) states:

Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or member of the public, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

This Court has recently addressed GR 31(j) as it relates to the Bone-Club factors in State v. Coleman, 151 Wn. App. 614, 214 P.3d 158 (2009). While GR 31(j) is part of an analysis utilizing the Bone-Club factors, it alone does not justify sealing juror information absent consideration of the other factors. Id. at 623.

Whether the defendant is entitled to a new trial is dependent on the circumstances of the case. State v. Momah, 167 Wn.2d 140, 149, 217 P.3d 321 (2009). “[T]he remedy should be appropriate to the violation.” Waller, 467 U.S. at 50.

A conviction is reversed when a court fails to conduct the necessary analysis before entering a closure order only when that act constitutes a structural error. Momah, 167 Wn.2d at 149. A structural error is one which “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) quoting Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1872, 144 L.Ed.2d 35 (1999). Cases which have dealt with this issue suggest that unless the reasons which the Court has articulated for the right to an open courtroom have been compromised no structural error has occurred.

A majority of the Court found no structural error mandating a new trial when a portion of jury selection was conducted in chambers in Momah. The Court reasoned that the defendant affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, and actively participated in and benefitted from the closure. Momah at 151-152. Nor did this Court

find any structural error in circumstances similar to this case in Coleman. There the questionnaires were only used in jury selection, which was conducted in open court. The questionnaires were not sealed until after the jury was selected and sworn. There was nothing in the record to indicate the questionnaires were not available for public inspection during the jury process. This Court concluded the sealing order had no effect on the defendant's right to a public trial. Coleman, 151 Wn. App. at 624.

In both of these cases the reasons for a right to a public trial were not compromised. In Momah although a portion of jury selection was conducted in chambers, it was done in part to encourage jurors to be more candid about their qualifications as jurors. It thus served the purpose of encouraging jurors to responsibly perform their roles as jurors, as well as possibly discouraging perjury. Cf. People v. Meza, 188 Cal App. 3<sup>rd</sup> 1631, 1647 (1987) (A juror commits perjury when he does not respond to general questions in voir dire, thereby implying his answer to the question, and that implication is a material misstatement).

In Coleman, all jury questioning was done in open court. Thus the all the participants in trial were subject to public scrutiny and the defendant had the benefit of the advice and insights of his

family and friends. The questionnaires, which were only relevant to jury selection, were not sealed until after that portion of the trial had been completed. In these circumstances this Court held Coleman was not entitled to reversal. Coleman, 151 Wn. App. at 624.

In contrast, where the purposes of an open public trial were not served, the Court has found structural error which did necessitate reversal. In Orange the trial court imposed a permanent full closure of the courtroom during jury selection, prohibiting all members of the defendant's family and friends from observing that portion of the trial. In Easterling<sup>3</sup> and Bone-Club the trial court imposed a temporary full closure of the courtroom during a pre-trial hearing. In each of these three cases there was no public scrutiny to encourage the participants in the proceeding to act responsibly, or to discourage perjury. It also prevented the defendant from having the benefit of advice from people who supported him. In short, the defendant was deprived of a fair trial in those circumstances. Reversal was therefore required.

Orange, Easterling, and Bone-Club all involved closing a live hearing, while Coleman and the defendants' cases involve sealing

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<sup>3</sup> State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006).

a court record. This is a distinction which should determine the remedy for failing to conduct the required analysis before entering the sealing order. Notably the defendants cite no cases in which the remedy for sealing a court record without first conducting the necessary analysis was reversal.

A live hearing is a dynamic proceeding which cannot be recreated. A transcript does not fully convey the totality of information one may obtain from being present and observing the proceeding. Only one who is present may observe not only the speakers words, but his tone of voice and posture as well. A juror's response on paper may seem benign, but in person may communicate any range of emotions. One who has the opportunity to observe a juror's demeanor while answering questions in voir dire may obtain significant information regarding the juror's qualifications to serve. The Court has recognized the unique benefit from actually observing the persons questioned. State v. Swan, 114 Wn.2d 613, 666, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991) (the Court gives the trial court deference in a child hearsay ruling because it is in a prime position to observe and evaluate a witnesses' demeanor), In re Gentry, 137 Wn.2d 378, 411, 972 P.2d 1250 (1999) (credibility

determinations are left to the trier of fact who had the opportunity to evaluate the witnesses' demeanor and judge their credibility). In contrast a document which has been sealed does not change. What one can see in the document before it is sealed, one may see after it is unsealed.

Thus, like Coleman the remedy in this case should be to remand the case to the trial court to conduct the Bone-Club analysis. The defendants were not denied the benefit of an open public trial even though the judge sealed juror information sheets after the jury was selected. Each defendant had the benefit of public scrutiny, as well as the opportunity for input from family and friends during jury selection. Juror questionnaires are generally used as a tool for the parties to sort through the qualifications of jurors, and therefore not usually the kind of thing the public routinely accesses. Despite that there was nothing that prevented the public from viewing those documents during the portion of the trial when they were most relevant, while the jury was being selected. Under these circumstances the defendants' trial was neither "fundamentally unfair" nor did it "render the trial an unreliable vehicle for determining [the defendants'] guilt or

innocence.” The Court should find no structural error that requires a new trial for either defendant.

The defendants assert the judge’s pretrial comments regarding not copying the questionnaires is evidence he sealed them at that time. An order not to copy documents is not the same as an order not to reveal the content of those documents from other persons. There is nothing in the record to support the claim that anyone was precluded from viewing those documents before jury selection was completed.

The defendants also argue that failure to conduct a Bone-Club analysis prior to sealing was a structural error in itself, requiring reversal. He relies on State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). Strode was a plurality opinion. The holding of the Court in a plurality opinion is the position of the justices concurring on the narrowest grounds. State v. Zakel, 61 Wn. App. 805, 808, 812 P.2d 512 (1992), affirmed, 119 Wn.2d 563, 834 P.2d 1046 (1992). There the concurring opinion adhered to its decision in Momah that a structural error necessitating reversal from a courtroom closure was dependant on the facts. The differing result was due to the difference between the facts in each case. Unlike Momah there was nothing in the record in Strode to suggest that

the court considered the competing interests of the right to a public trial and juror privacy, and there was no knowing waiver of public trial rights. Strode, 167 Wn.2d at 234-36.

Because the purposes for a public trial right were served the defendants received a fair trial. Thus no structural error occurred and the defendants are not entitled to a new trial. Like Coleman the defendants are only entitled to remand for consideration of the order to seal those forms in light of Bone-Club and Waldon.

**B. THE DEFENDANTS AGREED TO ADMISSION OF PHONE RECORDS. THEIR CONFRONTATION RIGHTS WERE NOT VIOLATED WHEN AFFIDAVITS FROM THE CUSTODIAN OF RECORDS FOR CELL PHONE RECORDS WAS INTRODUCED INTO EVIDENCE.**

The defendants assign error to admission of cell phone records which were authenticated by way of certifications of custodian of records. They argue their confrontation rights were violated when they were not afforded the opportunity to cross examine those custodians of records. BOA Zerahaimanot 1, 35-40.

Pre-trial the State gave the defense notice that they intended to authenticate the cell phone records by way of certifications from the custodian of records pursuant to the newly enacted 10.96 RCW. Neither Lee nor Zerahaimanot filed any objection to admission of phone records based on certifications from the

custodian of records. Trial counsel for Lee told the State that he did not oppose admission of phone records under the new law. Trial counsel for Zerahaimanot expressed a desire to see the actual certifications before making a decision on whether to object. 8-7-08 RP 15-17; 3 CP \_\_\_\_ (sub 99 07-103039-0, State v. Zerahaimanot, Response to Defense Brief RE Phone Records Foundation). The only issue Zerahaimanot contemplated raising in regards to the phone records involved a Frye hearing which he subsequently withdrew. 8-25-8 RP 17-20.

During motions in limine neither Zerahaimanot nor Lee objected to introduction of summaries of phone records. The Court noted in its written order on motions in limine that "Parties agree that complete records will come in as well." 1 CP 61<sup>4</sup>. Cell phone records for seven of the witnesses and both defendants were introduced at trial. Bristol Chaney Ex 184, 3 RP 350; Leroy Holt Ex. 209, 5 RP 860; Nicole Jorgensen Ex. 228, 5 RP 860; Danika Medley Ex. 229, 7 RP 1194; James Howell Ex. 234, 7 RP 1320;

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<sup>4</sup> The clerk's papers in each of the defendant's cases have slightly different numbering. With reference to documents filed in both cases the State's response refers to the clerk's papers filed in State v. Zerahaimanot unless otherwise indicated.

Isabel Ellis Ex. 237, 7 RP 1358; Steven Lee, Ex. 238, 7 RP 1358; Dick Richardson, Leroy Holt, Steven Lee, Ex. 239, 8 RP 1391-1395; Bristol Chaney, Nicole Jorgensen, Danika Medley, James Howell, Isabel Ellis, Forrest Starrett, Ex. 240, 8 RP 1391- 1395. With the exception to the records for James Howell contained in Ex. 234 neither defendant objected to the admission of those records.

The only reference the defendants make now to any objection to the cell phone records occurred during the course of motions in limine where counsel for Zerhaimanot objected to testimony from records custodians via the internet on confrontation grounds. BOA Zerhaimanot at 14, 1 RP 74-75. This discussion related to the State's response to the defendant's trial brief and CrR 3.6 motion. In that response brief the State noted that the defense had made no objection to the records or certifications from records custodian. It then raised the possibility that the State may seek live testimony from the records custodian if necessary. 3 CP \_\_\_\_ (sub 136, State's Response to Defendant's Trial brief and CrR 3.6 motion, page 13-14). Nothing in the statute prevents either party from calling the records custodian to testify. RCW 10.96.030(5). Thus the discussion the defendants' reference was not an objection to admission of the certifications and the phone records. It was

only an objection to the manner in which live testimony was to occur if the State sought to call the records custodian for live testimony.

**1. When The Defendants Did Not Give Prior Notice Of An Objection To Admission Of Certifications Of Record Custodian And The Business Records Associated With Them Their Confrontation Rights Were Not Violated By Admission Of That Evidence.**

A party may introduce business records without the testimony of the custodian of records if the records are accompanied by an affidavit which sets forth the foundational requirement for admission of those records. RCW 10.96.030(1),(2). A party who opposes admission of that evidence based on the certification of the records custodian is required to file a motion within a sufficient time before trial so that if the motion is granted the party offering the record has sufficient time to produce the custodian of records. RCW 10.96.030(3). If a party does not timely file a motion objecting to the evidence then any objection is waived unless good cause is shown. RCW 10.96.030(4).

The defendants' rely on the Court's decision in Melendez-Diaz v. Massachusetts, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). Melendez-Diaz stated the defendant has the burden of asserting his Confrontation Clause objection. It found no problem

with statutes like RCW 10.96.030 that regulated the time within which a defendant must assert that right. Melendez-Diaz 129 S.Ct. at 2534,n. 3, 2541.

Thus CrR 6.13(b)(3)(iii) does not create a confrontation violation because it requires the defendant to demand an experts appearance at trial after being properly served notice the State intends to admit a certification that complies with that rule regarding a test performed on a substance or object. State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001). In another context the Court found no due process or self incrimination violation from a Florida statute which required a defendant to give notice of an alibi defense pretrial or forfeit the defense at trial. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

The defendants were properly required to assert their Confrontation rights within a reasonable period of time before trial. Because they did not do that the certifications and records were properly introduced into trial. No violation of their Confrontation rights occurred.

**2. Alternatively, The Defendants Have Not Shown A Manifest Error Affecting A Constitutional Right Which Would Permit Them To Raise The Issue For The First Time On Appeal.**

Even aside from the statutory requirements the defendants have waived an argument that an error occurred in admission of the certifications and phone records unless they can show it was a manifest error affecting a constitutional right. RAP 2.5(a)(3). The alleged error does suggest a constitutional issue. However, in order to satisfy the burden to show the error is manifest, the defendants must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

While the defendants have not addressed that specific issue they have argued that the error in admission of the records was not harmless beyond a reasonable doubt because they were a key piece of evidence which corroborated Holt's account of the murder. BOA Zerhaimanot at 43. The Court should reject both that argument, and any argument that admission of the evidence was a manifest error that the defendants may make in reply because the records were not the only evidence which corroborated Holt's testimony.

Walker, Howell, and Holt all testified that Walker, Howell, and Starrett were upstairs while Holt, Zerhaimanot, and another man Holt identified as Lee were downstairs. They all agreed that Walker tried to get Holt to leave and take the defendants with him. They all testified that Starrett went downstairs at one point to leave the apartment. Walker and Holt both said Zerhaimanot was suspicious of Starrett, demanding to know who he was. Howell corroborated evidence Zerhaimanot was suspicious of people he did not know because Zerhaimanot demanded to know Howell's identity when Howell returned to the apartment. 3 RP 477, 484-489; 5 RP 692-698, 702, 788-89, 803-04, 807-09.

Walker and Holt both said that when Starrett came downstairs Zerhaimanot went into the kitchen with Walker, Starrett, and Mitchell. Walker and Holt both testified that Lee and Holt came into the kitchen after them. While in the kitchen Lee pointed a gun at Starrett. Zerhaimanot patted Starrett down and demanded that he take everything out of his pockets. Walker, Holt, and Howell all testified Walker was screaming while this was going on. Walker corroborated Holt that two people carried Starrett out of out of the apartment from the kitchen. 3 RP 490-494, 497; 5 RP 812-816.

Physical evidence supported Holt's testimony as well. Holt testified he observed Zerahaimanot and Lee each shoot at Starrett while Starrett was seated in his truck. Zerahaimanot shot downward and then ran off. Lee then shot at Starrett's head before running off in the same direction as Zerahaimanot. Walker confirmed Zerahaimanot and Lee each had a gun. Bullets and shell casings for a 9 mm. firearm and a .22 cal firearm were found in and around Starrett's truck. An autopsy performed on Starrett's body showed he suffered bullet wounds to his head and legs. 3 RP 491; 5 RP 826-829; 6 RP 1097-1121; 8 RP 1427-1444.

After Holt saw the murder he testified he ran to another location later identified as 203 Dorn. From there he called a cab to take him to an address in Silver Lake. Evidence from the cab company showed it received a call to pick up a customer at 203 Dorn and go to Silver Lake on August 21, 2007 at 7:11 a.m. The call had been received from Holt's phone number. 5 RP 830-834, 860; 6 RP 1049-1052; 8 RP 1560-1561.

The phone records at issue do corroborate testimony that phone calls were made between phones which belonged to various witnesses in the early morning hours of August 21, 2007. As shown they were not the only evidence which corroborated Holt's

testimony. Rather a significant portion of his testimony was corroborated by testimony from other witnesses and physical evidence. The phone records themselves were not the critical piece of evidence which the jury necessarily required in order to find Holt credible. Thus the defendants cannot meet their burden to prove any potential error was manifest. They have waived this issue for review with respect to the cell phone records admitted at trial.

If the Court does reach the confrontation issue raised by the defendants' it should reject their argument that their right to confront witnesses was violated. In Melendez-Diaz the defendant was charged with distributing cocaine. The Court considered whether certifications from chemists violated his confrontation rights under the Sixth Amendment. Melendez-Diaz, 129 S.Ct. at 2530. The certifications were introduced in order to prove the substance seized from Melendez-Diaz was cocaine. The Court distinguished the kind of evidence at issue in that case with a clerk's certificate authenticating an official record. In the latter case the certificate was traditionally admissible at trial. The exception was narrow and only related to records that were otherwise admissible. In contrast

the chemist's certification created evidence for the sole purpose of providing evidence against the defendant. Id at 2539.

This distinction was examined by the Court when it concluded that a certification from the Secretary of State regarding a motorists driving record did not violate the Confrontation Clause in State v. Murphy, \_\_ A.2d \_\_ (2010WL1076226 (Me.)). The Court reasoned in part that certification reported neutral information by the public officer charged with custody of that information. The Court also noted that unlike the record at issue in Melendez-Diaz cross examination regarding the certification in that case had little utility; the collection and maintenance of the records were largely automated, and the data collected was not subject to any serious interpretation, judgment, or analysis. Id. at 6.

Likewise the Court held a certification from the custodian of records at FedEx did not violate the Confrontation Clause in United States v. Mallory, \_\_\_ F.Supp.2d \_\_\_, (2010 WL 1286038 (E.D.Va.)). That certificate provided the foundational requirement for business records introduced in a mail fraud case. The Court found the certification fell within the historical authentication exception described in Melendez-Diaz. The Court reasoned that the certification did not comment on the content or meaning of the

record, but simply described the manner in which the document was produced and maintained. Id at 3.

Murphy and Mallory provide sound reasons for distinguishing the certification at issue here and the certification in Melendez-Diaz. The certification is the kind of document which has historically been treated as an exception to the right of confrontation. It does not comment on the contents of the records, but merely recites the manner in which the phone records were maintained and produced. It does not contain information that is subject to judgment or analysis. Therefore cross examination would add little to the determination of the case. For these reasons, should the Court consider the substance of the defendants' Confrontation challenge to the certificates from records custodians, it should be rejected.

**C. THE COURT'S ANSWER TO THE JURY QUESTION REGARDING THE "TO CONVICT" INSTRUCTION DID NOT DEPRIVE EITHER DEFNDANT OF DUE PROCESS OF LAW.**

The jury was instructed on the elements of first degree murder as follows:

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

- (1) that on or about the 21<sup>st</sup> day of August, 2007, the defendant Zerahaimanot or an accomplice caused the death of Forrest Starrett;
- (2) that the defendant Zerahaimanot or an accomplice acted with intent to cause the death of Forrest Starrett;
- (3) that the intent to cause the death was premeditated;
- (4) That Forrest Starrett died as a result of the defendant Zerahaimanot's or the accomplice's acts; and
- (5) That the acts occurred in the State of Washington

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

1 CP 50.<sup>5</sup>

During the course of deliberation the jury sent out two questions regarding Instruction number 15. In the first question the jury asked "Regarding jury instructions (part #15 and #16) elements (1), (2), (4) include the word accomplice 'or an accomplice'. However element (3) does not include any mention of accomplice.

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<sup>5</sup> Instruction number 16 was identical to instruction number 15 except it substituted defendant Lee for defendant Zerahaimanot. 1 CP 51.

Are we, the jury, aloud (sic) to consider the lack of the word 'accomplice' for element (3) as significant? "The court responded "you must rely on the instruction you have already been given." 1 CP 29. The next day the jury sent out a second question asking "on Instruction page #15, are we to interpret that element (3) is a continuation of element (2)? That is, the 'intent' referred to in element (2) directly is associated with the 'intent' in element (3)?" The court responded "Regarding instruction number 15, the word 'intent' in element number 3 refers to the 'intent' required to be proved in element number 2." 1 CP 28.

The defendants now allege the trial court committed error when it gave its second answer to the jury regarding instruction number 15. Specifically they argue the supplemental instruction did not require the jury to find that if each defendant were acting as an accomplice to the other that he also shared the same mental state as the other acting as a principal. In doing so the defendants argue the supplemental instruction relieved the State of its burden to prove every element of the charge. The Court should reject this argument because it misstates the law of accomplice liability ignores the plain meaning of the supplemental instruction.

In order to convict a defendant on an accomplice liability theory the State must prove that the accomplice acted with general knowledge the principal was going to commit the crime that the accomplice was charged with. State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 717 (2000), State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). The accomplice need not have specific knowledge of every element of the crime committed by the principal. Roberts, 142 Wn.2d at 512. When the crime charged is murder, the accomplice must be shown to have knowledge that his acts will promote or facilitate a murder, regardless of the degree of murder. Sarausad v. State, 109 Wn. App. 824, 835-36, 39 P.3d 308 (2001). (See Waddington v. Sarausad, \_\_\_ U.S. \_\_\_, 129 S.Ct. 823, 172 L.Ed.2d 531 (2009))

The court's supplemental instruction regarding Instruction number 15 did not misstate the law of accomplice liability. A plain reading of the second element in that instruction stated that either the defendant acted with intent to cause the victim's death, or an accomplice acted with intent to cause the victim's death. The court's supplemental instruction did no more than tell the jury that in order to convict the defendant of first degree murder, whoever's

intent, the defendant or an accomplice's, must have been premeditated.

The defendants interpret the Court's decisions in Roberts and Cronin to mean that in order to be convicted as an accomplice the State must prove the accomplice shared the same criminal intent to commit the substantive offense. BOA Zerahaimanot at 46. This is contrary to the holdings in both cases which required an accomplice have "knowledge" that his principal was committing a specific offense in order for the accomplice to share in culpability for that offense. In no case has the Court held that the evidence must show that the accomplice shared the same mental state with the principal.

The defendants claim the supplemental instruction was erroneous because, without additional instructions clarifying the role of an accomplice, it relieved the State of the burden to prove that as an accomplice they acted with knowledge of the principal's premeditated intent. BOA Zerahaimanot at 50. However, as this Court said in Sarausad, supra, an accomplice need only have general knowledge that the principal intends to commit a murder, but need not have specific knowledge of the degree of the offense. Thus, whether or not the accomplice had knowledge the principal

had premeditated intent to commit murder is immaterial, as long as he generally knew that the principal intended the murder.

The defendants also argue the court's supplemental instruction negatively impacted the felony murder instructions as well. They claim that because the jury was not instructed on which order to consider the alternative means of committing murder it is possible that jurors used the judge's answer to its question on Instruction number 15 to erroneously consider the evidence in light of Instruction number 8, setting forth the elements of felony murder. This argument should be rejected for the same reasons that the answer to Instruction number 15 was a correct statement of the law.

Further the jury was instructed to decide each count charged against each defendant separately. 1 CP 38. Jurors are presumed to follow the court's instructions. State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). The question related to Instruction number 15 not number 8 (relating to Zerahaimanot) or 9 (relating to Lee). Presumably jurors had no confusion regarding the elements of the felony murder count and considered that as a charge separate from the intentional murder count. Thus assuming for the sake of argument that the trial court's answer to the question

relating to Instruction 15 was wrong, it would have no impact on the felony murder count defined in instruction 8.

**D. THE AMENDED INFORMATION WAS SUFFICIENT TO INFORM THE DEFENDANTS OF THE ELEMENTS OF THE CRIME OF FIRST DEGREE FELONY MURDER.**

The defendants next argue the amended Informations filed in their cases did not contain the essential elements of first degree felony murder because they did not include the elements of the predicate offenses. The charging language for each defendant read:

COUNT I; FIRST DEGREE MURDER WITH A FIREARM committed as follows: That the defendant, on or about the 21<sup>st</sup> day of August, 2007, committed or attempted to commit the crime of second degree kidnapping, and in the course of or in furtherance of such crime or in immediate flight therefrom, the defendant, or another participant, did cause the death of another person, to-wit: Forrest Starrett, not a participant in such crime, said death occurring on or about the 21<sup>st</sup> day of August, 2007; proscribed by RCW 9A.32.030(1)(c), a felony; and that at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm, as provided and defined in RCW 9.94A.510, RCW 9.41.010, and RCW 9.94A.602,...

1 CP 103-104<sup>6</sup>

“[T]he ‘essential elements’ rule requires that a charging document allege facts supporting every element of the offense...” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The purpose of the rule is to apprise the defendant of the charged crime so that he may prepare a defense. State v. Kiorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991).

The Court has held that the elements of the underlying felony are not elements of felony murder. State v. Hartz, 65 Wn. App. 351, 355, 828 P.2d 618 (1992), State v. Bryant, 65 Wn. App. 428, 438, 828 P.2d 1121, review denied, 119 Wn.2d 1015, 833 P.2d 1389 (1992). Even though the underlying crime is itself an element of felony murder, the defendant is not actually charged with that crime. State v. Medlock, 86 Wn. App. 89, 101, 935 P.2d 693, review denied, 133 Wn.2d 1012, 946 P.2d 402 (1997). Therefore, they need not be alleged in an Information charging felony murder. Bryant, 65 Wn. App. at 438.

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<sup>6</sup> This language is contained in the second amended information charging Zerhaimanot and in the third amended information charging Lee. Coincidentally they both are numbered pages 103 and 104 in each set of clerk’s papers designated by each defendant.

The defendants acknowledge that the Court has previously ruled the elements of the underlying felony are not essential elements of felony murder. They urge the Court to overrule those cases in light of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Apprendi held that factors which bore on the defendant's degree of culpability, and in turn extent of punishment, must be pled and proved. "Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 540 U.S. at 490. Blakely clarified the "statutory maximum" was the maximum penalty the court could impose based on the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303.

The defendants point to cases decided after those two cases to support their position that the elements of the predicate offense in a felony murder case are now essential elements of felony murder. Those cases are not support for their position. They are straightforward applications of the rule announced in Apprendi as applied to different crimes than the one at issue here. State v.

Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004) (when the nature of a controlled substance increases the penalty which the court may impose that fact must be alleged in the information), State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (a firearm enhancement is a sentencing enhancement which must be alleged in the Information).

The defendant also cites State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009). In that case the Court held aggravating factors were not essential elements of a crime, and therefore were not required to be charged in the Information. This case says nothing about the nature of predicate offenses as elements of another crime. At best it supports the proposition that certain facts need not be pled in the Information in order to enhance the defendant's sentence. All that is necessary is notice of the State's intent to prove those facts prior to the hearing in which those facts were sought to be proved.

These cases do not invalidate the Court's prior decisions regarding the elements of felony murder. In charging felony murder the defendant is not actually charged with the underlying crime. Rather it serves as a substitute for the mental state that the State otherwise would have to prove. Bryant, 65 Wn. App. at 438. As

such the predicate felony, and not its specific elements, is the essential element which must be included in the Information and proved to the jury. Because the predicate felony was alleged in the Informations the defendants were sufficiently informed of the nature of the charge.

**E. FAILURE TO RAISE AN ARGUMENT THAT THE CONVICTIONS CONSTITUTED SAME CRIMINAL CONDUCT AT SENTENCING DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.**

The defendants next argue their trial attorneys provided ineffective assistance of counsel when they did not argue the murder convictions and the unlawful possession of firearm conviction constituted same criminal conduct for scoring purposes at sentencing. The evidence presented at trial did not support an argument that the two offenses constituted the same criminal conduct.

When alleging counsel was ineffective the defendant bears the burden to prove (1) that defense counsel's representation was deficient and (2) that defense counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's representation is deficient if it falls below an objective standard of reasonableness

based on a consideration of all of the circumstances. Id. A defendant is prejudiced by counsel's deficient representation if there is a reasonable probability that except for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "A reasonable probability is a probability that is sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When a defendant raises a claim of ineffective assistance of counsel he bears the burden to prove the absence of a legitimate strategic or tactical reason for the challenged conduct by counsel. In re Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). The Court indulges in a strong presumption that counsel's representation was reasonable and constituted sound trial strategy. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996), Elmore, 162 Wn.2d at 252..

Whenever a person is sentenced for two or more current offenses the sentence range for each current offense is determined by using all other current and prior convictions as if they were prior convictions for purposes of calculating the offender score unless the court finds two or more current offenses encompass the same

criminal conduct. RCW 9.94A.589(1)(a). Offenses which constitute the same criminal conduct are counted as one offense. Id. Same criminal conduct is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. Id. Each element must be satisfied in order for multiple offenses to constitute the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). First degree murder and unlawful possession of firearm are not same criminal conduct because they do not involve the same victim or the same criminal intent.

**1. The Attorneys Made A Strategic Decision At Sentencing When They Did Not Argue The Offenses Constituted Same Criminal Conduct.**

The record reflects that both attorneys made the strategic decisions to seek a lower sentence by focusing on the defendants and the facts of the case. Each attorney highlighted his client's relative lack of criminal history and community support. Zerahaimanot's attorney additionally argued that he should receive a lower sentence on a failed defense theory. 10 RP 2189-2193, CP 20-23.

At the same time the defense attorneys could have made a strategic decision to not argue the unlawful possession of firearm

and murder counts constituted same criminal conduct based on existing authority. The Court had already held that unlawful possession of firearm and assault did not constitute same criminal conduct. State v. Thompson, 55 Wn. App. 888, 781 P.2d 510 (1989). The Court had also held that unlawful possession of firearm and manslaughter did not constitute same criminal conduct. State v. Becker, 59 Wn. App. 848, 801 P.2d 1015 (1990). Given these authorities is it likely that the defense attorney made a strategic decision to focus on arguments that were more likely to be successful, and not challenge the score on a basis that was not likely to succeed. As counsels' conduct can be characterized as a strategic choice, neither defendant can show he received ineffective assistance of counsel when his attorney did not make a same criminal conduct argument at sentencing.

**2. Since The Charges Did Not Constitute Same Criminal Conduct The Attorneys Did Not Provide Deficient Performance, and The Defendant's Did Not Suffer Prejudice, When A Same Criminal Conduct Argument Was Not Made.**

The defendants fail to show their attorneys provided deficient performance because any argument the two crimes constituted same criminal conduct would have failed. Had counsel raised the

issue they would not have been able to show the two crimes had the same victim or the same criminal intent.

As the defendants acknowledge the Court has held the victim of unlawful possession of firearm is the general public. State v. Haddock, 141 Wn.2d 103, 110-111, 3 P.3d 733 (2000). The victim of the homicide was not the general public, but Forrest Starrett. Thus the same victim part of the test is not met. Had counsel argued the offenses constituted the same criminal conduct they would have been overruled.

The defendants suggest that defense counsel could have made a viable argument that Starrett was a member of the general public, and therefore the same victim test would have been met. BOA Zerhaimanot at 62. A similar argument was rejected in Lessley. There the defendant argued a burglary and kidnap involving three people met the test because there was only one "central victim." The Court rejected that argument because the statute mandated multiple crimes affecting multiple victims was not same criminal conduct. Lessley, 118 Wn.2d at 779. Just as in Lessley, Starrett's dual status as a member of the general public and murder victim did not eliminate all other members of the

general public as victims of the unlawful possession of firearms charge for the purposes of satisfying the same victim test.

The crimes did not satisfy the “same objective intent” portion of the test either. In analyzing this factor the Court engages in a two part analysis. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, review denied, 118 Wn.2d 1006, 822 P.2d 288 (1991). The first inquiry is to objectively view each underlying statute and determine whether the required intents, if any, are the same or different for each count. Id. at 816, State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). If they are different then the offenses are counted as separate crimes. Id. If they are the same, then the court proceeds to the next step which is to objectively view the facts usable at sentencing and determine whether the defendant’s intent was the same or different with respect to each count. Id.

As the Court has stated the objective intent for unlawful possession of firearm is voluntary possession of a gun after a felony conviction. Thompson, 55 Wn. App. at 894, Becker, 59 Wn. App. at 855. The objective criminal intent behind murder is to kill someone. Dunaway, 109 Wn.2d at 216. It is therefore different than the intent for unlawful possession of firearm.

The defendants ignore the authority from this Court on this issue and instead argue the unlawful possession furthered the homicide. That argument relates to the second part of the inquiry conducted after the Court reviews the relevant statutes to determine if the intents are the same for each offense. Because the intent for each crime here is different, this second part of the analysis is not undertaken.

The defendants likewise fail to establish prejudice flowing from counsels' failure to raise the same criminal conduct argument. Absent an affirmative showing that the defendants would receive a favorable decision they have not establish any actual prejudice. McFarland, 127 Wn.2d at 337, n. 4. Based on the forgoing even if defense counsel had raised the issue it is unlikely the court would have found the crimes constituted same criminal conduct.

In an ineffective assistance of counsel claim defendants bear the burden to prove both deficient performance and resulting prejudice. Strickland, 466 U.S. at 687. The defendants here fail to sustain their burden on either prong. The Court should reject the argument the defendants received ineffective assistance of counsel at sentencing.

**F. THE SENTENCE DID NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES.**

Both defendants were charged with First Degree Murder with a Firearm alternatively under a felony murder theory and under a premeditated intent theory. 1 CP 103 (Zerahaimanot), 1 CP 103 (Lee). The jury convicted of both alternatives. 1 CP 24-27 (Zerahaimanot), 1 CP 35-38 (Lee). The court entered a finding on the judgment and sentence for each defendant that the defendant had been found guilty by jury verdict of First Degree Murder with a Firearm in violation of RCW 9A.32.030(1)(c) (felony murder), and First Degree Murder with a Firearm in violation of RCW 9A.32.030(1)(a) (premeditated intentional murder). As to the premeditated intentional murder charge the court added the notation that "Count II merges into Count I for sentencing purposes." 1 CP 5 (Zerahaimanot), 1 CP 20 (Lee). The court entered sentence on Count I and Count III. It did not enter sentence on Count II. The defendants argue the manner in which the court recognized the jury's verdicts violated their right to be free of double jeopardy.

The Double Jeopardy clause bars multiple punishments for the same offense. State v. Kelley, 168 Wn.2d 72, 226 P.3d 773,

775 (2010), North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2089, 23 L.Ed.2d 656 (1969). Under similar circumstances presented here the Court has held a defendant is not subject to multiple punishments when the trial court recognizes the full extent of the jury's verdict, but then notes that one count merges into another, and sentences the defendant for only that one count.

This Court was faced with an identical claim on nearly identical facts in State v. Johnson, 113 Wn. App. 482, 54 P.3d 155 (2002), review denied, 149 Wn.2d 1010, 69 P.3d 874 (2003). There the defendant was charged in the alternative with first degree premeditated murder and second degree felony murder. The jury found the defendant guilty of second degree intentional murder as a lesser included of first degree murder and second degree felony murder. At sentencing the trial court found the defendant had been convicted of both crimes but merged the two counts into one. In the judgment portion of the judgment and sentence the court adjudged the defendant guilty as set forth in the findings. This Court found that procedure did not result in multiple punishments because he received only one conviction and one sentence. Id. at 488.

Likewise the Court held there was no double jeopardy violation when the trial court entered a notation on the judgment and sentence recognizing the jury's verdict in State v. Meas, 118 Wn. App. 297, 75 P.3d 998 (2003), review denied, 151 Wn.2d 1020, 91 P.3d 95 (2004). There the defendant was charged with aggravated first degree murder and first degree felony murder for his role in the death of a single victim. He was convicted of both counts. The court noted on the judgment and sentence "Count II-Defendant's conviction on Count II is deemed to have merged with the defendant's conviction in Count I and the Special Verdict entered by the jury. Defendant shall be sentenced only upon the conviction on Count I." The Court rejected the argument that this notation constituted double punishment, finding there was no double jeopardy violation. Id. at 305-306.

The defendants argue that conviction in count II, premeditated murder, should have been vacated because it constituted multiple punishments, and thus violated their right to be free from double jeopardy. They rely on State v. Schwab, 98 Wn. App. 179, 988 P.2d 1045 (1999), and State v. Read, 100 Wn. App. 776, 998 P.2d 897 (2000). Those cases do not support their position because in each case a judgment and sentence was

entered on two counts which were the same in law and in fact. Thus the defendant's double jeopardy rights were implicated. Schwab, 98 Wn. App. at 188-189, Read, 100 Wn. App. at 792-793. Because no sentence was entered for count II Schwab and Read do not support the defendants' argument.

The defendants also cite State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). In Womac the defendant was convicted of homicide by abuse (count I), second degree felony murder (count II) and first degree assault (count III). The court entered judgment on all three counts but did not sentence the defendant on counts II and III. The Court of Appeals directed the trial court to conditionally dismiss counts II and III allowing for reinstatement should count I be later reversed, vacated or set aside. The Supreme Court agreed with Womac that this procedure violated double jeopardy principles. The Court said it was unfair to hold two counts in abeyance in case count I was reversed. Id. at 651. Although the defendant was not sentenced on two counts, the Court held he still received punishment for those offenses because of the potential for collateral consequences flowing from the counts which were not vacated. Id. at 656-57.

Womac distinguished the circumstances of that case with those in State v. Trujillo, 112 Wn. App. 390, 49 P.3d 935 (2002), review denied, 149 Wn.2d 1002, 70 P.3d 964 (2003). In Trujillo the defendant had been charged in the alternative and only one of the two convictions were reduced to judgment. There the Court held no double jeopardy violation had occurred. Trujillo, 112 Wn. App. at 411. In Womac the defendant was charged with separate offenses, all of which were reduced to judgment. There the Court found the remedy was to vacate the charges on which the defendant had not been sentenced. Womac, 160 Wn.2d at 660.

The facts here are similar to those in Trujillo. The defendants were charged in the alternative. Pursuant to the reasoning in Johnson and Meas reference to count II merging into count I did not reduce the premeditated murder count to judgment which would cause a double jeopardy violation.

In Trujillo the Court did state that the defendant should be sentenced on the greater charge without reference to verdict on the lesser charge. Trujillo, 112 Wn. App. at 411. Womac did not comment on whether no reference to the second verdict was necessary in order to avoid a double jeopardy violation. Trujillo was decided in Division II. Johnson was decided by Division I

afterwards. The next year Division II followed the Johnson decision in Meas. This Court should follow the decisions in Johnson and Meas. The reference to the jury's verdict in the judgment did not result in reducing count II to judgment because it also ruled that count merged into count I.

Finally, the Court should find there is no double jeopardy violation here because the reference to count II on the judgment and sentence does not result in any collateral punishment for either defendant. The Court has recognized that collateral punishment for an offense which has been reduced to judgment can occur in the form of delay in eligibility for parole or increased sentence under a recidivist statute for future offenses. In addition the second conviction may be used to impeach the defendant in the future, and carries with it additional societal stigma. State v. Calle, 125 Wn.2d 769, 773, 888 P.2d 155 (1995), quoting Ball v. United States, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

None of those collateral consequences occur when the court recognizes the full extent of the jury's verdict by entering a finding that the jury returned guilty verdicts on both alternative means of committing the crime, and further recognizes that the second alternative merges into the first means to render judgment on a

single count of murder. The defendants will not risk additional points should they be convicted of a new crime in the future. They may only be impeached, and suffer the societal stigma of one crime, the murder of Forrest Starrett. Thus the manner in which the court dealt with the reality of the jury's verdict, and its consequences did not impose any additional punishments on the defendants.

#### **ISSUES RAISED BY STEVEN LEE**

#### **G. LEE IS NOT ENTITLED TO A NEW TRIAL BASED ON QUESTIONS POSED TO LEROY HOLT REGARDING HOLT'S POST MURDER CONVERSATION WITH ZERAHAIMANOT.**

Leroy Holt testified that some time after the murder was committed he had a conversation with Zerachaimanot in which Zerachaimanot talked about the murder. Zerachaimanot was described as being "foggy" and that he was stumbling over his words. Zerachaimanot told Holt that Starrett had grabbed for the gun, and that Zerachaimanot thought that he had shot Starrett in the head. Holt testified that he then told Zerachaimanot that Lee had shot Starrett in the head. Without objection Holt testified that Zerachaimanot did not take issue with Holt's assertion that Lee was the one that shot Starrett in the head. 5 RP 835-36, 904-906; 6 RP 1034-1035.

Lee now argues that testimony violated his Confrontation rights. He further argues the Court should consider the issue because it is a manifest error affecting a constitutional right.

**1. Lee Failed To Preserve The Issue For Review.**

Lee acknowledges he did not object to the Holt's testimony regarding Zerhaimanot's reaction when Holt corrected him concerning who shot Starrett in the head. Generally the appellate court will not consider an issue raised for the first time on appeal. RAP 2.5, State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The rule is designed to promote judicial economy by affording the trial court the opportunity to correct an alleged error and thereby avoid a possible appeal and new trial. State v. Scott, 110 Wn.2d 682, 865, 747 P.2d 492 (1988).

A claim which constitutes a manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3), Kirkman, 159 Wn.2d at 926. This Court has set forth a four step approach when considering an alleged error for the first time on appeal in State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). The court first makes a cursory determination as to whether the alleged error suggests a constitutional issue. Id. Second the court must determine whether the alleged error is

manifest. “Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Id. Third if the error is manifest the court will address the merits of the constitutional issue. Id. Fourth if the court determines there was an error of constitutional import, then it will undertake a harmless error analysis. Id.

**a. Lee Has Not Raised A Constitutional Issue**

The defendant initially argues the evidence is a constitutional error because it violated his right of confrontation, relying on Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2003). The Confrontation Clause encompasses in and out of court statements. Crawford, 541 U.S. at 50. Crawford recognized that only hearsay that was “testimonial” implicated the Sixth Amendment right to confrontation. Id. at 51. Other kinds of hearsay did not implicate that provision, but were governed by court rules. The evidence Lee identifies as erroneously admitted does not suggest a constitutional issue because it was neither a statement, nor was it testimonial.

The hearsay rules and the Sixth Amendment Confrontation Clause are both concerned with the introduction of statements.

State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007). The hearsay rules define a statement as an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion. ER 801(a). "Assertion" is not defined but the Advisory Committee's Notes to Subdivision (a) of FRE 801 provides that "nothing is an assertion unless it is intended to be one." State v. Collins, 76 Wn. App. 496, 498, 886 P.2d 243, review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995). Nonverbal conduct which is not intentionally being used as a substitute for words to express a fact or opinion is not an assertion amounting to a statement. In re Penelope B., 104 Wn.2d 643, 652, 709 P.2d 1185 (1985).

A person's silence under some circumstances may be considered a statement. In the case of an adoptive admission pursuant to ER 801(d)(2)(ii) a third person's statement may be attributed to the person if (1) the person heard it and was capable of responding and (2) the statement and circumstances were such that it is reasonable to conclude the person would have responded had there been no intention to acquiesce. State v. Neslund, 50 Wn. App. 531, 551, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988).

The Court held the statement of a co-defendant was an adoptive admission under ER 801(d)(2)(ii) in State v. Cotten, 75 Wn. App. 669, 879 P.2d 971 (1994), review denied, 126 Wn.2d 1004, 891 P.2d 38. There Cotten and his co-defendant, Baldassari, each participated in telling a witness about a murder they had participated in together. Under these circumstances the Court found Cotten adopted Baldassari's statements as his own. Id. at 689-90.

In contrast the Court found the defendant's silence in the face of another's statement was not tacit acquiescence in the truth of that statement in State v. McCaughey, 14 Wn. App. 326, 328, 541 P.2d 998 (1975). The person's statement did not accuse the defendant of any crime, nor did the statements require any counter response from the defendant. Id. at 328.

The cases cited by the defendant similarly limit adoptive admissions by the circumstances in which those statements were made. In those cases the Court did not find silence was a statement unless the circumstances indicated that it was intended to be a substitute for an oral or written statement. People v. Zamudio, 43 Cal. 4<sup>th</sup> 327, 350-51, 181 P.3d 105, cert. denied, \_\_\_ U.S. \_\_\_, 129 S.Ct. 567 (2008). (Testimony that the victim of a

robbery and murder never mentioned her property was missing before the crime was not a “statement” for purposes of the hearsay rule), People v. Meza, 188 Cal App. 3<sup>rd</sup> 1631, 1647 (1987) (a juror who was related to the defendant in a criminal case made a statement when he remained silent in response to the court’s general question asking if any juror knew any of the participants in the case.), U.S. v. Kenyon, 481 F.3d 1054, 1065 (8<sup>th</sup> Cir. 2007)(The defense sought to introduce evidence that two children had been asked if they provided any information that supported a third child’s allegation of sexual abuse. Evidence the children did not provide any such information was offered as non-verbal conduct that the defendant had not abused the third child, and was therefore hearsay).

Unlike the cases cited above, the evidence introduced here did not establish Zerahaimanot acted in any way which was intended to be a statement, either as his own or by adopting Holt’s statements. There was no evidence of what Zerahaimanot did when Holt contradicted him regarding his belief as to who shot Starrett in the head. Zerahaimanot had been confused as to exactly how the murder had been committed. The evidence did not establish Zerahaimanot’s confusion had been cleared up when Holt

contradicted him. Rather it underscored that Zerhaimanot remained “foggy” about the details of Starrett’s death. Under these circumstances it cannot be said that evidence established a statement made or adopted by Zerhaimanot inculcating Lee in the murder.

Because Holt’s statement did not become Zerhaimanot’s statement, the confrontation problem presented in Bruton is not present here. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). In Bruton a co-defendant’s extrajudicial statement implicating both the defendant and the co-defendant was introduced in their joint trials. In spite of an instruction that the confession was only to be considered as it related to the co-defendant, the Court held admission of that statement violated the defendant’s right to confront witnesses against him. Id. at 137.

Unlike the evidence at issue in Bruton the questioned evidence here is not an extrajudicial statement implicating Lee. The only statement implicating Lee came from Holt. Since Holt was available for cross-examination, Lee’s confrontation rights were respected.

The evidence also did not violate Lee’s confrontation rights because they were not “testimonial.” While the Court did not give a

comprehensive definition of what kind of hearsay constituted testimonial statements, it did include the functional equivalent of in court testimony; “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Id. at 52. Of the statements which Crawford has identified as testimonial, the common element is some involvement by a government official, either as police officer, justice of the peace, or as an instrument of the court. State v. Shafer, 156 Wn.2d 381, 389, 128 P.3d 87, cert. denied, 549 U.S. 1019, 127 S.Ct. 553, 166 L.Ed.2d 409 (2006). Casual remarks to nongovernment agents are generally not testimonial because they are not made in contemplation of bearing formal witness against the accused. Id. at 389.

Assuming for the sake of this argument that one could characterize the evidence as a statement attributable to Zerahaimanot, it was not a testimonial statement. Holt was not acting as an agent of the government when he talked to Zerahaimanot about the murder. Holt was actively avoiding the police, running away from them both at the time of the murder and even several weeks later when he eluded police in a car chase. Holt did not even cooperate with the court when he was brought

into testify at the inquiry court proceeding. 5 RP 830-831, 840-843; 10 RP 1845-1850. Any statements made between Holt and Zerahaimanot were not made in contemplation that they would be repeated in court. They were therefore akin to the casual remarks to family and friends that Crawford specifically excluded from the definition of testimonial statements. The Confrontation Clause was not implicated when the evidence was admitted.

**b. There Was No Manifest Error**

If Lee had identified a constitutional error then any error was not manifest. Lee's argument on this point is that Zerahaimanot's statement was the most competent evidence of Lee's guilt obtained from any witness. BOA at 14. Lee argues Zerahaimanot was in the best position to know who was responsible for the murder because he was a privileged insider. BOA at 18.

Lee's argument fails because the challenged evidence came from Holt, an eye-witness to the murder. In order for the portion of Holt's testimony identified by Lee to be the critical evidence against Lee, it must have been credible. In order for admission of that testimony to have had a practical and identifiable consequence in the outcome of the case all the rest of Holt's testimony, including his testimony regarding Lee's participation in the murder, must

have been incredible. While Lee characterizes Holt and Walker's testimony as "marginally adequate to convict," Lee at the same time acknowledges that their testimony is not subject to a credibility analysis on review. The testimony cannot be parsed out in the fashion advocated by Lee in order to establish admission of one portion of Holt's testimony was the lynch pin to Lee's conviction, without which he would not have likely been convicted, while the rest of Holt's testimony was worthless. Lee has not shown that admission of the challenged evidence was a manifest constitutional error. He has therefore not preserved the issue for review.

**H. LEE DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY DID NOT OBJECT TO HOLT'S TESTIMONY THAT ZERAHAIMANOT DID NOT TAKE ISSUE WITH HOLT'S VERSION OF EVENTS AS IT RELATED TO LEE.**

Lee alternatively argues that even in the absence of a confrontation violation his counsel was ineffective when he failed to object to Holt's testimony that Zerhaimanot did not challenge Holt's assertion regarding Lee's involvement in the murder. This argument should fail because the decision to not object was a matter of strategy. Further the evidence did not prejudice the defendant.

A defendant who claims he is entitled to a new trial on the basis of ineffective assistance of counsel bears the burden of showing counsel's performance was deficient and that he was thereby prejudiced by that deficient performance. Strickland, 466 U.S. at 687. When considering the issue the court takes into consideration all of the circumstances. Id. at 688. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance; "that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689.

An attorney's decision of whether to object or not is a classic example of trial tactics. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989). An ineffective assistance of counsel claim will be supported only when counsel fails to object in egregious circumstances on testimony that is central to the State case. Id. at 763.

The Court found failure to object constituted deficient performance that prejudiced the defendant in State v. Hendrickson, 138 Wn. App. 827, 158 P.3d 1257 (2007), affirmed, 163 Wn.2d 474, 198 P.3d 271 (2009). There the defendant was charged with

identity theft. The victim did not testify. The investigating officer testified without objection that the victim told him he had lost his identity at a particular location which happened to be near where the defendant lived. Because this testimony clearly fell within Crawford's definition of testimonial hearsay, and there was no other evidence supporting the charge, the court found counsel's failure to object to the hearsay evidence was deficient performance which prejudiced the defendant. Hendrickson, 138 Wn. App. at 833.

Lee's attorney's decision not to object to Holt's testimony on this point does not present the kind of egregious circumstance justifying a new trial that was present in Hendrickson. Whether Zerahaimanot took issue with Holt's assertion that Lee shot Starrett did not establish Lee's involvement in the murder. Rather it was Holt's testimony as an eyewitness in connection with other evidence that proved that both Lee and Zerahaimanot's shot at Starrett. Holt's testimony was corroborated by the presence of two different caliber bullets and bullet casings found at the scene. It was also corroborated by evidence from Walker that Lee and Zerahaimanot had guns while in her apartment. Walker also testified that Lee and Zerahaimanot were the ones who escorted Starrett out of the apartment before she heard shots fired.

Even if counsel had objected, it is not likely the objection would have been sustained. Where a motion to suppress would not likely have been granted the defendant does not establish the prejudice prong of an ineffective assistance of counsel claim. State v. McFarland, 127 Wn.2d 322, 337, n. 3, 899 P.2d 1251 (1995).

As discussed above, Zerhaimanot's failure to take issue with Holt's statement that Lee shot Starrett in the head was not a testimonial statement that would have been excluded under the rulings in either Crawford or Bruton. At the same time the evidence was relevant. It was a confession by Zerhaimanot that he had participated in the murder. As Lee has argued a participant in the crime would be expected to be in the best position to know who did what in connection with that crime. Because Zerhaimanot contradicted Holt's testimony regarding who shot Starrett in the head his statement, while relevant to his culpability, had the capacity to diminish Holt's credibility. Evidence Zerhaimanot was unsure on that point, and did not challenge Holt's contrary memory of events, reduced the likelihood that Zerhaimanot's statement would impact Holt's credibility.

Because the evidence was relevant, and there was other evidence which implicated Lee in the murder, counsel's decision

not to object was a reasonable strategic decision. Lee has failed to sustain his burden to prove counsel provided deficient performance which entitles him to a new trial.

#### IV. CONCLUSION

The Court should remand the case to the trial court to conduct a Bone-Club analysis regarding sealing juror questionnaires. For the reasons stated above the defendants convictions and sentences should be affirmed.

Respectfully submitted on May 11, 2010.

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