

64929-9

64929-9

No. 64929-9-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT BESABE,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR.¹

1. The court's findings that it contacted the parties by telephone before responding to the jury's written inquiry are not supported by substantial evidence. Agreed Narrative Report, at 1.

2. The court erred by giving Instruction 15, which misstated the law of transferred intent as it applied in the case at bar as discussed in the Opening Brief and as further explained herein.

3. The court erred by giving Instruction 30, which conflicted with Instruction 15 and confused the legal applicability of transferred intent as discussed in the Opening Brief and as further explained herein.

B. ARGUMENT.

1. THE PLAIN LANGUAGE OF THE FIRST DEGREE MURDER STATUTE, ALONG WITH THE PLAIN LANGUAGE OF OTHER STATUTES, PRECLUDES ITS APPLICATION TO AN "UNBORN CHILD."

A fundamental principle of statutory interpretation is to always start with the plain meaning of the statute. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The first degree murder statute allows for liability when an individual "with a premeditated

¹ A motion to file supplemental assignments of error is being filed simultaneously with this brief.

intent to cause the death of another person...causes the death of such *person* or of a *third person*.” RCW 9A.32.030(1)(a). Thus, this statute is limited in its application to victims who are “persons.”

The Washington legislature has never defined “person” to include a fetus or unborn child. The Criminal Code defines a “person” as “any natural person.” RCW 9A.04.110(17).² This Court has specifically held, “No Washington case has ever included an unborn child or fetus in its definition of a person.” State v. Dunn, 82 Wn.App. 122, 128, 916 P.2d 952, rev. denied, 130 Wn.2d 1018 (1996) (refusing to create criminal liability for criminal mistreatment to injury inflicted upon a child before birth). The Court explained that where the legislature intends for a statute to apply to a fetus, it specifically includes such language in the statute. Id.

The first degree murder statute does not include or contain any reference to an “unborn child.” RCW 9A.32.030. This sharply

² The Washington Criminal Code defines a “person” as “any natural person, and, where relevant, a corporation, joint stock association, or an unincorporated association.” RCW 9A.04.110(17).

contrasts with Washington's statutes for first degree manslaughter, RCW 9A.32.060(1)(b), and second degree assault, RCW 9A.36.021(1)(b), which punish injuries inflicted upon "an unborn quick child." Thus, the legislature deliberately chose to exclude the phrase "unborn quick child" from the language of the first degree murder statute, which in turn excludes its application to the facts of this case. Had the legislature wanted to include victims such as "baby boy Montoya" in the plain language of the first degree murder statute, it could have as it did in the other statutes. Therefore, the legislature's decision to omit these terms should be viewed as purposeful.

The rule of *inclusion unius est exclusio alterius* governs statutory interpretation: the inclusion of one term excludes the other. When a statute explicitly mentions certain terms, while excluding others, there is an inference that the Legislature intended those omissions. In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). Here, the Legislature specifically refers to injuries inflicted upon an "unborn child" and "fetus" in both the first degree manslaughter statute and in the second degree assault statute, yet does *not* in the first degree murder statute. Therefore, the absence

of terms in the first degree murder statute should be regarded as deliberate omissions by the legislature.

Furthermore, just as omitted words cannot be added to statutes, statutes “must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” J.P., 149 Wn.2d at 450 (citing Davis v. Dep’t of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)). The manslaughter and murder statutes both reside in the homicide chapter of the Washington Criminal Code, 9A.32, and consequently the statutes must be read together to ensure that no term is superfluous. The first degree manslaughter statute contains one provision, subsection (a), making it a crime to “recklessly cause the death of another *person*” and a second provision, subsection (b), which makes it a crime to “intentionally and unlawfully kill[s] an *unborn quick child* by inflicting any injury upon the mother of such child.” The legislature expressly included both the terms “person” and “unborn quick child” in different subsections of the manslaughter statute.

The State argues that the first degree murder statute applies to injuries inflicted upon unborn fetuses. However, the legislature’s inclusion of both a “person” and a “unborn quick child” separately

suggests otherwise: reading the statute to include an “unborn child” in the definition of a “person” would render provision (1)(b) of RCW 9A.32.060, the manslaughter statute, and its specific reference to “quick unborn child” superfluous. The legislature has explicitly mentioned injuries to unborn children when it wished to include them, as it did in the first degree manslaughter statute, and refers only to “persons” where it does not wish the statute to apply to injuries inflicted upon “unborn children.” In order to ensure that the term “unborn quick child” is not superfluous within the manslaughter statute, the murder statute should be read *not* to include “unborn quick children” within the definition of the term “person.”

Criminal statutes are strictly construed. The rule of lenity holds that any ambiguity in the meaning of a criminal statute must be resolved in favor of the defendant. State v. Kintz, 169 Wn.2d 537, 548, 238 P.3d 470 (2010). The first degree murder statute defines murder as the killing of a *person* with premeditated intent; the statute does not define person and thus whether an unborn fetus should be included could be considered ambiguous. Based on the rule of lenity, any potential ambiguity should be resolved in favor of Besabe. Taken together, these rules of statutory

construction inform that the plain meaning of RCW 9A.32.030 excludes application to injuries inflicted upon unborn fetuses.

Nonetheless, the State urges this Court to adopt the approach of the Connecticut Supreme Court in State v. Courchesne, 296 Conn. 622, 717-19, 998 A.2d 1, 67 (2010), which adopted the born alive rule, and held that a baby that is born alive and then dies due to injuries sustained in utero constitutes a person under the Connecticut murder statute. However, that case is neither dispositive nor controlling to Washington and this Court.

Many states have now rejected the common law born alive rule³ and instead created legislation that defines homicide to include the death of an unborn child or fetus from injuries inflicted in utero. For example, in reference to the victims of a homicide, the Alabama Criminal Code defines a person as “a human being, *including an unborn child in utero at any stage of development, regardless of viability*” Ala.Code § 13A-61(a)(3)(Cum.Sup.2009) (emphasis added). As another example, the Florida Criminal Code

³ The common law born alive rule held that “if a child dies before birth there is no crime but if the child is born alive and thereafter dies from the defendant’s felonious act the culpability is the same as that incurred in the killing of any other human being.” Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 40 A.L.R.5th 671, §2[a] (1998).

states that “[t]he unlawful killing of an unborn quick child, by injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed murder in the same degree as that which would have been committed against the mother.” Fla. Stat. Ann. § 782.09 (West 2007). At least twenty-four other states have drafted similar homicide statutes.⁴ See Courchesne, 998 A.2d at 110-12 (Conn.) (Zarella, J., concurring in part and dissenting in part). Washington is among these states, having implemented a statute that expressly creates criminal liability for first degree manslaughter for intentionally “kill[ing] an unborn quick child by inflicting any injury upon the mother of such child.” RCW 9A.32.060(1)(b). Had the legislature meant for the first degree murder statute, RCW 9A.32.030, to apply to an “unborn quick child,” it could have included the term specifically in the language of the statute as did many other states.

In its reliance on the Connecticut case of Courchesne, the State outlines the reasoning of the Minnesota Supreme Court. However, what respondent does not elucidate is that in addition to

⁴ In addition to those previously listed, the California Penal Code § 187(a) states that “[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought”; Kansas has included an “unborn child” in the definition of a person for purposes of the murder, manslaughter, and vehicular homicide

having a statute inclusive of an “unborn child” for manslaughter, the criminal code of Minnesota, unlike the Washington Criminal Code, has an *additional* specific statute entitled “Murder of Unborn Child in the First Degree” which holds someone criminally responsible who “causes the death of an unborn child with premeditation and with intent to effect the death of the unborn child or of another.” Minn.Stat. Ann. § 609.2261 (West 2009). The State also cites as support for its argument State v. Cotton, 197 Ariz. 584, 5 P.3d 918 (Ariz. App. 2000), where the court held that a baby born alive who subsequently died from fetal injuries constitutes a person for the purposes of the homicide statutes. However, similar to Minnesota, the Arizona Criminal Code specially states that for the purposes of manslaughter and first and second degree murder statutes, the victim can include an unborn child in the mother’s womb at any state of development. Ariz.Rev.Stat. Ann. §§ 13-1102, 13-1103, 13-1104 and 13-1105 (Cum.Sup.2008). These various states’ provisions explain why the courts in these states have interpreted the murder statutes in their respective jurisdictions to include an unborn child as a victim.

statutes. Kan. Stat. Ann. § 21-3452(d)(2007).

In contrast to Washington and the aforementioned states that expressly refer to unborn child in certain homicide and assault states, the Connecticut Penal Code does not make any reference to injuries inflicted upon an unborn child. See Conn. Gen. Stat. Ann. § 53a-53 through 53a-61a. The relevant murder, manslaughter, and assault statutes do not contain any language to either include or exclude their applicability to unborn children. Id.; 998 A.2d at 38-39. Thus, the court's decision in Courchesne, 998 A.2d at 67, to adopt the common law born alive rule is different from the case at bar, in which Washington has specifically enacted legislation in place of the born alive rule.

Furthermore, Washington's cases allowing for civil remedies based on injuries inflicted before birth do not mean, as the State argues, that this state has adopted the born alive rule. The ability to obtain civil damages is completely different from a criminal case where individual liberty interests are at stake. The Washington Court of Appeals has explained that for the purposes of determining compensation, "the court should use a measure of damage that makes the injured party as whole as possible without conferring a windfall." Pugel v. Monheimer, 83 Wn. App. 688, 922 P.2d 1377 (1996); see also Kim v. O'Sullivan, 133 Wn.App. 557,

137 P.3d 61 (2006) (explaining that “the purpose of tort damages is to place the plaintiff in the condition he would have been in had the wrong not occurred.”). This purpose of “making an individual whole again” is separate and distinct from the purposes of criminal sentences in Washington, which are primarily punishment, deterrence, protection, and retribution. RCW 9.94A.010.

Thus, Washington’s recognition of a cause of action for prenatal injuries does not provide support for reading the inclusion of the term “unborn child” into a statute that is expressly limited to a “person or third person.” RCW 9A.32.030. In the criminal context, the legislature has recognized liability for injuries inflicted upon an unborn child as proscribed in the first degree manslaughter statute, but have excluded similar application and criminal liability from the first degree murder statute by its plain terms. Based on the plain meaning of the statute, first degree murder does not apply to injuries inflicted upon an unborn child such as “baby boy Montoya.”

2. THE COURT'S FAILURE TO INSTRUCT THE JURY ON THE DEFINITION OF A PERSON OR REQUIRE THE STATE TO PROVE THE UNBORN CHILD WAS A PERSON WAS THE SUBJECT OF CONSIDERABLE DISCUSSION AND PLACED SQUARELY BEFORE THE COURT, MAKING THE STATE'S ASSERTION OF WAIVER INAPT

The trial judge and parties spent considerable time discussing the jury instructions, including whether the requirement of first degree murder that the perpetrator intend to kill, and in fact killed, a person necessitated a definition of "person." See e.g., 11/23/09RP 29-32, 54-57. The attorneys and court consulted various resources and both the defense and prosecution proposed definitions of a person, as well as a to-convict instruction that required the State to prove "baby boy Montoya" was a person. 11/23/09RP 60-69; 11/24/09RP 4-5. The court decided against giving any definition. 11/24/09RP 5.

In its response brief, the prosecution asserts that Besabe waived the issue because the definition he proposed would not have been helpful. Response Brief at 18. The State agrees that it would have been "probably helpful to define when a fetus is a person," but insists that Besabe's unhelpful definition waives his

right to object to the court's failure to define an important element of the offense. Id. at 20.

The State's waiver analysis is inapposite. The issue was squarely before the court and the subject of significant discussion. The court expressed dissatisfaction with any definition, from case law or Black's Law Dictionary, and thus concluded it would not give any definition or require the State to prove the unborn child was a person. 11/23/09RP 54-55, 60-63.

The issue is not simply would a definition be "helpful," to the jury, but whether it was necessary to define a critical term that for which the dictionary definition may not suffice, as explained in Besabe's opening brief, pages 14-20. The issue is also whether, by phrasing the instruction to characterize "baby boy Montoya" as a person, the court removed a factual issue from the jury's consideration and indicated it had already resolved the matter. Opening Brief, at 16-17. The accuracy and completeness of jury instructions based on the court's resolution of legal issues is a question of law, reviewed de novo. See State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). These fundamental legal and constitutional questions raise manifest legal errors that were not invited by Besabe and were discussed in detail by the parties

and court. Rather than giving the instructions sought by Besabe, the court gave instructions the commented on the evidence, diluted and misrepresented the State's burden of proof, and thereby denied Besabe a fair trial by jury.

The error is not harmless as the State contends. The jury did not decide whether the ability of medical professionals to extract a fetus in utero and keep him from dying for a short period of time, but who is insufficiently developed to live, constitutes a person as required for the first degree murder statute. The State misrepresents the nature of the birth and the developing fetus's ability to remain alive outside the womb, thus its harmless error analysis is incorrect.

3. THE TRANSFERRED INTENT INSTRUCTION DID NOT APPLY TO THE INTENT TO KILL AN UNBORN CHILD, THUS SHOWING THE ERROR IN GIVING INSTRUCTIONS 15 AND 30

The specific, premeditated, intent to kill a person is an essential element of first degree premeditated murder, even if another person ends up being the person who dies. RCW 9A.32.030(1)(a). The State charged Besabe with two counts of first degree premeditated murder but explained that its "consistent" theory of the case was that transferred intent did not apply to the

shooting of Carol Montoya. 11/24/09RP 23. Put another way, it did not believe the jury could base its verdict for the death of Carol Montoya, as charged in count I, on a finding that Besabe intended to kill someone other than Carol Montoya, such as her unborn child. This theory was an acknowledgement that “baby boy Montoya” was not a person when he remained unborn, and therefore, he could not be the “person” whom Besabe intended to kill as required for first degree premeditated murder. 11/23/09RP 23 (prosecution seeks new instruction so “as to not create any appellate issues that the transferred intent should not apply to counts one and I-A); 11/24/09RP 25-26 (prosecutor desires corrected instruction because “for appellate purposes we don’t want there to be any confusion that the jury misapplied the transferred intent theory”); RCW 9A.32.030(1).

Midway through its closing argument, the prosecution realized the jury instructions were incorrect and inconsistent with its theory of transferred intent. 11/24/09RP 23. It asked the court to give a different instruction telling the jury that transferred intent only applied to the counts involving the death of “baby boy Montoya.” 11/24/09RP 24; CP 172. The court agreed to re-instruct the jury as proposed by the State, and also agreed to strike language that

could cause the jury to apply transferred intent as the basis of Carol Montoya's death. 11/24/09RP 25, 26. Besabe did not endorse this change of instructions, and objected because it was so late to be altering the instructions when counsel was about to give her closing argument, but the court found this objection to be insufficient. 11/24/09RP 24-25.

But instead of striking Instruction 15 as the court had indicated it would, the court added Instruction 30, which repeated the language of Instruction 15 but added, "This instruction applies only to Counts II and II-A." CP 172; 11/24/09RP 26.

This addendum did not clarify the law for the jury, instead, it created an irreconcilable conflict. The jury wrote a note asking for an explanation of the conflict but the court refused to give one. CP 177.

Besabe did not propose or participate in creating this conflict. He was under the impression that the court would strike the instruction complained of rather than give two instructions to the jury, and since the change occurred just before defense counsel was preparing to give her closing argument, at a time when she did not have further opportunity to review and comment upon the court's instructions. Besabe could not have waived an error he

did not anticipate or understand was occurring. The flaw in the instructions is discussed below and in Besabe's opening brief, at 22-24 and 27-28.

4. THE COURT DID NOT PROPERLY INCLUDE
BESABE OR HIS ATTORNEYS IN ITS
DISCUSSION WITH THE DELIBERATING
JURY

a. The recent court hearing does not "settle the record" about the procedures the court used when the deliberating jury asked a question. After Besabe filed his opening brief, the prosecution set a hearing before the trial judge for the purpose of shedding light on what, if any, contact occurred between the court, the attorneys, and Besabe when the deliberating jury asked about the confusion generated by the conflicting transferred intent instructions. 3/9/11RP 2.

None of the attorneys or the court had a specific recollection of discussing the jury's question. 3/9/11RP 5. The defense attorneys checked their notes. Scott Ketterling had "no memory of a question being asked or anything" and no notes indicating he received notice of a jury question. 3/9/11RP 7. Terri Pollack thought she had "a vague memory of a question" but had no idea if she talked to anyone about it. 3/9/11RP 6. Prosecutor Kristen

Richardson “vaguely recall[ed] being in court and discussing an instruction question,” but did not know what that was about. Since her memory was that she was in court, it is more likely she recalled the discussion about adding a new transferred intent instruction in the middle of her argument, since there is no evidence that the judge held an in-court hearing about the deliberating jury’s question. In fact, the court’s findings indicate it would have had a telephone conversation about the issue, illustrating that Richardson’s memory of an in-court conversation could not have been about the jury’s question. Agreed Report of Proceedings, at 1.

Despite the trial judge’s lack of specific memory, the judge felt certain that he would not have responded to the jury without first consulting counsel both because this was his practice and because of another case in which the Court of Appeals told him that it was improper for him not to discuss a jury question with the parties before responding. 3/9/11RP 5, 6.

However, the judge’s claim that he would not have responded to the jury without first consulting counsel is not supported by the evidence. First, the judge relied on the fact that he had been chastised by the Court of Appeals for responding to a

jury question without consulting counsel and now never makes that mistake. 3/9/11RP 6-7. That case involved a *pro se* defendant and the judge had responded to the jury without consulting any one because of logistical difficulties in speaking with the *pro se* defendant. 3/9/11RP 7. The judge believed that this other case happened before Besabe's trial and the admonition from the Court of Appeals would have been fresh in his mind. 3/9/11RP 6.

However, the case of which the judge spoke did not happen before Besabe's trial. The very only case, published or unpublished, involving the scenario of which the judge spoke and involving the same judge occurred after Besabe's trial.

In State v. Talley, COA 62792-9-I, 2011 WL 1541474 (April 14, 2010) (unpublished),⁵ the deliberating jury asked about a note written on an exhibit. Without contacting either party, the court directed the jury to rely upon the evidence presented in court for your deliberations. 2011 WL 1541474, *2. In that case, the State conceded and the Court of Appeals agreed it was improper to instruct the jury without notifying either party.

⁵ Although unpublished cases may not serve as precedential authority, Besabe refers to this case because it was factually important to the trial court and not for its legal reasoning. GR 14.1.

Besabe's trial occurred in late November 2009. This was before the Court of Appeals admonished the judge and therefore, this admonishment does not demonstrate that the court actually consulted the parties in the case at bar. The judge's belief that he would not have instructed the jury without first speaking to the parties rested on an erroneous recollection of the sequence of events.

Furthermore, during the course of the trial, the judge indicated it did not intend to further instruct the jury if it asked questions during deliberations. 11/23/09RP 62-63. The judge insisted that it wanted to settle on correct jury instructions so that if the jury asked a question, the court would give the response, "I'm just going to say refer to the instructions." 11/23/09RP 62. The court wanted to determine the jury instructions "once and for all, and if they ask a question about it I'm not going to give any further instructions on the issue." *Id.* Thus, the court's comments indicate it did not intend to consider supplemental instructions and wanted to quickly respond to a question from the deliberating jury.

This statement of the court's intent is consistent with its practice in this case. When the jury asked the court to explain the apparent contradiction in Instructions 15 and 30, the court quickly

responded and refused to give further explanation, just as it said it would. CP 178. However, because the court did not resolve or address the conflict, the court's refusal to give further instruction exacerbated the problem.

At the March 9, 2011 hearing, the judge admitted he had no specific recollection of the jury's question. The fact that none of the lawyers remembered it either should be taken as evidence that no such conversation about the jury's note occurred. No one had contemporaneous notes indicating any such conversation or a memory of it. The judge's recollection was clouded by a misunderstanding of when the other case occurred in which he had responded to the jury's question without consulting any parties. Finally, it is uncontested that Besabe was not informed of or included in the discussion about the deliberating jury's question.

b. The court's failure to include Besabe in its discussions with the deliberating jury violated his right to be present. In two recent cases, the Supreme Court has recognized the fundamental importance accorded the accused's right to be present under article I, section 22. In State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011), the Court held that the right to "appear and defend in person" under article I, section 22, is interpreted

independently of the corollary federal right. 170 Wn.2d at 884.

Irby explained that the state constitutional right is triggered whenever the accused's "*substantial rights may be affected.*" Id. (emphasis added by Irby, quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)).

In Shutzler, the judge responded to an inquiry from the deliberating jury that it was unable to reach a verdict without notifying the defendant or his attorney, and told the jury to continue deliberating, carefully consider the evidence, and try to reach a verdict. 82 Wash. at 366. The Supreme Court ruled that the defendant's right to be present extends to "every stage of the trial when his substantial rights may be affected," and this includes any of the court's "special instructions [to the jury] during the period of their deliberations." Id. at 367. By responding to the jury's question without telling the defendant, the court violated his constitutional and statutory right to be present. Id. "[A]ny denial of the right without the fault of the accused is conclusively presumed to be prejudicial." Id. It is "a wrong" that does not require the defendant to show anything "was done which might not lawfully have been done had he been personally present." Id.

The intent of the framers is demonstrated by cases where the courts held that an accused person had a personal right to be present when discussing instructions with a deliberating jury. See Linbeck v. State, 1 Wash. 336, 338-39, 25 P. 452 (1890) (attorney's presence does not cure error); State v. Wroth, 15 Wash. 621, 623, 47 P. 106 (1896) (court's refusal to give further instruction insufficient to satisfy accused's right to be present); State v. Beaudin, 76 Wash. 306, 308, 136 P. 137 (1913) ("the right to be personally present is mandatory during any instructions to jury). The Supreme Court's recent endorsement of the standard discussed in Shutzler demonstrates the fundamental importance of the right to be present anytime the proceedings may involve substantial rights, which include instructions to the deliberating jury. 170 Wn.2d at 884.

The Supreme Court more fully explored the broader guarantee of the right to be present in State v. Martin, _ Wn.2d _, 2011 WL 1896784, *4-6 (May 19, 2011), expressly holding that article I, section 22 contains a broader guarantee of the "right to be present" than the Sixth Amendment. The Supreme Court decision in Martin undermines the State's reliance on State v. Jasper, 158 Wn.App. 518, 245 P.3d 228 (2010), rev. granted, 170 Wn.2d 1025

(2011), because Jasper simply cited its now-discredited analysis in Martin with further addressing the state constitutional right. See Jasper, 158 Wn.App. at 539 n.12.⁶

Martin and Irby demonstrate the need to independently evaluate the accused person's personal right to be present during any stage when his substantial rights may be affected. As Irby recognized, article I, section 22's explicitly protected right to "appear and defend in person" uses a different standard than the Sixth Amendment: whether the accused's substantial rights may be affected. 170 Wn.2d at 885. Additionally, Shutzler holds that an accused person's substantial rights may be affected when the judge communicates with the deliberating jury without first notifying him. 82 Wash. at 367.

As articulated in Shutzler, and affirmed in Irby, a violation of the right to be present is "conclusively presumed to be prejudicial." 82 Wash. at 367. The court violated Besabe's right to be present during a part of the proceedings where his substantial rights could

⁶ The Supreme Court has granted review of Jasper's analysis of the right to be present when responding to an inquiry from the deliberating jury. See http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/ (framing issue as, "Whether the trial court violated a criminal defendant's constitutional right to be present when it responded to jury inquiries without notifying the defendant or his attorney.").

be affected, because the jury asked a question about a critical legal issue and the court affected Besabe's rights by declining to correct the error. Besabe's exclusion from a substantive stage of the proceedings violates his constitutional right to be present in person and this violation undermines the fairness of the proceedings as protected by article I, section 22.

5. THE ATTEMPTED MURDER INSTRUCTION
MISSTATED THE ESSENTIAL ELEMENTS OF
PREMEDIATED MURDER

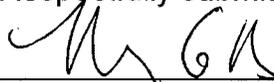
As explained in Besabe's opening brief, the to-convict instruction purporting to set forth all the essential elements of attempted first degree murder did not accurately and completely contain all essential elements. Opening Brief, at 38-44. The State's efforts to downplay the nature of the error are unavailing, because the failure to make the essential elements manifestly apparent to the average juror denies an accused person the right to a fair trial by jury. See State v. Aumick, 126 Wn.2d 422, 429, 431, 894 P.2d 1325 (1995).

C. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Besabe respectfully requests this Court remand his case for further proceedings.

DATED this 24th day of May 2010.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64929-9-I
v.)	
)	
ROBERT BESABE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF MAY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SEATTLE, WA 98104		

[X] ROBERT BESABE	(X)	U.S. MAIL
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2011 MAY 24 11:00 AM

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