70418-4

70418-4

NO. 70418-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

TERRANCE IRBY,

Appellant.

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

The Honorable Michael E. Rickert, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The selection of jurors 27 and 38 to decide appellant's case violated his right to trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the Washington Constitution.

2. Appellant was denied his constitutional right to jury unanimity on Burglary in the First Degree.

3. Appellant was denied his constitutional right to jury unanimity on Felony Murder in the First Degree.

4. The State's evidence is insufficient to prove Aggravated Murder in the First Degree.

5. The State's evidence is insufficient to prove Felony Murder in the First Degree.

6. Conditional vacation of appellant's Felony Murder conviction violates double jeopardy.

7. The sentencing court erroneously concluded that appellant is a persistent offender.

8. In finding appellant's 1976 conviction comparable to a current "most serious offense" under Washington law, the court engaged in improper fact finding and violated appellant's Sixth Amendment right to trial by jury.

9. In its findings and conclusions regarding appellant's status as a persistent offender, the sentencing court erred when it entered finding of fact 1 (Irby's date of birth) and conclusions of law 1, 2, 4, and 7-9.[1]

Issues Pertaining to Assignments of Error

1. Despite appellant's insistence on a fair and impartial jury, and the trial court's promise to honor this constitutional right, two seated jurors were biased against appellant. One conceded she favored the prosecution and hoped to find appellant guilty. The second admitted difficulty putting aside her "pro police officer" views and her negative view of the appellant's decision to waive his right to counsel for trial. Did inclusion of these individuals on appellant's jury deny him his constitutional right to a fair and impartial jury?

2. Appellant was charged with one count of Burglary in the First Degree for his actions in either of two separate buildings. Jurors were not instructed that they must unanimously agree as to the building in which the burglary occurred, and the prosecutor told jurors they could base their verdict on either building. Was appellant denied his right to a unanimous jury verdict?

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[1] The court's findings and conclusions are attached to this brief as an appendix.

3. Appellant also was charged with one count of Felony Murder in the First Degree based on the predicate felony of Burglary in the First Degree. Did the lack of juror unanimity on Burglary in the First Degree also taint the jury's verdict for this crime?

4. To establish Aggravated Murder in the First Degree, the State had to prove that the murder was committed "in the course of, in furtherance of, or in immediate flight from" a burglary or that it was committed "to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime." Where the evidence establishes a killing and, at most, a separate and subsequent burglary, did the State fail to meet its proof requirements?

5. Felony Murder similarly required proof that the victim was killed "in the course of, in furtherance of, or in immediate flight from" a burglary. For the same reason, did the State fail to prove this crime beyond a reasonable doubt?

6. Recognizing that convictions for both Aggravated Murder in the First Degree and Felony Murder would violate double jeopardy, the sentencing court vacated the Felony Murder conviction. Unfortunately, the court repeatedly referred to the Felony Murder conviction in the judgment and expressly indicated

the conviction remained available for reinstatement should the other murder conviction be overturned. Is this conditional dismissal a violation of double jeopardy?

7. At sentencing, the court treated a 1976 conviction as a strike under the Persistent Offender Accountability Act ("POAA"). That conviction, however, is not legally comparable to any POAA offense. Nor is it factually comparable. In finding otherwise, however, the court engaged in its own fact-finding regarding the events in 1976. Does this violate Washington law and appellant's Sixth Amendment right to trial by jury?

8. Despite the State's failure to prove that the 1976 conviction should be counted as a strike, the court entered findings and conclusions treating it as a strike offense. Where the record does not support several of these findings and conclusions, are they erroneous?

B. STATEMENT OF THE CASE

1. Convictions, Reversal, and Remand

In 2005, the Skagit County Prosecutor's Office charged Terrance Irby with multiple criminal offenses. CP 1-4. He was convicted of Aggravated Murder in the First Degree, Felony Murder in the First Degree, and Burglary in the First Degree in connection

with the death of James Rock. CP 14-15. These convictions were reversed, however, based on a violation of Irby's constitutional right to be present for all critical stages of trial. CP 11-14.

On remand for a new trial, Irby chose to waive his right to appointed counsel and represent himself. CP 66; 3RP[2] 33. Irby became convinced he could not receive a fair trial in Skagit County based on the conduct of trial judge Michael Rickert, prosecutors, and others involved in the case. He ultimately decided not to attend trial in protest of a process he deemed corrupt. 16RP 14-18.

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[2] This brief refers to the verbatim report of proceedings as follows: 1RP – August 8, 2011; 2RP – August 25, 2011; 3RP – August 31, 2011; 4RP – September 7, 15, and 21, 2011, November 1 and 23, 2011, February 23, 2012, and June 15, 2012; 5RP – August 25 and October 12, 2011, and January 5, 2012; 6RP – December 14, 2011, January 12, March 14, April 5, 25, and 26, May 24, June 7, July 6 and 20, August 23, September 13 and 18, and November 1, 2012; 7RP – February 8, 2012; 8RP – April 12, 2012; 9RP – April 20, 2012; 10RP – October 2 and 24, 2012, January 18, 2013, and February 28, 2013; 11RP – November 27, 2012; 12RP – December 21, 2012; 13RP – January 3, 10, and 24, February 6, March 8 (a.m. session) and March 28, 2013; 14RP – March 4 and 5, 2013; 15RP – March 6, 2013 (intro. remarks at jury selection); 16RP – March 6, 2013; 17RP – March 7, 2013; 18RP – March 8 (p.m. session) and March 11, 2013; 19RP – March 12 and 21, and April 18, 2013; 20RP – additional proceedings on March 12 and 21, 2013.

2. Jury Voir Dire

Despite his decision not to attend trial, Irby had made repeated efforts to ensure the jury that heard his case was fair and impartial, filing motions seeking a racially balanced jury and seeking sequestration to shield jurors from media coverage. CP 61; 4RP 165; 5RP 63-65; 14RP 60. Judge Rickert assured Irby the selected jury would be unbiased, impartial, and consistent with constitutional guarantees. 7RP 50-51. Since Irby was not present for jury selection, however, Judge Rickert and the two prosecutors representing the State were the only guardians of these constitutional rights. 16RP 24 (noting Irby not present).

Juror numbers 38 and 27 are pertinent to this appeal.

a. *Juror 38*

During the court's general questioning of prospective jurors, Judge Rickert asked, "Anybody here work in what I call the administration of justice; that means either now or in the past as a police officer, trooper, lawyer, judge, department of corrections, military policemen, paralegal, anything like that?" 16RP 39-40. Among those who responded affirmatively was juror 38, who indicated she had previously worked for Child Protective Services. 16RP 40. When Judge Rickert asked if anyone in this group

thought the experience would impact hearing the case, no one responded. 16RP 41.

Shortly thereafter, however, Judge Rickert specifically focused on the ability to be fair:

> we all have things in our lives that have happened to us and our families. We all have our own perceptions of how things should or ought to be. We acknowledge that all humans are different. The point is could we put aside our personal experiences and sit in judgment as a juror and give both Mr. Irby and the State of Washington a fair trial on a level playing field. That's our purpose of these questions.
>
> Now, that being [the] case does anybody have anything in their past or anything on their mind that you think wow this just might not be the case for me. I'm not sure I can do this based on the circumstances.

16RP 42.

Juror 38 raised her hand, which led to the following exchange:

Juror No. 38:	I'm a little concerned because I did work for the government, Child Protective Services, I'm more inclined towards the prosecution I guess.
Court:	Would that impact your ability to be a fair and impartial juror? Do you think you could listen to both sides, listen to the whole story so to speak?

Juror No. 38: I would like to say he's guilty.

16RP 43. Judge Rickert did not follow up further and moved on to other jurors who expressed concerns. 16RP 43-44.

Notably, prosecutors never questioned juror 38 about her pro-prosecution bias or her expressed desire to find Irby guilty. See 16RP 49-94. Prosecutors only had two direct interactions with juror 38. First, when they asked if anyone had a particularly good or bad experience with police, juror 38 shared that she recently had a particularly good experience involving the death of her mother, where officers "were very compassionate, and very understanding, and helpful." 16RP 69-70. Second, when prosecutors asked how jurors would assess any competing experts, juror 38 responded that she would determine which expert offered the most relevant information. 16RP 79-80.

Prosecutors exercised five peremptory challenges to get to juror 38, who became the last individual selected for Irby's case. 16RP 95-96; CP 382. She was not one of the alternate jurors; she actually deliberated and decided Irby's fate. CP 363, 382, 386.

b. *Juror 27*

Juror 27 indicated that she knew two potential prosecution witnesses – Skagit County Sheriff's Deputies Craig Mullen and Bill Wise. 16RP 37-38. Prosecutors' question about a particularly good or bad experience with police then led to the following exchange:

> Juror No. 27: I don't know whether it's necessarily good or bad. My dad retired as a Skagit County Sheriff about six years or so. So I kind of grew up, I knew a lot of older guys now. So I'm just more comfortable more inclined toward, you know, what they say just because I'm more comfortable with police officers.
>
> Prosecutor: Do you think you would be more inclined to believe a law enforcement officer if they are a witness in a particular case?
>
> Juror No. 27: I think I'm more inclined because I'm comfortable. And I also work in a hospital and, you know, we have a lot of guys bringing people in through ER whether it's firemen or policemen. I'm just more comfortable with them, I guess. I have to believe what they say when they bring people in. So I'm just more inclined in that direction, I guess.
>
> Prosecutor: You've never – from what I recall

you've never dealt with any law enforcement officers in this particular case?

Juror No. 27: I know a couple of them not super well, but I do know them.

Prosecutor: Do you believe – I guess the question was asked of [another juror] before involving Mr. Irby, you know yourself, do you think you can put any personal connection you have with law enforcement aside and decide this case based upon the evidence that's going to come in this courtroom and decide the case based on that?

Juror No. 27: I think it will be hard for me just because he isn't represented at all.[3] So I'm kind of pro police officer.

Prosecutor: In your mind it's a combination of those two that causes you a little concern?

Juror No. 27: Yes, it causes me concern. I will try, but it does cause some concern.

16RP 68-69. Juror 27 also was selected for Irby's case, was not an alternate, and decided Irby's fate. 16RP 96; CP 363, 382, 386.

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[3] Jurors were told Irby was not present by choice and not represented by counsel. 15RP 5; 16RP 49-52, 83.

3. Evidence at Trial

On the morning of March 11, 2005, Skagit County Sheriff's Deputy Craig Mullen was dispatched to conduct a welfare check at 35896 Shangri-la Lane in Hamilton, the home of James Rock. 16RP 127-129; exhibit 169. Rock, who was in declining health, no longer liked to drive and regularly obtained rides from Community Action, a local social services agency. 17RP 47, 52; 18RP 142-144. Rock had called on March 7th to schedule a March 11th ride. 18RP 145-146. Community Action requested the welfare check when their driver was unable to make contact with Rock at his home. 16RP 129-130.

Deputy Mullen knocked on doors, looked in windows, and walked around the property, but did not see anyone. 16RP 132. In addition to the residence, there is a separate shop – detached and separated from the residence by a breezeway – which has a larger sliding door and smaller man door. 16RP 134; 17RP 37, 73; exhibits 12, 70. Mullen noticed the man door was slightly ajar and entered. 16RP 136; exhibit 6. It was dark. Mullen called Rock's name but got no answer. He flipped on a light switch, but it did not work. He then turned on his flashlight and discovered Rock's body on the shop floor. 16RP 135-136.

Rock's body was resting on an aluminum lounge chair frame and partially obscured by an old inflatable mattress. 16RP 137, 145-146; exhibits 1-3, 14. There was significant blood on and around the body, including a pool of blood by Rock's head and some spatter and drips near the body and on the floor and wall near the man door. 16RP 137-139, 146; 17RP 112-120; exhibits 2, 4, 33, 70. There was no evidence of forced entry into the shop. 17RP 72. No obvious weapons were found. 17RP 95.

The front door to the residence was found unlocked. 16RP 149. Unlike the shop, the residence appeared largely undisturbed. Electronics, camping gear, a coin collection, and other items of value were still in the home. 16RP 149-150; 17RP 51-52, 147. The only items unaccounted for were three firearms Rock had owned in the past. 17RP 40-43, 51. Rock usually kept them in the master bedroom closet and locked the bedroom with a padlock. 17RP 38-39, 43. Based on debris found on the floor around the master bedroom door, and the absence of a doorknob, it appeared someone may have used force to open the door and gain access to that area of the home. 17RP 154, 157-159; 18RP 181-182; exhibits 91-93.

An autopsy revealed that Rock died from sharp and blunt trauma to the head and neck. 18RP 35. He had suffered a stabbing injury to the back of the neck, cuts to the front of the neck and scalp, and fractures to the back of the skull from multiple impacts with a hard object. 18RP 23-34. A search of Rock's home computer revealed the last confirmed use was Monday, March 7, 2005 at 8:44 p.m. 13RP 122. The last call made from Rock's cell phone occurred at 12:18 p.m. on March 8, 2005. 18RP 121. A newspaper dated Wednesday, March 9, 2005 had not been disturbed since its delivery to Rock's home. 13RP 189. Based on autopsy results, a time of death sometime on March 8 was within the range of possibilities. 18RP 36.

Skagit County Sheriff's Deputies determined the names of friends and associates of Rock, and identified Terrance Irby as a person of interest. 17RP 65, 139. Irby and Rock had known each other for a long time, and the two friends recently had been spending time together at Rock's home and elsewhere. 17RP 48-49; 18RP 158-160, 162-163, 170.

About a week and a half earlier, on March 2, 2005, a Chelan County Sheriff's Deputy had arrested Irby on an outstanding warrant and placed his Ford pickup truck in a Leavenworth impound lot.

18RP 39, 42-44, 48-49. On March 6, it was discovered the truck had been stolen from the lot. 18RP 44. Someone had removed a gate from its hinges, and Irby's truck was the only vehicle taken. 18RP 44-45.

Irby and his truck were seen thereafter in the Hamilton area. Interviews with those who lived in the area revealed that, on the afternoon of March 8, Jerry Revell and his wife, with the assistance of their son and a family friend, had moved to a home on Shangri-la Lane near Rock's home. 18RP 132-141, 164-167, 173. Revell knew Rock and was familiar with Irby's pickup truck, which he had seen parked at Rock's home on a previous occasion and which was parked at Rock's home that day. 18RP 167-170; exhibit 130. Revell could see "a couple people walking around" but was unable to recognize anyone. 18RP 168-169. Revell recalled hearing conversation from the direction of the property; the other two recalled hearing pounding sounds, which one of them described as the sound of chopping wood. 18RP 133, 141, 169.

About 4:30 that same afternoon, Irby drove his pickup to the home of Lorna Hoyle and pulled into her driveway. RP 105-106. Hoyle knew both Rock and Irby and lived about 5 minutes from Rock's home. 18RP 103-104. According to Hoyle, Irby was

rambling and his skin color seemed off. Irby said something about James, Hoyle's brother, and Hoyle explained that James was at work. 18RP 106-107. Irby went to leave, but his truck would not start. 18RP 107-108. James eventually arrived and got Irby's truck started. 18RP 114-115. According to James, Irby was "always weird," but on this day he was shaky and he was rambling. James also noticed Irby's unusual skin tone, which he described as "purplish." 18RP 115-116. James did not see any blood on Irby, however. 18RP 116. Irby finally left in his truck around 9:30 p.m. 18RP 110.

Later that same evening, around 11:00 p.m., Marysville Police arrested Irby, following a short chase, after Irby ran a red light while driving his pickup truck through town. 16RP 157-176; 17RP 4-7, 140. A search of the pickup revealed camping gear – including a backpack, first-aid kit, cooler, canteen, sleeping bag, shovel, and folding knife – as well as food and three magazines for a .22 rifle. 13RP 130; 17RP 8, 132-134; exhibits 52, 55. There was an unloaded .22 rifle in the truck bed. In the cab, there was a handgun and shotgun, both loaded. 17RP 8-11, 19-21. ATF records, and information from those familiar with the guns, later established that all three firearms had previously belonged to Rock and been stored

in his master bedroom closet. 13RP 134-136; 17RP 41-43; 18RP 152-153.

Rock's shoe size was 8. 17RP 50. Among the objects found in the bed of Irby's pickup was a pair of size 13 work boots. 13RP 130-133; 17RP 29. Small stains on the right boot were determined to be blood matching Rock's DNA profile.[4] 13RP 153-162. Other stains on both boots tested presumptively positive for blood, but were not subjected to DNA testing. 18RP 74-75, 82-84. Based on the characteristics of the bloodstains in the shop and staining on the boots, a Washington State Patrol Crime analyst concluded it was possible the boots were in Rock's vicinity when he was killed. 18RP 95-97, 100-101.

The prosecution's primary theory at trial was that Irby ambushed Rock from behind and murdered him in the shop so that he could steal his firearms. 16RP 124-125; 19RP 13, 22-28, 33-35, 38. The prosecution also suggested Irby may have been interested in other property, implying the camping equipment found in Irby's truck and one item of jewelry in his possession might also have been stolen from Rock's home. 19RP 13, 23, 34, 39-40.

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[4] The chance of finding a random match for this profile was estimated at one in three quadrillion. 13RP 161.

4. Current Convictions and Sentencing

Jurors found Irby guilty of Aggravated Murder in the First Degree, Felony Murder in the First Degree, and Burglary in the First Degree. CP 259-261, 263, 266. By special verdict, jurors also found Irby was armed with a deadly weapon while committing Felony Murder. CP 265.

Seeking to avoid double jeopardy, Judge Rickert vacated the Felony Murder conviction and associated deadly weapon finding. CP 333, 339; 19RP 96. For the Aggravated Murder conviction, the court imposed the mandatory sentence of life in prison. CP 333, 339; 19RP 96. The court also imposed a life sentence for the Burglary conviction after finding Irby to be a persistent offender based on convictions for two prior offenses – a 1976 conviction for Statutory Rape and a 1984 conviction for Assault in the Second Degree. CP 332-334, 339; 19RP 96. Irby timely filed his Notice of Appeal. CP 347.

C. ARGUMENT

1. IRBY WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY.

The federal and state constitutions guarantee every criminal defendant the right to a fair and impartial jury.[5] Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); State v. Gonzales, 111 Wn. App. 276, 277, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012, 62 P.3d 890 (2003). To protect these rights, a potential juror will be excused for cause if his views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Gonzales, 111 Wn. App. at 277-278 (quoting State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986)).

By statute, "actual bias" warranting dismissal is defined as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the

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[5] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, sec. 22 guarantees "a speedy public trial by an impartial jury . . . ."

challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging[.]" RCW 4.44.170(2). Although the statute refers to the "challenged person" and "the party challenging," removal does not turn on whether a party has exercised a challenge:

> CrR 6.4(c)(1) states that "[i]f the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case." This rule makes clear that a trial judge may excuse a potential juror where grounds for a challenge for cause exist, notwithstanding the fact that neither party to the case exercised such a challenge. In fact, the judge is obligated to do so. . . .

State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012), cert. denied, 134 S. Ct. 62, 187 L. Ed. 2d 51 (2013). Whether the court should have removed a juror for cause is reviewed for abuse of discretion. State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001).

There can be no doubt Judge Rickert abused his discretion, and denied Irby his constitutional right to a fair and impartial jury, when he permitted juror 38 to decide the case.

When Judge Rickert asked if there were any jurors who, based on past experiences, believed this was not the case for them, juror 38 raised her card and admitted she was "more inclined toward the prosecution." 16RP 42-43. And when Judge Rickert

then asked juror 38 if this would impact her ability to be a fair and impartial juror, she responded, "I would like to say he's guilty." 16RP 43. As previously discussed, at no time thereafter did the court or prosecutors revisit with juror 38 her pro-prosecution bias or her expressed desire to convict Irby. See 16RP 49-94.

In State v. Gonzales, a juror indicated she was more inclined to believe police officers and admitted she was not certain she could presume the defendant innocent in the face of officer testimony indicating his guilt on the charged offense. Gonzales, 111 Wn. App. at 278-281. Although the prosecutor expressed an intent to speak with the juror further on the matter, the prosecutor failed to do so. The juror was seated, and the defendant convicted. Id. at 279-280. On appeal, this Court recognized that the juror candidly admitted a bias for police and questioned her own ability to follow the presumption of innocence. Moreover, the juror was never rehabilitated; in fact, there was not even an effort at rehabilitation. Id. at 281-282. Gonzales' conviction was reversed. Id. at 282.

Similarly, at Irby's trial, juror 38 candidly admitted her bias for the prosecution and her desire to find Irby guilty. And there was no attempt at rehabilitation. Where a juror should have been

dismissed for cause but ultimately decides the defendant's guilt, reversal is required. Gonzalez, 111 Wn. App. at 282; see also U.S. v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (seating a juror who should have been dismissed for cause requires reversal); Fire, 145 Wn.2d at 158 (same).

Judge Rickert also erred by allowing juror 27 to serve. Juror 27's father is a retired Skagit County Sheriff. 16RP 68. She knew Skagit County Sheriff's Deputy Craig Mullen, who discovered Rock's body and played a significant role in investigation of the crime scene. 16RP 37, 125-156. She also knew Skagit County Sheriff's Sergeant Bill Wise, to whom Deputy Mullen reported. 16RP 38, 142. Juror 27 explained that, based on her experiences, she was more comfortable with police officers and predisposed to believe them. 16RP 68.

When the prosecutor asked juror 27 whether she could decide the case based on the evidence at trial, juror 27 candidly admitted it would be difficult both because Irby was not represented at trial and because "I'm kind of pro police officer." 16RP 69. Although juror 27 did respond, "I will try," she quickly added, "but it does cause some concern." 16RP 69. Prosecutors seemed satisfied since they did not ask any additional questions of juror 27

before selecting her to serve. 16RP 69-96.

Returning to the relevant standard, the question is whether juror 27's views prevented or substantially impaired the performance of her duties as a juror in accordance with the jury instructions and her oath. Dismissal was mandatory if she could not try the issues impartially and without prejudice to Irby's rights. Gonzales, 111 Wn. App. at 277-278; RCW 4.44.170(2).

Juror 27's frank answers required dismissal. She recognized her own bias in favor of law enforcement. Moreover, the fact Irby was without representation also biased her in favor of the prosecution. Although she indicated she would try to ignore these biases, she nonetheless repeated that she still had concerns about her ability to do so. And these concerns were never addressed again – by the court or prosecutors – before she was selected to serve. As with juror 38, this requires a new trial.

In response, the State may note that, had Irby been present for jury selection, he could have used peremptory challenges to remove jurors 38 and 27. While theoretically true, it is *the absence of such a challenge* that actually preserves this issue for review. See Fire, 145 Wn.2d at 158 (where a juror should have been removed for cause, issue preserved for appeal only if peremptory

not used against that juror and juror decides case) (citing Martinez-Salazar, 528 U.S. 304); Gonzales, 111 Wn. App. at 282 (absence of peremptory challenge preserves issue for appeal).

In any event, Irby should not have been forced into the position of using peremptory challenges to safeguard constitutional guarantees. He waived only his presence at trial, not his right to a fair and impartial jury. In fact, his motions to ensure a racially balanced jury and for sequestration underscored his strong desire to exercise this very right. And Judge Rickert had promised him a fair and impartial jury. 7RP 50-51.

2. IRBY WAS DENIED HIS RIGHT TO JURY UNANIMITY.

Criminal defendants have a right to unanimous jury verdicts. Const. art. 1, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). In State v. Crane, 116 Wn.2d 315, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991), the Washington Supreme Court succinctly explained Washington law on jury unanimity:

> In Washington, a defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the prosecutor presents evidence of several acts which could form the basis of one count charged,

> either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(citing Petrich, [101 Wn.2d] at 570; State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911)). In multiple act cases, when the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. Kitchen, [110 Wn.2d] at 405-06 (modifying the harmless error standard enunciated in Petrich). Since the error is of constitutional magnitude, it may be raised for the first time on appeal. Kitchen, [110 Wn.2d] at 411.

Crane, 116 Wn.2d at 324-25.

a. Burglary in the First Degree

At Irby's trial, to obtain a conviction for Burglary in the First Degree, the State had to prove each of the following elements beyond a reasonable doubt:

(1) That on or about the 8th day of March, 2005, the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That in so entering or while in the building or in immediate flight from the building, the defendant was armed with a deadly weapon or assaulted a person; and

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

CP 252.

Notably, because Rock's residence was unattached from the shop and separately secured, each structure was considered a separate building for purposes of this charge and the jury's verdicts. See CP 241 (even attached units that are separately secured constitute separate buildings).

Despite there being two buildings at issue, jurors were never instructed they had to be unanimous regarding the building on which they relied. See CP 217-258. Nor did the prosecutor elect a single building for consideration. Quite the opposite. He told jurors they could consider *both* buildings when assessing Burglary in the First Degree. 19RP 33 ("And Burglary in the 1st Degree in this case there are two separate ones you can consider."). He then argued why what occurred in each separate building satisfied the elements of the offense. See 19RP 33-34. This violated Irby's right to jury unanimity. See State v. Brooks, 77 Wn. App. 516, 520-521, 892 P.2d 1099 (1995) (failure to use a Petrich instruction or elect one of two buildings at issue violated right and required reversal).

The only remaining issue is whether this violation of Irby's right to a unanimous jury verdict can been deemed harmless, i.e.,

whether the State can demonstrate no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. The State cannot make this showing.

There was substantial reason for doubt regarding the shop and, in particular, element (1) – that Irby entered or remained unlawfully. Jurors were instructed, "A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." CP 242.

This was not a case involving some stranger who would not have had Rock's permission to enter the shop. Irby and Rock knew each other well, and it was not uncommon to see them together or see Irby's truck parked on Rock's property. 17RP 48-49; 18RP 158-160, 162-163, 170. In fact, Irby had been made to feel so comfortable on Rock's property that Rock's daughter described an event in 2004 – where Irby showed up, helped himself to a beer, and sat himself down on Rock's couch – as looking like Irby owned the place. 17RP 48-49. There was no forced entry into the shop. 17RP 72. Nor was there any other evidence suggesting Irby was not permitted in the shop at the time Rock was killed.

During closing argument, the prosecutor argued that, because Irby assaulted Rock in the shop, he did not have permission to enter or remain in the shop:

> And in the Burglary there was an entry or remaining unlawfully in the garage during the course of that burglary of that particular location. So you have that from the fact that Mr. Rock was not permitting Mr. Irby to commit this kind of assault on him in the garage. So you have established that Mr. Irby did not have permission to be there. You can infer that from the evidence that you have. And there's no evidence supporting that he had a right to be in Mr. Rock's garage at the time that the murder happened. The blows to the back of the head suggest that. There was an attack. The position of the body showed it was inside the garage when this happened.

19RP 33.

The prosecutor was mistaken. Both the Washington Supreme Court and this Court have rejected the notion that commission of a crime negates any license, invitation, or privilege to enter or remain on property. See State v. Collins, 110 Wn.2d 253, 258, 260-262, 751 P.2d 837 (1988) (declining to adopt this per se approach, which is the law in California); State v. Miller, 90 Wn. App. 720, 723-728, 954 P.2d 925 (1998) (rejecting argument that entering car wash for criminal purpose vitiated any license, invitation, or privilege to be there; approach would convert almost any indoor crime into a burglary); State v. Davis, 90 Wn. App. 776,

781 n.6, 954 P.2d 325 (1998) (under Collins, any implied revocation based on criminal activity is limited to situations where license to enter was limited to a specific purpose); see also State v. Allen, 127 Wn. App. 125, 136-137, 110 P.3d 849 (2005) (prosecutor misstated law by arguing jurors could find burglary simply because defendant intended to commit crime where he otherwise had permission to be).

Because this record shows Irby had permission to be on Rock's property generally, and there is no evidence of a forced entry into the shop or that permission had been revoked at the time of Rock's death, the State failed to prove a burglary at that location. Because one or more jurors could have entertained reasonable doubt that what occurred inside the shop established Burglary in the First Degree, reversal is required. Kitchen, 110 Wn.2d at 405-406.

b. Felony Murder in the First Degree

To obtain a conviction for Felony Murder in the First Degree, the State had to prove the following:

(1) That on or about the 8th day of March, 2005, the defendant committed burglary in the first degree;

(2) That the defendant caused the death of James T. Rock, Jr. in the course of or in furtherance of such

burglary in the first degree or in immediate flight from such crime;

(3) That James T. Rock, Jr. was not a participant in the burglary; and

(4) That any of these acts occurred in the State of Washington.

CP 236.

"To convict a defendant of felony murder the State is required to prove beyond a reasonable doubt each element of the predicate felony." State v. Quillin, 49 Wn. App. 155, 164, 741 P.2d 589 (1987) (citing State v. Gamboa, 38 Wn. App. 409, 412, 415, 685 P.2d 643 (1984)), review denied, 109 Wn.2d 1027 (1988). Element (1) above contained that requirement at Irby's trial.

For the same reason Irby was denied his right to juror unanimity on the stand-alone charge of Burglary in the First Degree, he was denied his right to juror unanimity for Felony Murder based on Burglary in the First Degree. Because there was no unanimity instruction or election by prosecutors regarding in which of the two separate buildings the crime occurred, Irby was denied his right to a unanimous guilty verdict for Burglary in the First Degree, which necessarily tainted the jury's verdict for Felony Murder based on that predicate crime.

3. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN IRBY'S CONVICTION FOR AGGRAVATED MURDER IN THE FIRST DEGREE.

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).

In order to establish Aggravated Murder in the First Degree, the State had to prove either of two aggravating circumstances: "[t]he murder was committed in the course of, in furtherance of, or in immediate flight from burglary in the first or second degree or residential burglary" or that Irby "committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime." CP 230. It failed to prove either. Therefore, the aggravated portion of Irby's conviction on count 2

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).

The Washington Supreme Court addressed the proof requirements for Aggravated Murder in the First Degree – and specifically the aggravating circumstance that the murder occurred in the course of a felony – in State v. Hacheney, 160 Wn.2d 503, 506, 158 P.3d 1152 (2007). The Hacheney court held, "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." Id. at 506 (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, 128 S. Ct. 1079, 169 L. Ed. 2d 820 (2008). Necessarily, the identified felony must have begun before the killing. Hacheney, 160 Wn.2d at 518-519.

The Hacheney 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 had

met its burden. Hacheney, 160 Wn.2d at 515-516. The Hacheney 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." Hacheney, 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.

The facts in Hacheney demonstrate the legal principle in practice. Early Christmas morning 1997, Hacheney left on a hunting trip and shortly thereafter neighbors noticed a fire at the Hacheney home. Firefighters responded and found the body of Hacheney's wife, Dawn, badly burned on the bed in the master bedroom. Id. at 506-507. They also found an electric space heater and several propane canisters in the room. Hacheney told investigators that he had turned the heater on before leaving the home and there had been some Christmas wrapping paper in the area. Id. at 507. An autopsy revealed that Dawn did not have soot in her trachea or lungs. Nor did she have carbon monoxide in her blood, all of which indicated she did not inhale after the fire began. Id. A woman with whom Hacheney had been having an affair came forward and told police that Hacheney admitted killing his wife by holding a plastic bag

over her head until she stopped breathing and then setting the fire. Id. at 507-508.

Hacheney was convicted of Aggravated Murder in the First Degree based on a jury finding that he committed the murder "in the course of" Arson in the First Degree. Id. at 508, 510. The Supreme Court reversed the aggravating circumstance. The murder had not occurred "in the course of" arson because the victim was already dead when Hacheney attempted to cover up the crime by setting the house on fire. In other words, it was not true that the death was a probable consequence of the arson. Id. at 518-520.

The main case relied upon by the Hacheney court, Golladay, provides another, particularly relevant example of this principle. Golladay was convicted of committing murder while "engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of larceny." Golladay, 78 Wn.2d at 128. Golladay killed a female hitchhiker in a remote location by repeatedly striking her in the back of the head with a blunt object. Id. at 122-23. He then drove away from the scene with her purse and other personal belongings in his car. A short time later, he hit an embankment with his car, which drew the attention of passersby. Golladay disposed of the purse and other items in a nearby field to conceal his

involvement in the crime. Id. at 124-25.

By repeatedly striking the victim in the head and killing her, Golladay had certainly committed murder. And by taking and disposing of the victim's purse and other personal items thereafter, Golladay had committed larceny. Id. at 130. This was not sufficient, however. Holding that "the causal connection between the commission of the collateral crime and the death must be clearly established," the Supreme Court found that, beyond speculation, there was nothing to establish the larceny was already in progress when the homicide occurred; therefore, there was an insufficient legal relationship between the two crimes because "the killing did not occur while in the commission of, or in withdrawing from the scene of, a larceny as required by [Washington law]." Id. 129-130. The evidence must clearly establish such a relationship. Id.

Hacheney and Golladay dictate the outcome in Irby's case. Assuming for the sake of argument that Irby was the individual who killed Rock in the shop, the causal connection between Rock's death and burglary was not established. For the reasons already discussed in this brief, because there is no evidence that Irby entered or remained unlawfully in the shop, a burglary did not take place at that location. Rather, any burglary took place inside the

residence.[6] Thus, as in Hacheny and Golladay, there is no evidence the connected crime had begun before the victim's death. And because death is not a probable consequence of a subsequent burglary, the evidence was insufficient to convict Irby of Aggravated Murder based on the circumstance that "[t]he murder was committed in the course of, in furtherance of, or in immediate flight from burglary in the first or second degree or residential burglary."

The other aggravating circumstance – that Irby "committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime" – also fails. This "concealment aggravator" is established if the evidence supports a finding that the killing was intended to postpone, for a significant period of time, discovery of a crime. Brett, 126 Wn.2d at 167. The concealment must pertain to some crime other than the murder itself. See State v. Longworth, 52 Wn. App. 453, 461-463, 761 P.2d 67 (1988).

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[6] In passing, during closing argument, the prosecutor threw out the possibility that perhaps Irby broke into the master bedroom, was discovered, and the two "got into it" inside the residence. 19RP 34. This is the type of speculation rejected in Golladay. The prosecutor did not explain how, if Irby was discovered inside the residence, Rock was killed in the separate shop building.

The State argued to jurors that Irby may have killed Rock to prevent him from reporting a burglary on his property or perhaps to prevent him reporting Irby's theft of his own truck from the impound lot in Leavenworth. 19RP 36-37. This was pure speculation. Compare Brett, 126 Wn.2d at 167 (aggravator appropriate where, prior to planned home invasion robbery, defendant indicated masks were not necessary because there would be no survivors); State v Manthie, 39 Wn. App. 815, 827, 696 P.2d 33 (aggravator appropriate where evidence revealed victim threatened to contact defendant's parole officer about assault just before defendant killed victim), review denied, 103 Wn.2d 1042 (1985). The State presented no similar evidence from which a rational trier of fact could reasonably conclude, beyond a reasonable doubt, that Rock was killed to hide Irby's involvement in some other crime.

Because the State failed to prove either aggravating circumstance, Irby's conviction and sentence for Aggravated Murder must be vacated.

4. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN IRBY'S CONVICTION FOR FELONY MURDER.

As charged, Irby was guilty of Felony Murder in the First Degree if – in the course of, in furtherance of, or in immediate flight

from – Burglary in the First Degree, he caused the death of James Rock. RCW 9A.32.030(1)(c); CP 236.

In Hacheney, the Supreme Court indicated that the same analysis applicable to the "in the course of" aggravating circumstance for Aggravated Murder applies to Felony Murder. See Hacheney, 160 Wn.2d at 515. Indeed, Golladay was a Felony Murder case, not an Aggravated Murder case. Id. For the same reason the State failed to prove Aggravated Murder based on burglary, it failed to prove Felony Murder based on Burglary in the First Degree. The State failed to prove a burglary in the shop, where Rock was killed. Thus, there was no evidence the murder occurred in the course of, in furtherance of, or in immediate flight from Burglary in the First Degree.

There is an additional issue regarding the Felony Murder conviction. Recognizing that convictions for both Aggravated Murder in the First Degree and Felony Murder in the First Degree would violate double jeopardy, Judge Rickert properly indicated at sentencing, and on Irby's Judgment, that he was vacating the Felony Murder conviction. CP 339; 19RP 96.

Unfortunately, however, elsewhere the Judgment refers to the "alternative of Felony Murder in the First Degree" and lists the

standard range Irby faced for that conviction. CP 336-338 (sections 2.1 and 2.3). Moreover, the written sentencing findings and conclusions include the following:

> Pursuant to [conviction and sentence for Aggravated Murder in the First Degree], a sentence on the charge of Felony Murder in the First Degree under the alternative would constitute double jeopardy and therefore that conviction should be vacated at this time. Such conviction would be reinstated should the defendant's conviction for Murder in the First Degree by premeditation in violation of RCW 9A.32.030(1)(a) be overturned on subsequent appellate review or collateral attack.

CP 333 (conclusion of law 2) (emphasis added). The references in the Judgment and highlighted language in the written findings and conclusions violate double jeopardy.

In State v. Turner, 169 Wn.2d 448, 465, 238 P.3d 461 (2010), the Supreme Court held that, "Double Jeopardy prohibits courts from explicitly holding vacated lesser convictions alive for reinstatement should the more serious conviction for the same criminal conduct fail on appeal – by means of the judgment, order, or otherwise." The remedy is removal of the offending language. Id. at 466. Should Irby's intentional murder conviction survive this appeal, this Court must strike references in the Judgment to possible sentences for Felony Murder and conclusion of law 2 in

the written sentencing order.

5. IRBY'S 1976 CONVICTION FOR STATUTORY RAPE IS NOT LEGALLY COMPARABLE TO A STRIKE OFFENSE AND HAS NOT BEEN PROVED FACTUALLY COMPARABLE.

The POAA requires the sentencing judge to impose a sentence of life without the possibility of release regardless of the standard range if the defendant is found to be a persistent offender. RCW 9.94A.570. Under the "three strikes" provision, a persistent offender is an offender who has been convicted of a "most serious offense" and has "before the commission of the offense . . . been convicted as an offender on at least two occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses . . . ." RCW 9.94A.030(37)(a)(i)-(ii).

RCW 9.94A.030(32) contains a list of qualifying offenses. Statutory Rape in the Second Degree is not included on that list. Judge Rickert found it to be a qualifying offense anyway based on his determination, by a preponderance of the evidence, that the former offense is legally and factually comparable to a current conviction for Child Rape in the Second Degree. CP 333 (conclusions 4, 7-9); 19RP 79. This was error.

The Washington Supreme Court has established a two-part test for determining whether prior offenses not listed in the three strikes statute are comparable to strike offenses. In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (citing State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998)). The same test applies whether the prior conviction is from a foreign jurisdiction or Washington. Review is de novo. State v. Stockwell, 159 Wn.2d 394, 397, 150 P.3d 82 (2007).

Under the first prong of the test, the court must compare the elements of the crimes to determine if the offenses are legally comparable. In cases where the elements of the prior offense are not substantially similar to a strike offense, or the prior statute prohibited a broader range of conduct, the offenses are not legally comparable. Lavery, 154 Wn.2d at 255-56.

Under the second prong of the test – used when the offenses are not legally comparable – the court determines whether the offenses are factually comparable. The sentencing court may look at the facts underlying the prior conviction to determine if the defendant's conduct would have resulted in a conviction for a current strike offense. Lavery, 154 Wn.2d at 255-256.

a. Irby's Conviction For Statutory Rape Is Not Legally Comparable To A Strike Offense.

Irby was convicted in 1976 of Statutory Rape under a statute that provided:

> A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

Former RCW 9.79.210.

Judge Rickert found this was legally comparable to a conviction for Rape of a Child in the Second Degree. CP 333 (conclusion 4). Under the current statutory scheme:

> A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.076(1).

As defense counsel pointed out below, the two offenses are not legally comparable based on differing age elements. See 19RP 71-72. While Statutory Rape in the Second Degree included 11-year-old victims, Rape of a Child in the Second Degree only includes victims that are 12 or 13 years old. Moreover, Statutory Rape merely required the perpetrator be "over sixteen years of age." In

comparison, Rape of a Child in the Second Degree requires the perpetrator be "at least thirty-six months older then the victim."[7]

Because the elements of the two offenses differ, and the former offense is broader, Statutory Rape is not legally comparable to Rape of a Child in the Second Degree. Judge Rickert erred when he found otherwise. CP 333; 19RP 79.

b. Irby's Conviction Has Not Been Proved Factually Comparable To A Strike Offense And Judge Rickert's Contrary Findings Violate Irby's Sixth Amendment Rights.

At sentencing, defense counsel also correctly argued that the 1976 offense was not factually comparable to Rape of a Child in the Second Degree and that the court was prohibited from conducting its own fact-finding in an attempt to demonstrate comparability. 19RP 71-73, 77-78.

While factual comparability requires the sentencing court to

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[7] In response, the State may point out that the former statute for Statutory Rape in the *First* Degree also contained a lower victim age and did not have language expressly requiring an age disparity. Yet, in State v. Stockwell, the Washington Supreme Court found the former offense legally comparable to Rape of a Child in the First Degree. In Stockwell, however, the Court was never asked to compare these particular elements. Rather, the only element at issue was nonmarriage. See Stockwell, 159 Wn.2d at 397 ("Only one element concerns us here."). Cf. Stockwell, 159 Wn.2d at 400 (Sanders, J., dissenting) (noting difference in age elements).

examine what happened in the prior case to determine if it would be a crime under the current statute, there is a very important limitation.

The Sixth Amendment jury trial guarantee, applicable to the States through the Fourteenth Amendment, includes the right to have any fact "which increases the penalty for a crime beyond the prescribed statutory maximum submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). "Statutory maximum" is not the maximum authorized by the Legislature. Rather, it is the maximum sentence a judge is authorized to impose without finding any additional facts.[8] State v. Evans, 154 Wn.2d 438, 441, 114 P.3d 627 (citing Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)), cert. denied, 546 U.S. 983, 126 S. Ct. 560, 163 L. Ed. 2d 472 (2005).

Under this constitutional right to a jury determination of facts necessary to increase punishment beyond the standard range, any factual examination for comparability is limited in scope. The sentencing court may consider only facts that were admitted,

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[8] In Irby's case, this is 67-89 months – his standard range for Burglary in the First Degree. CP 338-339.

stipulated, or proved beyond a reasonable doubt.[9] Descamps v. United States, __ U.S. ___, 133 S. Ct. 2276, 2288-2289, 186 L. Ed. 2d 438 (2013); State v. Olsen, ___ P.3d ___, 2014 WL 1942102, at *4-*5 (filed May 15, 2014); Lavery, 154 Wn.2d at 258.

In fact, where the prior statute prohibits a broader range of conduct than the current strike offense, examining the record for factual comparability may not be possible due to the absence of an incentive for the accused to attempt to prove he did not commit the narrower offense. It was for this reason the Lavery Court concluded that, where the statutory elements of the prior conviction are broader, the prior conviction "cannot truly be said to be comparable." Id. at 257-58; see also Descamps, 133 S. Ct. at 2289 ("A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense . . . .").

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[9] Whether there has been a Sixth Amendment violation, like comparability generally, is subject to de novo review. State v. Mutch, 171 Wn.2d 646, 656, 254 P.3d 803 (2011).

In State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004), review granted in part and remanded, 154 Wn.2d 1031, 119 P.3d 852 (2005), discussed in Lavery, the defendant had a prior Texas conviction for Indecency With a Child in the Second Degree. The State maintained this crime was comparable to the Washington crime of Child Molestation in the First Degree. Ortega, 120 Wn. App. at 168, 173. The pertinent age elements differed, however. The Texas offense covered victims younger than 17 while the Washington offense covered victims younger than 12. Various documents and the testimony of a witness established the Texas victim was 10 years old, thereby satisfying the Washington offense. Ortega, 120 Wn. App. at 172-174. Still, the sentencing court properly refused to treat the Texas conviction as comparable to a Washington felony, reasoning there was no indication the victim's precise age had been proved to a jury beyond a reasonable doubt. Ortega, 120 Wn. App. at 169 (citing Apprendi).

The same is true in Irby's case. In 1976, Statutory Rape in the Second Degree merely required proof the defendant was over 16 years of age and that the victim was at least 11 years old but not yet 14. Former RCW 9.79.210. Because there was no requirement – as there is today – that the State prove a 36-month age disparity,

there was not the same incentive to prove the precise ages of those involved. Nor was there the same defense incentive to challenge any such proof.

Judge Rickert looked to paperwork from Irby's 1976 case in an attempt to discern the facts of that offense. Specifically, the prosecutor submitted the affidavit of probable cause, information, verdict, judgment, and other documents from the court file. Sentencing Exhibit 8. These documents indicate the offense occurred on May 13, 1976, he was charged in July 1976, and he was convicted at a jury trial on October 15, 1976. Id. The information alleges:

> That the said defendant in the County of Chelan, State of Washington, did then and there willfully, unlawfully, and feloniously then and there being over sixteen years of age, did then and there engage in sexual intercourse with Kori Fogelstrom, not being married to the said Kori Fogelstrom, who was thirteen years of age; contrary to the form of the Statute R.C.W. 9.79.210 in such cases made and provided, and against the peace and dignity of the State of Washington.

Id. The judgment parrots this language. Id.

Neither this document, nor any other document relied upon by Judge Rickert, indicates that the jury was specifically required to find Irby's precise age, the victim's precise age, or that Irby was at least

36 months older. Typically, only the jury instructions will reveal this information if it exists. See Hickman, 135 Wn.2d at 101-103 ("law of the case" found in the jury instructions, which define the State's proof requirements); State v. Rivas, 49 Wn. App. 677, 683, 746 P.2d 312 (1987) (specific factual assertions included in the information need not be proved unless they are also included in the jury instructions). The State did not provide any jury instructions from the 1976 trial.

Over a defense objection, the prosecutor also urged Judge Rickert to look at Irby's birth date listed on documents from other court cases to extrapolate Irby's age in the 1976 case. 19RP 76-77. Judge Rickert did so. 19RP 78-79. He then entered written findings – again, over defense objection – which state, "According to certified court records the defendant was about one (1) week short of his 18th birthday at the time of the commission of the offense. The victim at the time of the offense was 13 years of age." CP 333 (conclusion 4); see also CP 331 (finding of fact 1 concerning Irby's age); 19RP 72-73, 77-82.

This is precisely the type of judicial fact-finding the Sixth Amendment prohibits. In order to find comparability of the 1976 offense, Judge Rickert had to evaluate the allegations in the information and other documents from that case, plus documents

from other cases, and enter additional findings of fact regarding age – facts not required for conviction at the time, and facts Irby would have had no incentive to contest. Reliance on these judicially determined facts to impose a life sentence under the POAA violates Irby's Sixth Amendment right to jury trial.

Judge Rickert erred when he treated the Statutory Rape conviction as a strike offense. The resulting sentence of life in prison without parole must be vacated.

D. CONCLUSION

The selection of jurors 38 and 27 denied Irby his constitutional right to a fair and impartial jury. All of his convictions must be reversed.

Irby was denied his constitutional right to a unanimous jury verdict on Burglary in the First Degree and Felony Murder in the First Degree. On this alternative ground, his convictions for these offenses must be reversed.

The State failed to prove the aggravating circumstances for Murder in the First Degree and failed to prove Felony Murder in the First Degree. This Court must reverse with prejudice the conviction for Felony Murder and the aggravated portion of the conviction and sentence for Murder in the First Degree.

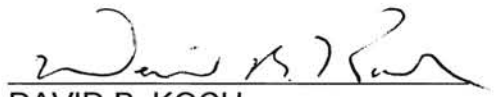
References to the Felony Murder conviction in the judgment and in the court's sentencing findings violate double jeopardy. These references must be stricken.

Finally, Irby's 1976 conviction is not comparable to a current strike offense. This Court should find that he is not a persistent offender and vacate his life sentence under the POAA.

DATED this 6th day of June, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

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SUPERIOR COURT OF WASHINGTON

COUNTY OF SKAGIT

STATE OF WASHINGTON, Plaintiff, v. TERRANCE IRBY, Defendant.	NO. 05-1-00276-9 SENTENCING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Comes now the Honorable Michael E. Rickert and having heard arguments of counsel and examined the exhibits and records and files herein makes and enters the following findings, conclusions and order:

I. FINDINGS OF FACT

1. The defendant in this case is Terrance J. Irby. His date of birth is June 10, 1958.

2. On March 12, 2013, a jury found the defendant guilty of Murder in the First Degree by premeditation in violation of RCW 9A.32.030(1)(a) occurring on or about March 8, 2005

3. The jury made the following findings of aggravating circumstances that existed at the time of the crime under RCW 10.95.020.

(a) While committing Murder in the First Degree the defendant did intend to conceal the commission of the crime pursuant to RCW 10.95.020(9),

(b) While committing the crime of Murder in the First Degree the defendant intended to protect or conceal the identity of any person committing the crime, pursuant to RCW 10.95.020(9),

(c) That the murder was committed in the course of, or in the furtherance of, or in immediate flight from Burglary in the First Degree pursuant to RCW 10.95.020(11)(c), and,

(d) That the murder was committed in the course of, or in the furtherance of, or in immediate flight from Residential Burglary pursuant to RCW 10.95.020(11)(c).

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4. On March 12, 2013, a jury found the defendant guilty of Felony Murder in the First Degree in violation of RCW 9A.32.020(1)(c) occurring on or about March 8, 2005. The jury returned a special verdict finding that the defendant was armed with a deadly weapon.

5. On March 12, 2013, a jury found the defendant guilty of Burglary in the First Degree in violation of RCW 9A.52.030 occurring on or about March 8, 2005. The jury returned a special verdict finding that the defendant was armed with a deadly weapon.

6. On October 15, 1976, the defendant, Terrance Irby, was convicted of the crime of Statutory Rape in Second Degree under Chelan county cause # 5029. On December 22, 1976, the defendant was sentenced on that case.

7. On October 17, 1984, the defendant, Terrance Irby, pled guilty to Assault in the Second Degree in King County cause # 84-1-2641-0. On November 13, 1984, was sentenced on that case to a term of 24 months of confinement. There was also a special finding entered that the defendant was armed with a deadly weapon to wit: a handgun. The judgment and sentence from this King County case specifically lists the defendant's prior Chelan County conviction among the criminal history.

8. By a preponderance of evidence based upon the records from the two (2) convictions, Statutory Rape in the Second Degree from Chelan County cause #5029 and Assault in the Second Degree from King County cause #84-1-2641-0, that the defendant in those two (2) cases is the same Terrance Irby who committed the present crimes in the present case wherein James Rock was murdered.

9. On August 2, 1994, the defendant, Terrance Irby, was sentenced in Skagit County District Court on the crime of Driving While License Suspended in the Third Degree in case #7729630 occurring on May 26, 1994.

10. On April 11, 1995, the defendant, Terrance Irby, was sentenced in Skagit County District Court of the crime of Driving While License Suspended in the Third Degree in case #24666 occurring on August 28, 1994.

11. On July 17, 1996, the defendant, Terrance Irby, was sentenced in Skagit County District Court of the crime of Driving While License Suspended in the Third Degree in case #C31767 occurring on April 8, 1996.

12. On February 4, 2004, the defendant, Terrance Irby, was sentenced in Skagit County District Court of the crimes of Driving While Under the Influence of Intoxicants and Reckless Driving in case #C43861, occurring on December 18, 2003.

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13. On February 9, 2004, the defendant, Terrance Irby, was sentenced in Skagit County District Court of the crime of Violation of a Protection Order in case #C44068, occurring on January 12, 2004.

14. On March 5, 2004, the defendant, Terrance Irby, pled guilty and was sentenced in Skagit County Superior Court to the felony crime of Malicious Mischief in the Second Degree occurring on January 12, 2004.

II. CONCLUSIONS OF LAW

NOW, THEREFORE, the Court finds that.

1. The aggravating factors found by the jury under RCW 10.95.020 on the charge of Murder in the First Degree by premeditation in violation of RCW 9A.32.030(1)(a) result in a sentence pursuant to RCW 10.95.030(1) of life imprisonment without the possibility of release or parole for Aggravated Murder in the First Degree.

2. Pursuant to that conviction and sentencing, a sentence on the charge of Felony Murder in the First Degree under the alternative would constitute double jeopardy and therefore that conviction should be vacated at this time. Such conviction would be reinstated should the defendant's conviction for Murder in the First Degree by premeditation in violation of RCW 9A.32.030(1)(a) be overturned on subsequent appellate review or collateral attack.

3. Given this Court's imposition of life imprisonment without the possibility of release or parole in conclusion of law number 1. above this Court is not entering a sentence as a persistent offender pursuant to RCW 9.94A.570 at this time. However, conclusions of law as to the applicability of that potential sentence are appropriate to be entered

4. The Court finds that the defendant's prior conviction for Statutory Rape in the Second Degree is comparable to the crime of Rape of a Child in the Second Degree. According to certified court records the defendant was about one (1) week short of his 18th birthday at the time of the commission of the offense. The victim at the time of the offense was 13 years of age.

5. Rape of a Child in the Second Degree is a Class A felony and codified under RCW 9A.44.076. Before being changed the crime of Statutory Rape in the Second Degree was codified under RCW 9.79.210.

6. The State has adequately proven that the defendant has prior misdemeanor convictions, which prevent the defendant's prior conviction(s) from washing out under RCW 9.94A.525(2).

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7. The Court finds that the two (2) prior convictions (Statutory Rape in the Second Degree and Assault in the Second Degree) are "most serious offenses" pursuant to RCW 9.94.030(28)[1].

8. Prior to the commission of the two (2) current convictions in the present case of Burglary in the First Degree and Murder in the First Degree (by Felony Murder), the defendant had previously been convicted of two (2) predicate three (3) strike offenses (most serious offenses as defined by RCW 9.94A.030(28)).

9. That the defendant, Terrance Irby, is a Persistent Offender pursuant to RCW 9.94A.030(32) under the statutory laws of the State of Washington.

III. ORDER

NOW, THEREFORE, it is hereby ordered that the defendant be sentence to life imprisonment without the possibility of release pursuant to RCW 10.95.030(1), RCW 9.94.505(2)(i) and, RCW 9.94A.510.

Dated ~~March 21, 2013~~ April 18, 2013.

Judge Michael E. Rickert

Presented by:

Erik Pedersen, WSBA#20015
Senior Prosecuting Attorney

Approved as to Form

Terrance Irby, ~~Pro Se~~
Defendant.

Sharon Field WSBA # 36082
Attorney for Defendant

[1] The numbering of RCW 9.94.030 is based upon the numbers at the time of the commission of the offenses herein.

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70418-4-I
	)	
TERRANCE IRBY,	)	
	)	
Appellant.	)	

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 6TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273
criminalappeals@co.skagit.wa.us

[X] TERRANCE IRBY
DOC NO. 631794
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF JUNE 2014.

X Patrick Mayovsky