No. 326951

COURT OF APPEALS DIVISION THREE
OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Oscar Alfred Alden,

Appellant

ON APPEAL FROM DOUGLAS COUNTY SUPERIOR COURT
Honorable Hon. John Hotchkiss

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Oscar Alden shot and killed Tom Maks. He testified that he shot instinctively in a "fear reaction" or "fear reflex" when Maks suddenly lunged towards him in the dark. RP 1185, 1200, 1202. Only minutes prior to the shooting, Maks, armed with a gun, had entered the house where Alden and his friends were sleeping, where he threatened to shoot Eric Hanson; threatened to kill all Alden's friends by throwing them off the deck of the house; tipped over the chair that Alden had been sleeping in; punched Alden in the stomach; told Alden he was going to chop off his dick and feed it to his dog; and slapped Alden's friend Dane Meier in the head. Fearing for the safety of his friends, two of whom were fighting with Maks, Alden ran to his car and retrieved his own gun. As he rounded a parked car, Alden suddenly saw Maks lunging towards him. Believing that Maks was about to shoot and kill him, Alden fired the one shot that killed Maks. Alden testified that he fired in self-defense.

The trial judge prohibited Alden from presenting *res gestae* evidence that a few hours earlier that evening, Maks assaulted one woman and tried to pick a fight with another. The court also prohibited Alden's friends from testifying that Alden had a reputation for peacefulness.

In closing argument the prosecutor misstated the law regarding the burden of proof with respect to self-defense and Alden's counsel failed to object. RP 1286. The "to-convict" instruction listed three elements of Murder 2°, but *omitted* the element of the absence of self-defense and erroneously informed the jury that "[i]f you find from the evidence that

each of these elements has been proved beyond a reasonable doubt, *then it will be your duty to return a verdict of guilty.*" CP 313 (italics added).

During deliberations the jury asked the trial judge, "Do we need to convict on both" Murder 2° and Manslaughter 1°? CP 302. Even though there was only one killing, the trial judge responded that one of the jury's options was to convict Alden of *both* offenses. CP 302. The jury returned verdicts finding Alden guilty of both Murder 2° and Manslaughter 1°. Although the jury returned *four* verdicts (two general verdicts on the two crimes charged and two special verdicts pertaining to firearm allegations) when polling the jury the trial judge only asked the jurors if "the verdict" – singular – was their verdict and the verdict of the jury. The parties later realized that it would violate double jeopardy to find Alden guilty of both murder and manslaughter, and so the manslaughter verdict was vacated.

At sentencing Alden asked the court to find that there were two statutory mitigating factors. He pointed to the undisputed evidence that Maks initiated and provoked the incident that led to his death, and to the evidence that Maks' threatening behavior significantly affected Alden's conduct even though it was not accepted as a complete defense. Without denying that the evidence established both of these mitigating factors, the sentencing judge simply stated that he would not impose an exceptional sentence below the standard range because that would be "offensive" to Maks' family and friends, and to the jury. RP 1563.

II. ASSIGNMENTS OF ERROR

Appellant assigns error to:

1. The trial judge's response to the jury's question: "Do we need to convict on both counts?"

2. The trial judge's exclusion of evidence that earlier in the day on which he was killed Thomas Maks physically assaulted one woman (Tedders) and tried to provoke a fight with another (Flores).

3. The trial judge's exclusion of evidence that the defendant had a reputation for being a peaceful, nonviolent person.

4. Jury Instruction No. 7, the "to-convict" instruction for the crime of murder in the second degree (Copy attached as Appendix A).

5. Defense counsel's failure to object to the prosecutor's misstatement of the law when he told the jury what had to be shown "in order for you to return a not guilty verdict by reason of self-defense." RP 1386.

6. The trial judge's refusal to impose an exceptional sentence below the standard range because that would be "offensive" to the victim's family, and to the jury.

III. STATEMENT OF THE ISSUES

1. The jury sent the trial judge an inquiry stating that they were "confused on the charging decisions we are to make" regarding Murder 2° and Manslaughter 1°, and asking "Do we need to convict on both counts?" The trial judge responded that the jury could find him "guilty of either or both." Was the defendant deprived of his constitutional right to a unanimous jury verdict by this response?

2. Did the trial judge abuse his discretion by excluding evidence of the victim's assaultive and belligerent behavior which occurred within six hours of the shooting notwithstanding the *res gestae* rule that acts which are part of an unbroken sequence of events, and which are close in time to the final event, are admissible to show the actor's conduct or state of mind?

3. Did the trial judge abuse his discretion by excluding defense

testimony that the defendant had a reputation for peacefulness on the ground that college and high school friends of the defendant did not constitute a sufficient "community" for purposes of reputation testimony?

4. Did the failure of Instruction No. 7 to include the absence of self-defense in the list of the elements of murder in the second degree, deprive the defendant of his due process right to proof beyond a reasonable doubt of every element of the crime?

5. Was the defendant denied his right to effective assistance of counsel when his attorney failed to object to the prosecutor's closing argument statement which shifted the burden of proof by erroneously telling the jury what had to be shown "in order for you to return a not guilty verdict by reason of self-defense" (RP 1386), instead of stating that the absence of self-defense had to be shown in order for the jury to return a guilty verdict?

6. By refusing to consider imposing an exceptional sentence below the standard range because such a sentence would be "offensive" to the victim's family and friends, did the trial judge deprive the appellant of his due process right to an independent and neutral magistrate?

7. Is it an abuse of discretion, and/or unconstitutional, to allow the family of the victim to veto a proposed exceptional sentence below the standard range?

8. Is it an abuse of discretion, and/or unconstitutional, to refuse to impose an exceptional sentence because it would offend the jury?

IV. STATEMENT OF THE CASE

A. Procedural History

Initially, Alden was charged with a single offense: Murder 2°. CP 1-2. Then, in an Amended Information, he was charged with *two* offenses: Murder 2° and Manslaughter 1°. CP 181-82. Manslaughter 1° was charged as an "alternative" to Murder 2° as follows:

COUNT II – MANSLAUGHTER IN THE FIRST DEGREE

> ***In the alternative*** to Count I – Murder in the Second Degree ***and as a lesser included offense,*** the Plaintiff alleges: . . . the above-named Defendant did recklessly cause the death of another person . . . .

CP 182 (emphasis added).

Finally, in a *Second* Amended Information, Alden was charged with the same two offenses, but all the previous language about charging Manslaughter 1° as an "alternative" to Murder 1°, and about Manslaughter 1° being a "lesser included offense" was deleted. CP 194. The Second Amended Information was filed on the very first day of trial. RP 160.[1] No one informed the trial judge of the difference between the first amended information and the second amended information; no one mentioned the elimination of the previous language that had charged the two crimes in the alternative; and no one explained why the Second Amended Information was being filed. Alden was tried on the Second Amended Information and the jury found Alden guilty of *both* Murder 2° and Manslaughter 1. CP 334-37.

At no time before or during trial did Alden's defense counsel challenge the propriety of charging Alden with both Murder 2° and Manslaughter 1° for the same killing of the same person. But after the jury verdicts had been returned, but before sentencing, defense counsel realized

[1] Defense counsel made no objection to the filing of the second amended information. RP 160. Instead, defense counsel simply stated, "my client is aware of the amended – second amended Information. He will waive formal reading, we'll be entering a plea of not guilty to both charges." RP 160.

that it would be a double jeopardy violation to convict Alden of both crimes because on the facts of this case that would amount to multiple punishment for the same offense. Accordingly, defense counsel raised this issue in his sentencing memorandum, arguing that Alden "cannot be punished, sentenced or have a criminal history that includes more than a single conviction since Oscar's actions amount to a single transaction." CP 415. Relying upon *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010), defense counsel argued that the double jeopardy clauses of the Fifth Amendment and art. I, § 9 prohibited punishing Alden for both Murder 2° and Manslaughter 1°. CP 416.

The prosecutor stated on the record that "the State agrees" and therefore the State moved for dismissal of the Manslaughter 1 charge. RP 1505. The trial court granted that motion. CP 422.

Alden was sentenced to prison for 231 months (19 years and 3 months). CP 425. Alden filed timely notice of appeal. CP 436.

B. Statement of Facts

1. <u>Testimony of prosecution witnesses</u>

In June of 2013, Dayton Wiseman invited several friends, including Oscar Alden, to help him celebrate his 23rd birthday by spending the weekend at his family's vacation home. RP 324. Wiseman and his roommate Dan Ptacek arrived at the house on Thursday night. RP 332, 350. On Friday night, Raymond Roberts (age 23), Victoria Lincoln (age 24), Andrew Ross (age 26), Sarah Chase, Eric Hansen (age 23), Oscar Alden (age 25) and Jordan Court arrived at the Wiseman house. RP 368,

488, 491, 596, 663, 958, 1059. Dane Meier (age 24) arrived on Saturday around 5 p.m. RP 368, 372.[2]

Tom Maks lived in the house next door. RP 330. On Saturday around noon Maks came over to the Wiseman house asking if anyone had any ammunition he could have, and eventually Ray Roberts traded Maks some bullets in exchange for a bag of marijuana. RP 492-93, 551.[3]

On Saturday evening most[4] of the group decided to go out drinking in Chelan. RP 332. Meier invited Maks to go along with them. RP 334, 381. Maks rode in Hansen's car along with Lincoln. RP 629. Lincoln felt Maks was already intoxicated and aggressive. RP 630.[5]

The group left for Chelan around 9:30 or 10 p.m. RP 335. They went to a bar called Tin Lizzie's where Maks got very intoxicated. RP 337, 374, 787. When they left the bar, somewhere between midnight and 1 a.m., they left Maks behind. RP 375. When they got back to Wiseman's house they all went to sleep. RP 377.

A few hours later Tom Maks entered the Wiseman home, went up to the second floor of the house and caused a disturbance. He was angry that he had been left behind in Chelan without a ride home. RP 643, 793. Roberts woke up and heard Maks making "remarks about killing people,

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[2] The ages listed are their ages as of the time of trial.

[3] Jordan Court, called as a defense witness, confirmed that he was present and that he saw Roberts make this trade. RP 906-07.

[4] Roberts stayed at the house. RP 494.

[5] Eric Hansen, who testified as a defense witness, also testified that Maks seemed intoxicated when they left for Chelan. RP 975.

fattest to smallest, throwing them off the deck, and he had a wine glass" in his hand. RP 495, 389, 606. Maks also threatened to shoot Eric Hansen. RP 992.[6] Maks was drunk and he was yelling and using vulgarities. RP 384, 442, 500, 675. Roberts, Ross and Chase all saw that Maks had a pistol tucked into the small of his back. RP 496-98, 679, 727, 729, 795. Lincoln also saw the handle of the gun. RP 610.

Maks grabbed Meier's leg and shook it. RP 385. He grabbed Victoria Lincoln by the face and shook her face. RP 386, 605. He moved over to the chair that Alden was sleeping in and he forcefully flipped the chair over, causing Alden to fall out of the chair onto the floor. RP 386-87, 495. Meier heard someone say "Call the cops." RP 447.

Chase told Maks she was calling the cops and that he needed to leave. RP 796. Eventually Roberts and Meier were able to calm Maks down enough to persuade him to leave the house. RP 392, 609. They walked him downstairs and out the sliding glass door on the first floor. RP 392-93, 498. Maks walked off towards his own home but Meier could not tell where he went. RP 452. Roberts, however, says he saw Maks walk back to his own house and enter it. RP 502. Roberts and Meier remained outside and waited for police to arrive. RP 452, 503. Roberts was afraid Maks might vandalize their cars. RP 503. Then Maks came

[6] Hansen, who testified as a defense witness, said that he woke up when someone kicked him and he found Maks standing over him. RP 991. Maks said to Hansen: "How about I give you one on the left, one to the right, and one down the center." RP 992. Hansen asked Maks , "Is that a gun threat?" and Maks replied, "It is what it is." RP 992. Hansen told Maks, if that is a gun threat I'm going to call the cops," and Maks then "stammered off somewhere else in the room." RP 992.

back to the Wiseman home. RP 396, 505.[7]

When Maks returned he again confronted Roberts and Meier. They asked him to leave and told him the police were on their way but Maks wouldn't leave. RP 509. Meier was worried because he had heard people in the house yelling that Maks had a gun. RP 401. Roberts said to Maks, "If you didn't have your gun I'd kick your ass right now." RP 400, 508. In reply Maks lifted his shirt up and spun around in a pirouette "almost like he was saying 'I don't have it [the gun] now." RP 401, 455. Maks yelled at Roberts, "I'm going to take my pants off so you can suck my dick." RP 456, 569. Then Maks took off his shirt, pants, and flip flops, leaving himself dressed only in his underwear. RP 402, 456, 510.

Maks then slapped Meier in the head, and Meier then slapped him back. RP 404, 456-57, 514. Maks stumbled backwards and Roberts began punching him. RP 405, 458, 515. Maks fell down on the ground. RP 407. Roberts told Alden to get his gun and Alden ran to his car to get it. 521, 523. Ross also went to his car and got his pistol. RP 735.

According to Meier, Maks was then in a position that was somewhere between standing on his feet and lying on the ground, and he was moving his body up and down. RP 408, 410. At this moment Alden and Ross came walking briskly around the front of Meier's parked car and suddenly encountered Maks. RP 412. Both Alden and Ross had pistols in

[7] Wiseman said Maks was gone a minute or so before he came back and Roberts said he was gone for five to ten minutes. RP 396, 505. Ross said Maks was gone between 1 and five minutes. RP 733.

their hands. RP 523, 697. Alden was holding his gun out in front of him. RP 414. Ross also had his gun out in front of him and Ross was looking down the sights of the gun. RP 697. Roberts warned Alden, "Oscar, . . . have your gun out, have it ready, this guy is crazy." RP 415, 521.

According to Meier, Maks was moving when Alden shot him. RP 417. Meier said Maks "wasn't still and he wasn't completely upright." RP 417. He described Maks as "sort of halfway up." RP 466. Asked to describe Maks' movements Meier said, "It's not jerky but it wasn't slow. It was . . . I want to say like a little bit above normal speed." RP 419. On the other hand, Meier said he would not describe Maks' movement as "lunging" at anyone. RP 419. Meier said it appeared that Maks was trying to stand up and that he was moving his hands. RP 419, 420, 461. According to Roberts, Maks was not trying to stand up, and he was not making any major movements, but "maybe" he was reaching up with a hand a little bit. RP 526.

When Alden got to the front of the parked car he turned and shot Maks from a distance of two to three feet. RP 416, 462. After he was shot Maks crumpled to the ground. RP 420. Ross told Alden to unload his gun and to put it down and Alden did as Ross instructed. RP 421, 468, 528.

Police found Alden's .9 mm pistol just outside the Wiseman house where Alden set it down. RP 207. A neighbor found a .9 mm spent bullet in her driveway and it was determined that this bullet was fired from Alden's .9 mm pistol. RP 207-08, 241, 755.

Dr. Gina Fino, the Douglas County Medical Examiner, performed

an autopsy on Maks' body. RP 820, 825. She found three perforating (through and through) gunshot wounds all related to the one bullet that struck Maks. RP 830. The first wound was at the top and on the right side of Maks' forehead, and there was a corresponding exit wound behind his left ear; there was a second perforating wound in Maks' left upper arm; and there was a third perforating wound to the little finger of Maks' left hand. RP 830, 836, 838. Dr. Fino found no gunpowder stippling and no soot on the body; therefore she was unable to form any opinion regarding the distance between Maks and the gun when the gun was fired. RP 833.

She opined that the bullet first passed through Maks' head and then through his left arm. RP 839. Dr. Fino said she was simply unable to explain the gunshot wound to Maks' left finger:

> And, then, somehow this left finger is also involved in a gunshot wound injury. That could be from a separate discharge of the weapon. If there's only evidence of one discharge of the weapon, then somehow that finger has to fit into the wound path and I can't be sure how.

RP 839. Dr. Fino was also unable to say exactly what position Maks' body was in when the shot was fired. RP 841, 859.

Both Maks' blood and his vitreous fluid was tested for alcohol; his blood alcohol was measured at 0.28% and his vitreous fluid was measured at 0.34%. RP 845.[8] Dr. Fino testified that in order to produce these alcohol readings, assuming a "burn-off" rate of 0.02% per hour, Maks

[8] Dr. Fino said that the vitreous alcohol reading is generally a more accurate measure of the true blood alcohol reading at the time of death. RP 846. She agreed that Maks' actual blood alcohol level may have been even higher at the time of his death. RP 868.

would have had to have consumed somewhere between 14 and 17 "standard" drinks. RP 848.

2. Testimony of the defendant and defense witnesses

Oscar Alden, age 25 (age 23 at the time of the incident), testified at trial. RP 1059. He drove over to Sun Cove on Friday with his friend Ray Roberts. RP 1063. On Saturday, when hewent to his car to retrieve something from the trunk, he met Maks for the first time. RP 1070. Maks approached Alden from behind, tapped him on the shoulder and said, "You're the guy that sold me the bullets." RP 1071. Alden jumped and replied that no, he was not the guy that traded bullets to Maks in exchange for a bag of marijuana, that was another guy (Ray Roberts). RP 1071.

Alden, who has attention deficit disorder, was holding a prescription bottle of Adderall in his hand when Maks approached him. RP 1072-73. Maks said that he had heard that someone staying in the Wiseman house had some Adderall, and he asked Alden what he wanted in exchange for some of his pills. RP 1074. Alden replied that he did not want to trade anything for his Adderall, but Maks kept pressuring him. RP 1075.[9] Maks, who had a beer in his hand, flipped the cap of a beer bottle into the trunk of Alden's car, and then he apologized to Alden saying that was a rude thing to do. RP 1076. The bottle cap landed on top of Alden's open backpack. RP 1075. Maks reached inside the backpack, even though the bottle cap was on top of the pack and not inside it. RP 1076.

[9] Dane Meier also testified that Alden refused to give Maks any of his Adderall. RP 470.

Alden thought Maks was searching for his bottle of Adderall. RP 1076. Maks retrieved the bottle cap and put it in his pocket. RP 1077.

The next time Alden saw Maks was around 10 p.m. when the group was leaving Sun Cove to go into Chelan. RP 1079. Maks tapped on the window of Alden's car and asked if he could get a ride in Alden's car. RP 1081. Alden told him that he was a stranger and he did not feel comfortable giving him a ride. RP 1082. Maks ended up getting a ride with Eric Hansen. RP 629.

Arriving in Chelan Alden went into the Tin Lizzie bar along with the rest of the Wiseman group. RP 1083. Since Alden was a designated driver, he had only one drink. RP 1085. Shortly before leaving the bar, Maks asked Alden if Victoria Lincoln was his girlfriend and Alden said she was not. RP 1094.

When Alden got back to the Wiseman house he went to sleep in a chair. RP 1092, 1096. He woke up sometime later because Maks was in the room and he was yelling, "You guys left me in Chelan, you motherfuckers." RP 1097, 1099. Maks also complained that the group had several women and Maks "just want[ed] to skull fuck one for now." RP 1102. Maks turned over the chair that Alden was in and then asked Alden, "What are you staring at fat boy?" RP 1103. Then he punched Alden in the stomach saying, "Fuck you fat boy, I'm going to chop off your dick and feed it to my dog." RP 1103.

Alden saw that Maks had some black colored object with him and saw him tuck it into his back pocket. RP 1105. Alden thought it might be

a large knife. RP 1106. Maks kept repeating that he was going to push everyone off the deck of the house. RP 1107. Maks "said he was going to kill us all one by one and his only problem was deciding whether he was going to kill us from fattest to skinniest or skinniest to fattest." RP 1108. Alden heard one of the women say that the cops had been called and were on their way. RP 1109. Maks said he'd take care of the police. RP 1113. Alden also heard a woman scream, "Oh my god, he has a gun." RP 1109.

After Meier and Roberts finally managed to escort Maks out of the house, Alden heard yelling from outside. RP 1114. Alden recognized Maks' voice and he thought that Maks still had a gun. RP 1116.[10]

Alden heard Roberts yelling, "Oscar, get your gun." RP 1118. He saw Maks fighting with Roberts and anothrer person whom he thought was Jordan Court; he thought they were wrestling with Maks over possession of Maks' gun. RP 1119. Actually it was Roberts and Meier – not Roberts and Court – who were fighting with Maks. RP 1127, 1155. Alden was afraid and felt that he had to protect his friends. RP 1128.

Alden ran to his car and retrieved his pistol from it. RP 1120. As he walked back to where he'd seen Roberts and Maks fighting, he chambered a round. RP 1125. Walking past Meier's parked car, Alden saw that Maks had somehow broken free from Roberts. RP 1130. Maks

[10] The parties stipulated that earlier in the evening Maks had been in possession of a pistol. The following stipulation was read to the jury during the defendant's case: "That on the evening if June 8, 2013 at approximately 9:30 p.m., Tom Maks left the residence of a friend and had in his possession his .45 caliber 1911 semi-automatic pistol." RP 1058; CP 286. A copy of the stipulation is attached as Appendix B.

then made a sudden movement towards Alden and Alden tensed up and shot him. RP 1130. Alden said, "I saw him break free and come at me, sir." RP 1155. He described Maks' sudden movement as "like a football player lunging to tackle me." RP 1130. He thought one of Maks' arms may have been raised as Maks lunged forward. RP 1181. Alden also thought Maks had his gun in his hand, and that if he didn't act Maks was going to shoot him and kill him. RP 1130, 1186. Alden was also concerned that Maks might shoot his friends. RP 1130. Alden said he had "never been so scared in [his] life." RP 1131. He fired his gun because he was scared that he might die. RP 1176. Alden testified, "I fired because I was afraid he was going to kill me." RP 1200.[11]

Alden said he did not aim the gun when he fired. RP 1131. He said it was too dark to aim. RP 1131. Because it happened so quickly, Alden was not aware that Maks was dressed only in his boxer shorts until after he had shot him. RP 1163. Although Alden admitted intentionally shooting the gun, he never said that he intended to kill Maks. RP 1202. But he did acknowledge that "when you shoot a gun at a human being that one of the likely results is death." RP 1168-69.

Alden admitted that after he got his gun from his car and headed back towards Roberts and Maks, he was running with his finger in the trigger. RP 1146. He conceded that that probably wasn't a good idea and

[11] The police obtained a search warrant and searched Maks' house, but they never found Maks' gun. RP 246. They did find ammunition for a pistol inside Maks' house. RP 247.

after the incident he told a detective that it wasn't a good idea to be shooting in the dark. RP 1164, 1167.

Dr. John Butt, formerly the Chief Medical Examiner for Nova Scotia and for Alberta, testified regarding the autopsy of Tom Maks. RP 1307, 1309. He agreed with Dr. Fino that the first wound caused by the bullet that Alden fired was the head wound. RP 1326. But in contrast to Dr. Fino, who was completely unable to explain the wound to the finger, Dr. Butt opined that after exiting the head the bullet next struck and passed through the finger. RP 1329. According to Dr. Butt, it was simply anatomically impossible for the bullet to have gone through the upper arm first and through the finger after that. RP 1329. "You can't put your [left] hand behind your left arm, it's not possible." RP 1329. Therefore, Dr. Butt concluded that Maks had his arm up and in front of him at the time the bullet struck him. RP 1330.

The State presented a photograph of Maks taken after he was shot which shows Maks' body slumped over his knees. The State argued that the photograph showed the position that Maks was in immediately after he was shot, but Alden denied this stating that initially after he was shot Maks fell forward on the ground and that his body was stretched out flat. RP 1151. The inference was that after Maks fell flat on his stomach he then drew his knees up under him and died in the position depicted in the photograph. The same photograph was shown to Dr. Butt. Dr. Butt testified that Maks "certainly wasn't killed in that position," and that Maks had his hand up when he was shot. RP 1332. The State did not offer any

rebuttal testimony to dispute the testimony of Dr. Butt.

Marty Hayes, the President of the Firearms Academy of Seattle and a former police officer, was the defendant's firearms expert. RP 1212, 1216-18. Hayes testified that in his opinion when Alden fired his gun he was somewhere between 3 to 6 feet away from Maks, and Maks had his left hand raised up in the air. RP 1229, 1243. Although the prosecution contended that Alden's gun was a mere six inches from Maks' head when it was fired, Hayes testified that that was "virtually impossible" because there was no gunpowder residue found on Maks. RP 1285.

Looking at a photo of the position that Maks was in when police arrived and found his body, Hayes said that it *was* possible that Maks was lunging towards Alden, and that he was rising and was bringing his arm up when he was shot. RP 1278, 1287, 1289.

Hayes agreed with Dr. Butt (1) that the bullet went through Maks' head first, through his hand second, and lastly through his arm; and (2) that it was physically impossible for Maks to have been in the position depicted in the photograph (the prosecution referred to it as "the Muslim position") when he was shot. RP 1244, 1288.

3. The "To-Convict" Instruction and the Separate Instruction On Self-Defense (Justifiability).

Instruction No. 7 informed the jury that in order "[t]o convict the defendant of the crime of Murder in the Second Degree" the State was required to prove each of the following three elements beyond a reasonable doubt:

(1) That on or about June 9, 2013, the defendant acted with intent to cause the death of Tom Maks;

(2) That Tom Maks died as a result of defendant's acts; and

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

CP 313. Instruction No. 7 made no reference to the element of the absence of self-defense (or to the absence of justification).

Instruction No. 15 informed the jury of the "defense" of justifiability. (Copy attached as Appendix C). It stated, "It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction." CP 321. It further explained that "homicide is justifiable when committed in the lawful defense of the slayer" and in the last paragraph it stated that the prosecution carried "the burden of proving beyond a reasonable doubt that the homicide was not justifiable." CP 321.

4. <u>Jury instructions on considering the lesser included offense of manslaughter and the judge's response to the jury's question</u>.

The jurors were instructed on Murder 2° (Instruction Nos. 6-7), Manslaughter 1° (Nos. 9-10), and Manslaughter 2° (Nos. 12-13). CP 312-13, 315-16, 318-19. In Instruction Nos. 19 and 20 they were also instructed about the order in which they should consider these different offenses. No. 19 told the jurors what to do if they were not satisfied that Alden was guilty of Murder 2° as charged in Count I:

> The defendant is charged in Count I with ***Murder in the Second Degree. If,*** after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is

guilty, ***then*** you will consider whether the defendant is guilty of the lesser crime of ***Manslaughter in the Second Degree.***

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

CP 325 (emphasis added).

Thus, this instruction told the jurors that if they could not find Alden guilty of Murder 2° they should *skip over Manslaughter 1°* and go directly to Manslaughter 2° in order to consider whether that lesser offense had been proved. Neither party objected to this Instruction. An Appendix to the Washington Pattern Jury Instructions for Criminal Cases includes Illustrative Sets of Jury Instructions. One of those sets contains a model jury instruction that shows how a jury should be instructed when a defendant is charged with Murder 2° and there is evidence from which a jury could find either Manslaughter 1° or Manslaughter 2°. 11A Washington Practice, WPIC Criminal at 814 (ed. 2008). The WPIC model instruction refers to *both* lesser, and does *not* skip over Manslaughter 1 as Instruction 19 did in this case.[12]

Instruction No. 19 was followed by No. 20 which told the jurors what to do if they were not satisfied that Alden was guilty of Manslaughter 1° as charged in Count II:

The defendant is charged in Count II with ***Manslaughter in the***

[12] The model instruction tells the jury that if it is not satisfied beyond a reasonable doubt that the defendant is guilty of Murder 2°, "then you will consider whether the defendant is guilty of the lesser crimes of manslaughter in the first degree and manslaughter in the second degree." A copy of the WPIC's illustrative instruction is set out in Appendix D to this brief.

> ***First Degree.*** ***If***, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, ***then*** you will consider whether the defendant is guilty of the lesser ***crimes*** of ***Manslaughter in the Second Degree.***
>
> When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

CP 326 (emphasis added).

No one objected to this Instruction. No one noticed that the instruction referred to lesser "crimes" – in the plural – instead of to the lesser "crime" – in the singular, given that only one lesser crime (Manslaughter 2°) was mentioned.

The jurors were given three general verdict forms, A, B and C, corresponding to Murder 2°, Manslaughter 1°, and Manslaughter 2°.[13] CP 328. Instruction No. 22, the upon retiring" instruction, directed the jurors not to consider Manslaughter 2° if they found Alden guilty of Murder 2°; not to consider Manslaughter 2° if they found Alden guilty of Manslaughter 1°; and to consider Manslaughter 2 if they found Alden not guilty of Murder 2° and Manslaughter 1°. CP 328-29.

After deliberating for roughly 3-1/2 hours (from 12:22:58 to 4:00 p.m.) the jury foreman sent the following question to the court:

> We are confused on the charging decisions we are to make. Is the defendant charged with both 2nd degree murder and 1st degree manslaughter. Do we need to convict on both counts?

CP 302.

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[13] They were also given two special verdict forms to use when deciding whether the defendant was armed with a firearm, one for each count.

After conferring with counsel for both parties, the trial judge gave the following response to the jury:

> The defendant is charged with both Murder in the Second Degree and Manslaughter in the First Degree. ***You can find him*** not guilty of either or both and/or ***guilty of*** either or ***both***.

CP 302 (emphasis added). Neither party objected to this response. RP 1492. Forty minutes after receiving this response the jurors returned their verdicts of guilty on both counts. CP 341.

5. <u>Recognition of the Double Jeopardy violation and correction of that error at the outset of the sentencing hearing</u>.

When the jurors asked if they "need[ed] to convict [Alden] on both counts," the answer that the trial judge gave was partially correct and partially incorrect. It was accurate to tell the jurors that they could acquit him of both. It was also accurate to tell them that they could convict him of one charge but not the other. But it was ***in***accurate to tell the jurors that they could convict him of both. Indeed, as both the defense attorney and the prosecutor belatedly realized and acknowledged, double jeopardy *prohibited* convicting Alden of both Murder 2° and Manslaughter 1°.

In *State v. Schwab*, 98 Wn. App. 179, 988 P.2d 1045 (1999), this Court found a double jeopardy violation in this same situation:

> We conclude that convictions for both second degree felony murder and first degree manslaughter for a single homicide violate state and federal constitutional guarantees against double jeopardy. Schwab's argument based on the disjunctive definition of homicide is persuasive: one killing equals one homicide; one unlawful homicide equals *either* murder, homicide by abuse, *or* manslaughter. From this we find that the legislature did not intend to provide multiple punishment for a single homicide.

Schwab, 98 Wn. App. at 188-189 (italics in original). This Court then vacated Schwab's conviction for first degree manslaughter.[14]

In the present case, the State chose to prosecute one crime – one homicide – as if Alden had committed two separate crimes. *Initially* the prosecution identified the two crimes as alternatives, thus acknowledging that a jury could *not* convict Alden of both. There is nothing wrong with prosecuting two charges as alternatives.[15] But when the State filed the Second Amended Information and eliminated the language charging the two counts as alternatives. The case was then tried and the jury was instructed on the elements of Murder 2° and Manslaughter 1° as if they were two independent offenses. This left the jury confused as to how the killing of one person could constitute two crimes, and so they asked the trial court whether they "need[ed] to convict" on both charges.

Since Manslaughter 1° is a lesser included offense within Murder 2°, the jury should have been instructed that it was ***forbidden*** to find the defendant guilty of both offenses. Instead, in direct conflict with *Turner* and *Schwab*, the jury was erroneously instructed that it ***was permissible*** to

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[14] The prohibition against multiple punishments for the same offense prohibits more than just a sentence. "[E]ven a conviction alone, without an accompanying sentence, can constitute 'punishment' sufficient to trigger double jeopardy protection." *State v. Turner*, 169 Wn.2d 448, 454-55, 238 P.3d 461 (2010). *Accord State v. Womac,* 160 Wn.2d 643, 648 160 P.3d 40 (2007). Similarly, even if a court imposes concurrent sentences, it still violates double jeopardy to convict the defendant of two charges if they are in fact but a single offense. *State v. Calle,* 125 Wn.2d 769, 775, 888 P.2d 155 (1995).

[15] *See, e.g., State v. Bowerman,* 115 Wn.2d 794, 800, 802 P.2d 116 (1990) (charging aggravated premediated murder and felony murder as alternatives in the single count was permissible and proper); *State v. Trujillo*, 112 Wn. App. 390, 409, 49 P.3d 935 (2002) (permissible to charge "first degree assault, or, alternatively, attempted murder").

find Alden guilty of both offenses, and that is exactly what the jury did.

Belatedly realizing that a double jeopardy violation had been committed, the parties agreed that the double jeopardy violation could be cured by dismissing the charge of Manslaughter 1° and the trial judge did just that. But as noted in Argument Section A, the dismissal order did *not* cure the jury unanimity problem that the trial judge exacerbated when he erroneously answered the jury's inquiry.

6. Refusal to make findings regarding mitigating factors because that would be offensive to the victim's family and to the jury.

At the sentencing hearing Alden's counsel argued that two statutory mitigating factors were clearly present in this case:

> We believe that under two of the, mitigating circumstances, which are found in the, in the statute, first is the fact that, as this first mitigating circumstances [sic], ["]to a significant degree the victim was an initiator, willing participant, aggressor or provoker of the incident.["] If that isn't true in this case, there is not a case that I can imagine where that would be more fitting. . . .
>
> Next, the second mitigating circumstance is that . . . ["]the Defendant committed the crime under duress, coercion, threat or compulsion, while insufficient to constitute a complete defense, but which significantly affected his or her conduct.["] Both of those fit. Of course the first one I think is, is right on with all fours in with the facts of this case, and we are asking, our recommendation that my client be sentenced to four years in the institution, of course then to that will be added five years or 60 months for the gun enhancement.

RP 1554-56 (emphasis added).

The mother of the deceased spoke at the sentencing hearing, and asked the judge *not* to decide "that Tom's life is worth less than the maximum time allowed by the State." RP 1525. The judge said he could

not impose a sentence below the range because that would be "offensive" to Maks' family, and to the jury:

> [T]he concern that the Court has is that sentencing Mr. Alden, no matter how or what kind of life Mr. Alden has led up to this particular point, ***sentencing him to below the standard sentencing range would rightfully be offensive to Mr. Maks' parents and family and friends, and clearly his daughters. I think sentencing Mr. Alden below the standard range would be offensive to the jury's struggle in this particular matter.***

RP 1563 (emphasis added).

Additional facts which pertain to those assignments of error which involve evidentiary rulings are presented in the Argument sections B & C which deal with those specific assignments of error.

V. ARGUMENT

A. Alden Was Denied The Right to Be Assured That Any Jury Verdict Would Be Unanimous. When Answering the Jurors' Inquiry The Trial Judge Did Not Explain That In Order to Convict They Had to Be Unanimous As to *Which* One of The Two Charged Crimes Alden Committed.

1. If Some Jurors Believed The State Had Proved an Intentional Killing While Others Believed It Had Proved an Unintentional But Reckless Killing, Then The Right to a Unanimous Verdict Was Violated by Conviction for Murder 2°.

The trial judge erroneously told the jurors that one of their options was to find Alden guilty of *both* intentional Murder 2° and unintentional Manslaughter 1°. CP 302. But it would be nonsensical for one individual juror to find Alden guilty of *both* Murder 2° and Manslaughter 1°, because murder is an intentional killing and manslaughter is an ***un***intentional killing. Since one person cannot simultaneously find that Alden killed

both intentionally and unintentionally, the judge must have been using the pronoun "you" as a way of addressing the entire jury as a collective body.

But this raises unsolvable unanimity problems because it is impossible to know whether all 12 jurors were convinced that Alden intentionally killed Maks. Alden has a constitutional right to a unanimous jury verdict. *State v. Lamar,* 180 Wn.2d 576, 583, 327 P.3d 46 (2014); *State v. Stephens*, 98 Wn.2d 186, 190, 607 P.2d 304 (1980). If fewer than 12 jurors were convinced that he killed intentionally, then Alden's conviction for Murder 2° is unconstitutional and cannot stand.

Suppose 6 jurors were persuaded Alden killed intentionally, and 6 others were not, but were persuaded that he killed recklessly. Since a person who acts intentionally is deemed to have also acted recklessly, and since the jury was so instructed (Instruction No. 11)[16], this means that all 12 jurors unanimously found all the necessary elements for the lesser offense of Manslaughter 1°. But under this scenario, since *fewer* than all 12 found that Alden killed intentionally, the jurors *failed* to reach a unanimous verdict that Alden was guilty of Murder 2°. *Compare Stephens*, 98 Wn.2d at 189-90;[17] *State v. Kitchen*, 110 Wn.2d 403, 412,

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[16] "When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally as to that result." CP 317.

[17] "The State charged Stephens with one count of assault against Heieck and Jahnke. Instruction No. 6A stated ... that the jury must find "the defendant knowingly assaulted Richard Heieck or Norman Jahnke." ... Defense counsel objected to instruction No. 6A as permitting a nonunanimous jury verdict. Counsel pointed out that instruction No. 1 set forth the verbatim text of the amended information charging Stephens with one count of assault against Heieck and Jahnke. ***The Court of Appeals found the instruction to be***

(Footnote continued next page)

756 P.2d 105 (1988).[18]

There is a very real possibility that this happened in this case. It is *not* incumbent upon Alden to establish that this *did* happen. On the contrary, it *is* incumbent upon the State to prove that this did *not* happen. "In a criminal case we must be certain that the verdict is unanimous." *State v. Badda*, 63 Wn.2d 176, 182-83, 385 P.2d 859 (1963) quoted in *Lamar*, 180 Wn.2d at 588.

In *State v. Ashcraft*, 71 Wn. App. 444, 859 P.2d 60 (1993), after deliberations had commenced one juror became unable to continue and so the trial judge replaced him with an alternate juror. But the record was unclear as to whether the jurors had to disregard all prior deliberations and begin their deliberations anew. Without such an instruction, the right to a unanimous jury verdict would be unprotected. After the alternate joined the jury, jury deliberations resumed and eventually the jury found the defendant guilty. The State argued that because the record did not affirmatively show that such an instruction was *not* given, Ashcraft could not prove that his right to a unanimous jury verdict was violated. But the Court *rejected* this argument, holding that it was not his burden to show that his right to jury unanimity was violated; it was the State's burden to prove that the right to jury unanimity was protected:

"impermissible" because it allowed conviction if, e. g., six jurors believed Stephens assaulted Jahnke and six believed he assaulted Heieck. We agree."

[18] The Court noted that some jurors may have decided to vote to convict based on an act that occurred before school in a trailer and other jurors may have rested their verdict on an act that allegedly occurred in a shower.

> [W]e fully agree with the appellant that it was reversible error of constitutional magnitude to fail to instruct the reconstituted jury on the record that it must disregard all prior deliberations and begin deliberations anew. We reject the State's contention that because the record does not affirmatively reflect that the jury was *not* so reinstructed, appellant has failed to demonstrate a reasonable possibility of prejudice. Such is not the proper test. An appellate court must be able to determine *from the record* that jury unanimity has been preserved.

Ashcraft, 71 Wn. App. at 465, citing *Badda*, 63 Wn.2d at 181-83.[19]

2. <u>Failure to assure unanimity is manifest constitutional error</u>.

Appellate courts "must be certain that the verdict [in a criminal case] is unanimous." *Badda*, 63 Wn.2d at 183, quoted in *Lamar*, 180 Wn.2d at 588. *Lamar* recently reaffirmed the principle that even if a jury unanimity claim was not raised in the trial court, it can be raised for the first time on appeal because the failure to provide certainty that the right to a unanimous verdict was honored "is manifest error affecting the constitutional rights to a jury trial and a unanimous verdict. This conclusion is consistent with the past recognition that jury instructions that fail to require a unanimous verdict constitute manifest error affecting a constitutional right." *Lamar*, 180 Wn.2d at 586. Washington courts have consistently considered claims of violation of the right to a unanimous jury verdict which were raised for the first time on appeal. *See, e.g.*, *State*

[19] Thus, although it is ***not necessary that a criminal appellant make such a showing, in the present case*** the record ***does*** affirmatively show that the jury was ***not*** reinstructed on the need for jury unanimity after the trial judge erroneously told the jurors that they could convict Alden of both Murder 2 and Manslaughter 1.

v. Kitchen, 46 Wn. App. 232, 234, 730 P.2d 103 (1986),[20] *State v. O'Hara,* 167 Wn.2d 91, 100-101, 217 P.3d 756 (2009);[21] *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990) (issue considered despite defendant's failure to request unanimity instruction).

3. Here, as in *State v. Russell*, it is impossible to know whether the jury unanimously agreed that the defendant was guilty of intentional second degree murder.

This case presents the same type of "unsolvable" jury unanimity problem as that presented in *State v. Russell*, 101 Wn.2d 349, 678 P.2d 332 (1984). There the defendant was charged with intentional second degree murder, but on the day set for trial the State was permitted to amend the information to charge both *intentional* Murder 2° and *unintentional* Felony Murder 2° based upon a second degree assault. The jury found Russell guilty as charged. Although the jurors were instructed that they must be unanimous as to which alternative form of Murder 2° they found, "[u]nfortunately, the verdict form supplied to the jury did not distinguish between second degree felony murder and intentional second degree murder." *Id.* at 354. The jurors simply returned a verdict form that stated Russell was guilty of Murder 2°.

The Supreme Court reversed Russell's conviction for Murder 2°

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[20] In *Kitchen* the jury unanimity issue was raised for the first time in the appellant's reply brief. And yet the Court of Appeals considered the issue because it was manifest error affecting a constitutional right and the Supreme Court affirmed, and reversed Kitchen's conviction. *State v. Kitchen*, 110 Wn.2d 403, 412, 756 P.2d 105 (1988).

[21] "Jury instructional errors that we have held constituted manifest constitutional error include: . . . failing to require a unanimous verdict . . . ."

because it found that the verdict form used "makes it impossible to know whether the jury returned a guilty verdict on intentional second degree murder or the 'alternative' charge of second degree felony murder." *Id.* The verdict form created "an insoluble problem." *Id.* It was simply "impossible to know" whether the jurors unanimously decided that Russell had committed intentional murder or an unintentional felony murder. *Id.*

Russell is directly on point. Here, as in *Russell*, the jury was given two contradictory alternatives. They could convict Alden of intentional Murder2°, or they could convict him of unintentional Manslaughter 1°. When the jurors expressed confusion as to what to do with these contradictory charges, the trial judge expressly told them they could convict Alden of *both*, even though it is impossible for a killing to be both intentional and unintentional at the same time. To make matters worse, when this incorrect supplemental instruction was given the jurors were *not* told that they had to unanimously agree that Alden killed intentionally in order to convict him of Murder 2°. Nor were they told that they could not convict him of both murder and manslaughter if some thought he killed recklessly but not intentionally, and others thought he killed intentionally. Here, as in *Russell*, the conviction for Murder 2° must be set aside.

4. Nothing on the verdict forms themselves instructed the jury that they had to be unanimous.

The jury returned four verdict forms. CP 334-337. There was no language on any of those forms that mentioned the requirement of jury

unanimity.[22] Two of Alden's proposed verdict forms *did* specifically refer to jury unanimity.[23] If the trial judge had used the defendant's proposed jury verdict forms then the jury would have seen right on the verdict form for Manslaughter 1 that they should not be filling out that form if they were in unanimous agreement that Murder 2° had been proved. But the trial judge didn't use the defendant's proposed verdict forms. Thus, the verdict form that convicts Alden of Murder 2° merely states, "We the jury, find the defendant, OSCAR A. ALDEN Guilty of the Crime of Murder in the Second Degree as charged in Count 1 of the Information." CP 334.

5. The Jury Poll In This Case, Like the Jury Poll in *Lamar*, Does Not Provide Adequate Assurance That the Jurors Unanimously Agreed That Alden Was Guilty of Murder 2°.

Frequently when a jury is polled and all twelve jurors respond that the jury's verdict is also their individual verdict, the polling makes it clear that the right to a unanimous jury verdict was scrupulously honored. This is particularly true in cases where there is only one defendant on trial and he is charged with only one offense. *See, e.g., State v. Mickens*, 161 Wash 83, 87, 377 P.2d 240 (1962) (dicta). But polling does not always provide assurance that jury unanimity was obtained. As the Court noted in *Badda,*

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[22] None of the prosecution's proposed verdict forms contained any language about jury unanimity either. CP 215-218.

[23] Alden's proposed verdict forms for Manslaughter 1° stated: "We the jury having found the defendant OSCAR A. ALDEN, not guilty of Murder in the Second Degree as charged in Count 1, ***or being unable to unanimously agree*** as to that charge, find the defendant _____ of the lesser included crime of Manslaughter in the First Degree." CP 239. Similarly, Alden's proposed verdict form for Manslaughter 2° referred to the jury "being unable to unanimously agree" on the charge of Manslaughter 1°. CP 240.

when there is more than one count, and more than one verdict form, polling will not necessarily provide the necessary assurance:

> ***That the poll of the jury in the Mickens case***, *supra*, showed the verdict to be unanimous could confidently be stated, for it ***applied to one defendant charged with a solitary count of second degree burglary***. But in the instant case, we have the clerk's minutes describing the poll of the jury covering two defendants, each charged with two counts of robbery, and two separate special verdicts returned on the question of the employment of a deadly weapon. Thus, ***the poll of the jury possibly encompassed six separate findings***, all embodied in the clerk's meager minutes, that the poll showed all twelve jurors announced ***it*** was their individual verdict and the verdict of the jury.
>
> ***This case involves multiple defendants, multiple counts and special verdicts.*** Under these circumstances, where the jury were never told that the concurrence of all twelve of them was essential to a verdict, and ***the record does not disclose the questions asked and the answers given in the poll of the jury,*** but simply the clerk's notation that it was unanimous, how can a court of review rule with the same degree of confidence that the clerk's minutes show a unanimous verdict? ***In a criminal case we must be certain that the verdict is unanimous; in Mickens we were; here we are not.***

Badda, 63 Wn.2d at 182-83 (emphasis added).

Most recently in *Lamar* the Supreme Court reaffirmed *Badda* and again held that despite the fact that the jury was polled, the requisite certainty that the jury returned a unanimous guilty verdict was lacking and therefore the defendant's conviction had to be reversed. Like *Mickens* there was only one defendant in *Lamar*. But like *Badda* the defendant was charged with more than one offense. Lamar was charged with one count of rape of a child and one count of child molestation. 180 Wn.2d at 579. The jury was instructed that it had a duty to deliberate in an effort to reach

a unanimous verdict and that a juror could not surrender his honest belief or change his mind just for the purpose of reaching a verdict. *Id.* at 580. The jury deliberated for 45 minutes on a Friday afternoon, and then on Monday one of the jurors called the court to say he was too sick to continue to serve on the jury. The trial judge replaced the ill juror with an alternate, told the other 11 jurors to bring the alternate "up to speed," and the jurors then resumed deliberating. But the judge failed to reinstruct the jury on the need to be unanimous in order to return a verdict:

> ***The court did not reinstruct the jurors on their duty to deliberate together in an effort to reach unanimity*** after considering the evidence impartially with the other jurors; nor did the court instruct the jury to disregard prior deliberations and begin anew.

Lamar, 180 Wn.2d at 581 (emphasis added).

Four hours later the jury returned with its verdicts, acquitting Lamar of rape of a child and convicting him of child molestation. *Id.* The jury was then polled. Each juror answered "yes" when asked if the verdicts were "how you voted on both of these counts." 3 VRP at 432-33. *Lamar*, 180 Wn.2d at 581. The Court held that the polling did *not* establish that the right to a unanimous jury verdict was honored. Polling did not rule out the possibility that the 11 jurors simply brought the alternate "up to speed" on what had already been decided on Friday afternoon, and thus left open the possibility that the alternate disagreed with a determination that had been made prior to joining the jury.[24]

[24] For example, the 11 jurors plus the 1 sick juror later replaced may have all agreed that the defendant touched the child for the purpose of achieving sexual gratification – an element of child molestation. But 1 or 2 of the original 12 may not have been convinced

(Footnote continued next page)

In the present case, the uncertainty as to what the jury poll actually showed is even greater than it was in *Lamar,* because despite the fact that the jurors completed and returned *four* verdict forms, when he polled the jury the trial judge phrased his question so as to inquire whether the "verdict" – singular – was the "verdict" of the jury and the "verdict" of the individual juror. Alden ordered a supplemental verbatim report of proceedings so as to obtain a transcript of the exact words spoken when the jury was polled. That transcript confirms that the trial judge *never* used the plural form of the noun. Instead, 24 times the judge inquired about the "verdict," always using the singular form of the noun.[25]

When jurors are returning *four* verdicts, asking about *one verdict* is not helpful in clarifying whether they are unanimous in their agreement about *each* of the four verdicts. On the contrary, the way in which the trial judge worded his polling questions actually ***mis***informed the jury that they were actually really only returning one verdict. If one (or more) of the jurors felt that the manslaughter 1 verdict was "his" (or "her") verdict, but

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that penetration – an element of rape of a child – had been proved. The alternate may have *disagreed* with the determination made before he replaced the sick juror. The alternate may *not* have been convinced that the defendant acted with the intent to achieve sexual gratification. But since that determination had already been made, the alternate may have simply gone along with that "prior" jury determination. Then the reconstituted jury may have decided that it could not agree about penetration, but since it had "already" decided the sexual gratification element had been proved, it returned a verdict of guilty of child molestation. If this is what occurred – and no one could be confident that it did not occur – then only 11 of the 12 jurors on the jury that found the defendant guilty of child molestation actually agreed that that charge had been proved.

[25] The transcript reads: "THE COURT: Juror number 1, is this your verdict? JUROR NO. 1: Yes. THE COURT: Is it the verdict of the entire jury? JUROR No. 1: Yes." RP 1581. This was repeated eleven more times. (See Appendix E attached).

that the murder 2 verdict was *not* "his" (or "her") verdict, it is unlikely that the juror would have answered "no" to either of the judge's questions. Given that the trial judge had specifically instructed the jurors that they could find Alden guilty of either charge, or of both, it is far more likely that the jurors would have interpreted the polling questions as asking them, "Is either and/or both of these verdicts your verdict?" Perhaps a particularly bright and bold juror might have realized that the judge's questions were ambiguous and might have responded to the judge's question with a question, such as:

> Well your Honor, which of the four verdicts are you referring to right now?

Or perhaps such a juror might have said,

> Well your Honor, the Manslaughter 1° verdict is my verdict, but the Murder 2° verdict is not.

But it is not their fault that the form of the judge's questions was ambiguous and seemingly asked if they agreed with one of the four verdicts. And it is not appellant Alden's fault either.

In sum, the trial judge consistently referred to the whole package of four verdicts as one verdict. Under these circumstances, the fact that all twelve jurors answered "yes" to each question doesn't provide any meaningful assurance that all twelve jurors felt the crime of intentional murder had been proved. Here, as in *Lamar* and *Badda* the defendant's conviction must be reversed because "[i]n a criminal case ***we must be certain that the verdict is unanimous,"*** and under the circumstances of this case no court can be. *Lamar*, 180 Wn.2d at 588 (emphasis added).

B. The Exclusion of Evidence That Maks Physically Attacked Two Women in the Hours Shortly Before his Death Was an Abuse of Discretion.

1. The State's motion in limine to exclude evidence of Maks' attacks on Flores and Tedders was granted.

Alden sought to present evidence regarding Maks' assaultive and aggressive conduct towards two women, April Tedders and Victoria Flores, which occurred earlier in the evening on the night of Maks' death. Alden's counsel described the evidence that the defense wanted to present in two separate briefs. CP 152-154; 163-64. Maks' assaultive conduct against Tedders took place sometime before 9:30 or 10 p.m., when Maks rode into Chelan with the young folks. RP 335. His assaultive conduct against Flores occurred somewhere between midnight and 1 a.m., after the young folks had left the Tin Lizzie bar and gone back to the Wiseman house. RP 375. Defense counsel summarized the evidence as follows:

> Mr. Maks was to be the guest of the Poush's for a bar-b-que. During the afternoon [Maks] made three trips to a local store/deli called the Cider Works. ... On the first trip he went to pick-up a tank of propane to be used at the bar-b-que.
>
> Witnesses at Cider Works described Mr. Maks as drunk and out of control. He had thrown a full propane tank at the store manager and threatened to "kneecap" her.
>
> Mr. Maks[']s second visit to the Cider Works was as the passenger of Hannah Poush, she had gone there to unlock the ice cream cabinet for Manager April Tedder. Hannah Poush told Ms. Tedder that Tom Maks was "Tom is so fucked up. Tom is so drunk." Ms. Tedder told Hannah about the incident a little earlier involving the propane tank. Ms. Tedder repeatedly begged Hannah, who was pregnant, not to ride in the car with Mr. Maks.
>
> His third visit, he came alone at 8:30-8:40 p.m., near closing time. He came in and began screaming at the top of his lungs, "Let[']s

> get fucking fucked-up at the Cider Works." At the time the store was packed full of families and children. At one point, Ms. Tedder had to insert herself between Mr. Maks and her younger co-worker Naomi, to protect her.
>
> After the manager talked him into leaving the store, she locked the door and kept all customers inside until she was sure Mr. Maks was gone.
>
> Mr. Maks rejoined the group of young people, who had decided to drive to a bar in Lake Chelan. They let Mr. Maks tag along. Mr. Alden was one of the designated drivers. Mr. Maks first purchased two rounds of expensive drinks, had some drinks at the Lake Chelan bar where the group had gone, and then wandered off to another bar. Witnesses at this other bar observed Mr. Maks engaging in highly inappropriate behavior, calling the female customers whores and the bar a whorehouse. Which resulted in Mr. Maks being ejected from the premises. As security attempted to remove Mr. Maks from the bar, he dropped to his knees and begged them to let him stay, offering them money. Once outside, Mr. Maks began ripping off his clothes. Police were called, but Mr. Maks had walked away before they arrived.

CP 152-54.

Relying on ER 401, 402 and 403, the State moved in limine to exclude this evidence on the grounds that it wasn't relevant, and/or that any probative value it had was outweighed by its prejudicial impact. CP 116. The prosecutor argued that since Alden was not present when Maks assaulted Tedders, or when he was abusive to Flores, his conduct towards these women could not have been in Alden's mind when he shot Maks later around 4 a.m. RP 100. Alden's counsel argued that Maks' aggressive and assaultive conduct during the hours leading up to his death all occurred "within a very brief period of time which culminated in [his] death" and under the case law applicable to the *res gestae* rule Alden

wanted to "show what actually happened so the jury can look at this entire event." RP 106, 108. After listening to argument, the trial judge granted the State's motion and excluded the evidence, reasoning that because Alden was unaware of Maks' confrontations with Tedders and Flores, these incidents were irrelevant to his claim of self-defense:

> Well, as I understand it, to the charges the defense will be self-defense in this matter. Self-defense is that ***prior violent incidents would be relevant to establish reasonable*** apprehension as an essential element of ***his self-defense claim, but only if it is shown that he knew of those incidents.***

RP 112 (emphasis added).[26]

The trial judge said that *he understood* that Alden's counsel was *not* claiming that the evidence was relevant to self-defense, and that he was only offering it under the *res gestae* exception to show how Maks was acting during the twelve hours prior to his death. Nevertheless the trial judge still excluded the evidence:

> ***I understand your position is not that it comes in in order to establish self-defense, but to show the jury, I guess, the entire of the day and what occurred under a res gestae***, and the Court's familiar with res gestae. . . . But I don't think that this is a case where res gestae is relevant to the jury determining what happened at the particular time and the particular incident that hit [sic] happened. ***Anything that Mr. Alden was aware of in relation to Mr. Mak[s], what he did or didn't do, and if that forms a basis for his self-defense, I think it's admissible, but things that he's not aware of I do not believe are admissible, so***

[26] The trial judge's comment evidences a fundamental misunderstanding of who bears the burden of proof on the issue of self-defense. It is well settled that a defendant does *not* bear the burden of "establishing" or proving that his self-defense claim is meritorious. On the contrary, the State bears the burden of proving the *absence* of self-defense beyond a reasonable doubt. *See State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983).

the Court would grant the motion.

RP 113 (emphasis added).

Later during the trial when Sarah Chase was called as a defense witness, the prosecutor asked that the jury be excused and then noted that in her statement to the investigating detective Chase said that she saw that "Maks was arguing with the bartender and that it was her impression that he was trying to get into a fight with the bartender . . ." RP 781-82. The prosecutor argued that the trial judge had already ruled that there would be no testimony about any acts of aggression committed by Maks that Alden did not see himself. RP 782. Defense counsel argued that what Chase saw was relevant to *her* state of mind when, later in the evening, she saw Maks had entered the Wiseman house and that he had a gun. RP 782-83. The trial judge again ruled that since Alden did not see Maks trying to get into a fight with the bartender, the evidence wasn't relevant to the issue of self-defense and therefore it was not admissible. RP 783.

2. Under the *res gestae* rule the defendant is entitled to give the jury the whole story of what transpired on the evening of Maks' death.

When a person commits a series of crimes in a brief period of time, *all* of those crimes are admissible under the *res gestae* doctrine. Usually the issue arises because the prosecution wants to present evidence of uncharged crimes committed by the defendant, and the defendant objects on the ground that admission of such evidence would violate ER 404(b)'s command that "[e]vidence of ***other*** crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show action in

conformity therewith." (Emphasis added). But beginning with *State v. Tharp*, 27 Wn. App. 198, 616 P.2d 693 (1980), *aff'd* 96 Wn.2d 591, 594, 637 P.2d 961 (1981), Washington courts have consistently held that when the uncharged crimes are part of a series of acts committed close in time to the charged act, the uncharged crimes are not "other" crimes because they are part of the same transaction, and thus they are properly admitted:

> The uncharged crimes were an unbroken sequence of incidents tied to Tharp, all of which were necessary to be placed before the jury in order to have ***the entire story of*** what transpired on ***that particular evening.*** Each crime was a link in the chain leading up to the murder and the flight therefrom. Each offense was a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.

(Emphasis added).[27]

3. *State v. Thompson* demonstrates that assaults and provocative acts committed earlier in the evening are relevant to show that Maks – not Alden -- was the aggressor that night.

In another murder case, *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584, *rev. denied*, 108 Wn.2d 1014 (1987), Division I held that the defendant's uncharged acts were properly admitted under the *res gestae* doctrine to show that the defendant was acting aggressively earlier in the

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[27] Similarly, in *State v. Lane*, 125 Wn.2d 825, 832, 889 P.2d 929 (1995), another murder case, the State was permitted to present evidence regarding uncharged criminal acts committed both prior to and after the killing. The Court reaffirmed the holding of *Tharp* that a defendant has no right to limit the prosecution to presenting an incomplete picture of the whole transaction: ""The jury was entitled to know the whole story. ***The defendant may not*** insulate himself by committing a string of connected offenses and thereafter ***force the prosecution to present a truncated or fragmentary version of the transaction*** by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character." *Id.* at 832, quoting *Tharp*, 27 Wn. App. at 205 (emphasis added).

evening. One witness testified that he observed Thompson leaving a bar yelling, "I'm going to kill the bastard" and brandishing a gun. *Id.* at 4. Another witness testified that Thompson pointed a gun at him and said he didn't like what the witness had just said. *Id.* "Both of these incidents testified to took place in the hour just prior to the death and injury of" the person Thompson shot and killed. *Id.*

Thompson argued that admission of the evidence was improper because it was character evidence barred by ER 404(b). But the Court rejected that argument, noting that the uncharged acts were part of a continuing course of action and they were relevant to show who was the aggressor that night:

> [T]he testimony [of the prosecution witnesses]. . . is relevant because it tends to contradict Thompson's testimony that his acts of shooting were in self-defense, because ***it showed a continuing course of provocative conduct during the course of an evening.***

Thompson, 47 Wn. App. at 11 (emphasis added). Similarly, 25 years later this Court followed *Thompson* and found no error in the admission of evidence that, on the night of the murder, the defendant was waving a gun around and stating that she could kill the victim. *State v. Grier*, 168 Wn. App. 635, 644, 278 P.3d 225 (2012) ("[T]his 'res gestae' evidence was relevant and admissible under ER 401 and 402 as part of the events leading up to and culminating in the murder.").

4. **Under the *res gestae* rule the prosecution may introduce evidence of earlier acts of the defendant to show that *the defendant was the aggressor* and that he was *not* acting in self-defense. But the rule applies to evidence offered by the defense as well. Evidence regarding acts of the victim are admissible to**

show that the *victim was the aggressor* and that the defendant *was* acting in self-defense.

The *res gestae* rule is equally applicable to the prosecution and the defense. There is nothing about the rule that says it applies only to acts of the defendant and not to acts of the victim. Evidence that the victim engaged in a series of aggressive and provocative acts which culminated in the defendant having to use force in self-defense is clearly relevant. Most of the time it is the State that offers evidence of the defendant's continuing course of conduct under the *res gestae* rule.[28] But some cases demonstrate that failure to allow the defendant to offer evidence of the victim's continuing course of conduct can be reversible error.

For example, in *State v. Creighton*, 330 Mo. 1176, 52 S.W.2d 556 (1932), in a murder trial the defendant contended that he shot and killed Coyne Hatton in self-defense. Creighton sought to present evidence "that a little more than half an hour before the shooting Hatton had been engaged in conversation with some of the young men" in the company of Hatton's girlfriend, and that Hatton "was drunk and quarreled with the young men, but the evidence was excluded." *Id.* at 1187. The prosecution argued – as the State did here in Alden's case – that the evidence was properly excluded because Creighton wasn't present and didn't witness Hatton's conduct, but the Missouri Supreme Court rejected this argument:

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[28] In addition to *Tharp, Lane, Thompson*, and *Grier, see, e.g., State v. Brown*, 132 Wn.2d 529, 570-76, 940 P.2d 546 (1997); *State v. Powell*, 126 Wn.2d 244, 263-64, 893 P.2d 615 (1995); *State v. Lillard*, 122 Wn. App. 422, 431-32, 93 P.3d 969 (2004); *State v. Hughes*, 118 Wn. App. 713, 77 P.3d 681 (2003);

> Appellant complains of the trial court's refusal to permit him to show that at and just before the homicide the deceased was drunk and in an ugly mood. Undoubtedly, if the deceased was intoxicated and belligerent at the time of the homicide, the appellant had a right to show it. ***If the same condition existed so shortly before that time as to affect his mental state when he encountered [Creighton], it would likewise be admissible.*** [Citations]. While it is true evidence of disconnected difficulties with third parties has been held incompetent in several cases, yet this rule cannot apply to proof of a mental condition which would continue down to the time of the event under investigation and enter thereinto. In what has just been said ***we refer, of course, to cases in which self-defense is an issue, and the question as to who was the probable aggressor becomes important.***

Creighton, 330 Mo. at 1198 (emphasis added). The Court reversed Creighton's murder conviction and ordered a new trial. *Id.* at 1200.

Other courts have come to the same conclusion as the Missouri Supreme Court. *See*, e.g., *State v. Waldron,* 71 W.Va. 1, 75 S.E. 558, 560-61 (1912)*; State v. Bierd*, 118 Iowa 474, 92 N.W. 694 (1902).

5. <u>The trial judge here made the same mistake that the trial judges made in *Waldron* and *Beird*. In a homicide case where the defendant is claiming self-defense, the evidence is relevant not because it shows what the defendant was thinking, but because it shows what the decedent did: it shows who was the aggressor</u>.

The trial judge in this case ruled that because there was no evidence that Alden knew about Maks' aggressive and assaultive conduct towards Tedders and Flores, the evidence was simply irrelevant. The trial judge stated that "***prior violent incidents*** [by Maks] ***would be relevant*** to establish apprehension as an essential element of [Alden's] self-defense claim, ***but only if it is shown that [Alden] knew of those incidents.*** RP 112 (emphasis added). "[B]ut things that he's not aware of I do not believe

are admissible, so the Court would grant the motion." RP 113.

This reasoning shows a fundamental misunderstanding of the relevance of the evidence. This reasoning simply fails to recognize the relevance of the evidence to the question of who was the first aggressor, which is a different factual question from whether the defendant had an objectively reasonable basis for using deadly force in self-defense. In *Waldron,* the West Virginia Supreme Court reversed a Murder 2° conviction because the defendant was not allowed to present evidence that shortly before he arrived on the scene, the deceased beat up a man named Hermanson. *Waldron,* 75 S.E. at 559. The State argued that since the decedent's assault against Hermanson was unknown to Waldron it was entirely irrelevant. *Id.* The trial judge accepted this argument and excluded the evidence of the assault on Hermanson. But the State Supreme Court reversed, holding that the assault was admissible under the *res gestae* rule, even though Waldron knew nothing about it.

> [W]hen self-defense is relied on, and where as in this case, there is evidence tending ***to show the deceased was the aggressor***, the dangerous character of deceased may be shown by the facts and circumstances attending the homicide, ***and so connected with it as to constitute a part of the res gestae***. . . .

Waldron, 75 S.E. at 560 (emphasis added).[29]

[29] The Court quoted a passage from *Wigmore on Evidence* stating that there was "much confusion on the subject" of whether the defendant had to show that he was aware of the specific violent act that the decedent committed shortly before the defendant encountered and killed him. Wigmore explained that this confusion was the result of the court's inability to distinguish between two separate uses of the evidence. In order to be relevant to the reasonableness of the defendant's fear of the decedent, the defendant *did* have to establish that he was aware of the decedent's prior violent act because someone told him about it. But in order to be relevant and admissible for the purpose of showing

(Footnote continued next page)

Thus, when the evidence of the victim's violent act is offered to show that the defendant's fear was objectively reasonable, to make the evidence relevant it must be shown that the defendant knew about the decedent's act. But when the evidence is offered to prove who was the first aggressor, it is relevant even though the defendant was unaware of it.

> ***[W]here*** self-defense is relied on and ***there is some evidence that [the] deceased was the first aggressor, and the question is what the deceased probably did do***, his quo animo, as evidenced by ***his recent acts*** of turbulence ***even towards a third person, so connected in time, place and circumstances with the homicide***, as to likely characterize the deceased's conduct towards the defendant ***ought***, on the principles stated by [Dean Wigmore] . . . ***to be received in evidence***, for the question is what [the] deceased probably did, not what [the] defendant probably thought [the] deceased was going to do.

Waldron, 75 S.E. at 560-61 (emphasis added). The *Waldron* Court said "the rule we approve is stated thus":

> ***The violent conduct of the deceased*** shortly preceding the homicide, ***though*** in the absence of and ***unknown to the accused, is admissible to*** show his [the decedent's] condition of mind and ***characterize his conduct during the fatal difficulty*** and by some courts is regarded as part of the res gestae.

Waldron, 75 S.E. at 560-61 (emphasis added).

The Iowa Supreme Court made exactly the same point when ruling that even the "uncommunicated threats or violent disposition of the deceased, not known to the defendant at the time of the affray, may be

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that the decedent was the first aggressor, the defendant did *not* have to show that he knew about the deceased's violent conduct. For that second purpose: ***"this additional element of communication is unnecessary***; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do." *Id.* at 560 (emphasis added).

shown," not for the purpose of showing that the defendant had reasonable grounds to be concerned about his own safety, but for the purpose of showing who was the first aggressor in the confrontation between the deceased and the defendant. *State v. Beird*, 118 Iowa 474, 92 N.W. 694, 696 (1902).[30] So long as the violent acts of the deceased were perpetrated in the period of time leading up to his confrontation with the defendant, they are part of the *res gestae* of the homicide with which the defendant has been charged. *Id.*[31]

Many other courts have adopted the same rule that on "the issue of who was the aggressor, it is irrelevant that the defendant did not know about the deceased's character." *United States v. Burks*, 470 F.2d 432, (D.C. Cir. 1972), (murder conviction reversed), citing *Evans v. United States,* 277 F.2d 354 (1960). *Accord United States v. Wiggins*, 93 U.S. 465, 467 (1876) (same);[32] *State v. McIver,* 125 N.C. 645, 34 S.E. 439 (1899) (same);[33] *Torres v. State,* 71 S.W.3d 758, 761-62

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[30] "***Evidence of such threats or disposition is admissible*** for defendant ***when the question is who was the aggressor in the affray***; the theory being that in case of uncertainty the jury may take such threats or violent and reckless disposition of the deceased into account, as tending to show that he, rather than the defendant, was the aggressor." *Id.* (emphasis added).

[31] "***[S]uch acts***, as a part of the course of conduct ***of the deceased immediately preceding the affray, and continued up to the time of the affray, would be a part of the res gestae*** with reference to the intention or disposition with which the affray was entered into by him."

[32] "Where the question is what was the deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was hostile to the defendant, *even though such threats were not communicated to the defendant.*" (Italics added).

[33] "The [defendant] proposed to ask the [prosecution] witness if the deceased did not exhibit this violent and vicious temper towards another of his [hired] hands that [same]

(Footnote continued next page)

(Tex.Crim.App.2002) (in murder trial it was error to exclude evidence of specific violent act deceased committed against a third person, remanded for harmless error analysis);[34] *Barnes v. Commonwealth*, 214 Va. 24, 197 S.E.2d 189, 190 (1973) (manslaughter conviction reversed);[35]

6. *Dicta* in Washington Cases recognizes the same rule.

In at least two cases Division Two has stated in dicta that when offered to prove that the victim was the first aggressor, the fact that the defendant did not know about the victim's violent character or conduct is irrelevant. In *State v. Callahan*, 87 Wn. App. 925, 943 P.2d 676 (1997) the defendant was convicted of Assault 2 for shooting Ben Manning. Callahan knew nothing about Manning before he shot him. *Id.* at 934. Although his conviction was reversed on other grounds, in dicta the court noted that although Manning's reputation for violence was not admissible to show that Callahan's fear of Manning was reasonable, it *was* admissible to show that Manning was the first aggressor even though Callahan had no knowledge of it. *Id.* Similarly, in *State v. Stepp*, 18 Wn. App. 304, 569 P.2d 1169 (1977), after reversing the defendant's murder conviction for instructional error, in dicta the Court noted that a victim's bad reputation

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morning, and beat him unmercifully. This was also excluded. In this we think there was error."

[34] "When a defendant claims that the deceased was the first aggressor, prior specific acts of violence relevant to the ultimate confrontation may be offered to show a deceased's state of mind, intent, or motive."

[35] "The Attorney General conceded before us that where an accused adduces evidence that he acted in self-defense, evidence of specific acts is admissible to show the character of the decedent for turbulence and violence, *even if the accused is unaware of such character.*" (Italics added).

for violence may be admissible, "even if unknown to the accused, to corroborate his claim that the other was the aggressor." *Id.* at 311.

7. **The trial judge abused his discretion because he applied the wrong law and reached the untenable conclusion that the evidence was not relevant.**

A trial judge abuses his discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A decision is based "on untenable grounds" or made "for untenable reasons" if it was reached by applying the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). Here the legal standard that the trial judge applied was simply the wrong standard. The trial judge believed that a condition of admissibility was that the defendant be able to show that he knew of the prior violent act of the deceased. In fact, the law is just the opposite: knowledge of the prior act of the victim is not required. On the contrary, the correct legal rule is that knowledge is *not* required in order to admit the evidence to show that the deceased was the first aggressor. Hence, there was a clear abuse of discretion.

8. **Here as in *Bierd*, *Creighton*, *Waldron* and *Burks*, the conviction for murder must be reversed.**

The erroneous exclusion of evidence of Maks' assault against Tedders and his attempt to pick a fight with the bartender deprived Alden of key pieces of what happened on the evening of June 9, 2013. To paraphrase *State v. Tharp* and *State v. Lane*:

> The jury was entitled to know the whole story. ***The [decedent] may not*** insulate himself by committing a string of connected offenses and thereafter ***force the [defendant] to present a truncated or fragmentary version of the transaction*** by arguing that evidence of other crimes is inadmissible because it only tends to show the [decedent's] bad character.

Lane, at 832, quoting *Tharp*, 27 Wn. App. at 205.

The most hotly disputed fact in the entire case is whether Maks lunged towards Alden and whether Alden fired in response to that lunge in order to protect himself. Alden testified that he lunged. RP 1130. Prosecution witnesses Meier said Maks did not lunge, but he acknowledged that Maks *was* moving, seemed to be standing up, and was moving his hands. RP 419, 420, 461. Dr. Butts said Maks had his hand up and in front of him when he was shot. RP 1330. The State's expert could not, and would not, provide any explanation at all for the wound to the hand. If the jury had heard that Maks had made an unprovoked physical attack on Ms. Teddders earlier in the evening, and that he had tried to pick a fight with the bartender at the bar he visited right before he went to the Wiseman house, there is a reasonable probability that one or more jurors would have voted to acquit Alden. In *Thompson* the Court said:

> Here, the testimony of the three witnesses was ***relevant to show the absence of self-defense by showing a continuing course of provocative conduct.*** Additionally, the testimony was relevant under the res gestae exception, because this conduct took place in between the time Thompson and his friends encountered [the victims] and the time of the shootings.

Thompson, 47 Wn. App. at 12 (emphasis added). The same is true here.

It was the State's burden to prove that Alden did *not* act in self-

defense. Thus, the State needed to prove that Maks – the man who had been inside the house with a gun just minutes earlier – did *not* suddenly lunge at Alden. The State argued to the jury that Maks wasn't doing anything when Alden shot him. Alden disputed this and the opinion of the defense pathologist tended to support Alden. The excluded evidence that earlier in the same evening Maks made an unprovoked attack on Tedders, and attempted to provoke a fight with Flores, would have supported Alden's testimony that Maks also committed an unprovoked attack against him, by lunging towards him right before Alden fired.

C. Excluding the Reputation Evidence was an Abuse of Discretion.

1. <u>There is no rule that friends of the defendant cannot comprise an adequate community for purposes of reputation testimony</u>.

On the first day of trial defense counsel advised the trial judge that the defense intended to present testimony regarding Alden's "reputation of being nonviolent or a peaceful type of person." RP 168. He explained that the defense witnesses were all people who "have known him for a long time" and they knew of his reputation as being a nonviolent person. RP 168.[36] All of the proposed defense reputation witnesses had been present at the Wiseman home at the time of Maks' death, they had all been interviewed by the investigating detective, and they all "told Detective Groseclose that he was a nonviolent person. RP 169. The trial judge

[36] Wiseman and Meier grew up with Alden and went to high school with him. RP 330, 369. Roberts had known Alden for eight years and went to high school with him since sophomore year. RP 491, 539. Lincoln had known Alden for five years. RP 548. Hansen met Alden in the 9th grade. RP 964.

commented that he was not sure that the defense had "an appropriate community" for reputation testimony, but postponed discussing the issue until the next day. RP 171. The next morning the trial judge stated that while the evidence was relevant, "I don't believe that his friends that he associates with, etcetera, constitutes a community." RP 184. Citing to *State v. Thach*, 126 Wn. App. 297, 106 P.3d 782 (2005), the judge said that a defendant's family did not constitute an adequate community for purposes of reputation testimony. RP 185.

Defense counsel responded that his proposed witnesses were "not family members"; they were instead friends of Alden who grew up with him, some of whom went to middle school or high school with him, and therefore they *did* constitute an appropriate community. RP 188. Although they did not "live together, they're not all on his block," nevertheless they were "the people who know him" and who knew of his reputation as a "quiet and a nonviolent person." RP 189-90. But the trial judge excluded the evidence ruling that the defendant's friends did not constitute an adequate community because "everybody has a friend":

> THE COURT: Candidly, Mr. Harrison, ***under your argument everybody gets to present character testimony*** when it's relevant, there's no reason to have a rule, there's no reason to discuss community ***because I presume everybody has a friend.***
>
> MR. HARRISON: Well, but this – The thing about it is we're talking about people that know my client –
>
> THE COURT: ***Everybody has a friend.***
>
> MR. HARRISON: well, everybody has a friend but that's – one person is not a community, but if a person –

THE COURT: Well, I suspect everybody has three or four friends.

MR. HARRISON: ***But not everybody has a reputation among those friends for truthfulness or for being peaceful or nonviolent or those sort of things. None of the other people have a reputation among their friends for being peaceful or nonviolent, or any*** – or violent, for that matter.

None of them have that. Only Oscar Alden because it is such a marked part of the person, and they, they know that and they've talked about it. He is the sort of quiet person of the group, he is the one who never raises his voice, he's the one that avoids any kind of conflict, and they all know it and they've talked about it. It is a community and they have discussed this among themselves. And, and they let the Detective Groseclose, know about that when he asked about it.

THE COURT: The Court's not going to allow it.

RP 191-92 (emphasis added).

2. <u>Evidence of a reputation for peacefulness is highly relevant when the defendant is charged with a crime which includes an element of specific intent</u>.

Under ER 405(a) evidence of a pertinent character trait of the accused is admissible when offered by the accused. Where intent is an essential element of an offense character evidence is admissible to support an inference that the defendant lacked that intent. *State v. Eakins*, 127 Wn.2d 490, 495, 902 P.2d 1236 (1995). Eakins was charged with second degree assault. One of the essential elements of that crime is the specific intent either to cause bodily harm or to create an apprehension of bodily harm. *Id.* at 496. In the present case, Alden was charged with Murder 2° and one of the elements of that crime is an intent to kill.

Eakins offered to present "evidence of peacefulness, [which,] if believed by the jury, would make it less probable he would intentionally

threaten another person with a deadly weapon . . ." *Id.* at 500. But the trial judge excluded Eakins' evidence. The Supreme Court held "[i]t was error for the trial court to refuse to admit Eakins' evidence as to his reputation for peacefulness," and ordered a new trial. *Id.* at 503.

The same is true here. Although Alden conceded the act (of pulling the trigger), he did not concede the essential element of acting with an intent to kill. It is reasonably possible that if the jury had known of Alden's reputation for peacefulness it would have concluded that he did not act with intent to kill, and thus would have acquitted him of Murder 2°.

3. <u>In *Land* the Supreme Court overruled *Swenson* and held that a defendant may offer evidence of his reputation in any group of people with whom he works, does business, or goes to school</u>.

State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963) held that testimony concerning a person's reputation had to be based on that person's reputation "in the community in which he or she resides," and that it could not be based on his reputation where he works. *State v. Land*, 121 Wn.2d 494, 497, 851 P.2d 678 (1993). But the *Land* Court overruled *Swenson,* throwing out *Swenson's* narrow definition of an "adequate community" and adopting "a more functional definition of 'community' parallel to that adopted by the federal courts . . . ." *Id.*

The important thing, the *Land* Court said, was that a witness giving reputation testimony be someone who was a member of a "group of people who knew the witness best." *Id.* at 498.

> [T]oday it is generally agreed that proof may be made ***not only of the witness where he lives***, but also of his repute, as long as it is

> "general" and established, ***in any substantial community of people among whom he is well known, such as the group with whom he*** works, does business or ***goes to school.***

Land, 121 Wn.2d at 499, quoting 1 Charles T. McCormick, *Evidence* 159 (4th ed. 1992) (emphasis added).

Washington courts have not hesitated to hold that the defendant (as well as the prosecution) has a right to present reputation testimony where the testifying witness is simply a member of some group of people who are familiar with the reputation, regardless of whether they reside in the same community. *See. e.g., State v. Carol*, 89 Wn. App. 77, 948 P.2d 837 (1997);[37] *State v. Callahan*, 87 Wn. App. 925, 935, 943 P.2d 676 (1997).[38]

4. <u>The Trial Judge's reliance on *State v. Thach* was misplaced</u>.

The trial judge stated that "the *Thatch* (phonetic) case indicated that the family in and of itself of the Defendant was not a natural community." RP 185. While this is an accurate reading of *Thach,* the *Thach* case provides no support for the trial judge's ruling. In *Thach* the defendant "attempted to introduce the testimony of Song Thach, his sister, as a character witness regarding his peaceful nature." *State v. Thach*, 126 Wn. App. 297, 306, 106 P.3d 782 (2005). "The [trial] court ruled that

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[37] This Court held that the defendant should not have been denied permission to present testimony from Nelson Gwynn that the alleged victim had a bad reputation for truthfulness. Gwynn knew the victim "through Boy Scouts." *Id.* at 95. The trial court had ruled that the Boy Scouts was not a large enough community to qualify as an adequate community for reputation testimony. This Court disagreed and directed the trial court to admit such evidence at the defendant's retrial. *Id.*

[38] In a trial for second degree assault, the trial court had prohibited the defendant from presenting evidence that he enjoyed a reputation for peacefulness in his work community. The Court of Appeals held that the trial court erred, and directed that such testimony be permitted at the defendant's retrial. *Id.* at 936.

Binh's sister could not testify to establish his reputation in the community." *Id.* at 315. The Court of Appeals affirmed this ruling noting that "[n]o case law exists supporting the proposition that a family constitutes a community for purposes of character evidence." *Id.*

In the present case, as defense counsel twice pointed out, none of the proposed defense witnesses were family members. RP 188, 190. Thus, *Thach* provides no support for the trial court's ruling in this case.

5. <u>The trial court abused his discretion</u>.

The trial judge erroneously believed that friends of the defendant could never constitute an adequate community. As *Vaughn v. Commonwealth,* 230 S.W.3d 559, 561 (Ky. 2007) demonstrates, this is an error of law, not an exercise of discretion:

> Since the trial judge ruled that evidence from two of B.D.'s elementary school teachers on B.D.'s reputation for untruthfulness was inadmissible because a school is not an adequate community, error occurred. This error was one of law, not discretion. . . .

In the present case, the trial judge committed the same type of mistake. He applied an incorrect standard of law. A ruling made by applying the wrong standard of law is an abuse of discretion. *Rohrich*, 149 Wn.2d at 654. Here, as in *Vaughn,* the defendant's conviction should be reversed.

D. The "To-Convict" Instruction (No. 7) for Murder 2° Failed to Comply With the Yardstick Rule of *Rader, Emmanuel, Smith* and *Mills*, Because it Omitted An Element of the Crime.

This case is controlled by *State v. Rader*, 118 Wash. 198, 203 P. 68 (1922) and *State v. Hilsinger,* 167 Wash. 427, 9 P.2d 357 (1932). These cases are directly on point. In *Rader* the Court reversed a conviction for

Murder 2° because the instructions that listed the elements of first and second degree murder failed to include the element of a lack of "justification," *i.e.*, the absence of self-defense:

> The appellant complains of these instructions we think justly. Murder in any form is the felonious killing of a human being. It is a killing without justification or excuse, yet ***all reference to this element is omitted*** by the [trial] court in its definition of murder in the first and second degrees. . . . [W]e think the appellant was entitled to have the element of justification called to the attention of the jury in its definitions of the degree of murder, especially since he in writing requested it.

Rader, 118 Wash. At 203-04. As in Alden's case, in *Rader* there was a separate instruction that did mention the fact that a killing is not murder unless it was a unjustified killing. But *Rader* held that this was not adequate to cure the problem that the earlier instruction purported to completely define the crime:

> It is true that later on its instructions the court did attempt to define justifiable homicide, but ***we cannot think this in any way cured the defect in the original instruction***. It was given in an independent instruction without any reference to the previous instruction and consequently without indication that it was a modification or the previous instruction.

Rader, 118 Wash. At 204 (emphasis added).

Rader was followed by *State v. Hilsinger*, 167 Wash. 427, 9 P.2d 357 (1932) where the Court refused to overrule *Rader* and again reversed a murder conviction because the instructions defining the crime of Murder 2° again left out the element of the absence of justification.

Thirty years after *Rader* and twenty years after *Hilsinger* the Supreme Court issued its decision in *State v. Emmanuel,* 42 Wn.2d 799,

259 P.2d 845 (1953). There the Court again explicitly held that *Rader* "is controlling here" and refused to overrule it:

> [U]nder the holding in [*Rader*] that the [defendant] therein "was entitled to have the element of justification called to the attention of the jury in its definitions of the degree of murder," it must be held that the trial court, in the case at bar, committed reversible error in leaving out of its instruction defining murder in the second degree the elements of excuse or justification.
>
> *In instructing a jury as to the statutory definition of the crime with which a defendant stands charged, all of the pertinent elements contained in the statute should be set forth.* The instruction here complained of was certainly unfair to the appellant and we are not inclined to overrule the prior decision of this court to the effect that the error cannot be cured by subsequent instructions such as were here given.

Emmanuel, 42 Wn.2d at 820, quoting *Hilsinger*, 167 Wash. At 443-44 (italics supplied by the *Emmanuel* Court). Relying upon *Rader* and *Hilsinger* the Court reversed Emmanuel's conviction holding that it was "compelled . . . to hold that the omission of [one of the] elements from [Instruction] No. 5 was prejudicial error" *Id.* at 820-21.

The Court reversed the conviction despite the fact that the missing element was referenced in another instruction:

> [T]he trial court undertook to specifically tell the jury in instruction No. 5 that they could convict if they found that four certain elements of the crime had been proven beyond a reasonable doubt. ***In effect, the judge furnished a yardstick by which the jurors were to measure the evidence in determining appellant's guilt or innocence of the crime charged,. The jury had a right to regard Instruction No. 5 as being a complete statement of the elements of the crime charged.*** This instruction purported to contain all the essential elements and the jury were not required to search the other instructions to see if another element alleged in the information should have been added to those specified in

instruction No. 5.

Emmanuel, 42 Wn.2d at 819 (emphasis added).

In *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991), the Washington Supreme Court suddenly departed from the rule of *Rader*, *Hilsinger* and *Emmanuel*. It did so without mentioning any of these cases. In direct contravention of the holding of these three cases the *Hoffman* Court addressed the defendants' contention that the absence of self-defense must be part of the "to-convict" instruction that sets forth the elements the crime of first degree murder and rejected it. *Id.* at 109. Even though *Rader*, *Hilsinger*, and *Emmanuel* all specifically rejected the notion that some other instruction could cure the error of failing to include an element in the "to-convict" instruction, the *Hoffman* Court stated that there was no prejudicial error because "the instructions taken as a whole" properly instructed the jury on the applicable law. *Id.*[39]

After *Hoffman* the Supreme Court reaffirmed the "yardstick" rule in at least five cases. *See, e.g., State v. Eastmond*, 129 Wn.2d 497, 503, 919 P.2d 577 (1996);[40] *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325

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[39] *State v. Mak*, 105 Wn.2d 692, 733, 718 P.2d 407 (1986) – the *only* case that the *Hoffman* Court cited in support of its decision – is not on point. In *Mak* the appellant challenged an instruction because it failed to inform the jury about the requirement of jury unanimity. The Court responded that jury unanimity was adequately addressed in a separate instruction. *Mak* did not involve any claim that an element of the offense was omitted from the "to-convict" instruction. Since the *Mak* appellant was not complaining about a violation of the "yardstick rule", the *Hoffman* Court committed obvious error in relying upon *Mak* as authority to reject the claim raised by the *Hoffman* appellants.

[40] Instruction No. 6 omitted element of specific intent to cause fear thereby "relieving the state of its burden of proving every essential element of the crime produces a fatal error"; Assault 2 conviction reversed.

(1995);[41] *State v. Smith,* 131 Wn.2d 258, 930 P.2d 917 (1997);[42] *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).[43] In a fifth case, *State v. Oster,* 147 Wn.2d 141, 147, 52 P.3d 26 (2002) the Supreme Court recognized a limited exception to the yardstick rule for crimes where one of the elements is the fact of a prior conviction, but reaffirmed the general rule.[44] Similarly, the Court of Appeals has steadfastly adhered the yardstick rule,[45] except for one decision of Division One which relied upon *Hoffman. See State v. Meggysey,* 90 Wn. App. 693, 705, 958 P.2d 319 (1998), overruled on other grounds by *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005).

In light of the Supreme Court's decisions in *Aumick, Eastmond, Smith, Mills*, and *Oster*, Appellant Alden respectfully submits that *Hoffman* has been impliedly overruled. It is clear that *Hoffman* is an aberration and that the Supreme Court would not follow *Hoffman* today if it was called upon to do so. Accordingly, this Court should acknowledge

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[41] Conviction for attempted rape reversed ;instruction omitted element of intent.

[42] Conviction for conspiracy to commit murder reversed because an element of the crime was omitted from the 'to-convict' instruction.

[43] Conviction for felony harassment reversed where "to-convict" instruction omitted element of putting the victim in reasonable fear.

[44] "We adhere to our holdings in *Emmanuel* and *Smith.* The jury has a right to regard the "to convict" instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction. However, we recognize a special exception when the element of a crime is prior criminal history ..."

[45] *See, e.g., State v. Rivas,* 168 Wn. App. 882, 278 P.3d 686 (2012) (conviction for malicious mischief 2° reversed where instruction omitted element of common scheme or plan); *State v. Pope,* 100 Wn. App. 625, 999 P.2d 51 (2000) (conviction for bail jumping reversed where instruction omitted element of the underlying charge upon which defendant had secured release on bail).

that *Hoffman* has been overruled, decline to follow it, and instead apply the yardstick rule of *Rader, Hilsinger* and *Emmanuel.*

In the present case, Alden maintained that he acted in self-defense. "Once the issue of self-defense is properly raised . . . the absence of self-defense becomes another element of the office which the State must prove beyond a reasonable doubt." *State v. McCullum*, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983) (a murder case).[46] *Accord State v. Jordan,* 180 Wn.2d 456, 465, 325 P.3d 181 (2014); *State v. Read*, 100 Wn. App. 776, 787, 998 P.2d 897 (2000). *McCullum* explicitly held that despite the Legislature's failure to include the word "unjustifiable" in the definition of homicide, the lack of justification – which is to say the absence of self-defense – remains an element of any degree of homicide. *Id* at 493[47]

In *Rader* and *Hilsinger* the to-convict instructions failed to include the element of the absence of self-defense (which was described in the legal argot of that era as the absence of justification). The defendants' Murder 2° convictions were reversed in both of those cases. The same result is dictated in this case.

In *Smith* the Supreme Court held that this type of error is not

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[46] *Accord State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984) (absence of self-defense is an element of Assault 2); *State v. Hanton*, 94 Wn.2d 129, 132, 614 P.2d 1280, *cert. denied,* 439 U.S. 1035 (1980)(absence of self-defense negates recklessness and thus is also an element of first degree manslaughter).

[47] "[W]e must conclude that such changes were intended to relieve the prosecution of the necessity of *pleading* the absence of self-defense. By removing the words "unless it is excusable or justifiable" from the definition of homicide and including self-defense under the provisions of RCW 9A.16, entitled "Defenses", the Legislature merely relieved the State of the time-consuming and unnecessary task of alleging and proving negative propositions which may not be involved in each case."

subject to harmless error analysis: "Our holding today is in accord with prior cases of this court holding that failure to instruct on an element of the offense is automatic reversible error." 131 Wn.2d at 265. *Accord Eastmond,* 129 Wn.2d at 503 (omission of an element is a "fatal error").[48]

E. Alden Was Denied Effective Representation of Counsel By His Attorneys' Failure to Object to the Prosecutor's Statement That In Order to Acquit They Had to Find That All the Requirements of Self-Defense Had Been Satisfied.

In closing argument the State told the jury that all three elements of self-defense had to be "satisfied" *in order for them to acquit* Alden:

> When you read the jury instruction on self-defense, the language is important, and that would be instruction number 15. And I say there's three elements, we've numbered them 1, 2, and 3, but when you read them you'll see that they're separated by the term and. Not the term or, the term and, which means that ***all three must be satisfied in order for you to return a not guilty verdict by reason of self-defense.***

RP 1386 (emphasis added).

This was clearly incorrect. There was no requirement that the requirements of self-defense be "satisfied" before the jurors could acquit. There was no burden on the defense at all. It would have been accurate to tell the jury that there had to be proof of the *absence* of self-defense in order for the jurors to return a verdict of ***guilty***. There is a world of difference between requiring proof that the elements of self-defense were

[48] Similarly, this court has held that such an error always requires reversal: "[A]n elements instruction that purports to present all of the requisite elements to the jury in a "complete statement of the law and yet omits an element creates a constitutional error requiring reversal." *State v. Bache,* 146 Wn. App. 897, 905, 193 P.3d 198 (2008).

not satisfied before the jury could ***convict*** Alden, and requiring proof that the elements of self-defense were ***satisfied*** before they could ***acquit*** him.

The prosecutor simply stood the law on its head; contrary to *McCullum* and Instruction No. 15, the State shifted the burden of proof to the defendant. As this Court noted in *State v. Rodriguez,* 121 Wn. App. 180, 184, 87 P.3d 1201 (2004), one cannot "conceive" of any strategic reason why defense counsel would want to have a jury instructed in a manner which "decrease[s] the State's burden to disprove self-defense." Moreover, "misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." *State v. LeFeber,* 128 Wn.2d 896, 913 P.2d 369 (1996), citing *McCullum*, 98 Wn.2d at 487-88. Both prongs of the *Strickland* test are met in this case, and Alden's conviction must be reversed.

F. The Trial Judge's Refusal to Find the Statutory Mitigating Factors Is Not Supported by Substantial Evidence. On the Record of this Case Both Statutory Mitigating Factors Are Clearly Present. The Trial Judge Abused His Discretion in Refusing to Find Them and Impermissibly Delegated His Sentencing Discretion to the Victim's Mother.

A defendant has a due process right to an impartial and independent judge. *Tumey v. Ohio*, 273 U.S. 510 (1927). A judge cannot simply abdicate his responsibility to decide whether an exceptional sentence is appropriate because the victim's family would be offended if he decided that it was.

The legislature has identified two mitigating factors that *do* justify imposing a sentence below the standard range. In this case it is

indisputable that the mitigating factor identified in RCW 9.94A.535(1)(a) applies: "To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." Long ago the Supreme Court upheld an exceptional sentence based upon a finding of this factor. *State v. Pascal*, 108 Wn.2d 125, 136-137, 736 P.2d 1065 (1987).[49] This statutory factor clearly applies in this case.[50] It is also undisputed that the RCW 9.94A.535(1)(c) applies to this case. That part of the statute recognizes the following mitigating factor:

> The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

See Pascal, 108 Wn.2d at 136. The jury found Alden's claim of self-defense "insufficient to constitute a complete defense," but no one can deny that the perception that Maks was threatening Alden "significantly affected" Alden's behavior.

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[49] *See also State v. Birnel*, 89 Wn. App. 459, 949 P.2d 433 (1998) (relying on this statutory factor the sentencing judge imposed a sentence that was less than half of the lower end of the standard range for second degree murder).

[50] It was *uncontested* that Maks

- entered the house where Alden and his friends were sleeping in the wee hours of the morning,
- threatened to shoot Eric Hanson with his gun
- threatened to kill everyone present by throwing them off the deck of the house,
- tipped over the chair that Alden had been sleeping in,
- punched Alden in the stomach,
- told him he was going to chop off his dick and feed it to his dog, and
- slapped Alden's friend Dane Meier in the head.

RP 456-57, 643, 793, 992, 1103, 1108. The only disputed fact was whether Maks was lunging towards Alden when Alden pulled the trigger.

The judge acknowledged that the jury struggled over the case. RP 1653. Thus the judge conceded that this was a hard case for them to decide. This suggests that the trial judge thought it was a close case – at least for some jurors. The fact that the jurors ultimately rejected self-defense does not disqualify Alden for application of the statutory mitigator found in RCW 9.94A.535(1)(c). On the contrary, the SRA "explicitly authorizes a trial court to treat a failed defense as a mitigating factor supporting an exceptional sentence below the standard range." *State v. Jeannotte*, 133 Wn.2d 847, 848, 947 P.2d 1192 (1997).

Perhaps the Maks family would be "offended" by a sentence below the standard range. But that is not a valid reason for refusing to follow the law. A judge may not delegate his sentencing responsibility to the family of the victim. Alden was entitled to application of Washington's sentencing laws regardless of whether a fair assessment of those laws led to a sentence that the victim's family did not like.

In *Schillberg v. Cascade District Court*, 94 Wn.2d 772, 775, 621 P.2d 115 (1980), the Court considered "whether the prosecution may veto" a defendant's request for a deferred prosecution. The Court held that notwithstanding the label, a deferred prosecution "is fundamentally a new sentencing alternative" and that consideration of such a sentence and the weighing of arguments for and against it were "fundamentally judicial acts." *Id.* at 778. The Court concluded that RCW 10.05.030 was unconstitutional because it gave the prosecutor an unfettered right to block that sentence and thus interfered with a judicial function.

Appellant submits that just as the Legislature cannot give the prosecutor a veto over a sentencing alternative, neither can a judge give a veto over a sentencing alternative to the victim's family and thereby delegate his judicial sentencing power to a private citizen.

In the present case the mother of the deceased asked the judge not to decide that "Tom's life [was] worth less than the maximum time" allowed by state law. RP 1525. But a sentencing judge cannot decide the length of a murder sentence based on an assessment of the "worth" of the decedent's life. Indeed, if murder sentences were calculated on that basis, judges would almost never impose an exceptional sentence below the standard range, for what judge would ever want to indicate that in his or her mind the decedent's life was not "worthy" of the maximum?[51]

The judge's suggestion that an exceptional sentence would "offend" the jury is even more indefensible. Every Washington jury is instructed that "you have nothing whatever to do with any punishment that may be imposed in case of a violation of the law." WPIC 1.02.[52] Since

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[51] The Legislature enacted the Sentencing Reform Act to eliminate sentencing disparities based on the "personal philosophy" of individual judges. *State v. Garcia-Martinez*, 88 Wn. App. 322, 328, 944 P.2d 1104 (1997). If judges defer to the wishes of relatives of crime victims, then these sentencing disparities will be reintroduced due to differences in attitudes towards retribution and forgiveness held by the relatives of crime victims. If one victim's family objects to an exceptional sentence, and another family does not object under similar circumstances, deference to the wishes of the families will result in vastly different sentences.

[52] "The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases." *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001), quoting *State v. Bowman,* 57 Wash.2d 366, 271, 356 P.2d 999, 1002 (1960). "[T]he jury is told that punishment is none of its concern, that its sole function is to decide the defendant's guilt or innocence. Punishment is a question of legislative policy . . ." *State v. Todd,* 78 Wn.2d 362, 375, 474 P.2d 542 (1970).

jurors play no role in sentencing, there is no basis for a judge to state that he cannot impose a particular sentence because it would offend the jury.

Moreover, jurors are told they may not allow sympathy to influence their verdict, and that they "must act impartially with an earnest desire to reach a proper verdict." WPIC 1.02. The same principle is no less applicable to the judge when it comes to determining the appropriate sentence. A judge may not allow sympathy for the victim's family to lead him to decline to impose a fair and appropriate sentence. He too "must act impartially with an earnest desire to" impose a "proper" sentence.

Even in capital cases the sentencing jury is not allowed to consider sympathy for the victim.[53] In this case, the sentencing judge trespassed onto the wrong side of this line by allowing sympathy for the victim's family to veto the proposal for an exceptional sentence, and ignoring the undisputed existence of mitigating facts which in fairness the Legislature has stated should be considered when determining the sentence.

VI. CONCLUSION

For the reasons stated above in Argument sections A through E, Appellant asks this Court to reverse his conviction and remand his case for a new trial. For the reasons stated in Argument section F, Alden asks this Court to vacate his sentence, and to remand for resentencing before a different judge.

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[53] *State v. Rupe,* 115 Wn.21d 379, 398, 798 P.2d 780 (1990) ("The jury was properly instructed not to permit sympathy to influence it.").

Respectfully submitted this 2nd day of June, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By _____
James E. Lobsenz, WSBA #8787
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney of record by the methods noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

Attorneys for Respondent:
Mr. Walter Gordon Edgar
Deputy Prosecuting Attorney
Douglas County Prosecutor's Office
P.O. Box 360
Waterville, WA 98858
Email: gedgar@co.douglas.wa.us

DATED this 2nd day of June, 2015.

Deborah A. Groth, Legal Assistant

APPENDIX A

No. 7

To convict the defendant of the crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 9, 2013, the defendant acted with intent to cause the death of Tom Maks;

(2) That Tom Maks died as a result of defendant's acts; and

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX B

SUPERIOR COURT OF WASHINGTON
COUNTY OF DOUGLAS

STATE OF WASHINGTON, Plaintiff, vs. OSCAR ALDEN, Defendant.	)	NO. 13-1-00104-1 STIPULATION TO OF EVIDENCE

STIPULATION

The parties stipulate to the admissibility of the following evidence:

That on the evening of June 8, 2013, at approximately 9:30 p.m., Tom Maks left the residence of friend, and had in his possession his 45 caliber 1911 semi-automatic pistol.

HONORABLE JOHN HOTCHKISS
Judge of the Superior Court

APPENDIX C

No. 15

It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer any person in the slayer's presence or company when:

1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;

2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

APPENDIX D

4.11

LESSER INCLUDED CRIME OR LESSER DEGREE

The defendant is charged with murder in the second degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crimes of manslaughter in the first degree and manslaughter in the second degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

APPENDIX E

Court of Appeals, Division III No. 32695-1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR DOUGLAS COUNTY

STATE OF WASHINGTON,	)	
Respondent,	)	**No. 13-1-00104-1**
	)	
v.	)	
	)	
OSCAR ALFRED ALDEN,	)	
Appellant,	)	

THE HONORABLE JOHN HOTCHKISS
SUPPLEMENTAL VOLUME
EXCERPT OF JURY TRIAL
July 29, 2014
(Pages 1579 - 1584)

APPEARANCES:

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****

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(BEGINNING OF EXCERPT)

Tuesday, July 29, 2014 at 2:28 p.m.

THE COURT: Juror number 1, is this your verdict?

JUROR NO. 1: Yes.

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 1: Yes.

THE COURT: Juror number 2, is this your verdict?

JUROR NO. 2: Yes.

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 2: Yes.

THE COURT: Juror number 3, is this your verdict?

JUROR NO. 3: Yes.

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 3: Yes.

THE COURT: Juror number 6, is this your verdict?

JUROR NO. 6: Yes.

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 6: Yes.

THE COURT: Juror number 7, is this your verdict?

JUROR NO. 7: Yes.

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509-754-9507/509-630-1705

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 7: Yes.

THE COURT: Juror number 14, is this your verdict?

JUROR NO. 14: Yes.

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 14: Yes.

THE COURT: Juror number 15, is this your verdict?

JUROR NO. 15: Yes.

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 15: Yes.

THE COURT: Juror number 21, is this your verdict?

JUROR NO. 21: Yes.

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 21: Yes.

THE COURT: Juror number 22, is this your verdict?

JUROR NO. 22: Yes.

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 22: Yes.

THE COURT: Juror number 27, is this your verdict?

JUROR NO. 27: Yes.

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THE COURT: Is it the verdict of the entire jury?

JUROR NO. 27: Yes.

THE COURT: Yes? Alright.

THE COURT: Juror number 29, is this your verdict?

JUROR NO. 29: Yes.

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 29: Yes.

THE COURT: And, Juror number 31, is this your verdict?

JUROR NO. 31: Yes.

THE COURT: Is it the verdict of the entire jury?

JUROR NO. 31: Yes.

THE COURT: Thank you.

(END EXCERPT - 4:53:55 p.m.)

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CERTIFICATE

STATE OF WASHINGTON)
) ss.
County of Douglas)

I, Jo L. Jackson, do hereby certify:

That I was requested to provide the foregoing transcript of digitally-recorded proceedings;

That the foregoing transcript consisting of five (5) pages is a true and correct transcript of all such recorded testimony adduced and proceedings had and of the whole thereof to the best of my ability;

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 27th day of January 2015.

JO L. JACKSON

Notary Public in and for the State of Washington, residing at Waterville.

My commission expires on March 19, 2016.

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