NO. 32841-4-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MARCO ANTONIO GALLEGOS, Appellant.

BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

On February 6, 2013, Marco Gallegos was charged with two counts of aggravated first degree murder, an alternative count of first degree murder, and unlawful possession of a firearm. CP 1-2. He was charged jointly with three codefendants, Troy Whalen, Jose Pineda, and Heriberto Villa. CP 1-2. The charges stemmed from the following facts:

Jose Pineda, also known as "Loks," was Michael Eby's drug supplier. RP 641, 1385, 1398, 1409, 1171. They saw each other on a weekly basis and had known each other for about eight months. RP 1385, 1394. Pineda developed a plan to confront Mr. Eby when he learned that Mr. Eby solicited a rival Sureño gang member, David Campos, to set up Pineda to get robbed. RP 1413. Pineda used a ruse in order to confront Mr. Eby. He told Mr. Eby he had $600 that he owed him and got Mr. Eby

to agree to meet him at Troy Whalen's garage. RP 1450-77. The garage was a place where gang members spent time together and did drugs. RP 1255, 1263-4.

On the way to Whalen's home, Pineda brought his good friends Marco Gallegos, aka "Dabs" or "Sir Loco," and Heriberto Villa as backup. RP 1447, 1449, 1545, 1606, 1609, 1173. Pineda and Gallegos were in the same gang, "La Raza XIV." RP 1253. Within the La Raza gang, Gallegos was a "soldier" and one of the people you called if you wanted something handled. RP 1732, 1744. Gallegos went along with Pineda's plan to assault Mr. Eby. RP 1456. All three went into Whalen's garage after they got to the house. RP 1301, 1304. Both Pineda and Gallegos were armed. RP 1460.

Mr. Eby showed up with a friend, Ryan Pederson. RP 1306. Pineda led Mr. Eby into the garage where they smoked and talked. RP 1456. Pineda then asked Villa to bring Mr. Pederson into the garage and Villa complied. RP 1458. When confronted with the allegation, Mr. Eby acted surprised but admitted that he might have made a comment before he knew Pineda. RP 1463. Mr. Campos was called on the telephone and confirmed the Mr. Eby tried to get him to set up Pineda. RP 1465-6. Pineda told Mr. Eby that he was "gonna mess him up." RP 1662-3. Pineda testified that Mr. Eby knew what was going to happen to him

because he had seen a prior attack on someone who stole pot plants from Pineda. RP 1477. After Pineda's comment, Mr. Eby started punching Pineda. RP 1455.

Gallegos, who had been standing and blocking the door, walked to within two feet of Mr. Eby and shot him. RP 1664-7. At that point, Pineda then felt the weight of Mr. Eby's body on top of him and Mr. Eby wasn't moving. RP 1471-2. Gallegos then pulled Mr. Eby off of Pineda, and proceeded to shoot Mr. Eby multiple times while he was on the ground. RP 1471-2, 1551, 1664-7, 1750. Mr. Eby had a total of three gunshot wounds: one to the right side of his head, one to his right upper arm, and one to his chest. RP 552-3, 556. He died as a result. RP 552, 556, 559-60, 1551.

Gallegos then took control of the situation and told people what to do. RP 1487. He was calm the whole time. RP 1746. They wrapped Mr. Eby's body in a sheet, plastic bags, rope, wire, and duct tape. RP 439-441. Gallegos's plan was to put Mr. Eby's body in the trunk of Mr. Eby's own car and dump the car near Rosa Dam in the canyon. RP 1488, 1490-1, 1504.

Gallegos also ordered Villa to "smoke that fool," referring to Mr. Eby's friend, Mr. Pederson, so there wouldn't be any witnesses. RP 1494. The plan was to get Villa more involved in order to keep him quiet. RP

1493-4. Villa held Mr. Pederson at gunpoint inside of the house and then forced him into Mr. Eby's car. RP 1499. Everyone got into Mr. Eby's car except for Whalen, who drove Pineda's car. RP 1502.

On the way to the canyon, Gallegos warned, "the world's gonna end for some people." RP 1505. When they got there, everyone but Mr. Pederson got out of the car. RP 1509. At the time, Gallegos was standing just a few feet away from Mr. Pederson with his gun out. RP 1510-1, 1702, 1703. Villa was being boxed in by both Pineda and Gallegos. RP 1701. Pineda threw his gun at Villa and told him he had to do it. RP 1704. Villa felt that he if didn't shoot Mr. Pederson, Gallegos would have shot him. RP 1703. Villa then shot Mr. Pederson two times, striking him in the head and killing him. RP 1512, 1704. They left Mr. Eby's car there, along with the bodies of Mr. Eby and Mr. Pederson, and left the canyon in Pineda's car. RP 1333, 1337.

Trial was initially set for April 1, 2013 but continued for a multitude of reasons. Numerous pre-trial motions were heard and trial officially commenced on August 20, 2014. A jury was sworn in on August 29, 2014. CP 1260. On September 2, 2014, opening statements were made. Trial lasted 11 days and included 218 exhibits being marked by the clerk and 33 witnesses being called by the State. CP 1230, 1259.

The State rested on September 23, 2014. RP 1265. Gallegos did not call any witnesses. RP 1873.

The case went to the jury on September 24. RP 1266. On September 26, 2014, Gallegos was found guilty of two counts of first degree premeditated murder, second degree (intentional murder) and second degree (felony) murder, first degree unlawful possession of a firearm, as well as numerous sentencing enhancements.[1] CP 1204-1219. He was sentenced to life imprisonment without the possibility of release or parole. CP 1238. This appeal followed.

III. ARGUMENT

A. GALLEGOS HAS FAILED TO PROVE THAT HIS ATTORNEY'S DECISION TO FORGO WPIC 6.05 WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

In Strickland v. Washington, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. 466 U.S. 668; 104 S. Ct. 2052 (1984). Under Strickland, the analysis begins with a "strong presumption that counsel's performance was reasonable." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). It involves a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This

[1] The State had amended the charge prior to trial. Gallegos was convicted as charged.

> requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

Ineffective assistance of counsel is a fact-based determination that is "generally not amenable to per se rules." Strickland, 466 U.S. at 696 ("Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.").

1. Gallegos has failed to show that his trial lawyer's performance was deficient.

A lawyer's performance is deficient if it falls "below an objective standard of reasonableness." Strickland, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation.

Accordingly, the defendant bears the burden of establishing deficient performance. State v. McFarland, 127 Wn.2d 332, 335, 889 P.2d 1251 (1995).

"When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." Kyllo, 166 Wn.2d at 863; State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ("[T]his court will not find ineffective assistance of counsel if 'the actions of counsel complained of go to the theory of the case or to trial tactics.'" (quoting State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)). Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The 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) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Finally, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

WPIC 6.05 states as follows:

> Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 6.05, at 184 (3d ed. 2008) (WPIC). WPIC 6.05 should be given "if requested by the defense." Note on Use to WPIC 6.05. Here, it was not requested.

But the defense counsel's decision to forgo a cautionary accomplice instruction could have been a reasonable trial strategy. Although the codefendants testified for the State, some of their testimony also helped Gallegos. Villa testified that it was Pineda who was calling the shots. RP 1724. He testified that Gallegos didn't say anything before or after the first shooting or at the dam. RP 1724. He also testified that Gallegos was the only one not doing drugs in Whalen's garage. RP 1739. Pineda testified that he only planned on confronting Mr. Eby and

"checking" him.[2] RP 1420. He admitted on cross-examination that he only initially identified Mr. Eby's shooter as "some dude." RP 1535-6.

Furthermore, Whalen testified that he didn't see the shootings but only heard gunshots. RP 1307, 1333. He testified that Pineda was the one directing things after the shooting. For example, Whalen said Pineda asked for a sheet, handed Villa a pistol, asked Whalen to help lift the body into the trunk, asked Whalen to drive his car to the Canyon and then to another's house, and told everyone "this stays between us 4." RP 1308, 1318. All of this testimony, while it came from State's witnesses, was helpful for the defense, who wanted to point to Pineda as more culpable than Gallegos. And each party is entitled to the benefit of the evidence regardless of whether it comes from the State or the defense. See WPIC 1.02. As such, in view of this testimony, it was a legitimate tactical decision to forgo the instruction. Defense counsel would not want to undermine all of the codefendants' testimony by adding a cautionary instruction regarding their testimony.

The fact that parts of the codefendants' testimony helped Gallegos is also apparent from his attorney's closing argument. In closing

[2] "Checking" someone means means holding someone accountable and the level of violence used will be greater if an outsider is getting checked. RP 1837-8.

argument, Gallegos's attorney relied on the testimony of Villa to bolster his client's defense. RP 1977. He stated:

> There's no evidence that anybody testified to other than well this is what we hear whatever that Mr. Gallegos threatened anybody in this case. Heriberto Villa went so far as to say he'd never been threatened by anyone in this case. The only thing that he was saying about Mr. Gallegos talking to him was tell him I wasn't there. Didn't say he threatened him. Tell them I wasn't there. Why else would he be saying tell them I wasn't there?

Later on, he relies on more testimony of Villa:

> Although Villa said that Pineda was not the shot caller. He did everything. Gallegos didn't really say anything not on the drive, not at the house, nothing until prompted he, he said he walked out and had a gun in his hand as Pederson was walking out but as, as he's telling the story he doesn't say that Gallegos did anything. There's a good, good reason for that because Mr. Gallegos didn't do anything.

And yet another time, he refers to Villa's testimony in support of his case:

> But Villa says that those dudes would have shot me. He doesn't say Dabs would have shot me. He doesn't say Gallegos would have shot me.

RP1921. He also points out that the witnesses across the board, testified that Gallegos was "not into meth." RP 1982. In closings, the defense attorney multiple times referred to Pineda's testimony that he used

Gallegos's name in the past to get out of a charge. RP 1984, 1979. This was all clearly helpful to the defense case.

Furthermore, the testimony of each individual codefendant was cross-corroborated by the testimony of two other codefendants. This case didn't rest solely on one person's word. Mr. Eby's father and daughter, as well as David Campos and Ashli Pineda, also corroborated the testimony of the accomplices. Ashleigh Eby, Mr. Eby's daughter, confirmed that her father was going to meet "Loks" the night he disappeared. RP 641, 804. She testified that "Loks" owed her dad $600. RP 677-8. And that on the night of the murder, "Loks" was trying to get ahold of her dad and she relayed that to him. RP 679. When she spoke to her dad, she could hear Mr. Pederson in the car with him. RP 702. Mr. Eby's father also confirmed that his son went to Whalen's house to see a person that owed him money. RP 729-31.

Mr. Campos confirmed that Mr. Eby solicited him to "jack Loks." RP 1792. He also confirmed that he was called on the night of the murder to confirm what Mr. Eby had asked of him. RP 1793-4. Phone records showed that Mr. Eby and Pineda were calling Mr. Campos around the same time, 10:34 p.m. RP 1797, 1802. Both were calling from the same vicinity. RP 1797. Phone records showed that after the phone call to Mr.

Campos, Mr. Eby's phone stopped receiving calls eight minutes later. RP 1804.

Ashli Pineda, Pineda's wife, testified that Gallegos was at her house when she and Pineda got back from Walmart on the evening of the murder. RP 1051. She said that Gallegos left with her husband. RP 1053. She then heard them later that night after she had gone to bed. RP 1053. Villa was with them as well and possibly another person. RP 1053-4. They came inside her home and were talking. RP 1053. They were there for about 30 minutes and then everyone left except for her husband. RP 1055.

In addition to lay testimony, there was physical evidence that corroborated the testimony of the accomplices. The forensic pathologist testified that Mr. Eby's cause of death was three gunshots wounds, each of which could be capable of causing death. RP 560. One gunshot wound was mid-chest, one was to the right upper arm, and one was to his head. RP 548-556.

He also testified about Mr. Pederson's cause of death. He observed a gunshot wound to Mr. Pederson's head and shoulder. RP 508-521. He gave an opinion that the gunshot wound that impacted the eye, the brain, and caused skull fractures was the lethal wound. RP 521. The

description of the gunshot wounds by the forensic pathologist was consistent with the testimony given by Whalen, Pineda, and Villa.

Furthermore, cell phone tower data was consistent with the testimony of the accomplices. That data showed that Mr. Eby and Pineda were in the general area of Whalen's garage. RP 800-802. Mr. Eby's phone stopped emitting a signal at 10:41 pm the night he was murdered. This is consistent with testimony that his phone was tossed into the fireplace in Whalen's garage. Pineda's last phone call was at 11:57 pm, consistent with testimony that his phone was tossed out the window of the car on the way back from the canyon. RP 802, 1707.

Physical evidence later found in Whalen's garage also corroborated the testimony of the accomplices. A photo was found showing a blanket on a couch inside of Whalen's home. The blanket was the same one that was wrapped around Mr. Eby's body. RP 933. A sheet was found that also matched the one found on Mr. Eby. RP 939. What appeared to be part of an Apple IPhone was found in the fireplace and Mr. Eby's phone was an Apple IPhone. RP 941-2. There was a folding camp chair belonging to Mr. Eby's father that was found outside the garage. RP 946. The chair had been kept in the trunk of Mr. Eby's car and was likely moved to make room for Mr. Eby's body.

Officers also found multiple types of wire that were similar to that wrapped around Mr. Eby's body. RP 943. In addition, the matching end of a cut electrical cord that powered a fireplace fan was found. RP 943. The cord had been cut and wrapped around Mr. Eby. This, along with other facts, corroborated testimony that Mr. Eby's murder occurred in Whalen's garage. RP 950. Furthermore, blood found on a chair was sent to the crime lab and confirmed to be that of Duane Martin, confirming Pineda's account that on a prior occasion, he beat Mr. Martin in his garage after learning that Mr. Martin stole marijuana plants from him. RP 1200-5, 1397-99.

Expert testimony was also consistent with the testimony of the cooperating witnesses. Forensic scientist Rick Wyant testified as an expert for the Washington State Patrol Crime Lab. RP 987. He examined several bullets, bullet fragments, and fired cartridge cases. RP 997. His analysis supported the witnesses' testimony that two separate guns were involved in the killing of Mr. Eby and of Mr. Pederson.

Mr. Wyant examined a bullet and bullet fragments relating to Mr. Eby (Exhibits 99, 100, and 102) and found that they were all fired from the same non-Glock firearm. RP 1013-5, 1017-9, 1021, 1031. However, the fired bullet and fragments (Exhibits 93 and 105) relating to Mr. Pederson were both fired from a Glock-type firearm. RP 1007, 1031.

Furthermore, Mr. Wyant concluded that the cartridge cases found in Mr. Eby's car (Exhibits 103 and 104) were fired from the same gun and consistent with the bullet and fragments recovered from the car. RP 584-90, 1031. In sum, because the testimony of each accomplice was substantially corroborated through other witnesses, cell records, expert testimony, and physical evidence, it was not reversible error for Gallegos's attorney to forgo seeking WPIC 6.05.

2. Gallegos has failed to show that deficient performance prejudiced his defense.

To satisfy the prejudice prong of the Strickland test, Gallegos must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." Kyllo, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; Garrett, 124 Wn.2d at 519. In assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law" and must "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like." Strickland, 466 U.S. at 694-95.

To prove prejudice, Gallegos must prove the jury would probably have acquitted him if his lawyer had proposed WPIC 6.05. See State v.

Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991). Gallegos's lawyer ably revealed the inconsistencies and biases of the witnesses. For example, he pointed out inconsistencies in each codefendant's testimony, RP 1975-6,1978-9,1980-1,1984. He described how they were all meth users. RP 1982. He talked about the deals that they made with the State and how they all had "a lot to lose." RP 1984. Every inconsistency or bias that could have been raised with these witnesses was raised and laid out for the jury to consider.

The fact that they entered into cooperation agreements was made clear. The defense attorney also told them to be skeptical of what the witnesses were saying. RP 1984. And the jury learned not only about the cooperation agreements, but also learned about the gang lifestyle of the witnesses and their using and selling drug. It was abundantly clear that the cooperating witnesses were involved in illegal activities. Furthermore, the jury was instructed to consider the biases and prejudices of the testifying witnesses. WPIC 1.02.[3] As such, a cautionary instruction in this case would not have caused the jury to acquit Gallegos.

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[3] WPIC 1.02 states: "You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and

B. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND PREMEDITATION.

Gallegos claims that there is insufficient evidence of aggravated first degree murder in that the murder of Mr. Eby was without premeditation. In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wash. 2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. State v. Gentry, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 599, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. Id. Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

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any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony."

Circumstantial evidence may be used to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Premeditation has been defined as "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. Gentry, 125 Wash.2d 570, 598-99, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995). Premeditation must involve more than a moment in point of time. RCW 9A.32.020(1). Premeditation may be inferred when the circumstances of the crime suggest that the defendant considered the death prior to acting. Gentry, 125 Wash.2d at 598-99. Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial. Id. at 598. A number of appellate cases have considered the sufficiency of evidence with respect to premeditation and demonstrate that a wide range of proven facts will support an inference of premeditation. Id.

For example, sufficient evidence to infer premeditation has been found where (1) multiple wounds were inflicted; (2) a weapon was used;

(3) the victim was struck from behind; and (4) there was evidence of a motive, such as robbery or sexual assault. Id. at 599. In State v. Rehak, the Court held that evidence showing the victim was shot three times in the head, two times after he had fallen on the floor, was sufficient to establish premeditation. 67 Wn. App. 157, 834 P.2d 651 (1992). And in State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985), evidence that the victim was struck by two blows to the head, with some interval passing between the blows, while she was lying face down, supported a finding of premeditation.

Here, the facts of the case, when viewed in the light most favorable to the State, show deliberate premeditation and planning to take Mr. Eby's life each time he pulled the trigger. The testimony was consistent that Gallegos was standing by the door, blocking anyone from leaving. Gallegos was not there to do drugs or hang out. He was described as a "soldier," someone you call when you need back up. He knew what the plan was--to physically assault Mr. Eby. Pineda, his friend and fellow gang member, was getting hit by Mr. Eby at the time. Gallegos could have fired a warning shot but that wasn't his plan or intent. He chose to pull out the gun he was concealing, walk up to Mr. Eby, aim the gun, and pull the trigger. This was a calculated attack. He then told Pineda he did it because Pineda was getting "fucked up." RP 1474. Villa described

Gallegos as two feet away from Mr. Eby, or "point blank" at the time he shot Mr. Eby. RP 1667. This shot was intentional and premeditated. Gallegos acted with the planned intent of taking Mr. Eby's life. The fact that he gave a reason for the shooting -- that Pineda was getting "fucked up," also demonstrates that he had formed the intent to take Mr. Eby's life prior to shooting him.

After this first shot, Mr. Eby's body went still and the weight of his body came down upon Pineda. He was no longer a threat to anyone. Yet, Gallegos decided to pull Mr. Eby off of Pineda, and shoot Mr. Eby again at least two more times while Mr. Eby was on the floor. Whalen testified that he heard three or four gunshots, while Villa said that there were four to five gunshots. RP 1307, 1674.

Based on the location of the gunshot wounds, it is logical to infer that Gallegos was intentionally trying to kill Mr. Eby. Shooting someone in the head from close range shows an intent to kill. Similarly, a shot to the mid-chest suggests that Gallegos was trying to shoot Mr. Eby in the heart to make sure he didn't survive. The forensic pathologist concluded that any one of the three shots could have been lethal. RP 560. Like the Sargent and Rehak cases, there was some interval passing between the blows, which also supports a finding of premeditation.

Furthermore, after he took Mr. Eby's life, Gallegos then calmly proceeded to give directions to the others and wrap up Mr. Eby's body and put in the trunk of a car. He then ordered that the witness, Mr. Pederson, be killed. RP 1491. Gallegos acted consistent with someone who had formed a deliberate and calculated plan to take Mr. Eby's life.

There was also sufficient evidence of a motive in this case. Villa testified that when Mr. Campos confirmed that Mr. Eby had tried to get him to set up Pineda, "Gallegos was pretty mad." RP 1662. He also said that while Gallegos was standing by the door and blocking it, he looked mad. RP 1664. It is important to note that Gallegos and Pineda were Norteño gang members of the same gang. The fact that Mr. Eby tried to solicit a Sureño gang member to rob Pineda, Gallegos's friend and a fellow Norteño gang member, gave him a motive to want to kill Mr. Eby.

A 22-year veteran of the Yakima Police Department, Sgt. David Cortez, testified as a gang expert. RP 1240. He testified about some of the basic concepts adhered to by members of a gang. First of all, there is an expectation that you "put in work" or commit crimes for the gang. RP 1831. Second, problems are solved with violence and respect is achieved with violence. RP 1834. Third, disrespect is taken as a challenge and usually responded to with violence. RP 1835. Fourth, if you go against one gang member, you go against them all. RP 1835. It is expected that

you back up a fellow gang member. RP 1838. One gang member does not face a situation alone. RP 1838. Fifth, "getting checked" means holding someone accountable and the level of violence will be greater if an outsider is getting checked. RP 1837-8.

An example of someone getting checked was elicited during Pineda's testimony in which he described an earlier attack on Duane Martin after Mr. Martin stole some marijuana plants from Pineda. RP 1396. Pineda supplied meth to Mr. Martin. RP 1393-4. Pineda called up Mr. Martin, met up with him, and took him to Whalen house to talk to him about the stolen plants. RP 1397. Mr. Eby was present at the time. RP 1477. Pineda had two guys backing him up and planned to "beat him down" if he was lying. RP 1397. Mr. Martin was beat with a construction stapler. RP 1398. His blood was found on a chair in Whalen's garage. RP 1200-5. Afterwards, Pineda's back-up guys took pistols from Mr. Eby and Mr. Martin. RP 1399.

With the gang connection between Gallegos and Pineda, it was clear that Gallegos had a motive to kill Mr. Eby. Mr. Eby hadn't just stolen some pot plants. He tried to set up a fellow Norteño gang member by soliciting a rival gang member. This would be seen as an attack on the entire gang and would call for a response, and a much greater response than the beating that Mr. Martin got. Mr. Eby was also an outsider so the

level of violence used to "check him" would be greater than if he were a member of Gallegos's own gang.

Based on all of the evidence, the evidence was overwhelmingly sufficient to support the jury's finding of premeditation. Any rational trier of fact could have found all the essential elements of first degree premeditated murder beyond a reasonable doubt.

C. GALLEGOS HAS FAILED TO PROVE THAT HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED.

Both the United States Constitution and the Washington Constitution provide a criminal defendant with the right to a speedy public trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Our state constitution "requires a method of analysis substantially the same as the federal Sixth Amendment analysis and does not afford a defendant greater speedy trial rights." State v. Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). This court reviews de novo constitutional speedy trial claims. Id. at 280.

Some pretrial delay is often "inevitable and wholly justifiable." State v. Shemesh, 187 Wn. App. 136, 144, 347 P.3d 1096 (2015) (citing Doggett v. United States, 505 U.S. 647, 656, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). The constitutional speedy trial right does not involve a fixed time, but rather focuses on the expiration of a reasonable time. Id.

Any constitutional "inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." Id. (citing Barker v. Wingo, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). In deciding reasonableness, courts consider four Barker factors: (1) the length of pretrial delay, (2) the reason for delay, (3) the defendant's assertion of his or her right, and (4) prejudice to the defendant. Barker, 407 U.S. 530.

1. Gallegos has not shown presumptively prejudicial delay.

In order to trigger the Barker analysis, a defendant must first demonstrate that the "interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Doggett, 505 U.S. at 651-52 (quoting Barker, 407 U.S. at 530-31). Courts consider the duration of pretrial custody, the complexity of the charges, and the extent to which a case involves a reliance on eyewitness testimony. State v. Iniguez, 167 Wn.2d at 292 (citing Barker, 407 U.S. at 531 & n.31).

In Iniguez, our state Supreme Court found "presumptive prejudice" based on a delay of more than eight months. Id. at 291-92. Importantly, (1) the defendant had remained in custody throughout this period, (2) the charges against him were not complex, and (3) such a lengthy delay

"could result in witnesses becoming unavailable or their memories fading," thus impairing his defense. Id. at 292. The Iniguez court took pains to note this eight-month delay was, however, "just beyond the bare minimum needed to trigger the Barker inquiry." Id. at 293; see also State v. Ollivier, 178 Wn.2d 813, 828, 312 P.3d 1 (2013), cert. denied, 135 S. Ct. 72 (2014) (23-month delay enough to trigger Barker analysis).

But, as our State Supreme Court noted in Ollivier, longer periods have been found acceptable. 178 Wn.2d at 828; see United States v. Lane, 561 F.2d 1075 (2d Cir. 1977) (58-month delay was not excessive); United States v. Porchay, 651 F.3d 930, 940 (8th Cir. 2011) (39-month delay was not excessive, given the numerous motions, demands, and general effort by the defendant to delay matters). Moreover, "in numerous cases courts have not regarded delay as exceptionally long...particularly when the delay was attributable to the defense." Ollivier, 178 Wn.2d at 828.

Here, the time between charging and trial (18 months) is not alone so excessive as to warrant a presumption of prejudice. The charges included aggravated murder, which would result in an automatic life sentence for Gallegos upon conviction, with no possibility of release or parole. RCW 10.95.030. There were also numerous sentencing enhancements alleged. The case also involved three codefendants, and two victims. There were 33 witnesses and 218 exhibits. With a case as

complex as this, and with multiple actors, it is expected that defense counsel would need significant time to prepare for charges of aggravated murder, charges which result in a mandatory life sentence. This is not the situation in Iniquez, were the charges were straight-forward and not complex. Under the circumstances of this case, Gallegos has not shown that the time between charging and trial was presumptively prejudicial. Therefore, the inquiry ends and Gallegos has not triggered the Barker analysis.

On appeal, Gallegos briefly argues that the 18 months is presumptively prejudicial because "the only plausible reason for delay was the State's insistence on joining Mr. Gallegos's trial with that of the codefendants." Brief at 25. However, the reason for the delay is not part of the first step of the analysis—whether the delay was presumptively prejudicial. The *reason* for the delay only comes into play when you get to the Barker factors. See Barker, 406 U.S. at 531 ("The second factor in the inquiry is the *reason* for delay.") (emphasis added). Furthermore, Gallegos's claim that the "only" reason for the delay was because the State was seeking joinder of defendants is wholly unsupported by the record. As will be discussed in the next section, which goes thru the Barker factors, there were a multitude of reasons given for the continuances that were ordered. Most of continuances during that 18-month period were

ordered, at least in part, because Gallegos's attorney was still preparing for trial. For the Court to force the case out to trial sooner than 18 months would have created a situation of ineffective assistance of counsel.

2. Even assuming, for sake of argument, that Gallegos has proven presumptive prejudice, the Barker factors weigh against finding a violation of his constitutional speedy trial rights.

Even assuming, *arguendo*, that he has shown a presumption of prejudice, the Barker factors do not weight in his favor. The first factor is the length of the delay and the extent to which it stretches beyond the bare minimum needed to trigger the Barker analysis. Doggett, 505 U.S. at 652. The longer the pretrial delay, the closer a court should scrutinize the circumstances surrounding the delay. The State would assert that this factor weighs in favor of the State as an 18 month time period for a trial involving two counts of aggravated first degree murder, second degree (intentional murder), second degree (felony) murder, first degree unlawful possession of a firearm, and numerous sentencing enhancements, can hardly be called a lengthy delay. When you add the fact that there were three codefendants and two victims, as well as a plethora of pretrial issues, for sake of argument, even if there was any delay, it can only be said to have barely triggered the Barker analysis.

The second factor is the reason for the delay. Here, delay caused by defense counsel is chargeable to the defendant. As noted by the

Ollivier court, "...most of the continuances were sought by defense counsel to provide time for investigation and preparation of the defense. Time requested by the defense to prepare a defense is chargeable to the defendant, and this factor weighs heavily against the defendant." Id. at 837. In this case, Gallegos's attorney was constantly stating that he needed additional time to prepare, while at the same time throwing in an objection to a continuance. It was clear at every hearing that his objection was really to make a record and not because he was sincerely ready for trial.

Beginning with the February 7, 2014 hearing, Gallegos's attorney indicated that there were motions he wanted to file in the case that had not been briefed yet. CP 90, 98-99, 111. He identified the motions as involving 1) hearsay issues, 2) cell phone tower evidence, and 3) foundational issues. He also indicated that he was still doing investigation and requesting records that would be provided to the State. CP 113-4. Clearly, the defense was not prepared for trial at that time. The court, rightfully so, continued omnibus one month to March 7 and hearings were tentatively set March 26 and 27. CP 103, 117. A briefing deadline was set, with briefs due February 21 and March 7. CP 100-101.

At omnibus on March 7, 2014, defense counsel for one of the codefendants announced a diminished capacity defense. CP 132.

Gallegos's attorney outlined additional work that he would need to do on the case, including interviewing cooperating witnesses and briefing the issues mentioned in February (cell phone and foundation issues). CP 132-4. He also stated that he had to do research and additional investigation, as well as file motions in limine and supplemental briefing regarding the Bruton issue. CP 134, 143. In addition, he indicated that he would need Brady materials regarding an issue that arose with one of the State's detectives. CP 132. The March hearing dates were consolidated into one day and set for March 28. CP 141.

On March 28, 2014, Gallegos informed the Court that the parties were in ongoing negotiations. CP 182. He also discussed the work he still had to do, including 1) going through discovery, including plea agreements, 2) getting the cell phone map, 3) getting additional information on Detective Gronewold, cell phone tower information, and the codefendants diminished capacity defense, and 4) filing a motion in limine regarding gang evidence. CP 161, 180-1,186-7, 194. At this point, trial was previously set for April 14, 2014. The Court maintained the trial date "with the understanding it isn't going out on...the 14th" and set a status for April 11. CP 201.

On April 11, 2014, the status hearing, the Court continued the trial within the 30-day buffer to May 5, 2014. The State needed time to get a

report regarding the diminished capacity evaluation. CP 206-7. It was expected to be ready within one to two weeks. CP 206-7. At this hearing, the Court ordered the disclosure of the free talks, Villa's diminished capacity evaluation report, Brady information on Detective Gronewold, and all cell tower information on Pineda's phone. CP 230-6.

Gallegos's attorney made it clear that he needed this additional information before going to trial. He needed the codefendants' cooperation agreements and requested interviews be set after getting the reports. CP 219. The trial judge concluded that, "this case is not ready for trial for a number of reasons that we've spent a great amount of time talking about." CP 242. The judge noted that "both sides need to evaluate the Brady material that's going to be submitted regarding Detective Gronewald..." and that Gallegos's attorney "needs to evaluate what he's going to be receiving." CP 238-9. Gallegos's attorney told the judge "I'm reviewing severance, but can't right now without further information." CP 240. Clearly, based on this extensive record, there was good cause to set the trial to May 5, 2014.

The next hearing before that trial date was April 21, 2014. At that time, Gallegos's attorney said he had not had a chance to review the materials and needed two weeks to go over the materials. RP 57, 59. At the same time he indicated that he would be bringing another motion, a

motion to dismiss for speedy trial. RP 62. Another status hearing was set for April 30. RP 94. The Court ordered the parties to sit down and go through the discovery before then. RP 85.

At the April 30 hearing, just days before trial, Gallegos's attorney asked for more time to review transcripts and outlined seven motions he needed to bring: 1) speedy trial, 2) prosecutorial delay or misconduct, 3) Brady, 4) severance, 5) gang evidence, 6) a suppression issue on a warrant, and 7) other additional motions in limine. CP 272-3. Gallegos's attorney also asked for redacted Brady information. He told the court that he needed "100 hours on all these issues, research, writing, clarification, whatever investigation." CP 282-3. He asked for a hearing in six weeks, which would allow him three weeks to do briefing and three weeks for the State to respond. CP 283. He said they would need another five weeks for severance and other issues if the court did not dismiss the case. CP 284. He added, "I'm now in a position where I would love to have a lot more time on this." CP 292. He agreed that a trial eight weeks after June 27 was a realistic trial date but noted "I need to still object to any date that you set." CP 303.

The Court appropriately concluded, "nobody is ready to go to trial on this case" and continued the trial date on the court's motion. CP 323. The Court set a trial date of July 14 and June 27, noting that on June 27,

they would have a meaningful discussion about the trial date and that the July 14 was just set for tracking purposes. CP 304-5. The trial judge made an extensive record as to why there was good cause to move the trial date:

> Clearly there is additional work that is going to be very relevant to this case that needs to happen before this case is ripe for trial. We have set a briefing schedule and hearing dates on the most conservative scheduling that we can in light of the circumstances that have already been outlined in this record. Again, I'm not hearing that it would cause, my words, actual prejudice under the case law that's been noted...
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> I'm certainly not seeing anything that would lead to anything rising to the level of actual prejudice that would not justify the court in taking this action today. As I've stated, I think it's necessary for these cases and the issues that need to be aired out to properly prepare it for trial.

CP 308.

On June 26, 2014, the State conceded the severance issue "after much deliberation and analysis." CP 45, 59. The Court agreed to start Gallegos's trial first on July 14. CP 60.

July 3, 2014 was the next hearing date. On that date, the court heard arguments on Gallegos's motion to dismiss for speedy trial. The Court denied his motion. The Court noted that the case has had a number

of challenges associated with it, including a tremendous amount of discovery and forensic evidence. RP 192. The Court also pointed out that while Gallegos's attorney objected to any further continuances, there were things that needed to be completed and forcing the parties to trial would have built in an issue of ineffective assistance of counsel. RP 195. The Court also concluded that there was no actual prejudice to Gallegos. RP 197, 206. In addition, the Court found that the State had not created delay to penalize the defendants and that there was no evidence to support malfeasance on the part of the State. CP 200-1.

On July 14, 2014, the other codefendant, Villa, pled guilty and Gallegos sought a continuance to "digest everything that had occurred as well as an opportunity to interview Mr. Villa." RP 323. The case was set over to July 18. CP 378. The interview took place. RP 323. On July 18, the State moved to continue the trial to August 18 or 25 due to witness and attorney unavailability. RP 342, CP 365-9. Unavailability of a witness is a valid reason for a continuance. Barker, 407 U.S. at 531. The court continued the trial and explained that trial would commence on August 20 with jury selection starting August 25. RP 353, CP 379. Trial commenced on August 20. RP 95.

Based on this lengthy summary of the many reasons for good cause continuances in this case, it can hardly be said that second factor

weighs against the State. None of the continuances can be described as unreasonable, especially when the trial court is juggling the schedules of multiple lawyers and multiple witnesses. Based on the extensive record created by Gallegos's attorney as to what he still needed to do to prepare the case for trial, the second Barker factor weights in favor of the State.

The third factor is the defendant's assertion of his speedy trial rights. As indicated in Barker, the court considers whether and to what extent a defendant demands a speedy trial. While an objection was made to setting the case over, Gallegos's attorney always made a thorough record explaining why he wasn't ready for trial. A blanket objection to every continuance loses its effect in this context. Based on the inconsistent statements, it is debatable to what extent Gallegos actually demanded a speedy trial.

The final factor is prejudice to the defendant. "A defendant ordinarily must establish actual prejudice before a violation of the constitutional right to a speedy trial will be recognized." Ollivier, 178 Wn.2d at 840. As explained in Ollivier, prejudice may consist of oppressive pretrial incarceration, anxiety, and concern of the accused, and the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence. Id.

Here, Gallegos argues that the prejudice is self-evident. (Brief at 31). His sole argument regarding *any* prejudice is that the State gained additional witnesses during a 16-month time period. (Brief at 31). However, while favorable testimony against a defendant is always going to be prejudicial to a defendant, this is not the type of prejudice envisioned by Ollivier. Ollivier talked about witness's memories fading and losing exculpatory evidence. Here, no evidence was lost. The defendant put on no witnesses. He made no claim that witnesses he would have called were no longer available due to delay. The only prejudice claimed on appeal is that while the case was pending, the State gained testimony that *overcame* Gallegos's defense. There is a stark difference between additional evidence becoming available to the State and an impairment of Gallegos's ability to present a defense.

For this argument, Gallegos claims that the State had insufficient evidence to present a case against him prior to codefendants agreeing to testify. (Brief at 31). If this were true, Gallegos could have filed a Knapstad motion at any time. He never did so. His late claim of insufficient evidence necessarily must be rejected. He never raised the issue below. The claim is brought up only now on appeal. As such, his argument that the State had insufficient evidence should be rejected by this court. There was no record made as to what evidence the State had at

any given time prior to trial because a Knapstad motion was never raised by Gallegos at the trial level.

Accordingly, Gallegos fails to present a single valid argument as to how any delay prejudiced his case. The prejudice is not "self-evident." The reason that he does not set forth facts that demonstrate prejudice is because there are none that would support his argument. As explained in State v. Rafay, 168 Wn. App. 734, 771-2, 285 P.3d 83 (2012), "a claim of presumptive prejudice alone, without regard to the other Barker criteria, is insufficient to establish a Sixth Amendment violation."

In sum, even if the court assumes there was presumptive prejudice, balancing the Barker factors weighs against Gallegos. The totality of the circumstances do not support finding a speedy trial violation of constitutional magnitude. The trial court had good reasons for granting each of the continuances and acted within the constitutional limits in balancing the competing interests of trying the codefendants jointly, accommodating trial preparation and scheduling concerns, and securing the defendant's constitutional rights. Thus, there was no violation of Gallegos constitutional right to a speedy trial under the Sixth Amendment and article I, section 22.

IV. CONCLUSION

In conclusion, the State asks that the court affirm Appellant's convictions. Trial counsel for Gallegos was not ineffective in forgoing WPIC 6.05. In addition, there was substantial evidence that the murder of Mr. Eby was premeditated. Furthermore, Gallegos's constitutional right to a speedy trial was not violated.

Respectfully submitted this 20th day of January, 2016,

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