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King County Prosecutor  
Appellate Unit

67227-4

NO. 67227-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

MYRON WYNN,

Appellant.

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Susan J. Craighead, Judge  
The Honorable Jeffrey Ramsdell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain appellant's conviction for felony murder based on robbery.

2. The trial court's instruction on robbery (instruction 9) misstated the law, relieved the State of its burden to prove all elements of the offense beyond a reasonable doubt, and denied appellant a fair trial.

3. Defense counsel was ineffective for failing to object to the faulty robbery instruction.

Issues Pertaining to Assignments of Error

1. To establish robbery, the State was required to prove that appellant used force – in this case a homicide – for the purpose of obtaining or retaining the victim's property. But the appellant denied any crime, no one saw a crime, and the precise circumstances surrounding the alleged incident remain unknown. Where no reasonable trier of fact could have found a robbery based on the evidence presented, must appellant's felony murder conviction be vacated?

2. Although the State was required to prove beyond a reasonable doubt that appellant used force for the purpose of obtaining or retaining the victim's property, appellant's jurors

received an instruction directing them – as a matter of law – that whenever a taking and homicide are part of the same transaction, it is a robbery. Even if this Court were to conclude the evidence was sufficient to sustain appellant's conviction for felony murder based on robbery, is reversal and remand for a new trial required in light of this erroneous instruction?

3. Because instruction 9 relieved the State of its constitutional burden to prove every element of the charged offense beyond a reasonable doubt, it may be challenged for the first time on appeal. Even if this were incorrect, appellant can raise the issue because defense counsel's failure to object denied appellant his right to the effective assistance of counsel.

B. STATEMENT OF THE CASE

1. Procedural Facts

On February 2, 2009, the King County Prosecutor's Office charged Myron Wynn with one count of Murder in the First Degree in connection with the 1996 disappearance of Robert Wykel. CP 1. No body has ever been found, and prosecutors could not pinpoint a date of death, requiring an allegation that Wykel may have been killed sometime between February 20, 1996 and March 13, 1996. CP 1-2, 16-17.

Initially, prosecutors charged Wykel in the alternative, alleging he may have premeditated the killing or perhaps killed Wykel while committing or attempting to commit Robbery in the First or Second Degree. CP 1, 16-17. Later, prosecutors abandoned their attempt to prove a premeditated killing and proceeded solely on a theory of felony murder. CP 56.

At Wynn's first trial, jurors deadlocked – seven inclined to convict and five inclined to acquit – and the trial judge declared a mistrial. Supp. CP \_\_\_\_ (sub no. 105, Order Declaring Jury Deadlock); Supp. CP \_\_\_\_ (sub no. 130, Defense Motion For Arrest of Judgment And Motion For A New Trial And Brief In Support Thereof, at 2).

Prosecutor's tried again, and a second jury found Wynn guilty in a case the trial judge described as one "with much less evidence than you ordinarily would see in a homicide case." RP<sup>1</sup> (3/31/11) 53-54; CP 93. A defense motion for arrest of judgment or new trial was denied. CP 142-143; Supp. CP \_\_\_\_ (sub no. 130,

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<sup>1</sup> Most of the transcript volumes from the second trial are consecutively paginated and will be referred to as "RP" followed by the relevant page numbers. References to volumes from the first trial and non-consecutively paginated volumes from the second trial will be identified by date and page number.

Defense Motion For Arrest of Judgment And Motion For A New Trial And Brief In Support Thereof).

With an offender score of 0, Wynn's standard range was 240 to 320 months. CP 135. The court imposed 240 months, and Wynn timely filed his Notice of Appeal. CP 137, 144-153.

2. Evidence At Trial

In 1996, Robert Wykel was 65 years old. RP 443; RP (3/31/11) 39. He loved to travel. In addition to traveling throughout the United States, he had been to Argentina, Mexico, South Africa, Australia, Russia, Spain, and other parts of Europe. RP 102, 133, 161, 328-329, 405, 471. He particularly loved Argentina, where he had lived for a period of time, and often spoke of returning. RP 102, 161, 178-179, 478.

A close friend described Wykel as a private man, who "tells you what he wants you to know." RP 448. After Wykel and his wife divorced, Wykel opened safety deposit boxes under different names to protect his assets from his ex-wife. RP 432-433, 464-465. He had boxes in Nevada, Illinois, and Idaho and perhaps dozens of safety deposit box keys. RP 485-489. Wykel was confident no one would ever find his hidden money. RP 465.

One of Wykel's hobbies was buying used automobiles, fixing them up, and selling them, which took him all over the United States. RP 105-106, 115-116, 403-404. Shortly before Wykel disappeared, he sold three of his four cars, leaving only a Mercedes, which he also was attempting to sell. RP 489, 601, 624.

Wykel had two primary social groups. He had his poker group, which largely consisted of individuals who lived near his Burien apartment, with whom he played poker once a week. RP 409-413, 443-445, 595-597, 661-664; exhibit 42. And he had his separate McDonald's group, with whom he had breakfast several times a week at a McDonald's restaurant in White Center. RP 769-774, 1176, 1182-1183. Myron Wynn was part of the McDonald's group. RP 771-774.

The precise date of Wykel's disappearance is not clear. John Ogden, from the poker group, testified that Wykel last attended a poker game in February 1996. RP 413. The group had switched from Wednesday nights to Thursday nights around this time, but Ogden believed this particular night was a Wednesday. Assuming that was correct, he believed the date was February 21, 1996. RP 413-414, 492-494, 502-504. He conceded, however, that he had previously identified both Wednesday and Thursday as

the correct night and that it could have been either.<sup>2</sup> RP 489-491, 495.

Contrary to Ogden, most in the poker group believed this game occurred on Thursday, February 22. RP 492. Ernest Deladd believed it was a Thursday, although he could not be certain. Nor could he be certain of which week this had been in February 1996. RP 664, 694. A third player, Mike Nelson, testified he was certain it was Thursday, although he could not recall the month. RP 597-598, 613-614.

All three men recalled that Wykel was in the process of purchasing a classic Ford Thunderbird.<sup>3</sup> RP 414-415, 602, 671, 673, 701. He had already made a down payment on the car – somewhere around \$1,000.00 to \$1,500.00 – which he had given to a middleman in the deal. RP 415. Although he did not disclose the name of this individual, he did say the person was part of his McDonald's breakfast group. RP 673-674, 703-704. Wykel had

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<sup>2</sup> At Wynn's first trial, Ogden testified he did not know whether this game was Wednesday or Thursday. RP 503-504.

<sup>3</sup> Deladd thought it was a 1955 or 1956 model based on discussions with Wykel. RP 671, 673. Ogden thought it was a 1966 or right around that period, although this was just an assumption based on a magazine he would later find in Wykel's apartment. RP 415, 575.

been frustrated with the slow pace of the transaction and was pleased he would finally see the car the next day. RP 602, 621-622, 673-674, 701-704. He told Ogden he was either going to get the car or his deposit back. RP 569.

Ogden and Nelson testified that they never again saw Wykel following this poker game. RP 418, 597. Deladd, however, may have seen Wykel the next day. He recalled a conversation with Wykel, while standing just outside Wykel's apartment, about the possibility of finding an old Mercury Cougar, a car Deladd was interested in purchasing. It was sunny outside when the two spoke, possibly close to supper time. RP 674-675, 700-701, 712-713.

In 2008, Deladd said this conversation could have occurred before the Thursday night poker game. RP 676-677, 713-714. But he also believed it could have happened on Friday, February 23, the day after the poker game. RP 677, 685. Although he was not certain, ultimately he testified to his belief that the conversation was separate from the poker game. RP 677, 718.

Wykel's poker friends began to worry when they did not see him for several days, his Mercedes was not parked at his apartment building, and he did not show up for the next week's game. RP 419, 604, 678. Family also began to worry when he did not answer

his phone or return their calls. RP 97-98. And his mail began to accumulate in his mailbox. RP 420, 678.

Wykel's Mercedes was found parked in a Burien Park and Ride lot. RP 1028-1029. There was no way to determine when the car first appeared there. RP 1031. But by March 8, 1996, it had been there over 72 hours and was tagged with a notice of parking infraction. RP 1028-1032, 1038; exhibit 77. It was towed from the lot on March 11. RP 1033-1034, 1038; exhibit 78. The car did not appear to be damaged; nor was there anything else unusual about its appearance. RP 1032, 1038-1041.

Wykel's poker buddy, Ogden, gained access to Wykel's apartment after speaking with the landlord, Kim Baker. RP 420, 797-798. Whereas Wykel was usually meticulous, he had failed to put away some milk, there were dirty dishes and half eaten food in the sink,<sup>4</sup> coffee left in a cup and in a pot, and his bed was left unmade. RP 203-204, 364-366, 421, 540-544, 805, 839-841; exhibits 10-13, 23. There also was a wine glass still containing wine. RP 364, 387; exhibits 10, 13. Wykel only drank alcohol in the afternoon or evening. RP 364.

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<sup>4</sup> Ogden described the food as "breakfast food," although he could not specifically recall what items he had seen. RP 421, 543.

On the dining room table, Ogden found an issue of Auto Trader for the week of February 11–18, 1996, open to pages B-12 and B-13. RP 423-424, 516-518; exhibits 14, 29. In addition to some handwritten notes on page B-13, there is a star next to an advertisement for a '66 Thunderbird for sale for \$5,200.00. RP 518-519; exhibit 29. Ogden assumed this was the Thunderbird Wykel had gone to see. RP 425, 575. But Wykel may have been looking at several Thunderbirds, which was consistent with his practice when seeking to buy cars. RP 592-593.

On March 13, 1996, after learning Wykel's car had been towed from the Park and Ride lot, Ogden called police and reported Wykel missing.<sup>5</sup> RP 427-429. Police took custody of Wykel's Mercedes, which they searched for evidence. RP 1035, 1261-1262. The car was then towed back to Wykel's Burien apartment. RP 122.

Despite a thorough search of the Mercedes, police somehow missed finding Wykel's wallet, which a family member later found between the driver's seat and the center console. RP 122, 1262. Wykel's identification and bankcards were still inside, but

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<sup>5</sup> Ogden also had called several days earlier, but initially police were unwilling to take a report. RP 426-427, 565.

apparently no cash. RP 123, 136-137. Wykel typically made all purchases with cash, which he kept in his pants pocket, either folded in half or in a clip. RP 185, 432, 603.

Based on a bidder's card found in Wykel's Mercedes, the detective assigned to the matter – Detective Earl Tripp – determined Wykel had attended a local auto auction on Thursday, February 22 and unsuccessfully bid on a Ford Escort. RP 1178-1179. Tripp contacted the seller of the Thunderbird listed on page B-13 of the Auto Trader found in Wykel's apartment, but there was no indication Wykel had ever contacted the seller. RP 1180-1181. Phone records revealed the last long distance call from Wykel's apartment was made the afternoon of Tuesday, February 20. No records were available for local calls, however. RP 1242.

Members of Wykel's family, including his stepdaughter, Rebecca Lee, arrived from out of town and, in conjunction with law enforcement, posted fliers and spoke with those who knew Wykel. RP 100-101, 122, 191-203, 262-263. The media also reported on Wykel's disappearance. RP 1175-1176. Among the items Lee found inside Wykel's apartment was the draft of a letter Wykel had written indicating his plan to return to Argentina and his interest in meeting, and establishing a long-term relationship with, a woman in

that country. RP 224-230; exhibit 28. According to the letter, Wykel planned on leaving for Argentina sometime after June of 1996. RP 229; exhibit 28.

Myron Wynn came to the attention of law enforcement on March 26, 1996. That morning, Wynn stopped by Wykel's apartment building and spoke to the landlord, Kim Baker. RP 810-811. He identified himself as "one of the breakfast boys," referring to the McDonald's group. RP 814. He told Baker he had been trying to reach Wykel, but Wykel's answering machine was not taking messages, and he had noticed Wykel's Mercedes parked in the building lot. RP 813, 819. According to Baker, Wynn looked "scruffy and scary," was slurring his words, and appeared to be under the influence of something. RP 812-813.

Wynn mentioned something about Wykel taking a trip to Nevada, but Baker was having a difficult time understanding him. RP 813. She told Wynn that Wykel was missing, which did not appear to evoke a reaction from him. RP 813-814. He may, however, have been in shock. RP 861. Baker told Wynn he should get in touch with Detective Tripp and gave Wynn his contact information and contact information for Rebecca Lee. RP 816-817.

Heeding Baker's advice, Wynn immediately called Lee. RP 247, 250-251. During their conversation, he told her that he last saw Wykel on February 18 or February 20. RP 256. He repeatedly said Wykel was on vacation, noted that Wykel had talked about buying a car in Nevada, mentioned California, and also said Wykel was planning on going to Argentina. RP 256-258. According to Lee, Wynn switched topics a lot, was difficult to understand, and sounded nervous. RP 259. Like Baker, Lee encouraged Wynn to contact Detective Tripp. RP 260.

Wynn called Tripp the same day, indicating he was a friend of Wykel's and had just learned that he was missing. RP 1191. During their conversation, Wynn indicated Wykel had been interested in purchasing a Thunderbird from a seller in the Spanaway area. RP 1191-1192. Based on Wynn's description of the car, Tripp concluded it was likely a model from 1955 to 1957, which confirmed his belief this was not the car listed in Auto Trader. RP 1192-1193.

In a subsequent interview that same day, Wynn told Tripp he had last seen Wykel on Tuesday, February 20, 1996, at Wykel's apartment. RP 1194. He also told Tripp that Wykel had mentioned attending an auto auction on Friday, February 23. RP 1195. Tripp

took Wynn's fingerprints. RP 1200. When Tripp tried to speak with Wynn further, Wynn indicated he had to get back home to make a scheduled dental appointment with a Dr. Allenbach and that a friend was picking him up for the appointment. Wynn agreed to meet with Tripp again the next day. RP 1201-1202.

Tripp drove Wynn home and waited nearby for about 20 minutes. He did not see anyone pick up Wynn during that time. RP 1201-1202. Tripp also called Dr. Allenbach's office and whomever he spoke to indicated they had no record of Wynn being a patient. RP 1207.

Over the course of the next few weeks, Tripp repeatedly attempted to meet with Wynn again, but either Tripp or Wynn was forced to reschedule or cancel based on conflicts. RP 1202-1205, 1322-1332. On April 11, Tripp had Wynn arrested on an unrelated misdemeanor warrant to give him an opportunity to speak alone with Wynn's girlfriend, Lynn Malaspino, but Wynn bailed out before Tripp could do so. RP 1332-1333.

Tripp spoke with Wynn by phone early in the morning on April 12, and Wynn agreed to meet Tripp at a Burien Burger King restaurant. RP 1205-1206. Despite this plan, Tripp drove to Wynn's home, picked him up, and then drove him to the restaurant.

RP 1206, 1334-1137. He told Wynn he was responsible for Wynn's arrest the day before. RP 1338. He wondered why Wynn sometimes used the last name Holdredge, and Wynn explained it was his birth name.<sup>6</sup> RP 1207, 1339. Tripp also said he did not believe the reasons Wynn had provided for missing their appointments and told him about the call to Dr. Allenbach's office. RP 1207. Wynn replied that Allenbach was his girlfriend's dentist, but had been willing to treat him. His regular dentist was a Dr. Terrance in West Seattle.<sup>7</sup> RP 1208. After a "pointed conversation," Tripp left Wynn at the restaurant. RP 1342.

A few days after this conversation, Tripp spoke to Wynn's sister – Robyn Wynn – and learned that Wynn and Wykel had visited her home "the latter part of February, 1996." RP 1215. According to Tripp, Robyn<sup>8</sup> called him back the next day and reported that the visit occurred on Friday, February 23, 1996. RP 1215.

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<sup>6</sup> "Wynn" is the defendant's stepfather's last name. RP 1053.

<sup>7</sup> Tripp later tried but could not locate a dentist by this name. RP 1208.

<sup>8</sup> To avoid confusion with Myron Wynn, Robyn Wynn will be referred to by her first name.

At the time, the Wynn family owned a property in Nisqually called Mother Nature's Acres. RP 1056. The 140-acre property includes an 11-acre lake. RP 1056; exhibit 82. For an annual fee, members could use the property for tent or RV camping. The property was rustic and heavily forested with dirt roads. RP 1056-1058. Much of the land was undeveloped. RP 1062.

Wynn had worked on the property off and on over the years. RP 1069-1070. Robyn served as the resort's operations manager and was in charge of 15-20 staff. RP 1060. A gate, which was staffed 24 hours a day, limited access to the property. RP 1062-1063, 1065-1066. In 1996, Robyn lived in a house right next to that gate. RP 1070-1071, 1127-1132; exhibits 84-85.

According to Robyn, in late February 1996, her brother called ahead, sometime around noon or earlier, and said he was stopping by for a visit. RP 1078-1079, 1083-1085. Wynn told his sister he was bringing someone with him and that they were going to Lakewood to look at a Thunderbird. RP 1084, 1092. He may have said the car was located on South Tacoma Way. RP 1096. It was her impression that her brother had nothing to do with the car deal and was simply along for the ride. RP 1148.

Whereas Tripp indicated that Robyn later identified the precise date as Friday, February 23, Robyn believed she may also have told Tripp it could have been Thursday, February 22.<sup>9</sup> RP 1081-1082. In fact, she could not discount the possibility the visit took place February 15, 16, or even February 29. RP 1140-1142. She could only say for certain that the visit occurred on a Thursday or Friday in late February. RP 1142. Phone records showed calls from the home where Wynn was staying to his sister on both February 22 and 23, among other dates that month. RP 1581-1582.

According to Robyn, Wynn and Wykel arrived at the resort before 1:00 p.m. in a Mercedes Benz Wykel was driving. RP 1085. Wynn introduced his sister to Wykel by name. RP 1085-1086, 1124. Wykel appeared to be a "younger looking older man" and Robyn guessed he was in his fifties. He was in a good mood. The three chatted for about half an hour and had coffee together. Wynn even gave Wykel a tour of the property. RP 1087, 1092-1093, 1125-1126, 1137. Robyn was going through a divorce at the time and recalled that Wykel gave her advice on how to protect her

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<sup>9</sup> Robyn testified "there was a lot of stuff that was definitely left out" of Detective Tripp's statement regarding his 1996 conversation with her. RP 1167.

assets. RP 1126. Wykel and Wynn were getting along and there was no indication of any tension or animosity between them. RP 1097-1098, 1123-1125.

Notably, Robyn was at the gate when Wynn and Wykel left the property together in Wykel's Mercedes. She was certain they left together. RP 1098-1102, 1144, 1167. With Wykel driving, they turned right after passing through the gate and headed toward the highway. RP 1137-1138. Despite Robyn's certainty, law enforcement believed Wykel's body was somewhere on the property of Mother Nature's Acres. Years later, however, two separate searches with cadaver dogs revealed nothing. RP 1683-1685; RP (3/29/11) 49, 118-129. Moreover, no one ever reported seeing or hearing anything suspicious on the property. RP 1135-1136.

In 1997, Wynn moved to Texas, where he had family. RP 1373-1375, 1408-1409. Detective Tripp did nothing on the case from 1997 until his retirement in 1999, at which time Detective John Holland took over the investigation. RP 1173, 1694. Detective Sue Peters later joined him on the case. RP 643, 1582-1585.

The case received a "jump start" in 1999 when Holland learned that during a 1997 family reunion in Texas, Wynn's aunt

was in possession of a diamond she had obtained from Wynn. Holland believed this might be important because Wykel had worn a diamond ring. RP 1585-1587, 1672-1674. In March 2000, Detectives Holland and Peters traveled to Texas for interviews and to locate the diamond. RP 1380, 1591-1592, 1674.

Wynn's aunt – Nell Terrell – gave detectives a pendant containing a diamond. RP 1410-1411, 1593-1594, 1675-1676. Wynn told Terrell, and Terrell's daughter, that he had found the diamond at a bus stop. When Terrell's daughter expressed disbelief, Wynn then said he bought it from someone who had inherited it. RP 1395, 1403, 1411. He had it made into a pendant for his girlfriend at the time (Lynn Malaspino) while still living in Washington. RP 1411. Terrell purchased the pendant from Wynn for \$2,000.00. RP 1412.

Much like the date of Wykel's disappearance, the date on which Wynn first possessed this diamond is not clear. Malaspino believed she first heard Wynn mention the diamond as early as February 15, 1996, although she was not certain. RP 912, 939-946. Wynn told her he found the diamond at a Burien Park and Ride. RP 911-912, 938-939. Malaspino first saw the diamond sometime later in February 1996 while with Wynn at South Center

Mall. RP 913. She was shopping for her sister's birthday and, after briefly separating from Wynn in the mall, he returned with the diamond in a pendant setting. RP 913.

Malaspino's mother's birthday is February 14 and her sister's birthday is February 22. RP 895-896. The family traditionally has one birthday party for both of them and Malaspino recalled showing the pendant to her mother and sister at their joint party in 1996. RP 891-892, 914. Typically, the party would take place on the Sunday between their birthdays, but it could also have taken place on a Sunday after her sister's birthday. RP 915. Therefore, according to Malaspino, this particular party could have taken place Sunday February 18 or Sunday February 25, 1996. RP 915.

Other family members were similarly uncertain. Contrary to Malaspino's testimony that the party usually occurred on the weekend between the birthdays, her sister, Debbie Banghart, testified it usually occurred on the weekend after her February 22 birthday if that date fell on a weekday, but she had no independent recollection of the 1996 party. RP 984-985, 997. And her sister's husband, Ken Banghart, testified the party could have been earlier than February 14 or after February 22; he did not recall, either. RP 892, 896-900. But when he first saw the diamond, it was not yet in

a setting and Wynn told him he found it at a Park and Ride lot. Banghart could not recall where or when he first saw the stone, however. RP 891, 900-902.

In late 1996, before Wynn moved to Texas, he had moved out of Malaspino's home and the two ended their relationship. He had asked her to return the diamond and Malaspino gave it back to him. So that he would have some money, she also loaned him \$5,000.00, which he never paid back. RP 921-923. Thereafter, Wynn stayed temporarily with his sister at Mother Nature's Acres before leaving for Texas. RP 1108-1109, 1122. His sister reported seeing him with a "large wad of cash." RP 1110.

The only available photo showing Wykel wearing his diamond ring was a distance shot. RP 269-270; exhibit 30. Friends and family members who had seen the ring over the years estimated the diamond was between one and five carats, but no one knew for certain. RP 288, 434, 453-454, 642, 651-652, 668, 696.

At detectives' request, Wykel's stepdaughter – Rebecca Lee – described the diamond to a metal smith and a gemologist in an attempt to identify the stone's size and features. RP 270-278. At the time this was done, it had been at least 15 years since Lee had

seen the ring up close. RP 291-292, 357. She described the stone as round and noted it did not come to a point on the underside. RP 274, 278. She estimated the size by looking at circles. RP 275-276. Lee did not know “the 4 Cs” concerning Wykel’s stone – the precise carat weight, clarity, color, or cut. RP 360-361.

Leigh Anne Butterbrodt, a metal smith, was one of the two individuals who attempted to identify the characteristics of Wykel’s stone based on Lee’s description.<sup>10</sup> RP (3/30/11) 117, 123. The two concluded the description was consistent with an Old European cut stone with an approximate size of 7 mm and approximate weight of 1.25 carats. RP (3/30/11) 129-131. Butterbrodt testified the diamond obtained from Wynn’s aunt was also an Old European cut. RP (3/30/11) 138-139.

Butterbrodt conceded that Old European cut stones are not rare. RP (3/30/11) 141-143. Moreover, since she was not provided an actual stone, the estimated carat weight was based just on the estimated diameter, and stones of the same diameter can have different weights based, for example, on differing depths and the practices of the particular cutter. RP (3/30/11) 144-147. Moreover,

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<sup>10</sup> The second individual, a diamond expert, did not testify due to health issues. RP (3/30/11) 124, 174.

although Butterbrodt concluded Lee's description was consistent with an Old European stone, the formula she used to estimate carat weight was for a more modern Round Brilliant stone. RP (3/30/11) 150-151.

In the end, Butterbrodt's "best determination" was that the stone Lee described was "probably an Old European cut" but she had no information on color, clarity, or depth of the stone and could only offer a "best estimate" on the stone's diameter. RP (3/30/11) 170-174.

Gemologist Ted Irwin examined the stone Wynn sold his aunt. RP (3/30/11) 89, 106-107. It was an Old European cut. RP (3/30/11) 107. The stone was still in a setting, which prevented exact measurements. RP (3/30/11) 180-181. Because of the stone's irregular shape, diameter measurements varied from 6.93 mm to 7.2 mm. RP (3/30/11) 183-184. Irwin averaged these measurements to estimate the weight at 1.28 carats, although he conceded it would be luck if this were correct. RP (3/30/11) 189-193, 202.

According to Irwin, there can be greater variance between Old European cut stones than one would find with modern stones, making exact measurements even more critical when attempting to

determine the size and weight of a particular stone. RP (3/30/11) 188, 200-201. Without an actual stone to examine, any result is necessarily hypothetical. RP (3/30/11) 203-204, 235-236. Irwin called it "foolhardy" to attempt to give a carat weight for an Old European stone based only on a possible diameter. RP (3/30/11) 206.

Ideally, to identify a particular stone, experts want to know the color, the clarity, the cut, the weight, the girdle diameter, the depth diameter, and the diamond plot. The fewer items one has, the less reliable the comparison. And without all of them, there is no way to prove the identity of a particular stone. RP (3/30/11) 238-240.

Although police could not establish the stone Wynn sold his aunt was from Wykel's ring, the State nonetheless charged Wynn with Wykel's murder based, in part, on inconsistencies in Wynn's statements over the years and statements attributed to him by others after he moved to Texas.

Police had first interviewed Wynn in 1996. RP 1604. They interviewed him again in 2000 and 2004. RP 1610; RP (3/29/11) 22, 74. Depending on the interview, Wynn identified Roy, Sumner, and Spanaway as the location of the car he and Wykel had gone to

see together. RP 1630. Although Wynn was inconsistent on this point, detectives conceded that Wynn consistently indicated the car was somewhere in the general south sound area even though the precise location changed. RP (3/30/11) 55. Detectives also conceded that memories can change over time and Wynn frequently prefaced his answers to their questions with the disclaimer that he could not be certain. RP (3/29/11) 24-25; RP (3/30/11) 44-45.

Police lied to Wynn about several key facts to assess his reaction and attempt to "trip him up." RP (3/29/11) 23-24. For example, Wynn initially told detectives he found the diamond he later sold his aunt after Wykel's disappearance. When detectives falsely told him Wykel's DNA had been found on that diamond, Wynn claimed he had shown the diamond to Wykel a few weeks before Wykel's disappearance. RP (3/29/11) 71-72. Wynn also initially indicated he was uncertain whether he had ever driven Wykel's Mercedes. When police lied and said his fingerprints were found in the car, Wynn indicated that he had driven it. RP 1641-1642; RP (3/29/11) 72-73.

Despite the detectives' efforts, however, most of what Wynn told police over the years remained consistent. RP (3/30/11) at 53-

57, 83-84. And he consistently denied involvement in Wykel's disappearance. RP 282-284, 320; RP (3/29/11) 24.

While in Texas, Wynn had told others he could not return to Washington because he was a suspect in a murder and was once overheard saying, "I don't understand what the big F'ing deal was. The guy was a weasel, he was a crook" and "I don't give a damn how many times they come down, they can't prove anything." RP 1444-1146; exhibit 108, at 28, 30. Wynn's niece claimed that on one occasion, she overheard him say that Wykel had given him the diamond. RP 1493-1494.

William Alexander,<sup>11</sup> a former co-worker in Texas, claimed that after one visit by Washington detectives, Wynn said, "those clowns aren't even in the right ballpark" and to get away with murder, you simply have to make sure there is no witness, no body, and get rid of the weapon. Exhibit 113, at 24-25. Alexander also claimed that Wynn said because the victim was well traveled, his

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<sup>11</sup> Williams suffered "a massive internal brain injury" in 1995, which affected his memory, although he claimed it only impacted his recall of events before the accident. Exhibit 113, at 27-28. He currently takes medication and continues to have difficulties maintaining focus. *Id.* Alexander's testimony on cross-examination very strongly suggests he suffers from profound mental health issues as a result of this massive brain injury. A summary here will not suffice. It can only be fully appreciated if read. See exhibit 113, at 31-116, 123-126.

absence would not be noticed for a significant time. Finally, Alexander testified that Wynn said he cut up the victim's body, placed it in a duffle bag wrapped in chains, and threw it in a river. Exhibit 113, at 25-26. On cross-examination, however, Williams admitted that Wynn may have been speaking hypothetically about how to get away with "murder in general" and not what he had personally done. Id. at 81-82, 85.

In an attempt to help establish a motive, the State presented evidence that Wynn was behind in paying some of his bills and faced some small claims judgments against him. See RP 1564-1575.

The State also presented evidence suggesting Wynn was a bit of small time con man.<sup>12</sup> He had once collected \$40.00, ostensibly to obtain a Barbie doll for Ken Banghart, who wanted to give the doll as a Christmas present. But Wynn never produced the doll and never returned the money. RP 892-893. He once told Debbie Banghart he could get her a deal on a washer and dryer and she gave him somewhere between \$150.00 and \$300.00 to make the purchase for her. He never produced the appliances or

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<sup>12</sup> The jury's consideration of this evidence was limited to motive and whether Wynn had engaged in a common scheme or plan. CP 101.

returned the money. RP 986-988. He once collected money for a little league baseball tournament, but the team never went to the tournament and the money was never refunded. RP 1041-1051. And he once promised to obtain a computer for his sister in exchange for some money and marijuana but never produced the computer. RP 1106-1108.

To rebut the notion Wykel voluntarily left his life in Washington behind and fulfilled his dream of moving to Argentina unannounced, the State presented evidence that Wykel had planned to attend his granddaughter's wedding in June 1996, he had expressed an intent to visit his son in Chicago, and he had recently been writing and speaking on the phone with a potential romantic interest from New York, whom he planned to see sometime in the future. RP 96, 151-152, 720-736. Moreover, his clothing, suitcases, toiletries, and passport were still in his apartment. RP 205, 216-218.

Family checked for safety deposit boxes and bank accounts using Wykel's or his former wife's name, but not any other names Wykel might have used to hide his assets. RP 242-243, 335-336, 371-372, 378-379, 388-389. At the time of his disappearance, Wykel had in excess of \$48,000.00 in a local Seafirst bank account.

RP 1009-1017. He had withdrawn \$5,200.00 in cash on or before February 12, 1996, and deposited \$3,700.00 a few days later. RP 1011, 1019-1021

The sole defense witness was Cleo Evans. RP (3/31/11) 28. Evans testified that in April 1996, she saw a television broadcast about Wykel's disappearance. RP (3/31/11) 29. Within half an hour of seeing that broadcast, she saw whom she believed to be Wykel crossing the street. RP (3/31/11) 32-33. He looked like he was in his fifties, but could have been a younger looking older gentleman, and he appeared "dazed and confused." RP (3/31/11) 30-31, 40. She called police to report what she had seen, but there was never any follow up. RP (3/31/11) 29, 33. The first person to ever contact her was a defense investigator in preparation for Wynn's trial. RP (3/31/11) 34.

Wykel's DNA was submitted to state and national missing persons databases and a matching profile has never been found on any evidence collected in any case. The database does not, however, cover international cases. Exhibit 109, at 12-13-14, 17, 19. Federal agencies, such as social security, have reported no activity concerning Wykel since he disappeared in 1996. RP 1686-

1687, 1712-1713. Wykel was eventually declared legally dead for purposes of probate. RP 266-268.

During closing arguments, the prosecution argued that Wynn was the middleman with whom Wykel was working to obtain a Thunderbird. RP (4/4/11 a.m.) 71. The poker game occurred on Thursday, February 22, 1996, and on Friday, February 23, Wynn and Wykel visited Wynn's sister at Mother Nature's Acres before heading out to see the Thunderbird. RP (4/4/11 a.m.) 67-68, 72-73, 87-88. But there was no car. Rather, as Wynn had done in the past, he had conned Wykel by obtaining a deposit on the fictitious car with no intention of producing the car or returning the money. RP (4/4/11 a.m.) 40-42, 62-65, 89. Wykel was not willing to let him get away with it, however, and when he finally demanded his deposit back, Wynn panicked and somehow killed him. RP (4/4/11 a.m.) 41-44; RP (4/4/11 p.m.) 88-89. Thereafter, Wynn took his diamond ring and any cash Wykel had been carrying before disposing of the body. RP (4/4/11 a.m.) 46, 106-107; RP (4/4/11 p.m.) 84.

The defense argued that Wynn had nothing to do with the car deal. RP (4/4/11 p.m.) 7, 12. Moreover, even if the date Wykel and Wynn were at Mother Nature's Acres was the afternoon of

February 23, 1996 – which the defense argued had not been established – based on Deladd’s testimony that he may have seen Wynn that evening, Wykel came home after that outing. RP (4/4/11 p.m.) 28, 31, 44. Other evidence inside Wykel’s apartment – including the partial glass of wine (which Wykel only drank in the evening) also established this. He was not killed – much less killed by Wynn – earlier that day. RP (4/4/11 p.m.) 38-43. The defense also pointed to the evidence suggesting Wykel may not be dead at all and may have left the country or be suffering from some mental impairment. The main point, however, was that the State had utterly failed to account for his whereabouts, dead or alive. RP (4/4/11 p.m.) 20-24, 54-55. Ultimately, argued the defense, the State’s theory was based on assumptions rather than actual evidence. RP (4/4/11 p.m.) 60-69.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN WYNN’S CONVICTION FOR FELONY MURDER BASED ON ROBBERY.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant

challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

As charged in this case, Wynn was guilty of murder in the first degree if, while committing or attempting to commit robbery in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he caused the death of another person. RCW 9A.32.030(1)(c); CP 56, 105.

A person commits robbery when "he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person . . . ." RCW 9A.56.190. "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking . . . ." Id. Moreover, the crime requires an intent to steal. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

The State failed to present evidence sufficient for jurors to reasonably conclude Robert Wykel's death occurred in the course of, in furtherance of, or in immediate flight from a robbery. Therefore, Wynn's murder conviction must be reversed and dismissed. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

a. The State Failed to Prove Robbery

The most recent and thorough discussion of the robbery statute's requirements is found in State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006). Allen was a 5-4 decision in which the majority found the evidence sufficient to convict the defendant of aggravated first-degree murder with robbery as the aggravating factor. Allen, 159 Wn.2d at 11. Although the Court was split on whether the evidence in that particular case was sufficient to demonstrate a robbery, there was no split on the robbery statute's requirements, discussed at length in the dissenting opinion authored by Justice Alexander. See Allen, 159 Wn.2d at 11-16 (Alexander, J., dissenting).

As pointed out by Justice Alexander, Washington long ago departed from the broader view that the use of any force prior to a

theft necessarily demonstrates robbery. Id. at 12 (citing State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992)). Rather, “the force must relate to the taking or retention of property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance ‘to the taking.’” Id. at 13 (quoting State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005)).

Thus, consistent with this relatively narrow definition of robbery, “the mere taking goods from an unconscious person, without force, or the intent to use force, is not robbery, unless such unconsciousness was produced expressly for the purpose of taking the property in charge of such person.” State v. Larson, 60 Wn.2d 833, 835, 376 P.2d 537 (1962) (quoting 2 Francis Wharton, Wharton’s Criminal Law § 1092, at 1390 (12<sup>th</sup> ed. 1932)).

The Supreme Court of Massachusetts has explained the reasoning behind this approach:

“Robbery may be punished more severely than larceny from the person. The principal policy served by this greater punishment is deterrence of the use of force (and the accompanying risk to human life) to obtain money or other property. This policy is not served where the intent to steal is not formed until after the assault. We conclude, therefore, that where the intent to steal is no more than an afterthought to a previous assault, there is no robbery.”

Allen, 159 Wn.2d at 14 (quoting Commonwealth v. Moran, 387 Mass. 644, 646, 442 N.E.2d 399, 401 (1982) (citations omitted)).

In Allen, the majority indicated that it largely agreed with the dissent's summary of the law: "Merely demonstrating that the use of force preceded the theft does not amount to robbery." Allen, 159 Wn.2d at 10 n.4. But the majority parted company with the dissent when assessing whether the evidence sufficed to prove a robbery in that case, finding "there was sufficient evidence presented for a reasonable jury to find that robbery was one of Allen's purposes for killing." Id.

A comparison of the evidence in Allen's case – barely sufficient – with the evidence presented in Wynn's case demonstrates that the evidence fell short at Wynn's trial.

Allen confessed to killing his mother in her home. Allen, 159 Wn.2d at 4-5. Allen was often in financial difficulty and, prior to the murder, he mentioned to a friend that his mother kept a cashbox in her home. He had also asked his mother for a loan, but she had declined. Id. at 9. On the day of the murder, Allen went to his mother's home and the two argued after his mother emphasized that he needed to get to work on time, his job was at risk, and that if he lost his job he and his children could end up homeless. Id. at 4.

The argument turned physical and Allen killed his mother by first strangling her and then striking her in the head with a rifle. Id. at 4-5. He then took his mother's cash box and left with it. Id. at 5.

While the four-judge dissent found this evidence merely established the use of force and a subsequent theft (and therefore failed to prove the force was used for the purpose of theft), id. at 11, the five-judge majority concluded "there was sufficient evidence presented for a reasonable jury to find that robbery was one of Allen's purposes for killing." Id. at 10 n. 4.

The evidence presented in Wynn's case falls well short of that in Allen. The State presented no witness who claimed to see the death of Robert Wykel. Moreover, even if it is assumed Wykel was murdered, the particular circumstances of his death are unknown. There is no confession or any other evidence – paraphrasing Allen – "for a reasonable jury to find that robbery was one of Wynn's purposes for killing."

Quite the opposite. Assuming the State's theory is correct and Wynn killed Wykel the same day the two men visited Mother Nature's Acres on Friday, February 23, 1996, Wynn was not acting like a man with robbery on his mind. Men intending robbery don't introduce the target to family and openly travel with him shortly

before the crime. To the extent the lack of evidence in this case suggests anything at all, it suggests the taking of Wykel's personal property was an afterthought following a dispute that ended in violence and Wykel's death. Indeed, the State's own argument at trial was that Wykel was killed because Wynn panicked; it was not because Wynn planned to rob him. RP (4/4/11 p.m.) 89.

Because there was no evidence that Wynn killed Wykel for the purpose of theft, the State failed to prove a robbery.

- b. Since There Was No Established Robbery, The State Necessarily Failed To Prove Wykel's Death Occurred in The Course of or in Furtherance of Robbery.

The Washington Supreme Court also recently addressed the proof requirements for felony murder. Under the felony murder statute, "in order for a death to have occurred in the course of a felony, there must be a causal connection such that the death was a probable consequence of that felony." State v. Hachenev, 160 Wn.2d 503, 506, 158 P.3d 1152 (2007) (citing State v. Golladay, 78 Wn.2d 121, 131, 470 P.2d 191 (1970), overruled on other grounds by State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976); State v. Diebold, 152 Wash. 68, 72, 277 P. 394 (1929)), cert. denied, 552 U.S. 1148 (2008). The identified felony must have begun before

the killing. Hachenev, 160 Wn.2d at 518-519. A killing done to facilitate a robbery would satisfy this standard. Id. at 518 n.6.

The Hachenev court recognized that some earlier cases erroneously suggested a broader rule in which the State need not establish the timing of events. These cases implied that so long as the killing was part of “the res gestae” of the felony, the State could prove felony murder. Hachenev, 160 Wn.2d at 515-516. The Hachenev court noted that, despite erroneously suggesting a broader rule, in each of these earlier decisions, “the deaths clearly occurred either during, in the furtherance of, or in flight from the commission of the underlying felonies.” Hachenev, 160 Wn.2d at 516. In other words, overly broad language notwithstanding, these cases were all properly decided under the correct and more narrow rule.

One such case was State v. Craig, 82 Wn.2d 777, 514 P.2d 151 (1973) (citing State v. Coe, 34 Wn.2d 336, 208 P.2d 863 (1949)). In Craig, the defendant admitted that he and an accomplice entered a taxicab intending to rob the driver. Once inside the cab, they provided a fictitious address. The defendant had a knife at his feet and the accomplice had a belt with which he intended to restrain the driver while the defendant grabbed his

money bag. Craig, 82 Wn.2d at 780. The two men beat and stabbed the driver to death before discarding his personal property, which “bore signs of having been searched.” Id. at 778. The defendant later claimed he abandoned the robbery plan while in the cab, subsequently killing the driver in self-defense and as a result of a drug-induced “rage reaction” rather than part of a robbery. Id. at 778-779.

In finding the State had established felony murder based on robbery, the Craig court stated, “It was not incumbent upon [the State] to prove the state of mind of the defendant at the time of the killing.” Craig, 82 Wn.2d at 782. As the Hachenedy court recognized, the Craig court’s assertion that the State was not required to prove that Craig intended to rob the taxi driver at the time of the killing was overbroad (and unnecessary) because the evidence clearly supported a finding that the killing occurred during a robbery. Hachenedy, 160 Wn.2d at 516. Craig’s admissions and actions established his intent to rob prior to the killing.

The same simply cannot be said in Wynn’s case. Wynn made no admissions of an intent to commit robbery and, unlike Craig, the precise circumstances of the alleged killing are simply not known. Because the State failed to prove beyond a reasonable

doubt that a robbery was intended or occurred, it necessarily failed to prove that Wykel was killed in the course of or in furtherance of a robbery.

2. AN ERRONEOUS ROBBERY INSTRUCTION EASED THE STATE'S BURDEN OF PROOF AND DENIED WYNN DUE PROCESS OF LAW.

Even if the evidence were sufficient to support Wynn's conviction for felony murder based on robbery, reversal would still be required because jurors received an erroneous instruction (instruction 9) on the crime of robbery. This instruction improperly relieved the State of its burden to prove all elements of the offense beyond a reasonable doubt and violated Wynn's due process rights.

As previously discussed, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. Winship, 397 U.S. at 364. A jury instruction that relieves the State of this burden may be challenged for the first time on appeal. State v. Roggencamp, 153 Wn.2d 614, 620, 106 P.3d 196 (2005); State v. Stein, 144 Wn.2d 237, 241, 27 P.3d 184 (2001); State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

At Wynn's trial, the State proposed – and the trial court gave – an instruction based on WPIC 37.50. Supp. CP \_\_\_\_ (sub no. 101B, State's Instructions to the Jury); CP 106. That instruction provides:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

The taking constitutes robbery, even if death precedes the taking, whenever the taking and a homicide are part of the same transaction.

CP 106 (emphasis added).

The underlined portion of this instruction is incorrect. It directs jurors – as a matter of law – that a robbery has been committed whenever a taking and homicide are part of the same transaction. This statement contains no exceptions, exclusions, or qualifications.

The comment to WPIC 37.50 cites two cases in support of this language – State v. Craig and State v. Coe. Washington Pattern Jury Instructions, WPIC 37.50, at 675 (West 2008). These

cases should be familiar because they are both cited above in the discussion of what constitutes felony murder based on robbery.

As previously discussed, in Craig, the defendant admitted planning to rob a taxi driver and admitted killing him, but claimed he abandoned the robbery plan and ultimately killed in self-defense. In Hachenev, the Supreme Court noted the Craig court's overbroad language – in asserting that the State need not prove an intent to commit robbery when the defendant committed murder – where the murder in that case very clearly occurred during a robbery. Hachenev, 160 Wn.2d at 516.

Just as Craig suggested an overly broad rule of law concerning the proof requirements for felony murder, WPIC 37.50 reveals that Craig also has resulted in an overly broad rule concerning what constitutes a robbery. After discussing the proof requirements for felony murder, the Craig court turned its attention to the proof requirements for robbery and, quoting Coe, used the language now found in WPIC 37.50:

The final contention made is that one cannot be guilty of robbery if the victim is a deceased person. As an abstract principle of law this is true, as essential elements of the crime of robbery would necessarily be lacking. However, that principle cannot apply here, because the robbery and the homicide were all a part of the same transaction, and the fact that death may

have momentarily preceded the actual taking of the property from the person does not affect the guilt of the appellant in the commission of the crime.

Craig, 82 Wn.2d at 783 (quoting Coe, 34 Wn.2d at 341) (emphasis added).

The context of this statement in Craig is critical. The taking and killing in Craig were part of the “same transaction” in the sense that the killing was very clearly part of the preplanned theft by robbery. The killing was the force used to obtain the stolen property and therefore properly found to be a robbery.

The same is true in Coe. In that case, the defendant and an accomplice were riding in a car with the victim. The defendant and victim were in the front seat; an accomplice (Lillard) was seated in the back. Coe, 34 Wn.2d at 341. Lillard struck the victim in the head with a revolver and, when the victim resisted, shot and killed him. Coe and Lillard then removed the victim from the car and stole his personal property. The Coe court found that “the robbery commenced with the first overt act on the part of Lillard.” Id. Thus, as in Craig, the taking and killing in Coe were part of the “same transaction” in the sense that the killing was very clearly part of a preplanned theft by robbery. The killing was the force used to obtain the stolen property.

Craig and Coe both properly stand for the legal proposition that a killing and taking are part of the same transaction and constitute robbery – even where the taking is not completed until after the victim’s death – where the killing constitutes the force used to allow the taking. Neither, however, stands for the proposition that, so long as a killing and taking are part of the same transaction, they *always* establish robbery. Yet that is what WPIC 37.50 expressly states as Washington law.

The problem, of course, is that a killing and a taking – even when part of the “same transaction” – do not constitute robbery unless the purpose in attacking the victim was to facilitate theft. See Allen, 159 Wn.2d at 9-10 n.4 (agreeing with dissent that “Merely demonstrating that the use of force preceded the theft does not amount to robbery”); Allen, 159 Wn.2d at 12-16 (Alexander, J., dissenting) (under Washington law, use of force prior to theft is not robbery unless force used to obtain or retain property); Larson, 60 Wn.2d at 835 (theft from unconscious person not robbery unless unconsciousness produced expressly for purpose of taking).

The last paragraph of WPIC 37.50 is easily fixed. Instead of instructing jurors that a taking “constitutes robbery” under the described circumstances, it should indicate that such a taking *may*

constitute robbery under the described circumstances, since proof of robbery will turn on the established sequence of events. A transaction where the victim's death was an intended means to commit theft is robbery. A transaction where the theft is an afterthought will not. Thus, the WPIC could be revised to provide, "The taking may constitute robbery, even if death precedes the taking, when the taking and a homicide are part of the same transaction."

Alternatively, the WPIC could be made even more specific in its final clause. Instead of telling jurors a taking is necessarily robbery "when the taking and a homicide are part of the same transaction," the WPIC could be revised to provide, "The taking constitutes robbery, even if death precedes the taking, when the homicide was committed to facilitate the taking."

Whatever language is used, however, it is apparent the last bracketed paragraph in the current version of WPIC 37.50 is incorrect and tells jurors – as a matter of law – that whenever a taking and homicide are part of the same transaction, the taking always constitutes robbery. It directs a guilty verdict whenever this circumstance is found regardless of the defendant's intent at the time of the homicide.

An erroneous jury instruction that misstates the elements of the State's proof will be deemed harmless only if the reviewing court can conclude, beyond a reasonable doubt, the error did not contribute to the jury's verdict. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). The State cannot make this showing on this record.

The State presented no evidence establishing the precise circumstances of Wykel's death or any taking that occurred thereafter. For the reasons already discussed, in the absence of this evidence, jurors could not reasonably conclude Wynn committed robbery. Under instruction 9, however, the prosecution could dispense with the need for this evidence because that instruction rendered the timing of Wynn's intent to steal irrelevant.

The trial deputy made good use of the erroneous instruction during closing argument, telling jurors that even if Wykel's property was taken after his death, the State had necessarily established the requisite force for robbery:

And in the course of a robbery or an attempted robbery means retaining property by force, keeping it by force in some way or taking it with force. And that can be even if the victim that it's been taken from is dead. Instruction number 9 explains that to you.

Obviously a dead victim, there was force because he's dead. So that's sort of not so much of an issue.

And retaining the property could be a ring, could be a thousand dollar down payment, could be the \$5,000 that Wykel probably had to buy his car, and that's also true in the flight from the robbery, which means the drive back to Seattle. So it will make a little more sense as we go, but this is just sort of an overview of that.

RP (4/4/11 a.m.) 46.

Later, the prosecutor returned to this subject:

Now, I want to talk just briefly about the – let me go back to the elements, which it all has to lead back around to, dealing with the robbery and robbing a dead person. The law makes a provision that if you take property from someone after they're dead, the definition, that's force, using it to retain the property because they're dead and can't come back and get it. You could take it before they died, you could take it after they died.

RP (4/4/11 a.m.) 106; see also RP (4/4/11 p.m.) 78-79 (telling jurors they can rely on theft before or after killing for robbery).

The prosecutor then argued that after Wykel asked for his deposit back, Wynn "panicked," killed Wykel, and then took the cash he had been carrying and the ring he had been wearing the day he disappeared. RP (4/4/11 a.m.) 107; RP (4/4/11 p.m.) 84, 88-89. Under the incorrect language of instruction 9, the State was correct – as a matter of law this was a robbery because the

homicide and theft would have occurred during the same transaction. It relieved the State of its burden to prove intent to commit theft at the time of the force and, instead, required a conviction based merely on a showing that force preceded a theft.

The trial judge described this as "certainly a case with much less evidence than you ordinarily would see in a homicide case." RP (3/31/11) 53-54. Indeed, jurors at Wynn's first trial could not unanimously conclude he was guilty of felony murder based on robbery. The State finally succeeded at Wynn's second trial, but it is highly likely instruction 9 played a role in the jury's verdict given the total lack of evidence concerning the circumstances of Wykel's death and the taking of his personal property. The error in instruction 9 was not harmless.

Finally, were this Court to conclude that Wynn is precluded from challenging instruction 9 due his trial attorney's failure to object to that instruction, Wynn can still raise this issue because he was denied the effective assistance of counsel.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of

reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993).

Competent counsel conducts research and stays abreast of current happenings in the law. Bush v. O'Connor, 58 Wn. App. 138, 148, 791 P.2d 915 (an attorney unquestionably has a duty to investigate the applicable law), review denied, 115 Wn.2d 1020 (1990); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (reasonable attorney conduct includes a duty to investigate the facts and law), review denied, 90 Wn.2d 1006 (1978); see also Strickland, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations").

It is ineffective to propose an instruction – even a pattern instruction – where counsel had reason to know the instruction was incorrect. State v. Kylo, 166 Wn.2d 856, 865-869, 215 P.3d 177 (2009) (counsel deficient for proposing WPIC where proper research of case law would have indicated pattern instruction flawed). It is therefore certainly ineffective when counsel fails to object to a proposed instruction under such circumstances.

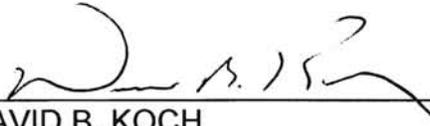
D. CONCLUSION

This Court should reverse Wynn's felony murder conviction.

DATED this 7<sup>th</sup> day of May 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "D. B. Koch", written over a horizontal line.

DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67227-4-1
	)	
MYRON WYNN,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7<sup>TH</sup> DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MYRON WYNN  
DOC NO. 349713  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF MAY 2012.

x Patrick Mayovsky

FILED  
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STATE OF WASHINGTON  
2012 MAY -7 PM 4:14