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Court of Appeals
Division I
State of Washington
NO. 70844-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA DAVID LAMBERT,

Appellant.

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

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 11-1-00181-5

BRIEF OF RESPONDENT

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I. INTRODUCTION

On October 3, 2011, Joshua Lambert, in a methamphetamine-induced psychosis, brutally stabbed to death his maternal and paternal grandfathers at their respective homes in Oak Harbor, Washington. E.g. RP 720-727; RP 235. Lambert also assaulted and bound with packing tape his 66-year-old great aunt, and left her on the floor next to her murdered brother in the living room of the home they shared. RP 270-71, 277-290 . Lambert entered the homes of his two grandfathers intending to steal firearms. RP 720-727; RP 290-293. Lambert also broke into the apartment of an acquaintance, and stole a compound hunting bow. RP 250-257. He claimed to have committed these crimes based on a delusional belief that his teenage son Sy, from whom he was estranged, was in danger and in need of Lambert's aid. RP 720-727; RP 218-226.

The Superior Court granted Lambert's request for self-representation at his arraignment on October 17, 2011. CP 6796; 6788; CP 6785. The court also appointed stand-by counsel to assist Lambert, should he request assistance. 11-21-2011RP at 10¹.

¹ The report of proceedings of the 10-day jury trial is numbered consecutively, and will be cited as "RP." Pretrial hearings are numbered individually, each starting at page 1. Those hearings will be cited as "mm-dd-yyyyRP."

Lambert represented himself through extensive pre-trial hearings, filing dozens upon dozens of motions, and arguing his motions. Lambert represented himself at a jury trial that began on July 9, 2013. Throughout the pre-trial and trial proceedings, Lambert's behavior ranged from nearly professional and cordial to numerous instances of offensive and disruptive outbursts directed at the court, the attorneys, and witnesses. After being repeatedly warned by the court that he would lose his right to self-representation for continued bad and contemptuous behavior, the court announced he had forfeited his Art. 1 §22 right of self-representation on July 18, 2013. This occurred while Lambert was presenting the defense case. RP 1109. At that time, stand-by counsel took over the presentation of his case for the final three days of the trial.

Lambert was tried by a jury on an eight-count Third Amended Information, charging two counts of first degree murder, three counts of first degree burglary, one count of first degree kidnapping, one count of taking a motor vehicle, and one count of unlawful possession of a firearm in the second degree. CP 626. The jury convicted him of all counts, and made findings that he was armed with a deadly weapon in six counts. CP 267-282. The jury made findings of aggravating circumstances permitting exceptional sentences in four counts. CP 269 – 274.

Lambert makes 12 assignments of error and raises numerous issues in his timely filed direct appeal.

II. RESPONDENT'S COUNTER-STATEMENT OF ISSUES

1. Lambert was charged in Count IV with the first degree burglary of the home of his 80-year-old paternal grandfather George Lambert. The defendant testified that he went to George's home with the intent to steal guns, and upon entry of the home immediately attacked then fatally stabbed George and slit his throat. Lambert then ransacked the home looking for guns. Was there sufficient evidence that, when construed most favorably to the State, any rational fact finder could have found the essential elements of burglary in the first degree beyond a reasonable doubt?

2. Lambert was charged in Count VI with the first degree burglary of the home of his mother Susie Lambert. The defendant testified that, after killing George Lambert, he drove to his mother's house intending to steal guns. Lambert testified that while in his mother's house, he saw his maternal grandfather, 80-year-old August "Gene" Eisner in the driveway. Lambert testified that he went outside and, using the same knife he had killed George with, repeatedly stabbed Gene in the back and slit his throat. Lambert testified that he then entered the garage to continue to look for guns. Was there sufficient evidence that, when construed most favorably to the State, any rational fact finder could have found the essential elements of burglary in the first degree beyond a reasonable doubt?

3. Where there was sufficient evidence of the burglaries charged in Counts IV and VI, was there also sufficient evidence to support the corresponding felony murder alternatives in Counts I and II predicated on those burglaries?

4. Should this Court reject the well-established principle that when a single offense may be committed by alternative means, there must be unanimity as to guilt, but not as to which means was the basis for committing the crime?
5. The trial court's instruction on the felony murder alternative required a finding that the defendant caused the death of the victim "during the course of, in furtherance of, or in immediately [sic] flight from the commission of burglary in the first degree." Does the instruction necessarily require that the defendant was involved in the burglary?
6. Where a person is convicted of multiple crimes arising out of the same act, the constitutional prohibition against double jeopardy must be applied with reference to the legislative intent as to whether multiple punishments should be allowed. May a person be convicted both of felony murder predicated on burglary, and the underlying burglary, in light of Washington's burglary anti-merger statute, RCW 9A.52.050?
7. Where the defendant repeatedly disrupted the trial, launched insulting verbal attacks at court and counsel, was repeatedly argumentative with witnesses, calling them liars during their examination by the prosecutor, and where the trial court warned the defendant on several occasions that continued disruptive behavior would result in forfeiting his right to represent himself, was the trial court justified in appointing standby counsel to represent the defendant for the final three days of the trial over the defendant's objection?

8. Where three psychiatric experts, including one of the defense experts, opined that Lambert was fabricating or embellishing mental illness symptoms, and based those opinions in part on the fact that Lambert had done significant research into symptoms of schizophrenia, did the prosecutor's cross examination of Lambert regarding his knowledge base, and argument pertaining to malingering infringe on Mr. Lambert's art. 1, § 22 rights to represent himself?

9. Did the trial court abuse her discretion when, shortly before trial, she announced she would defer ruling on a motion for acquittal based on insanity until after the evidence was presented at trial, where the defendant scheduled a hearing three days before the jury trial and never actually filed a motion indicating the basis for his acquittal motion?

III. STATEMENT OF THE CASE

A. Facts

Joshua Lambert, on October 3, 2011, was in a methamphetamine-induced psychotic state. RP 1502; RP 1431-35. He became fixated on a delusional belief that his teenage son Sy had been kidnapped, and he decided that he should steal some guns, presumably to protect or free his son. RP 723 -27 (reading of Exhibit 197 – defendant's sworn statement).

He first went to the home of his uncle Jeff Lambert on Troxell Road in Oak Harbor. RP 176, 189. Lambert testified that he went there to steal guns, but decided against it because there were too many people there. RP 938-939; RP 1371. He then went to George Lambert's house at Oldenberg Lane. RP 939. George Lambert was a "softer target" than the

houseful of people he believed was at his uncle's house. George Lambert, the defendant's paternal grandfather, was 80 years old, and had significant mobility issues due to a stroke. RP 272-73. When Lambert arrived, his 66-year-old great aunt Kay Gage was in the driveway putting items in her car. She told Josh his grandfather was in the living room, and told him to enter the house through the front door. RP 276-78. Lambert testified that he entered the front door and locked it behind him to keep Ms. Gage from interfering. RP 1374. He said he had his hands in his pocket, holding onto a folding knife that was open and "all ready." RP 1384-85.

As soon as he saw his grandfather, Lambert shoved the old man into his chair. Lambert claimed that he "reflexively" stabbed his grandfather because his grandfather raised his arms after Lambert shoved him. RP 941-42. He stabbed George Lambert 27 times, and cut his throat so deeply that he nearly severed his tongue. RP 1107-1108. The injury also transected George's carotid artery. RP 544. The autopsy report also revealed that George suffered multiple blunt force blows to his face. RP 543-546.

Soon after, his Aunt Kay entered the house through the garage. Lambert grabbed her, and took her phone. He pulled her into the living room where George lay dead or dying on the floor, and hit her on the head. RP 282-85. He forced her to lie face down on the floor by her

brother, and bound her wrists and ankles with packing tape. RP 287-88. Lambert then demanded she tell him where the guns were. He ransacked the house looking for guns. Ultimately he found a BB gun that he took because he thought it was a firearm. RP 1303-04.

Lambert then stole his Aunt's car and drove to Oak Harbor High School looking for his son. RP 942. When he realized the gun was a BB gun, he testified that: "I drove out to my mom's house because I – I knew there were guns there." RP 942. His mother, Susan Lambert, lived with her husband Jim Coffin and her father, August "Gene" Eisner on Hastie Lake Road in Oak Harbor. RP 587. Josh Lambert's son, Sy Lambert, also lived there. RP 587. Mrs. Lambert was Sy's guardian, and Josh was forbidden from being at the house. RP 900.

On his self-conducted direct examination, Lambert described encountering his maternal grandfather there, Gene Eisner. He stated that, like George Lambert, Gene Eisner raised his arms quickly, and Lambert reflexively stabbed him, "and then – then it continued on." RP 943. By continuing on, Lambert meant that he stabbed him 17 times in the back, and sliced open his throat, severing his carotid artery. RP 503; RP 530.

On cross examination, Lambert revealed that he had been in his mother's bedroom when he saw Gene in the driveway. RP 1391. He admitted that he expected to find a gun to steal at the house. RP 1391.

Lambert decided that, in service of his delusion, he had to tie up Gene. RP 1392. Lambert admitted that he used the same knife that he had earlier used to stab George Lambert. RP 1392. Lambert threatened him with the knife, and demanded the keys to the garage. RP 1394. When his 80-year-old grandfather said “no,” Lambert quickly dispatched him in the same fashion he had killed George. 1394-95.

Lambert stole a box of ammunition from the house, but was unable to open his stepfather’s gun safe. RP 232-33; RP 1398. The day before the murders, Lambert had stolen a shotgun from the house, and had sawed both the barrel and the stock shorter, so he could easily carry it on a bicycle. RP 1368-69. However, he had stashed it in the woods and was unable to find it on October 3, 2011.

After he left his mother’s house, Lambert broke into the apartment of Amber McCabe, an acquaintance of his. Ms. McCabe saw him, and demanded he leave her house. She noticed that he had two hypodermic needles protruding from his pocket. RP 262.

Lambert was arrested later that day. Lambert had turned his sweatshirt inside out to conceal the blood on it and avoid drawing attention to himself. RP 1401. He had one hypodermic needle in his pocket. RP 372. He also had a small baggie, consistent in appearance with baggies used to hold methamphetamine. RP 372. The baggie had a

white powdery residue determined to be 0.05 grams of dimethyl sulfone. RP 674-75. Dimethyl sulfone is a substance frequently used as a cutting agent for methamphetamine. RP 675.

While in jail, Lambert talked on the telephone and visited with his mother, Susan Lambert. Those meetings were audio recorded. Exhibit 205 was a recording of one such meeting on October 8, 2011. The recording was played for the jury, and transcribed as part of the proceedings. Lambert's mother accuses him of being "on something," and Lambert quickly changes the subject. RP 743. He later describes the day of the murder as "a trip." RP 744. Finally, he tells his mother, "I don't know how I got to that point. I don't know how I got to that point in the first place." She responds: "Drugs." Lambert pauses for such a long time, that his mother eventually asks if they are still connected.

In an October 14, 2011 phone call with his mother, Lambert tells his mother that there are "dirty needles" in a duffle bag on the side of her house, and he asks her to dispose of them. RP 748.

Lambert testified that he used methamphetamine intravenously, and kept needles stashed at his mother's house. RP 1356-57. Lambert admitted that methamphetamine has made him hallucinate when he was awake long enough, and that sometimes he would be awake for more than five or six days at a time. RP 1361-62.

Lambert admitted on cross examination that he had a fascination with guns when he was using methamphetamine. RP 1403-1404. He indicated that when he used methamphetamine he would get paranoid, and would bring out his guns and load them. RP 1404. His behavior caused his former girlfriend, Jackie Wallace, concern, and she would “get rid of” his guns, which he would leave around their residence. RP 1405.

In support of his insanity defense, Lambert retained and was evaluated by Dr. Robert Deutsch, a forensic psychologist, and Dr. Lawrence Wilson, MD, a forensic psychiatrist. Wilson was requested to evaluate Lambert for competency to stand trial and represent himself, but Lambert examined him at trial about Lambert’s claimed schizophrenia, including a number of hypothetical questions which formed the foundation of his insanity defense. RP 960-983. Much of Dr. Wilson’s testimony was consistent with the State’s mental health experts.

Dr. Wilson pointed out that substance induced psychotic delusion would last hours or days, as opposed to a mental disorder, which would last weeks or months. RP 976.

Dr. Wilson testified that he was “quite interested and amazed, actually, at how much he’d learned in his study” of mental health issues. RP 1018. Dr. Wilson noted that Lambert had read numerous internet articles, and a forensic psychiatry journal. Dr. Wilson also testified that

Lambert's self-reported symptoms were unusual for typical schizophrenic patients. He opined that Lambert's claimed symptoms could represent a faked attempt to exaggerate the experiences he had during earlier brief psychotic episodes with methamphetamine or psychedelic drugs or flagrant shame symptoms of how he presumes severe mental illness is actually experienced by an average person." RP 1028-29.

The State called two forensic mental health experts: Dr. Margaret Dean, MD, and Dr. Brian Judd, Ph.D. Both of them concluded that Lambert did not qualify for a defense of insanity. In particular, they agreed on several issues: They both found that he was malingering, or likely malingering, based on his insistence of pushing material at them, and his detailed descriptions of his claimed delusions. RP 1431-35; RP 1490-91. Dr. Dean noted that, when she interviewed Lambert at Western State Hospital, he referred to notes before answering her questions and tried to direct the interviews. RP 1437-38. She noted that was unlike any schizophrenic patient she had ever seen. Dr. Judd noted that Lambert was endorsing symptoms seldom seen in psychiatrically impaired populations.

Both Drs. Judd and Dean diagnosed Lambert as having anti-social personality disorder. RP 1448-52; RP 1480-81. Both were struck by his complete lack of empathy or emotional response to the murders of his two grandfathers, whom he claimed he loved.

Most importantly, both concluded that on October 3, 2011, Lambert was suffering from a methamphetamine induced psychotic episode. RP 1454-1457; RP 1482. In addition to all of the evidence of Lambert's methamphetamine use contained in reports and recorded phone calls, Dr. Judd interviewed Lambert's former girlfriend Jackie Wallace. RP 1510. Ms. Wallace told Judd that when Lambert used to come down from methamphetamine binges, he would become paranoid and engage in gun-seeking behaviors. RP 1510. As discussed above, Lambert admitted as much at trial. Dr. Dean also noted that it was inconceivable that Lambert would have recovered from actual schizophrenia after sitting in a jail cell for a few days without medication or treatment. RP 1447-48. Lambert did not receive any antipsychotic medications while in jail. RP 1349.

IV. ARGUMENT

Lambert makes twelve assignments of error, and raises a number of issues related to those claims. Many of those boil down to resolving the question of whether the charges of first degree burglary in Counts IV and VI are supported by sufficient evidence. The issues raised by the defendant differ slightly between the two counts, although both implicate his claim that there was a lack of unanimity in light of the fact that there

are alternative means of committing the charges. See App. Assignments of Error 1-5.

A. Standard of Review for Challenges Claiming Insufficient Evidence.

In a challenge based on sufficiency of the State's evidence made after the verdict, the reviewing court considers all evidence, including that presented in the defense case. See *State v. Jackson*, 82 Wn. App. 594, 607-09, 918 P.2d 945, 953-54 (1996). The standard for reviewing a claim of insufficient evidence is well known. In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Courts must defer to the fact finder on issues of witness credibility. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The relevant question is "whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237, 242-43 (2010)(citing *State v. Wentz*, 149 Wash.2d 342, 347, 68 P.3d 282 (2003)).

B. The Jury's Verdict on Count IV Charging First Degree Burglary of George Lambert's Home Is Supported By Sufficient Evidence, And Therefore There is Sufficient Evidence To Support The Felony Murder Alternative of Count I.

1. *Lambert entered George Lambert's home with the intent to steal guns, and he assaulted persons in furtherance of that objective, thereby exceeding the scope of any invitation to be in the home.*

The State was required to prove, in Count IV, that Lambert unlawfully entered or remained in the residence of George Lambert, with intent to commit a crime against a person or property therein, and that in entering, while in the building, or in immediate flight therefrom, he was armed with a deadly weapon or assaulted a person. RCW 9A.52.020. Here there was substantial evidence to prove each element, including both alternative means of assaulting a person or being armed with a deadly weapon.

As described above, the defendant testified that he went to George Lambert's and Kay Gage's house intending to steal guns. He decided to go there because there were too many people at his uncle's house. Lambert stated that he entered the house with his folding knife open and ready. He entered the house, murdered George Lambert, restrained Kay Gage, and then demanded to know where the guns were. He stole a BB gun believing it was an actual firearm.

Lambert claims that he did not enter or remain unlawfully because his Aunt Kay invited him inside. That argument has no merit under these facts. The Supreme Court has held that an invitation may be revoked by implication, such as here, where the owner of the premises did not know the defendant entered intending to commit a crime. “[D]epending on the actual facts of the case, a limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of the case.” *State v. Collins*, 110 Wn.2d 253, 261, 751 P.2d 837, 841 (1988).

In *Collins*, the Supreme Court found two bases to limit the scope of the invitation: the implied scope of the areas of the premise and the purpose for entry, and, in that case, grabbing the elderly female occupants and dragging them into a bedroom where they were assaulted and raped. *Id.* at 261.

Here the same analysis yields the same result. In fact, because Lambert admitted he went to the house with the intent to commit a burglary and steal firearms, and that he was “ready” with his knife, the evidence is far stronger in this case.

Here, the evidence plainly supports the finding of guilt on Count IV, especially when it is construed in a light most favorable to the State. The conviction for first degree burglary as charged in Count IV should be affirmed.

2. *The felony murder alternative for Count I is supported by substantial evidence.*

Lambert argues that the alternative means of felony murder in Count I is not supported by sufficient evidence of the predicate burglary, and therefore the conviction must be reversed. He is incorrect.

As argued above, Count IV charging burglary in the first degree was supported by sufficient evidence. It is settled law in Washington that a jury need only be unanimous as to guilt, but not as to which of several alternative means was used by the defendant to accomplish the crime. *State v. Talbott*, 199 Wash. 431, 438, 91 P.2d 1020, 1022 (1939); *State v. Arndt*, 87 Wn.2d 374, 377-78, 553 P.2d 1328, 1330-31 (1976)(explicitly overruling dictum in *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970) suggesting that a jury should be unanimous as to the means); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231, 234-35 (1994)(“If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary”); *State v. Fortune*, 128 Wn.2d 464, 467-68, 909 P.2d 930, 931 (1996)(“if sufficient evidence supports each alternative means of a charged crime, jurors can give a general verdict on that crime without giving express unanimity on which alternative means was employed by the defendant”).

3. *Lambert murdered his grandfather George in the course of and in furtherance of the burglary of George's home.*

Lambert also argues that the murder was not committed in the course of, in furtherance of, or in withdrawing from the burglary. His argument has no basis in fact. Here, even the defendant testified that his purpose for going to George Lambert's house was to steal guns – i.e. commit a burglary. The following exchange is one of several where Lambert said he went to both of his grandfathers' houses to steal guns:

Q (By Mr. Pacher) I - I'm going to jump in here with another question. So what led you to go over to your grandfather's house?

A That was the only place I knew that - where a gun was.

Q You're talking Grandpa George.

A Yes. Grandpa George. Yes. That was the only place in the entire world where I knew where a gun, besides my mom's house.

* * *

Q Yeah. You got inside the house, your Grandpa George's house?

A Oh.

Q Why were you there?

A Oh, I - I was there to the gun. And I was-- Or get a gun or a couple guns. I knew that he had guns. Just— I just knew in general.

RP 1301-02. *See also*, RP 1372-74; RP 722-727 (reading of

Lambert's hand-written sworn statement).

Moreover, Lambert's brief overstates the "sequencing" requirement of committing one crime in the course of another. App. Br. at 14. A murder committed "in the course of" a felony requires "a causal connection such that the death was a probable consequence of the felony." *State v. Hacheny*, 160 Wn.2d 503, 518, 158 P.3d 1152, 1160 (2007)(citing *Golladay*, 78 Wn.2d at 131). While Lambert is correct that "logic dictates" that the predicate felony must have begun before the killing, he omits a critical qualification the *Hacheny* Court attached to that holding.

The Court explained that a robber who kills his victim before the taking to facilitate the robbery "would clearly be [acting] 'in furtherance of' the robbery." *State v. Hacheny*, 160 Wn.2d at 518, n. 6 (Citing RCW 10.95.020(11)). The same reasoning would apply here.

C. The Jury's Verdict on Count VI Charging First Degree Burglary of Susan Lambert's Home Is Supported by Sufficient Evidence, And Therefore There is Sufficient Evidence To Support The Felony Murder Alternative of Count II.

The State was required to prove, in Count VI, that Lambert unlawfully entered or remained in the residence of Susan Lambert, with intent to commit a crime against a person or property therein, and that in entering, while in the building, or in immediate flight therefrom, he was armed with a deadly weapon or assaulted a person. RCW 9A.52.020.

Here there was substantial evidence to prove each element, including the alternative means of (1) assaulting a person or (2) being armed with a deadly weapon.

1. *Lambert was prohibited from being in his mother's home and he entered with intent to steal guns.*

As set forth in the State's statement of facts above, Lambert drove from George Lambert's house to his mother's house with the express purpose of stealing guns. RP 1391. Lambert was not allowed on the property except when his mother was home. RP 226-228; RP 900. He had the knife with him that he used to murder George, and testified that he used the same knife to murder Gene Eisner, his maternal grandfather. RP 1392-95. Here, it was Lambert's testimony at trial that established he had been in his mother's bedroom when he observed Gene in the driveway. Lambert said he left the house to tie up Gene, but ended up killing him. RP 1391. Thus, regardless of the sequence of his entering the residence and stabbing Gene, Lambert was at all times armed with a deadly weapon.

2. *Lambert assaulted Gene Eisner both in entering the building, and in immediate flight therefrom.*

On appeal, Lambert argues that when he killed Gene, he was not in a building (a point the State concedes), nor, he argues, was he entering or fleeing the building. In fact, Lambert left the building with the express

purpose of preventing Gene from interfering with his burglary, and then re-entered the building. Under these facts, it can be argued with equal strength that Lambert assaulted Gene “in entering” or in “immediate flight” from the building. RCW 9A.52.020.

Lambert, by his own words, killed Gene to facilitate the burglary, and thus used the murder as a means to enter the building and continue searching for guns. By the same token, it can be said that he had left the building immediately prior to killing Gene.

Any other application of the statute would lead to absurd results. A burglar who assaulted someone in flight from a building that he had just burglarized could reduce the severity of his crime by re-entering the building. In other words, by committing additional criminal acts, the burglar would be rewarded. That cannot be.

Lambert should not be rewarded for making an anticipatory assault on Gene, rather than waiting for Gene to enter the house, where he no doubt would have met the same fate.

3. *Lambert was armed with a deadly weapon.*

Lambert contends that he was not armed with a deadly weapon while entering, inside, or in flight from the house. He is incorrect, as Mr. Lambert was armed with the murder weapon the entire time.

A deadly weapon is a weapon “which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). The Supreme Court has cited to a decision of this court and ruled that “there must be some manifestation of willingness to use the knife before it can be found to be a deadly weapon under RCW 9A.04.110(6).” *In re Martinez*, 171 Wn.2d 354, 366, 256 P.3d 277, 283-84 (2011)(quoting *State v. Gotcher*, 52 Wn. App. 350, 356, 759 P.2d 1216 (1988)).

In *Gotcher*, the defendant was apprehended by police in a residence during the commission of a burglary. The defendant, when ordered to place his hands on the wall, at one point attempted to place his hand in a pocket. Police found a partially opened switchblade knife in his pocket. The Court of Appeals held that was sufficient evidence to prove the defendant was willing to use the knife, and upheld his first degree burglary conviction. Here, Lambert clearly manifested a willingness to use his knife, both on George Lambert and Gene Eisner.

The evidence plainly supports the finding of guilt on Count VI, especially when it is construed in a light most favorable to the State. The conviction for first degree burglary as charged in Count VI should be affirmed.

4. *The felony murder alternative for Count II is supported by substantial evidence.*

Lambert argues that the alternative means of felony murder in Count II is not supported by sufficient evidence of the predicate burglary, and therefore the conviction must be reversed. He is incorrect.

As argued above, the conviction of burglary in the first degree in Count VI was supported by sufficient evidence. Therefore, the alternative means of felony murder predicated on the burglary is also supported by sufficient evidence. As argued in Section B.2, a jury need only be unanimous as to guilt, and not as to which of several alternative means was used by the defendant to accomplish the crime. The argument will not be repeated here.

D. The Court Should Reject Lambert's Argument to Scrap Nearly Eighty Years of Alternative Means Jurisprudence.

1. *This Court must follow the decades of Supreme Court precedent that does not require a jury expression of unanimity as to any alternative means.*

Lambert devotes a considerable portion of his brief arguing in favor of a new rule in Washington that mandates a jury expression of unanimity as to alternative means. App. Br. at 19-32. He both misstates the law in Washington, and argues that the unanimity requirements of other states should apply in Washington. Both arguments must be rejected.

As argued above, it is settled law in Washington that a jury need only be unanimous as to guilt, and not as to which of several alternative means was used by the defendant to accomplish the crime. Our Supreme Court has followed this rule since at least 1939, in the case of *State v. Talbott*, 199 Wash. 431, 438, 91 P.2d 1020, 1022 (1939). The principle has been reiterated in dozens upon dozens of published appellate decisions. Most recently, the Supreme Court stated:

Under article I, section 21 of the Washington Constitution, criminal defendants have a right to a unanimous jury verdict. This right may also include the right to a unanimous jury determination as to the *means* by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime. In reviewing this type of challenge, courts apply the rule that when there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required.

State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030, 1032 (2014).

“Sufficient evidence is evidence adequate to justify a rational trier of fact to find guilt beyond a reasonable doubt.” *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231, 235 (1994).

Washington’s rule does not run afoul of federal jurisprudence. The *Martinez* court recognized that *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) held that a general guilty verdict

satisfies the due process clause of the Fifth Amendment of the federal constitution, notwithstanding an absence of unanimity on an underlying means supported by sufficient evidence. *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231, 235 (1994).

This Court must reject all of Lambert's arguments seeking a more onerous rule than the federal and state constitutions require.

2. *Even if unanimity instructions were required, the error in this case would have been harmless because the evidence in support of the State's case was overwhelming and virtually uncontested.*

Here the evidence was so strong regarding each of the means of committing the crimes, that if there was error in instructing the jury on unanimity, the error would be harmless. "When a trial court does not properly instruct on unanimity, the error is harmless only if no rational trier of fact could have entertained a reasonable doubt that each act sufficient to constitute the crime charged was proved beyond a reasonable doubt." *State v. Williams*, 136 Wn. App. 486, 496, 150 P.3d 111, 116 (2007)(citing *State v. Kitchen*, 110 Wn.2d 403, 406, 756 P.2d 105 (1988)).

In this case, Lambert himself provided substantial factual support for each of the State's legal theories. He testified that he went to each house intending to commit burglaries, and steal firearms. He testified that he attacked his grandfathers to prevent them from interfering with his

quest to obtain guns. He testified that he came to the first house armed and ready, with his folding knife concealed in his pocket, but open. He testified that he used the same knife to murder his grandfather Gene. He testified that he felt he did not have time to subdue and tie up his grandfathers, so he killed them instead. RP 940-42; RP 1392. He testified that he locked the door at George's house, and shoved George into a chair before viciously attacking him with the knife. He testified that he went from his mother's bedroom to the driveway to savagely attack Gene. Other than Lambert's claimed defense of insanity, there was virtually no evidence about the burglaries and the murders that did *not* support the State's case.

The jury had substantial evidence that Lambert was armed with a deadly weapon at both burglaries. The jury had substantial evidence that Lambert assaulted a person in entering, while inside, or in flight from each burglary. And the jury had substantial evidence that Lambert premeditated both murders.

E. Instructions 16 and 17 Accurately State the Elements of Felony Murder and Did Not Diminish the State's Burden of Proof.

Lambert argues that the instructions setting forth the elements of felony murder failed to require the jury to find that Lambert actually

committed the crime of burglary in the first degree. His argument is premised on an illogical reading of the instructions.

Instruction 16 states, in pertinent part:

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

(1) That on or about the 3rd day of October, 2011, the defendant caused the death of George Lambert;

(2) That the defendant acted by one or more of the following means:

(a) That the defendant acted with premeditated intent to cause the death of George Lambert;

OR

(b) That the defendant caused the death of George Lambert

(i) During the course of, in furtherance of, or in immediately [sic] flight from the commission of burglary in the first degree, and

(ii) George Lambert was not a participant in the crime of burglary in the first degree;

AND

(3) That the acts occurred in the State of Washington.

Instruction 17 mirrors instruction 16, except that Gene Eisner is named as the victim.

The instruction differs from the pattern jury instruction for felony murder (WPIC 26.04) because it was modified to accommodate the alternative means of premeditation and felony murder. The plain and

obvious meaning of the instruction is that the defendant was a participant in the crime of first degree burglary.

It defies reason that a person could commit a homicidal act “during the course of, in furtherance of, or in immediately (sic) flight from the commission of burglary in the first degree,” yet not be a participant in that burglary. Earlier in his brief, Lambert even argues that logic dictates that “in the course of a felony” means there is a causal connection between the felony and the murder. App. Br. at 14 (citing *Hacheney*, 160 Wn.2d at 518). Even assuming the jury determined the killings were committed “in immediate flight from” the burglaries, the obvious understanding of that phrase is that the person fleeing the burglary is doing so because he participated in the burglary.

Even if the court accepts Lambert’s argument, the error in this case would be harmless. Lambert cites the case of *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889, 894 (2002) for the proposition that this type of alleged instructional error is not subject to harmless error analysis. In fact, *Brown* says the opposite: instructional error, even where an element is omitted, *is subject to harmless error analysis*:

Defendants argue that the erroneous accomplice liability instruction permitted the State to obtain guilty verdicts against them without proving every element of the charged offenses beyond a reasonable doubt. They contend that this error is not subject to

harmless error analysis, but instead automatically requires reversal of their convictions. We disagree.

Id.

The question to be answered is “[W]hether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. *State v. Brown*, 147 Wn.2d at 341 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 15-18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967))).

Here, the evidence is uncontroverted that no one other than Josh Lambert burglarized the homes of George Lambert or Gene Eisner. There can be no confusion that Mr. Lambert killed his grandfathers during the course of, in furtherance of, or in immediate flight from burglaries committed by some other person. In this case, the jury was also asked to decide whether Lambert was in fact also guilty of the subject burglaries.

The Court should reject the argument that an element was omitted from the instruction. Even if the Court agrees with Lambert, the Court should find the error was harmless beyond a reasonable doubt.

F. Convictions For Both First Degree Felony Murder and First Degree Burglary Do Not Violate The Prohibition of Double Jeopardy Where The Legislative Intent Shows The Crimes Are Not The Same Offense.

Lambert asserts that the convictions for first degree burglary in Counts IV and VI cannot stand in conjunction with the corresponding first degree felony murder convictions in Counts I and II. He is incorrect because the resolution of such a double jeopardy challenge ultimately turns on the legislative intent. Here, the Legislature has explicitly expressed its intent in the burglary anti-merger statute, RCW 9A.52.050.

Both the federal and state constitutions protect a defendant against multiple convictions for the same offense. U.S. Const. amend. V (“No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.”); Wash. Const. art. I, § 9 (same); *State v. Calle*, 125 Wn.2d 769, 775, 888 P.2d 155 (1995) (citing *Whalen v. United States*, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)). Multiple convictions whose sentences are served concurrently may still violate double jeopardy. *Calle*, 125 Wn.2d at 775.

Within these constitutional constraints, the legislature has broad power to define crimes and assign punishments. *Id.* at 776. Where a single act supports conviction under multiple statutes, multiple punishments may be permitted unless, in light of legislative intent, the

crimes are the same offense. *State v. Kier*, 164 Wn.2d 798, 803-04, 194 P.3d 212 (2008). In other words, the question of whether conviction and punishment for multiple crimes arising out of the same conduct violates double jeopardy turns on how the legislature intended to punish the conduct. *State v. Louis*, 155 Wn.2d 563, 568-69, 120 P.3d 936 (2005); *State v. Freeman*, 153 Wn.2d 765, 768, 108 P.3d 753 (2005); *Calle*, 125 Wn.2d at 776. This Court's review of legislative intent is de novo. *Freeman*, 153 Wn.2d at 770; *Kier*, 164 Wn.2d at 804.

In determining whether multiple punishments were authorized by the legislature, a reviewing court must use the three-part test articulated by our supreme court in *Calle*. First, this Court looks to the language of the statutes themselves to see if the legislature implicitly or explicitly authorized or prohibited cumulative punishments. *Calle*, 125 Wn.2d at 776-77; *Kier*, 164 Wn.2d at 804. Here, the legislature explicitly authorized cumulative punishments by enacting the burglary anti-merger statute: "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050. Because the legislature expressly authorized separate punishments for burglary and any other crime committed during a burglary, there is no double jeopardy problem.

State v. Elmore, 154 Wn. App. 885, 900, 228 P.3d 760, 767 (2010), *review denied*, 169 Wn.2d 1018 (2010), provides the single definitive ruling from a Washington court on the question. The *Elmore* Court explicitly held that the burglary anti-merger statute allows for separate punishment when burglary is the predicate crime of the felony murder. *Elmore*, 154 Wn. App at 900 (citing *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999)).

Even if the legislative intent was not clear, Lambert's double jeopardy claim also fails under the *Blockburger*² or "same evidence" test. *Freeman*, 153 Wn.2d at 776-77; *Calle*, 125 Wn.2d at 777-78. Under that test, if there is an element of each offense that is not included in the other, and proof of one offense would not always prove the other, the two offenses are not the same for constitutional double jeopardy purposes. *Freeman*, 153 Wn.2d at 772, 776-77; *Calle*, 125 Wn.2d at 777-78; *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). Axiomatically, murder in the first degree, whether by premeditation or in the felony murder context, requires that the defendant cause a death. RCW 9A.32.030(1)(a), (c). Burglary in the first degree does not include that element. RCW 9A.52.020. Rather, first-degree burglary requires that a person enter or remain unlawfully in a building. *Id.* That element is not

² *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

included in murder, particularly when charged by alternative means and substantial evidence supports each alternative. Thus, burglary in the first degree and murder in the first degree are not the same offense under this analysis.

This result of the same evidence or *Blockburger* test creates a strong presumption that the legislature intended that the crimes should be punished separately, which can be overcome only by clear evidence of contrary legislative intent. *Louis*, 155 Wn.2d at 570. Nonetheless, the third part of the *Calle* test requires this Court to apply the merger doctrine as a tool of statutory construction to determine whether the legislature intended to impose multiple punishments. *Id.*; *Freeman*, 153 Wn.2d at 772-73. That doctrine “only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first-degree rape) the State *must* prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).” *Vladovic*, 99 Wn.2d at 421 (emphasis added). Washington courts have held in certain situations that Robbery in the First Degree and Assault in the Second Degree merge under this analysis. *E.g.*, *Freeman*, 153 Wn.2d at 777-78; *Kier*, 164 Wn.2d at 805-06.

Lambert argues that the merger doctrine applies because his first-degree murder conviction was predicated on the first-degree burglary. He cites *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 2913, 53 L. Ed. 2d 1054 (1977) for the proposition that convictions for both felony murder and the predicate felony always violates double jeopardy. *Harris* is a per curium opinion with virtually no analysis, and which does not address the importance of legislative intent to the analysis. *Harris* also dealt with the question of serial prosecutions for felony murder followed by the prosecution for the predicate felony of robbery. It also did not address a situation where, as here, felony murder was but one alternative means of the murder conviction.

Lambert's reliance on *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 1436, 63 L. Ed. 2d 715 (1980) is misplaced. The case concerned a defendant who challenged his consecutive sentences for rape, and murder predicated only upon that same rape. The Supreme Court vacated the consecutive sentence, but did so because "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." Thus, *Whalen* supports the State's argument that the double

jeopardy issue cannot be resolved without reference to the plain legislative intent.

Here, the plain legislative intent leads to only one result: the merger doctrine does not apply here because of the burglary anti-merger statute. *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999); *State v. Bonds*, 98 Wn.2d 1, 15, 653 P.2d 1024 (1982) (“[T]he anti-merger statute is an express statement that the legislature intended to punish separately any other crime committed during the course of a burglary.”); *State v. Michielli*, 132 Wn.2d 229, 237, 937 P.2d 587 (1997) (when words in a statute are clear and unequivocal, a court must apply the statute as written). Thus, the burglary anti-merger statute allows for separate punishment when burglary is the predicate crime of the felony murder. *State v. Elmore*, 154 Wn. App. 885, 900 & n.3, 228 P.3d 760 (2010).

G. Lambert Forfeited His Right To Represent Himself After He Repeatedly Ignored Warnings That His Persistent Disruptive And Offensive Behavior Would Result In The Appointment of Counsel.

Superior Court Judge Vickie Churchill put up with intolerable behavior by Mr. Lambert for 21 months. He was disruptive to proceedings, often shouting at participants in the court, using highly offensive and insulting language. His conduct, particularly when the

Court did not rule in his favor or a witness's testimony was not to his liking, was offensive to the dignity of the court and the proceedings.

Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. Wash. Const. art. I, § 22 (“the accused shall have the right to appear and defend in person”); *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). That does not mean that the defendant's right to self-representation overcomes the court's right to maintain order in the courtroom and conduct proceedings in a manner consonant with our trial traditions. *See McKaskle v. Wiggins*, 465 U.S. 168, 173, 104 S.Ct. 944, 948, 79 L.Ed.2d 122 (1984). “[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.” *Faretta v. California*, 422 U.S. 806, n. 46, 834, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975).

Lambert relies on *State v. Madsen*, 168 Wn.2d 496, 229 P.3d 714, 717 (2010) for the proposition that the court improperly found he forfeited his right to self-representation. *Madsen* is distinguishable from the instant case. The defendant in *Madsen* was never given an opportunity to represent himself. The trial court deferred ruling on the defendant's motion to proceed *pro se* for nearly two months, and then, on the eve of

trial, denied the motion as untimely. The Supreme Court held that was error. *Id.* at 508. The Supreme Court also held that Madsen's "disruptive" behavior during the pretrial hearing at which Madsen moved to represent himself was inadequate to justify denying his motion. The Court noted that Madsen was "trying to address substantive issues that the record shows he clearly thought were unresolved." *Id.* at 509.

Lambert's circumstances were quite different. Lambert was actually afforded the right to represent himself, and then proved that he was too disruptive. Judge Churchill went to extraordinary lengths to protect Lambert's right to represent himself. But, in spite of warning after warning, Lambert was unable to keep from disrupting the proceedings in a way that was offensive to the dignity of our trial traditions.

On July 18, 2013, the seventh day of the jury trial, the court ruled that Lambert had forfeited his right to represent himself. The "last straw" for Judge Churchill came when Lambert was conducting re-direct examination of the Island County Coroner. As he had done so many times before, Lambert became argumentative with the witness, whose testimony was not to his liking.

During Lambert's direct examination of the coroner, he requested, several times, a recess to interview the coroner privately. RP 1091-93; RP 1095. Lambert had already conducted two trial preparation interviews

with the coroner, Dr. Robert Bishop. RP 1096-97. As happened repeatedly, the trial judge attempted to ascertain how to assist Lambert, and Lambert's frustration quickly got the best of him. Both the prosecutor and the judge attempted to assist him outside the presence of the jury, to obtain the exhibits he needed and to formulate his questions. RP 1099-1102. Lambert was briefly mollified, and again attempted to examine Dr. Bishop.

When the testimony was not to his liking, Lambert said: "I see what you're doing. I see what you're doing." RP 1106. Lambert asserted that Dr. Bishop's testimony was different from what he said during a recorded interview, but Lambert could not properly lay a foundation for refreshing the witness's memory. RP 1106. Frustrated, he stated: "Are you trying to make the – the – the wounds on Mr. – on Lambert's face look worse than they were by lying about your statement?" RP 1107. The State's objection that the question was argumentative was sustained.

The court warned Lambert: "Do not continue this line of questioning." The State asked three questions on cross examination, and Mr. Lambert picked up where he left off:

Q: Hmm. Is there any reason you can't remember anything that's supportive of my case.

MR. BANKS: Objection. Argumentative.

THE COURT: Sustained.

Q (By Joshua D. Lambert) Hmm. Are you aware of what perjury is?

MR. BANKS: Objection. Argumentative.

THE COURT: All right. That is sustained.

[The Court excused the jury at that point.]

THE COURT: Please be seated. Mr. Lambert, I've told you several times. I've said that the last time would be the last time that you represented yourself as an attorney. Over the weekend-- I hope you're prepared, Mr. Pacher, because you will start on Monday.

RP 1109.

Lambert argued with the judge, who was trying to explain that Lambert had been disrespectful and argumentative. While he was talking over her (the transcript is incomplete) she tried to tell him he had offended the dignity of the court. RP 1110. She stated that Lambert had "lost his right, by his behavior, to represent himself." RP 1110. Standby counsel, Mr. Pacher was appointed to represent Lambert for the remainder of the trial.

After that day's proceeding, Lambert assaulted the Chief of the Island County Jail. RP 1124. Chief Dennis described the attack, and recommended additional security in the courtroom. In response, the court noted:

It has been my experience that whenever Mr. Lambert doesn't get his way on a motion, or something else, an objection, he gets-- He ramps

himself up to anger. And then-- I haven't seen him with the violence, but certainly there have been times when I thought that violence was imminent.

RP 1127.³

While the interaction that resulted in Lambert's losing his right to self-representation, in isolation, may seem tolerable, it was the culmination of months of misbehavior, and, coming as it did in front of the jury, was particularly offensive.

Examples of his disruptive behavior include:

³ Judge Churchill's comments were prescient. On July 22 Lambert was removed from the courtroom for disruptive behavior, and participated via closed circuit TV. He was permitted to return to the courtroom the following day, after a colloquy with the judge. However, during the testimony of Dr. Judd, one of the State's rebuttal witnesses, Lambert began yelling at the witness. As the jury was removed from the courtroom, Lambert continued:

JOSHUA D. LAMBERT: Liar. Be sent to the Olympia Examining Board of Psychology. What's the point? What's the difference? You lie, too, Ms. Churchill.

THE COURT: All right. Please be seated. Please remove Mr. Lambert from the courtroom.

JOSHUA D. LAMBERT: Say good-bye to your license. Olympia Examining Board, Psychology. I got the address memorized. I know where you're wrong (sic - "you work") at, too. Withdrawal? During withdrawal? Impossible. Negative symptoms aren't even relevant.

(Mr. Lambert begins fighting with Corrections deputies.)

THE COURT: Let the record reflect that Mr. Lambert --

DEPUTY SHERIFF: Don't bite. Don't bite.

THE COURT: -- has created a fight in the courtroom.

* * *

(Defendant removed from the courtroom.)

THE COURT: The record should reflect that Mr. Lambert became increasingly agitated. He started a fight in the courtroom. It took four officers to subdue him. He continued to fight as they removed him from the courtroom. Mr. Lambert will not be allowed back in the courtroom again.

At June 8, 2012 motion hearing, Lambert says to the judge: “This is a murder trial. Are you aware of that?” 06-08-2012RP 9. At the same hearing, after the trial judge ruled one of Lambert’s many motions was frivolous, Lambert says: “You’re frivolous.” 06-08-2012RP 15.

On June 29, 2012, at another hearing on Lambert’s motions, he continually interrupted the judge as she ruled, telling her that her reasoning was “irrelevant.” This prompting the judge to say: “Sir, if you continue I will have you removed from the court.” 06-29-2012RP 8. Shortly after, she reminded him again:

To the extent that the Defendant continues to be belligerent in his written and spoken words, he is taking the risk that the Court may remove him from the courtroom for obstructive behavior.

On October 19, 2012, he accused the prosecutor of “blatantly lying in court.” 10-19-2012RP 29. At the same hearing he was again told to stop interrupting the judge. 10-19-2012RP 34-35. He subsequently “objected” during the court’s ruling (something he did throughout all of the proceedings). E.g. 10-19-2012RP 60. A few minutes later Lambert, having just had a motion denied, told the judge, “You are lying about what he says.” *Id.* at 62.

He concludes the hearing by shouting at the judge:

JOSHUA D. LAMBERT: Well, I'm not going to show up on the 27th, I can guarantee that. You're going to have to drag me down here. You can't force somebody to go to Court without fucking evidence.

DEPUTY SHERIFF: Stand up.

DEPUTY SHERIFF: Just stand up. Just stand up.

JOSHUA D. LAMBERT: Fucking ridiculous. Where is my shoe? You got no real evidence. You fucking lied, you fucking shit, more than fucking anybody I've ever fucking seen. You've got more lies in that fucking shit than I've ever seen. Well, I'm not going to be here on the 27th. You're going to-- You're going to have to reschedule that. Fucking lying piece of shit.

At the next hearing, on October 30, 2102, the court admonished Lambert again, telling him he would lose his right to represent himself if he acted that way again. 10-30-2012RP. Shortly after that warning Lambert began to “spin up,” and the judge had to remind him not to yell at her. 10-30-2012RP 16.

At Lambert’s motions on March 5, 2013, he accused the judge of being “erroneously confused” about the law. Moments later the court had to instruct Lambert to stop yelling. 03-05-2013RP 4-5. In spite of that admonition, Lambert repeatedly interrupted the judge and prosecutor during argument on a motion. *Id.* at 7, 8, 11.

At an April 26, 2013 competency hearing, Lambert again challenged the judge, telling her: “You weren’t listening to what the law states.” He then told the judge she is “dumber than a box of rocks.” He

concluded by telling her she was lying, calling her “a retard” and threatening to report the judge to the Bar Association. 04-26-2013RP 24-26.

As the trial drew closer, Lambert’s behavior worsened. At the June 13, 2013 readiness hearing, Lambert repeatedly accused the judge of lying. He had to be admonished to stop interrupting the judge. He had to be told to stop yelling at the judge. He told the judge that she didn’t pay attention to him. 06-13-2013RP 37-44. The court again warned him that “if you keep it up, than you will not be representing yourself.” *Id.* at 44-45. He again resorted to yelling at the judge, who again admonished him. Finally the judge stated:

THE COURT: All right. We're going to get a few things settled here. And that is your behavior at trial. There's not going to be any of this argument back and forth. You're going to act like a professional. You said you wanted to be your own attorney. An attorney has to act a certain way in Court. You don't act that way. If it occurs that you go into one of these rants of yours, I'm going to have you taken out. I will not put up with having the whole judicial system made a joke by you and your attitude and your behavior. So I am putting Mr. Pacher on notice. You may have to jump in. So your ability to represent yourself is in your hands, Mr. Lambert, and no others.

06-13-2013RP 54.

On June 24, 2013, on the eve of trial, the court again warned Lambert that his bad behavior will result in losing his right to represent

self. 06-24-13RP 44-45. Later in that same hearing, the judge had to tell him to lower his voice because he was yelling. 06-24-2013RP 51.

Undeterred, at the next hearing Lambert told the judge she was “twisting” facts, and labeled certain witnesses as liars. The court admonished him that at trial he could not make comments that witnesses or participants are liars, or do not know the law. 06-28-2013RP 6. Shortly afterward, he questioned the judge’s ability to read. *Id.* at 9. He was again instructed that such comments will not be tolerated. A little while later, he told the judge: “I don’t expect the court to actually look up and find out that it’s not admissible. I don’t expect the court is going to rule on that correctly.” *Id.* at 27. When the court tried to admonish him again, Lambert interrupted the judge and told her, “That’s not a comment, that’s argument.” *Id.* at 28.

During the defendant’s *Frye* hearing on the morning of July 5, 2013⁴, the defendant yelled, and told the prosecutor, a native English speaker, that he didn’t understand English. 07-05-2013-1RP 12-13. He repeatedly interrupted the judge, and told her she was “nowhere near professional.” During the court’s ruling that day, he stated: “I want to go back to my cell. I’m not going to sit here and listen to this fucking

⁴ Two hearings were held on July 5, 2013, each with independent pagination. The *Frye* hearing will be cited as 07-05-2013-1RP, and the motions in limine of the same day will be cited as 07-05-2013-2 RP.

bullshit.” *Id.* at 20. He called the judge “too stupid to have an opinion” and a “fucking retard.” *Id.* He asked the prosecutor: “Do you have anything intelligent to say?” *Id.*

During motions in limine later on July 5, 2013, the court again warned Lambert:

Before we get started on the Defendant's Motions in Limine, I need to advise Mr. Lambert that your behavior this morning was unacceptable. That if you continue to act disruptive, disrespectful to the Court, screaming and yelling, and not following the procedures of the Court, then you will be removed from the Court. If you continue to do that, you will be denied your right to self-representation.

07-05-2013-2RP 2.

Nevertheless, Lambert engaged in all of the same types of behavior again, and was repeatedly warned not to yell, and to not insult the prosecutor and the judge. Ultimately his behavior prompted yet another warning, where he was told he cannot make insulting comments to participants during trial, and that he could not use profanity and be disrespectful to the court. *Id.* at 85-86.

On July 8, 2013, the trial court entered findings of fact regarding the need for enhanced courtroom security with Mr. Lambert. CP 616-625. In those findings, the court noted Lambert’s propensity for violence, his recent history of violent behavior while at Western State Hospital, and his unacceptable demeanor and conduct in hearings.

At trial on July 9, Lambert accused the prosecutor of committing perjury. RP 31-32. During voir dire, he accused the judge of ruling unfairly, and was found in contempt. *VoirDire*RP at 300.

Throughout the trial, Mr. Lambert would range from acceptable behavior to outrageous conduct. His repeated objections during the State's opening were all overruled. RP 128, 140, 147, 149. He later stated, "I was under the impression that the prosecutor has been to law school." RP 823. While examining his witness, Dr. Wilson, Lambert was frustrated with the court's rulings and followed a question with an aside to the judge: "Or is that irrelevant too?" The judge responded: "Sir, the sarcastic remarks have to be eliminated." RP 991.

Shortly afterward, Lambert asserted that the prosecutor, "hired a doctor to lie," which resulted in another admonition from the court. RP 997. As the trial shifted to focus on Mr. Lambert's untenable insanity defense, his behavior became more troublesome.

During Lambert's re-direct examination of Dr. Wilson, Lambert became argumentative because Wilson would not testify to Lambert's liking. The judge sustained an objection by the prosecutor and Lambert continued to argue with the judge over her ruling in front of the jury. RP 1073-75. At the end of the exchange, the trial judge warned Lambert that

repetitions of such behavior would result in loss of his right to represent himself. RP 1077.

Shortly afterward, while examining the coroner, Dr. Bishop, Lambert asked a series of argumentative questions, as described above, and accused the doctor of perjury, resulting in the judge finally imposing the consequence she had warned Lambert of, and appointed counsel to represent him.

This course of conduct justified the forfeiture of Mr. Lambert's right to self-representation.

H. Lambert's Intensive Study of the Symptoms of Mental Illness, Followed By His Voluntary Reporting of Fabricated and Embellished Symptoms Was Relevant To The Diagnosis of Malingering By Three Expert Witnesses, And Did Not Chill His Right To Represent Himself.

Lambert elected to present a defense of "not guilty by reason of insanity." That defense put in issue his mental state at the time of the crime. Because of the difficulty inherent in proving a mental state, circumstantial evidence of the defendant's behavior and his knowledge of the characteristics of mental disorders before and after the time of the criminal act is also highly relevant.

Here, Mr. Lambert admitted in a phone call to his mother that he had lied in court to discredit his mother's testimony. RP 1314; RP 1316.

The lie concerned his alleged mistreatment at a boarding school for troubled youth that he later proffered as a basis for his claimed mental illness.

Mr. Lambert was diagnosed by three forensic experts as malingering. By making his sanity the pivotal issue of the trial, the State must be entitled to explore Lambert's claims of mental illness, and the evidence that he is fabricating or exaggerating his symptoms.

Clearly, in a specialized field like psychology, the fact that the defendant has highly detailed knowledge of symptoms necessary to make out a defense is relevant to a fact-finder's decision on that defense. The State's questions of Lambert were limited to discerning whether Mr. Lambert was familiar with the symptoms of schizophrenia, and whether he learned about those symptoms from the Diagnostic and Statistical Manual of Mental Disorders (DSM), and from internet searches. RP 1320-22. Lambert refused to answer the questions. He was asked whether he expanded the symptoms he reported after doing his research, and he denied that, but admitted: "No. But I used more big words." RP 1322.

All three experts who believed Lambert was, or probably was, malingering, cited as a factor the depth and breadth of his knowledge of schizophrenia, or his insistence on pushing his theories. The State drew no inferences about his confidential work product, or his right to represent

himself. The defendant willingly, and at his own initiative, provided the fruits of his research to the experts who evaluated his mental condition. Those evaluators, in fact, often felt overwhelmed by the volume of material the defendant pushed at them. RP 1018-19 (Defense witness Dr. Wilson “amazed” at how much Lambert learned in his study of disorders); RP 1212-13 (Defense witness Dr. Deutsch testifying that Lambert advocated for a particular diagnosis); RP 1483-84 (State’s witness Dr. Judd noting that the majority of nearly 6,000 pages of material he reviewed was provided by Lambert, even though Dr. Judd did not request it); RP 1435-36 (State’s witness Dr. Dean testifying that Lambert tried to control the content of her evaluative interviews, and labeled his symptoms as “delusions” and “hallucinations”).

Because malingering is generally beyond the ordinary understanding of lay persons, it is a proper subject for expert opinion. Expert opinions and the basis for these opinions are admissible if they are helpful to the trier of fact. *In re Cross*, 180 Wn.2d 664, 717, 327 P.3d 660, 690-91 (2014) (citing *See Johnson v. Weyerhaeuser Co.*, 134 Wash.2d 795, 803, 953 P.2d 800 (1998) (malingering can be established through expert and nonexpert opinion) and *State v. Ellis*, 136 Wash.2d 498, 517, 963 P.2d 843 (1998)). The underlying bases of those expert opinions are also admissible at trial. ER 705.

Lambert can point to nothing in the record where the State sought to draw adverse inferences from his decision to represent himself. Lambert cannot show how his right to self-representation, and to prepare his case was impinged upon.

Lambert may also be asserting that the State improperly cross examined him regarding his work product. That argument must fail. Lambert's significant efforts to pressure the State's evaluators to diagnosis him as suffering from schizophrenia effectively waived any work product privilege he may have had in the research material. "The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived." *United States v. Nobles*, 422 U.S. 225, 239, 95 S. Ct. 2160, 2170, 45 L. Ed. 2d 141 (1975). Here, Lambert willfully provided the product of his research and theories to State's witnesses, even though they did not request it.

Mr. Lambert made his mental health and claim of insanity the focus of the trial. Lambert was not denied access to resources. In fact, it is apparent from the record, that Lambert had access to computers, recording equipment, the Internet, an investigator, transcriptionists, and resources far greater than anything discussed in *State v. Silva*, 107 Wn. App 605, 27 P.3d 663 (2001). Mr. Lambert cannot show that his rights were impaired or were prejudiced in any way.

I. The Trial Court Did Not Err In Announcing She Would Defer Ruling On Lambert's Anticipated Motion For Acquittal Under RCW 10.77.080, or In Determining That The Defendant Did Not Prove His Defense of Insanity.

Lambert claims the Court improperly deferred ruling on his motion for acquittal pursuant to RCW 10.77.080. However, Lambert never filed such a motion.

He filed a Note for Calendar on June 6, 2013, purporting to set a hearing on June 13, 2013. CP 1327. At the June 13 hearing, Lambert asked the Court to set a hearing for his motion for acquittal, and the Court directed him to coordinate with the court administrator. 06-13-2013RP 83-85. At the June 24, 2013 readiness hearing, Lambert asked to schedule his motion for acquittal for July 5th or July 9th, the morning of trial. 06-24-2013RP 53. Lambert believed the motion would last about an hour. The hearing was scheduled for July 5, 2013, the Friday before the Tuesday trial start on July 9, 2013.

On June 28, 2013, the State requested that the Court defer the motion for acquittal until all of the mental defense and rebuttal evidence had been admitted, since Lambert still had not filed a motion, and there was no practical way to make a record for the motion on the date scheduled. Moreover, the pre-trial motion would have duplicated the testimony needed at trial. CP 997-1048.

RCW 10.77.080 provides:

The defendant may move the court for a judgment of acquittal on the grounds of insanity: PROVIDED, That a defendant so acquitted may not later contest the validity of his or her detention on the grounds that he or she did not commit the acts charged. At the hearing upon the motion the defendant shall have the burden of proving by a preponderance of the evidence that he or she was insane at the time of the offense or offenses with which he or she is charged. If the Court finds that the defendant should be acquitted by reason of insanity, it shall enter specific findings in substantially the same form as set forth in RCW 10.77.040. If the motion is denied, the question may be submitted to the trier of fact in the same manner as other issues of fact.

Lambert claims that RCW 10.77.080 includes a requirement that a hearing on the motion be heard prior to the Start of trial. In fact, there is nothing in the statute that prohibits the court from deferring ruling on such a motion until the evidence has been presented at trial. The only timing requirement, it would seem, is that the trial decide upon the motion before submission to the jury. If the court determines the motion should be granted, the trial is over. If the court denies the motion, the case goes to the jury.

The defendant had consistently asserted for at least seventeen months prior to trial that his defense was to be “not guilty by reason of insanity.” 02-27-2012RP 4 (arraignment on Amended Information). Here, Mr. Lambert never filed a written motion for acquittal under RCW

10.77.080, and, until he presented his defense case, never proffered any evidence for the purpose of supporting such a motion.

1. The Evidence Was Overwhelming That Lambert Was Sane At The Time of the Crimes

Mr. Lambert's evidence of insanity at the time of the commission of his crime was weak and not credible. The overwhelming weight of the evidence was that Lambert did not meet the legal criteria for insanity, and he did not meet his burden of proof.

The evidence Lambert presented consisted of the testimony of Dr. Robert Deutsch. Deutsch opined that Lambert suffered from paranoid schizophrenia, and it was not a result of drug usage. He stated that, as a result, Lambert could not "appreciate the wrongfulness of his conduct." RP 1185. Interestingly, he did not even offer an opinion that was consistent with the definition of the insanity defense in RCW 9A.12.010:

To establish the defense of insanity, it must be shown that:

- (1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:
 - (a) He or she was unable to perceive the nature and quality of the act with which he or she is charged; or
 - (b) He or she was unable to tell right from wrong with reference to the particular act charged.

Dr. Deutsch later opined that he believed Lambert “believed he was doing the morally right thing” in killing his grandfathers to obtain guns in the service of his delusion. RP 1207. Such a statement does not meet the standard of “being unable to tell right from wrong.” It was Dr. Deutsch’s opinion that Lambert had an understanding of right and wrong, but was under a mistaken belief that a particular condition existed that justified the “rightness” of what he was doing. That is not insanity.

Deutsch stated that there “was no evidence disclosed or discovered around the time of the incident that would be suggestive that he was using drugs.” RP 1191. This opinion is contrary to the overwhelming circumstantial evidence that Lambert had been using methamphetamine, and had been behaving consistently with how he behaves when using methamphetamine.

In addition, even Dr. Deutsch acknowledged that Lambert was embellishing his symptoms:

Well, given the explanation that I just gave about malingering, yes, that he was, I believe, exaggerating some of his symptoms. He was misrepresenting some of his symptoms. He was emphasizing some of his symptoms. But in - in my mind that didn't change the fact that he had this severe, long-standing, underlying psychotic disorder. He had that. And as part of the interview he was trying to convince me, to make me believe that he really had it; that it was important for me to know that. And so, as a result of

that, I believe he was -- As I said -- overemphasizing or embellishing or exaggerating, misrepresenting.

RP 1178.

Dr. Deutsch, unlike the State's experts, did not even interview the witnesses who interacted with Lambert on the day of the murders -- Kay Gage, Amber McCabe, or the arresting officers. RP 1216-20. Dr. Deutsch acknowledged that he did not listen to the recorded conversations Lambert had with his mother, where the subject of his drug use came up. RP 1221. Dr. Deutsch did not know that Lambert admitted to lying about the severity of his mistreatment at the "boot camp" in Samoa. RP 1224-25.

Dr. Deutsch indicated that Lambert, at the time of the murders, was "making morality judgments," and admitted that by definition that meant Lambert was "grappling with what was right and wrong." RP 1241-42.

In contrast to Dr. Deutsch's inadequate opinion, the only other expert testimony about Lambert's sanity on the day of the crime came from Drs. Dean and Judd. As described above, they both concluded, based on substantial evidence, that Lambert was suffering from a substance-induced psychotic disorder. They concluded that he was malingering and embellishing symptoms for the purposes of his case.

Since Lambert's psychotic breakdown was due to voluntarily ingested substances, he could not take advantage of the defense of insanity. RCW 10.77.030.

Therefore, even if the trial court's oral findings regarding Lambert's motion pursuant to RCW 10.77.080 were inadequate, the record amply supports the court's decision. The jury agreed with the judge.

Any error in the court's ruling was harmless, due to the vast evidence in support of a finding of sanity.

V. CONCLUSION

For the reasons discussed herein, the Court should affirm Lambert's convictions.

Respectfully submitted this 18th day of April, 2016.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY



By: _____
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WSBA # 22926

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOSHUA DAVID LAMBERT,

Defendant/Appellant.

NO. 70844-9-I

DECLARATION OF SERVICE

I, Jennifer Wallace, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 18th day of April, 2016, a copy of Brief of Respondent, Motion to File Overlength Brief, Respondent's Third Motion for Extension of Time to Respond to Brief of Appellant, and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Gregory Link
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101

Signed in Coupeville, Washington, this 18th day of April, 2016.


Jennifer Wallace