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Court of Appeals
Division I
State of Washington

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRUCE HUMMEL,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Bruce Hummel's wife disappeared in 1990. Years later, he was prosecuted for premeditated murder in the first degree for causing her death. Despite extensive efforts, the police never found any trace of her or evidence indicating how, when, or where she likely died.

Given the paucity of evidence about the circumstances of Ms. Hummel's apparent death, the prosecution's case that Mr. Hummel acted with premeditated intent is purely speculative and therefore legally insufficient to prove the offense. In addition, the prosecution had the burden of proving that all acts occurred in the State of Washington under the law of the case, yet the prosecution did not show where the acts occurred. Further, by denying Mr. Hummel's request that the jury consider the inferior degree offenses of first and second degree manslaughter, the court deprived Mr. Hummel of his ability to meaningfully present a defense. These and other errors discussed below require the reversal of Mr. Hummel's conviction.

B. ASSIGNMENTS OF ERROR.

1. The prosecution failed to prove the essential elements of first degree murder, resulting in a conviction imposed in violation of Mr. Hummel's right to due process of law.

2. The prosecution failed to prove the essential elements of first degree murder under the law of the case doctrine.

3. The State did not meet its burden of proving the prosecution occurred in the proper venue, over Mr. Hummel's objection.

4. The court denied Mr. Hummel his right to due process of law and to meaningfully defend against the charge by refusing his request for inferior included offense instructions.

5. Mr. Hummel was denied his right to effective assistance of counsel in deciding whether to ask for a lesser degree offense instruction of second degree murder.

6. In violation of Mr. Hummel's statutory and due process rights, the court imposed discretionary legal financial obligations without a meaningful factual inquiry into his ability to pay even though presumptively indigent.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. To prove a person committed the most serious offense of premeditated murder, the prosecution must show beyond a reasonable doubt that the perpetrator acted not only purposefully, but also after deliberation and reflection. Evidence of premeditation may not be purely speculative or equivocal. There was no evidence of a plan to kill

Ms. Hummel and no evidence about how she died. In the absence of any information about the mechanism of the death and without any prior statements or actions showing any planning occurred, is the speculation regarding premeditation insufficient to prove this essential element beyond a reasonable doubt?

2. When the court instructs the jury that the prosecution must prove an element, and the prosecution does not object, this element becomes a part of the case that the prosecution must establish beyond a reasonable doubt. The to-convict instruction required the prosecution to prove that "the acts" essential to first degree murder occurred in Washington, rather than only some of the acts. When there was no evidence that all essential acts occurred within the state, has the prosecution failed to prove an essential element required by the to-convict instruction?

3. A defendant is entitled to have the jury instructed on lesser degree offenses when supported by some evidence viewed in the light most favorable to the defense. The court refused Mr. Hummel's request for lesser offense instructions of first and second degree manslaughter even though they are lesser offenses requiring a lesser degree of intent and a juror could have inferred from the evidence that Mr. Hummel

caused Ms. Hummel's death recklessly or negligently. Was Mr. Hummel entitled to instructions for available lesser included offenses?

4. The right to effective assistance of counsel includes the right to receive competent, correct advice before deciding whether to seek a lesser included offense instruction. Defense counsel persuaded Mr. Hummel to withdraw his request for a lesser included offense instruction of second degree murder based on counsel's erroneous advice that the sentences for first and second degree murder where almost identical when, the offense occurred, the ranges were significantly different. Did defense counsel misadvise Mr. Hummel to withdraw his request for an available lesser offense by misadvising Mr. Hummel about the sentence he would face, when it is reasonably probable that the jury would have convicted him of the lesser offense if it was available?

5. Legal financial obligations (LFOs) may not be imposed without an individual inquiry into the accused person's ability to pay. The court imposed several thousand dollars of discretionary LFOs as part of Mr. Hummel's sentence without inquiring into his ability to pay. Did the court impose LFOs in violation of its statutory and constitutional obligations?

D. STATEMENT OF THE CASE.

In October 1990, Alice Hummel disappeared. 1RP 49.[1] No one reported her disappearance to authorities until 2001. 1RP 106-07.

Ms. Hummel was married to Bruce Hummel and they had three children. 1RP 20-22. The oldest, Sharinda, was married, lived in another state, and did not have a close relationship to her mother. 1RP 94, 97. The middle child, Sean, was a senior in high school who also "didn't have a great relationship" with his mother at that time. 1RP 54-55, 132, 147. The youngest, S.H., was turning 14 years old in October 1990 and was closest to her mother. 1RP 20, 43.[2]

Earlier in their marriage, Mr. and Ms. Hummel had been teachers in numerous rural towns in Alaska, but Ms. Hummel had a host of health problems and moved to Whatcom County. 1RP 87-91. She received a monthly disability stipend from the Alaska school system due to her health problems. 1RP 105.

[1] The verbatim report of proceedings ("RP") from the trial is consecutively paginated. Any non-trial proceedings are referred to by the date of the proceeding.

[2] S.H. is referred to by her initials due to the sensitive nature of her allegations against her father. S.H. now uses her married name. 1RP 20. The other family members are referred to by their first names as needed for purposes of clarity, no disrespect is intended.

In the mid-1980s, Mr. Hummel left his job as a principal in Alaska so the family could be together. 1RP 92, 115. He worked fixing homes for a real estate agent, was a substitute teacher, and made extra money collecting pinecones sold as potpourri. 1RP 33-35. The children recalled that money was tight and there was regular bickering among the siblings and the parents. 1RP 35-36, 95, 121-22, 131.

One afternoon near October 18, 1990, Bruce Hummel told Sean and S.H. that Ms. Hummel had flown to California for a job interview. 1RP 47, 134. Sean knew Ms. Hummel was looking for work in California but did not know about a job interview. 1RP 135. S.H. was surprised that Ms. Hummel had left because the two had tickets to a ballet performance in a few days. 1RP 43. Sharinda was not surprised because her parents had moved often for jobs as she was growing up. 1RP 112. Later, Mr. Hummel said Ms. Hummel was starting the job in California without returning and over time, he said she met another man, moved to Texas, and wanted to start a new life. 1RP 51-52, 98, 137-38. When they got older, the children looked for Ms. Hummel but never found her. 1RP 57, 102-03, 162-63.

In 2008, the prosecution charged Mr. Hummel with one count of first degree premeditated murder. CP 5. The police searched for

evidence indicating how Ms. Hummel might have disappeared, including using cadaver dogs, ground penetrating radar, and other tools to search for residual forensic traces. 1RP 183-85; 2RP 229, 230, 259-60, 320-21, 327, 331. The investigation did not locate useful evidence. 2RP 259-60, 348-49, 353; 3RP 389, 401. They also searched through national databases to see if she was living elsewhere, but could not find her name or social security number after the time she disappeared. 2RP 318; 3RP 415, 419-21.

In 2004, when police first asked Mr. Hummel what happened to Ms. Hummel, he wrote a long letter addressed to Officer Les Gitts that a neighbor found and gave to the police. 2RP 219. The letter said he found Ms. Hummel dead in her bathroom, having committed suicide, and at her request, he did not tell their children and disposed of the body in the Bellingham Bay. 2RP 221-26. The police could not corroborate any aspect of this account: physically, Mr. Hummel could not have lifted Ms. Hummel's body into his van as the letter described, there were no traces of blood in the bathroom even though the amount of blood would have left some trace, and Bellingham Bay was not windy on the night in question as stated in the letter. 2RP 324, 327, 331, 366-67; 3RP 395-96; 4RP 483.

Mr. Hummel admitted that after Ms. Hummel died, he continued cashing her disability checks. 2RP 205-06. For this offense, he was convicted of wire fraud in federal court. 2RP 242. He also admitted that he had sexually abused his youngest daughter, S.H., mostly by having her touch him inappropriately. 1RP 40; 2RP 214. S.H. said that about two days before Ms. Hummel disappeared, she had told her mother about the abuse and believed Ms. Hummel would confront Mr. Hummel. 1RP 44-45.

After a jury trial in 2009, Mr. Hummel was convicted of first degree murder; a conviction that rested in part on a fellow jail inmate's testimony claiming Mr. Hummel confessed. CP 34. Mr. Hummel's conviction was overturned on appeal due to an improper courtroom closure. CP 30. This jail inmate did not testify at the second trial. Mr. Hummel was convicted of premediated murder. CP 247. No lesser included offenses were presented to the jury. CP 227-46; 4RP 557-60. Mr. Hummel was sentenced to the high end of the standard range. CP 302, 305.

E. ARGUMENT.

1. Where the prosecution rested its case for premeditation on equivocal, wholly speculative assertions, the State failed to prove the essential elements first degree murder

a. The prosecution bears the burden of proving all essential elements beyond a reasonable doubt.

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364.

To determine whether there is sufficient evidence for a conviction, reasonable inferences are construed in favor of the prosecution but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). "When intent is an element of the crime" it "may not be inferred from conduct that is

'patently equivocal.'" *State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013).

To convict Mr. Hummel of first degree murder, "the State [was] required to prove both intent and premeditation, which are not synonymous." *State v. Sargent*, 40 Wn.App. 340, 352, 698 P.2d 598 (1985) (citing *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982)). First degree murder requires the defendant act "with premeditated intent to cause the death of another person." RCW 9A.32.030(1)(a). Premeditation distinguishes first degree murder from second degree murder. *Brooks*, 97 Wn.2d at 876.

b. Premeditation requires evidence of deliberation and reflection in forming the intent to kill beforehand.

Premeditation means "the deliberate formation of and reflection upon the intent to take a human life" and involves "'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995)); RCW 9A.32.020(1). It requires deliberation lasting "more

than a moment in point of time." *Id*. at 644. A mere opportunity to deliberate is not sufficient to support a finding of premeditation.

Premeditation is not proven by showing the act causing death occurred over an appreciable amount of time, because to do so "obliterates the distinction between first and second degree murder." *State v. Bingham*, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). "Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation." *Id*.

Impulsive or spontaneous acts causing someone's death are not premeditated. *State v. Luoma*, 88 Wn.2d 28, 34, 558 P.2d 756 (1977). Where killing occurred in the heat of passion, it may have been intentional but not premeditated. *State v. Bolen*, 142 Wash. 653, 666, 254 P. 445 (1927).

In *Austin v. United States*, the court reviewed the historical development of premeditation as a requirement separate from intent in murder prosecutions and the critical distinction between the two elements. 382 F.2d 129, 133-36 (D.C.Cir. 1967), *overruled on other grounds by United States v. Foster*, 783 F.2d 1082, 1085 (D.C.Cir.1986). The "crux" is whether the accused engaged in a "process of reflection and meditation." *Id*. at 136. The jury needs to be

convinced beyond a reasonable doubt that there was "an appreciable time after the design was conceived and that in this interval there was a further thought, and a turning over in the mind - and not a mere persistence of the initial impulse of passion." *Id*. at 137.

In *Bingham,* the defendant met the victim on a bus and later that day they hitchhiked on a rural highway. 105 Wn.2d at 821. The victim was later found dead and evidence showed the defendant held his hand over her mouth, strangling her before raping her. *Id*. Although the Supreme Court found *time* for deliberation, it found no evidence from which the jury might have inferred *actual* deliberation. *Id*. at 827. The Court held that the mere passage of time for the killing to occur, in that case the approximately 3 to 5 minutes it took to kill by manual strangulation, showed only an opportunity to deliberate and by itself was insufficient to sustain the premeditation element absent evidence that the defendant did in fact deliberate. *Id*. at 822, 826.

c. The State found no evidence showing Mr. Hummel's deliberation prior to Ms. Hummel's presumed death.

No witness knew what caused Ms. Hummel's presumed death. Her body was never found and a substantial part of the trial was devoted to whether she died or simply moved away. Despite extensive

searching, the police did not locate any forensic traces indicating how, where or when she might have died such as blood evidence or a potential weapon. There is a complete absence of evidence showing what happened to Ms. Hummel.

There is no evidence that Mr. Hummel plotted to kill Ms. Hummel. He did not make statements indicating a desire to see her dead or gather materials to use for attacking someone. While he took advantage of her disability checks *after* she disappeared by using them to cover his expenses, he did not take actions *before* she disappeared that would indicate a plan to kill her, such as getting a life insurance policy, changing a will, or altering a bank account. There was no evidence of his financial fraud before Ms. Hummel disappeared. Taking her disability income after she disappeared does not indicate the pre-planning that marks premeditation.

The State's theory of premeditation was just as speculative as a theory of intentional but not premeditated killing. It reasoned that Mr. Hummel had a motive to kill Ms. Hummel, because his daughter had just told her mother that he was sexually abusing her. 5RP 588. Yet "[w]e do not infer criminal intent from evidence that is patently equivocal." *Vasquez*, 178 Wn.2d at 14. "[I]nferences based on

circumstantial evidence must be reasonable and cannot be based on speculation." *Id*. at 16.

Vasquez was a forgery case where the prosecution needed to prove the defendant possessed fraudulent documents with the intent to defraud. 178 Wn.2d at 7. The Court of Appeals had affirmed the conviction, reasoning why else would Mr. Vasquez have a falsified social security card and permanent resident card other than intending to defraud an employer or the police. *Id*. at 6. The Supreme Court reversed due to the impermissible speculation underlying the conviction. It unanimously found insufficient evidence of the required intent because the defendant's conduct and surrounding circumstances did not "plainly indicate such an intent as a matter of logical probability." *Id*.

Vasquez relied in part on *State v. Brockob*, 159 Wn.2d 311, 331, 150 P.3d 59 (2006), where the court found insufficient evidence to infer the intent manufacture methamphetamine when the defendant shoplifts an illegal amount of pseudoephedrine, The "mere assertion that [pseudoephedrine] is *known to be used* to manufacture methamphetamine does not necessarily lead to the logical inference that Brockob intended to do so, without more." *Vasquez*, 178 Wn.2d at 8-9 (quoting *Brockob*, 159 Wn.2d at 331-32).

These cases reaffirm the fundamental principle that proof of an element of a crime may not rest on speculation or equivocal evidence. To prove premeditated intent, motive alone is insufficient absent evidence of planning, statements of intent, or the nature of the wounds causing death.

In most murder prosecutions, premeditation is based on how the injuries were inflicted or how the parties acted at the time of the acts causing death occurred. *See State v. Sherrill*, 145 Wn.App. 473, 485, 186 P.3d 1157 (2008) ("In cases of premeditated intent to cause death, the cause of death is a significant factor" proving premeditation). For example, in *Ollens* the defendant claimed he acted in self-defense but the victim's throat was slit through multiple slashing motions and he was also separately stabbed four times in different parts of his body. *State v. Ollens*, 107 Wn.2d 848, 853, 733 P.2d 984 (1987). The *Ollens* Court found there was sufficient evidence for the State to present the question of premeditation to the jury because there were multiple, separately inflicted knife wounds, as opposed to one continuous act; the defendant's procured a weapon, unlike a case where the killing was inflicted manually; Ollens struck the victim from behind, favoring some

deliberate planning; and Ollens had the motive of committing a robbery. *Id*.

Another case found sufficient evidence of premeditation when the defendant had talked about killing his wife's friend, told others he was buying a gun, bought a gun the day he went to the place that he knew his wife's friend was living and shot him after slowly loading his gun. *State v. Finch*, 137 Wn.2d 792, 832-33, 975 P.2d 967 (1999). "The time and planning here is sufficient to show that Charles reflected upon his decision to take Ron's life" and his methodical loading and pointing of the gun "indicate premeditation." *Id*.

There was no evidence of planning activity by Mr. Hummel before Ms. Hummel's presumed death. The nature of whatever may have caused her death did not show a preconceived plan. And while there was a motive in that Ms. Hummel had learned that Mr. Hummel had been sexually abusing their youngest child, this motive alone cannot reasonably or logically establish that premeditated intent had formed. Mr. Hummel made no threats toward his daughter to stop her from telling others such as siblings, friends or the authorities. Even without Ms. Hummel, the risk remained that his daughter could accuse him of abuse. Likewise, the financial benefit of being able to access Ms.

Hummel's disability payments show Mr. Hummel took advantage of Ms. Hummel's absence but there is no evidence he arranged her killing for that purpose. The checks came to the family's home in the mail as they had done before she disappeared. There was no evidence that he took the money to purchase luxuries or alter his style of living.

An unplanned or impulsive killing may be intentional, but without premediated deliberation. *See Bingham*, 105 Wn.2d at 826. Premeditation substantially increases the available punishment. RCW 9.94A.515 (setting seriousness level for offenses); RCW 9.94A.510 (sentencing grid setting standard range based on offense's seriousness level). It is an independently required element the State must prove. RCW 9A.32.020(1)(a); RCW 9A.32.040(1)(a). A confrontation between Ms. and Mr. Hummel is just as likely to have caused an unplanned and impulsive act resulting in Ms. Hummel's death or disappearance than stemming from a preconceived plan to kill Ms. Hummel.

Where the State is unable to offer evidence of planning or show the nature of the killing occurred in circumstances from which deliberate intent could be logically inferred, the State has not met its

burden of proving there was a purposeful, intentional killing resulting from premeditated deliberation.

d. Insufficient evidence of an essential element of a crime requires reversal.

Absent proof of every essential element, a conviction must be reversed and the charge dismissed. *Vasquez*, 178 Wn.2d at 18. When the prosecution pursues an "all or nothing" strategy and fails to prove an essential element of the charged offense, the defendant is entitled to have the conviction dismissed due to the insufficiency of the evidence. *In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 294, 274 P.3d 366 (2012). Neither the prosecution nor the defense asked that the jury receive an instruction on a lesser offense. Accordingly, the prosecution's failure to present sufficient evidence showing the essential element of premeditated intent requires reversal. *Id*.

2. The State failed to meet its burden of proving the jurisdiction and venue in which the killing occurred.

a. The prosecution was required to prove that all acts essential to first degree murder occurred in Washington.

Article I, section 22 of the Washington Constitution guarantees criminal defendants the right to by an impartial jury "of the county in

which the offense is charged to have been committed." Washington courts have jurisdiction over offenses that occur within the state. RCW 9A.04.030; Art. 24, § 1 (defining state boundaries).

The State "bears the burden to show that jurisdiction properly lies in state court." *State v. L.J.M.*, 129 Wn.2d 386, 392, 918 P.2d 898 (1996). Ordinarily, the State meets this burden by presenting evidence that any or all of the essential elements of the alleged offense occurred 'in the state.'" *Id*. (quoting RCW 9A.04.030(1)). The location where the essential acts occurred becomes an essential element the State must prove when the prosecution takes on a burden of proving a specific venue. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); *see also State v. Stearman*, _Wn.App. _, 348 P.3d 394, 399 (2015) (finding insufficient evidence of venue where acts occurred in different county).

Here, the prosecution was obligated to prove the criminal acts necessary for the offense occurred in the State of Washington because this was as an essential element of the offense in the to-convict instruction. *Hickman*, 135 Wn.2d at 102. This element must be proven beyond a reasonable doubt as the law of the case. *Id*.; CP 242.

b. The prosecution failed to prove the essential element as required by the to-convict instruction that all acts occurred in Washington.

The court's instructions required the State to prove that "the acts occurred in the State of Washington." CP 242 (Instruction 12). This instruction deviated from the pattern instruction, which permits the State to take on the lesser burden of showing "that any of these acts" occurred in the state. *See* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 26.02 (3d Ed).

The to-convict instruction required the State to prove "[t]hat the acts occurred in the State of Washington." The prosecution had the burden to prove this element to the legal threshold of beyond a reasonable doubt. CP 242. The prosecution did not object to this instruction and proposed it within its packet of instructions. Supp. CP __, sub. no. 85.

In *Hickman*, the to-convict instruction contained the element that the alleged theft occurred in Snohomish County. While the prosecution would not ordinarily need to prove the particular county, when an essential element is added to the to-convict instruction, it becomes the law of the case and the element must be proven beyond a reasonable doubt. 135 Wn.2d at 105.

The prosecution assumed the burden of proving "that the acts" occurred in Washington, not merely one of the acts. The to-convict instruction provided, in pertinent part:

> To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) During the period of time intervening between the 1st day of October, 1990, through the 30th day of October, 1990, the defendant Bruce Hummel *caused the death* of Alice Kristina Hummel;
>
> (2) That the defendant *acted* with intent to cause the death of Alice Kristina Hummel;
>
> (3) That the intent to cause the death was premeditated;
>
> (4) That Alice Kristina Hummel died as a result of *the defendant's acts*; and
>
> (5) That *the 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 242 (emphasis added).

The prosecution had no evidence showing how or where the acts occurred that caused Ms. Hummel's presumed death. There was no particular location where Ms. Hummel died or a showing that Mr. Hummel formed a premeditated intent to kill her within the state. Even if one element could be inferred by speculating, such as presuming he formed the intent to kill her near his Whatcom County home, there was

no evidence that the remaining acts necessary for a conviction occurred within the state.

Mr. Hummel objected to the insufficient proof of venue. CP 110-14; 138. But the court overruled the objection, relying on its reasoning for rejecting a similar argument at the first trial. CP 192; 5/6/14RP 5; *see* 7/21/09RP 92-93.

Not only did the State fail to establish that Whatcom County was the appropriate venue for the prosecution, it did not offer facts and circumstances showing that each act necessary for a conviction occurred within the state, as required under the law of the case doctrine.

c. The failure to prove an essential element listed in the to-convict instruction requires reversal of the conviction.

It is well-settled that the prosecution assumes the burden of proving an element as the law of the case where the prosecution makes no objection to its inclusion in the to-convict instruction. *State v. Kirwin*, 166 Wn.App. 659, 671, 271 P.3d 310 (2012). Absent plausible evidence showing where Ms. Hummel was actually killed, the prosecution did not meet its burden of proving that all "acts" essential to the offense of first degree murder occurred within the State of Washington. The prosecution debunked Mr. Hummel's statement that

Ms. Hummel committed suicide in their home, showing through painstaking efforts of cadaver dogs, ground penetrating radar, extensive trace blood analysis, and through a biomechanics expert that there was no corroborating evidence. 2RP 229-30, 259-60, 320-31, 353; 4RP 483. Instead, the State speculated that Mr. Hummel took her to a remote location. 2RP 259-60. But if so, the remote location could have been across the nearby border in Canada or in another state. Speculation does not satisfy the State's burden of proving that "the acts" essential to the offense occurred in the State of Washington.

The absence of proof beyond a reasonable doubt of an added element requires dismissal of the conviction and charge. *Hickman,*135 Wn.2d at 99 (citing *Jackson,* 443 U.S. at 319; *v. Green*, 94 Wn.2d at 221). The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. *Hickman*, 135 Wn.2d at 99 (citing *inter alia, North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), *reversed on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)). Because the State failed to prove each act constituting the offense occurred in the state of Washington, the Court must reverse Mr. Hummel's conviction and dismiss the charge.

3. The court misapplied the law when denying the defense request for lesser included offense instructions of first and second degree manslaughter.

a. An accused person is entitled to a lesser included offense instruction based on viewing the evidence in the light most favorable to the accused.

It is "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973). RCW 10.61.003; U.S. Const. amend. 14; Const. art. I, §§ 3, 22. The constitutional right to a lesser included offense instruction stems from the "risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3rd Cir. 1988). "When the evidence supports an inference that the lesser included offense was committed, the defendant has a right to have the jury consider that lesser included offense." *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

In Washington, case law requires a court to give a requested lesser included offense instruction when two conditions are met: (1) legally the lesser offense is a necessary element of the offense charged, and (2) factually the evidence supports an inference that only the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

As inferior degrees of premeditated murder, first and second degree manslaughter necessarily meet the "legal prong" of the *Workman* test since all of the elements of manslaughter are also elements of intentional murder. *See State v. Schaffer*, 135 Wn.2d 355, 357-58, 957 P.2d 214 (1998). Here, the court denied the requested lesser degree instructions for manslaughter not on the legal prong, but on the factual prong.

To satisfy the factual portion of the *Workman* test, the evidence is viewed in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). A requested jury instruction on a lesser included or inferior degree offense should be given "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and

acquit him of the greater." *Warden*, 133 Wn.2d at 563 (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

However, a court may not unfairly deny a defendant his right to a lesser offense instruction by parsing the requirements too narrowly. In *Keeble*, an Indian tribal member was prosecuted for assault in federal court under a narrow jurisdictional statute and was denied a requested lesser offense instruction because the lesser offense was not part of the narrow statute that gave the federal court jurisdiction over tribal land. 412 U.S. at 206, 208-09. The Supreme Court reversed, finding that the legislators did not intend to treat Indians unfairly or make it easier to convict an Indian when it extended federal jurisdiction over certain offenses. *Id*. at 212-13. To preclude a lesser offense instruction "would raise difficult constitutional questions." *Id*. at 213. Consequently, the court concluded that the basic procedural fairness principles underlying a criminal trial require giving a lesser included offense instruction when the evidence warrants it. *Id*. at 214.

b. Mr. Hummel was unreasonably denied his request for lesser included offense instruction based on the court's misapplication of the law.

Viewing the evidence in the light most favorable to Mr. Hummel, he was entitled to jury instructions on manslaughter. Criminal culpability rests on a "hierarchy of mental states" defined by statute. *State v. Allen*, 101 Wn.2d 355, 359, 678 P.2d 798 (1984); RCW 9A.08.010. Intent, criminal recklessness, and criminal negligence are lesser mental states in the hierarchy. RCW 9A.08.010 (1), (2). First and second degree manslaughter are lesser offenses of intentional murder that require reckless or negligent mental states, respectively. *See State v. Jones*, 95 Wn.2d 616, 621-22, 628 P.2d 472 (1981).

The court criticized Mr. Hummel for failing to produce evidence that Ms. Hummel was killed by reckless or negligent conduct to prove first or second degree manslaughter. However, there was no more evidence that Ms. Hummel was killed by deliberate, premeditated act than there was by the reckless or negligent use of force. Assuming that Ms. Hummel was dead, there was no evidence how she died. The State focused its case on Mr. Hummel's motive to kill her following the sudden disclosure of sexual abuse by his teenaged daughter, coupled with the Ms. Hummel's unscheduled disappearance. Yet even if the

jury could reasonably conclude Ms. Hummel was dead, there was no more evidence indicating Mr. Hummel premeditatedly and intentionally killed her than the possibility that she died by a different mechanism.

Based on the vacuum of evidence showing how Ms. Hummel may have died, Mr. Hummel's constitutional right to present a reasonable theory of defense should have prevailed. Mr. Hummel cannot be faulted for failing to show that Ms. Hummel died in a negligent or reckless fashion when the State had no proof that she died any other way. Although cases speak of an affirmative showing that the lesser offense was committed to the exclusion of the greater, such a showing was exceedingly difficult when there was no evidence about the mechanism of death for Mr. Hummel to challenge. As in *Keeble*, the court denied Mr. Hummel his right to defend himself against the allegations by refusing his request for lesser included offense instructions that offer a theory that was just as plausible as the theory offered by the prosecution.

c. The erroneous refusal to instruct the jury on a lesser included offense requires reversal.

The refusal to give an instruction that prevents the defendant from presenting his theory that he did not recklessly or negligently act

is reversible error. *Warden*, 133 Wn.2d at 564. The right to present a defense, and to have the jury instructed on a valid theory of defense, is guaranteed by the Sixth Amendment and the more protective right to a trial by jury under article I, sections 21 and 22.

The court's refusal to instruct the jury on the lesser offense of fourth degree assault precluded Mr. Hummel from presenting the jury with a viable option of finding him culpable for causing Ms. Hummel's presumed death, as the jury could infer from his admission that he knew she was dead, but it could also find insufficient evidence he acted with premeditated intent. Instead, Mr. Hummel had to ask the jury to acquit of committing any charge. When an element remains in doubt but the defendant "is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction" absent an available lesser offense. *Keeble*, 412 U.S. at 212-13. The court improperly denied his ability to fully and effectively argue his theory of defense due to the court's denial of his request for lesser included offense instructions, which requires reversal of his conviction. *Warden*, 133 Wn.2d at 564.

4. Defense counsel unreasonably and prejudicially withdrew the request to ask the jury to consider the lesser offense of second degree murder based on a misrepresentation of the potential sentence upon conviction

a. The right to effective assistance of counsel includes a competent lawyer who makes reasonable tactical decisions.

An attorney renders constitutionally inadequate representation when she engages in prejudicial conduct for which there is no legitimate strategic or tactical reason. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011); U.S. Const. amend. 6; Const. art. I, § 22. Even if defense counsel had a strategic or tactical reason for acting in a certain fashion, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms," quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kyllo*, 166 Wn.2d 856, 862,

868-69, 215 P.3d 177 (2009). For example, an attorney performs unreasonably by "failing to object to an instruction which incorrectly sets out the elements of the crime" that "permitted the defendant to be convicted of a crime he or she could not have committed under facts presented by the State." *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (citing *State v. Ermert*, 94 Wn.2d 839, 849-50, 621 P.2d 121 (1980)). Likewise, a defense attorney must understand the law when advising telling a client about the State's proof. *Lafler v. Cooper*, U.S. _, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012). "[T]here is no conceivable legitimate tactic where the only possible effect of deficient performance was to allow the possibility of a conviction of a crime under a statute which did not exist and could not be applied during part of the charging period." *Aho*, 137 Wn.2d at 745-46

While an attorney's decisions are treated with deference, and her competence is presumed, her actions must be reasonable based on all circumstances. *Wiggins*, 123 S.Ct. at 2541; *State v. Tilton*, 149 Wn.2d 775, 785, 72 P.3d 735 (2003). To assess prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of a different outcome, but need not show the attorney's conduct altered the result of the case. *Tilton*, 149 Wn.2d at 784.

b. Mr. Hummel received inaccurate advice from his attorney when deciding whether to request an available instruction on the lesser offense of second degree murder.

The "decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her counsel but ultimately rests with defense counsel." *Grier*, 171 Wn.2d at 32. Counsel's decision to request a lesser offense instruction must be "reasonable" to constitute a competent professional choice. *Id.* at 34.

In deciding whether to request a lesser offense instruction, one well-established consideration for counsel is that "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Id*. at 36 (citing *inter alia*, *Keeble*, 412 U.S. at 212–13; *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

In *Grier*, the court acknowledged that the decision to request a lesser offense is a gamble that a defendant must make, yet this choice will not be reasonable unless counsel provided competent advice to her client to make this decision. *Id*. at 39. For example, a defendant may

not want a compromise verdict because she genuinely believes she is innocent, when a neutral observer might question the logic of that choice. *Id*. But as *Grier* explained, like a decision to plead guilty, the defendant's decision to accept or reject a proffered lesser included offense instruction cannot be reasonable if it is not based on an accurate understanding of the law. *Id*.; *see Lafler*, 132 S.Ct. at 1384.

Mr. Hummel initially asked the court to instruct the jury on the lesser included offenses of second degree murder and first and second degree manslaughter. 4RP 469. The court agreed there was evidence supporting intentional murder, based on his actions that indicated he knew she was dead and had died at a certain time. 4RP 559. But the defense withdrew his request for any lesser offense instructions, including second degree murder, after the court refused to instruct the jury on either degree of manslaughter. 4RP 557.

At Mr. Hummel's prior trial, he had requested and the court had given a second degree murder lesser offense instruction. Supp. CP _, sub. no. 87 (court's Instruction 6); Supp. CP _, sub. no. 86 (defense proposed instruction).

Defense counsel put her reason for withdrawing the request for a second degree murder instruction on the record. 4RP 561-62. She

explained that "based on Mr. Hummel's age, if he was to be convicted of murder II, to him, it's the same amount of time that we think would happen on murder I." *Id*. Counsel explained, "I don't think it would effectively make any difference" in terms of the sentence imposed based on Mr. Hummel's age and medical condition. 4RP 562.

Counsel's strategic advice to reject a proposed lesser offense instruction for second degree murder is reasonable only if based on an accurate understanding of the law. *See Kyllo*, 166 Wn.2d at 862.

Because the offense occurred in 1990, the sentencing laws in effect in 1990 control the offense. RCW 9.94A.345 ("Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."); *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

In 1990, the standard range for first degree murder was 240-320 months for an offender score of "0", while the standard range for second degree murder was 123-164 months. In 2014, at the time of Mr. Hummel's trial, the high end of the second degree murder standard range was far higher, 123-220 months, substantially reducing the difference between first and second degree murder convictions.

Having previously received a sentence at a high end of the standard range, Mr. Hummel could reasonably expect a similar high end sentence for any offense if convicted. CP 19, 22. However, 164 months as the high end of Mr. Hummel's second degree murder standard range is far less onerous than the 320 months he was likely to receive if convicted of first degree murder and far less than the 220 months at the high end of the present day standard range.

By the time of his second trial, Mr. Hummel had been in custody on this charge since 2008, giving him six years of sentencing credit. *See* Supp. CP _, sub. nos. 5, 7. A sentence of 164 months amounts to 13.6 years in prison. With the ability to earn 15 percent good time, Mr. Hummel could have his sentence reduced by 24.6 months and serve 11 years in prison, or five years of additional time if convicted of second degree murder. RCW 9.95A.729. While if convicted of first degree murder and sentenced to the 320-month high end of the standard range, or 26.6 years, he owed 21 years at the time of conviction, or 17.6 years if he received the full extent of good time available.

Contrary to defense counsel's assertion, the standard range as it existed in 1990 did not place Mr. Hummel in the position of serving "the same amount of time" as a first degree murder conviction. 4RP

562. While he would still have to serve some prison time, five years is far less than the nearly 20 years that would remain if convicted of the greater offense. Defense counsel did not reasonably advise Mr. Hummel based on an accurate assessment of the law when deciding not to seek a potential compromise verdict of second degree murder.

c. Mr. Hummel was prejudiced by his attorney's incorrect advice.

An attorney's deficient performance requires reversal when there is a reasonable probability that the outcome could have been different without the error. *Strickland*, 466 U.S. at 694. A defendant is not required to prove that he would not have been convicted but for the error. *See e.g.*, *House v. Bell*, 547 U.S. 518, 552-53, 126 S.Ct. 2064, 2086, 165 L.Ed.2d 1 (2006) (reversing for ineffective assistance based on new evidence where, even though jury might disregard new evidence, it "would likely reinforce doubts" as to defendant's guilt). The reasonable probability standard requires only that the error was sufficiently material that it undermines confidence in the jury's verdict. *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

As the Supreme Court acknowledged in *Keeble*, the jury is more likely to convict when presented with only a single choice of offense, and the evidence indicated the defendant is guilty of something. *Keeble*, 412 U.S. at 212-13. When rejecting Mr. Hummel's motion to dismiss the State's case after it rested, the court essentially explained that there was evidence that Mr. Hummel knew of Ms. Hummel's death from which the jury could infer he was involved in it. 4RP 550. The court acknowledged it was "not the strongest" case for premeditation, but would let this issue be decided by the jury. *Id*. In fact, there was no evidence of actual premeditation, planning, or deliberation. Accordingly, failing to let the jury consider the lesser offense of second degree murder left no option other than asking the jury to find him not guilty of any charge, no matter how distasteful that might be to jurors. Because Mr. Hummel made his decision to withdraw the request for an instruction on second degree murder based on incorrect information about the similarity of the sentences and it is reasonably probable that the jury would have convicted him of the lesser offense had it been presented, counsel's deficient performance was prejudicial and requires a new trial.

5. The court impermissibly ordered Mr. Hummel to pay LFOs without inquiring into his ability to pay these financial penalties

Our Supreme Court recently held that the "trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015); RCW 10.01.160(3). LFOs are added to a judgment and sentence and have penal consequences. RCW 9.94A.760.

Observing that the imperative "shall" in RCW 10.01.160(3) imposes a duty on the court to assess the defendant's financial resources and the burden of payment, the *Blazina* Court held that a trial court does not satisfy its obligation by inserting boilerplate language into the judgment and sentence. 182 Wn.2d at 838. It further admonished that a person's qualification as indigent under GR 34 should cause court's to "seriously question that person's ability to pay LFOs." *Id*. at 839.

Blazina was premised on the policy concerns underlying the imposition of LFOs without individually considering a person's actual ability to pay them. Poor citizens are entitled to equal protection of the law. U.S. Const. amend. 14; Const. art. I § 12; *Williams v. Illinois*, 399 U.S. 235, 245, 90 S.Ct. 2018, 26 L.Ed. 2d 586 (1970); *In re Personal*

Restraint of Mota, 114 Wn.2d 465, 788 P.2d 538 (1990). The constitution also prevents the loss of life or property without due process. U.S. Const. amends.5; 14; Const. art. I, §§ 3, 17, 22. The order that Mr. Hummel pay costs he is not able to afford, and that he suffers further punishment for failing to comply, is unconstitutional. *See Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974); *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1977). The court's unsupported finding that Mr. Hummel had the ability to pay his legal financial obligations is thus a constitutional issue that he may raise on appeal, even though *Blazina* gives the court discretion to address this issue. RAP 2.5(a); CP 302.

In addition, Washington courts are entitled to correct erroneous sentences whenever the error is pointed out. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Permitting defendants to challenge an illegal sentence on appeal helps ensure that sentences are in compliance with the sentencing statues and avoids sentences based only upon trial counsel's failure to pose a proper objection. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004) (quoting *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369, *rev. denied*, 122 Wn.2d 1024 (1993)).

The rule also inspires confidence in the criminal justice system and is consistent with the Sentencing Reform Act's goal of uniform and proportional sentencing. *Mendoza*, 165 Wn.2d at 920; *State v. Ford*, 137 Wn.2d 472, 478-79, 484, 973 P.2d 452 (1999); RCW 9.94A.010(1)-(3). Washington courts have often reviewed challenges to erroneous sentences for the first time on appeal. *Mendoza*, 165 Wn.2d at 919-20 (criminal history); *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (condition of community custody); *Ford*, 137 Wn.2d at 477-78 (criminal history); *State v. Moen*, 129 Wn.2d 535, 546-47, 919 P.2d 69 (1996) (timeliness of restitution order); *State v. Bertrand,* 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (sufficiency of evidence to support finding of ability to pay legal financial obligations), *rev. denied*, 175 Wn.2d 1014 (2012); *State v. Hunter*, 102 Wn. App. 630, 633-64, 9 P.3d 872 (2000) (drug fund contribution), *rev. denied*, 142 Wn.2d 1026 (2001); *Paine*, 69 Wn. App. at 884 (State's appeal of sentence below standard range).

Here, the court imposed LFOs with only a boilerplate finding of the ability to pay. Yet Mr. Hummel has been incarcerated since 2008. He has had appointed counsel throughout the trial and appellate proceedings. Mr. Hummel has health problems, including needing a

hearing device to listen to the trial proceedings, and is in his mid-70s. It is highly unlikely he has a present or future ability to pay LFOs. These financial penalties should be stricken absent an individualized inquiry and finding of his ability to pay based on the evidence presented.

F. CONCLUSION.

Mr. Hummel's conviction should be reversed due to insufficient evidence of essential elements. Alternatively, he should receive a new trial where he receives the lesser included offense instructions to which he is entitled and does not receive legal and financial obligations as a penalty due to his on-going indigence.

DATED this 22nd day of June 2015.

Respectfully submitted,

s/ Nancy P. Collins
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Washington Appellate Project (91052)
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 72068-6-I
	)	
BRUCE HUMMEL,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF JULY, 2015, I CAUSED THE ORIGINAL **CORRECTED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	DAVID MCEACHRAN, DPA WHATCOM COUNTY PROSECUTOR'S OFFICE [Appellate_Division@co.whatcom.wa.us] 311 GRAND AVENUE BELLINGHAM, WA 98225	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF JULY, 2015.

X_____

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