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No. **96584-6**
COA No. 32919-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LUIS GOMEZ-MONGES,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Luis Gomez-Monges asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Luis Gomez-Monges*, No. 32919-4-III (October 18, 2018). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires the State prove every element of the charged offense beyond a reasonable doubt. Mr. Gomez-Monges was charged with the premeditated murder of Vernon Holbrook yet there was a lack of evidence that he inflicted the fatal blows which killed Mr. Holbrook or that he acted as an accomplice. Is a significant question of law under the United States and Washington Constitutions presented entitling Mr. Gomez-Monges to reversal of his conviction with instruction to dismiss?

2. The separation of powers doctrine guarantees the equality of each of the three branches of government. One branch cannot encroach

on another's power without violating the separation of powers doctrine. Elected Yakima Prosecutor James Hagerty's *ex parte* letter to the presiding superior court judge seeking the recusal of the trial judge violated the separation of powers doctrine. Is a significant question of law under the United States and Washington Constitutions presented where the trial court erred in failing to dismiss the matter for a violation of the separation of powers doctrine?

3. Prosecutor Hagerty's *ex parte* letter constituted egregious prosecutorial misconduct and violated Mr. Gomez-Monges' right to due process. Is an issue of substantial public interest presented where the trial court erred in failing to dismiss the matter pursuant to CrR 8.3 (b)?

4. Should this Court apply a structural error analysis to the prosecutorial misconduct committed by Prosecutor Hagerty requiring reversal and dismissal of Mr. Gomez-Monges' convictions, where the prejudice is impossible to quantify and Mr. Gomez-Monges would be denied a remedy?

D. STATEMENT OF THE CASE

A Statement of the Case is found in the decision of the Court of Appeals at 2 through 9 and is incorporated by reference herein.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. This Court should rule there was insufficient evidence Mr. Gomez-Monges was guilty of first degree murder.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

To establish the first degree premeditated murder of Mr. Holbrook, the State was required to prove that Mr. Gomez-Monges acted with premeditated intent to cause the death of another and that the defendant actually caused the death of that person or a third person. RCW 9A.32.030(1).

The injuries that resulted in Mr. Holbrook’s ultimate demise were the fractured skull and lacerated neck. According to the State’s

theory, Mr. Gomez-Monges killed Mr. Holbrook, but the manner of his death belies that claim. There simply was no evidence Mr. Gomez-Monges killed Mr. Holbrook.

It is important to remember the jury refused to find that Mr. Gomez-Monges was armed with a deadly weapon. CP 1865. Both Dr. Reynolds, the State's pathologist, and Dr. Wigren, retained by Mr. Gomez-Monges, agreed that the injury to Mr. Holbrook's neck was caused by a sharp object; Dr. Reynolds claimed it could have been a box cutter, Dr. Wigren opined it was a sharp knife but unlikely a box cutter. RP 2368.

My sense is it probably wasn't that. It was probably some other sharp force like a knife, like a kitchen knife. It could even be a steak knife. It had to be something that would be able to get in deep enough. I think Dr. Reynolds said two inches for the blade. I just feel like if that box cutter been extended to two inches, it probably would have broken off at the base. That would be my sense.

Id. (Testimony of Dr. Wigren).

In addition, a box cutter seized at the scene of Mr. Holbrook's assault was tested for DNA which showed a mixed profile from at least three individuals. RP 1745.

Since the jury rejected the allegation that Mr. Gomez-Monges was armed, plus the fact Ms. Mendez did not see Mr. Gomes-Monges

with a deadly weapon, there was no evidence or finding that he caused the injury to Mr. Holbrook's neck.

Regarding the skull fracture, both doctors rejected the State's theory that Mr. Gomez-Monges caused it using his fist, the only act Ms. Mendez claimed she saw Mr. Gomez-Monges engaged in. Dr. Reynolds went to so far as to say anyone using their hand to attempt such a result would have broken every bone in their hand. RP 2338. Mr. Gomez-Monges neither had broken hand nor any injury to his hand.

Dr. Wigren concurred in this assessment, noting the injuries were caused by something "more consistent with an edge of a piece of wood, a two-by-four or even the edge of a brick, maybe even a rock." RP 2358. This was also consistent with the assessment of Dr. Padilla, the emergency room doctor who first saw Mr. Holbrook. RP 1456-57. He opined that the skull fracture could have been caused by "[a] numerous number of blunt items, hard objects, butt of a gun, brick, stones, something large blunt object likely." RP 1457.

Further, Dr. Wigren rejected the theory that the skull fracture could have been caused by someone stomping on Mr. Holbrook's head:

If it was stomping it would have to be a really hard-edged sole. It couldn't be like your sneaker, which has

kind of a rubberized, a compressible type of sole. It would have to be almost like a boot edge but not rubber. It would have to be like leather or even a metal edge.

The other thing that's missing is a patterned abrasion. Usually when you're stomping on someone, if you look at the sole of your shoes, there's a pattern to it like there is on my shoe. If I were to stomp on someone's head, you're going to see an abrasion typically nearby that has kind of this pattern along with it. That usually -- a surgeon would probably remark on that and a forensic nurse examiner would probably photograph that.

So I don't think it was -- I don't think it was a shoe or a stomping. I have seen stompings, and they usually have some sort of patterned abrasion with them.

Q. Basically if somebody gets stomped on the head they're going to have a shoe print on the side of their head?

A. Yes.

Q. Is that oversimplifying?

A. No, that's true. Yes.

Q. Okay. You didn't see any shoe prints on Mr. Holbrook?

A. I did not.

RP 2370-71.

Finally, the State in its closing argument could point to nothing specific that caused the blunt force trauma, only that Mr. Holbrook had suffered from it.

That's where Mr. Holbrook was brutally and viciously attacked. But who did that to him? That's where you heard from Adriana Mendez, it was the Defendant in this case, Luis Gomez-Monges . . . And what happens at that point? Ms. Mendez said, "Out of the corner of my eye, I saw Luis basically cock his hand back, his left hand." It's in a fist. And then she sees Luis hit Mr. Holbrook in the back of the head and he didn't even see it coming. Mr. Holbrook goes down.

...

She did say she saw Luis punch Mr. Holbrook in the head about four or five times. *Okay, we never said the injuries were caused by his hands.* We asked Dr. Reynolds about that, whether or not that was possible. He and Dr. Wingrun [sic] agreed no, because if someone did that, it would break their hand. *We don't know any reason or don't have anything to show that Luis, that either of his hands were broken.*

...

You didn't hear testimony from the doctors though that Mr. Holbrook' injuries to his head, these lacerations, were pokes, they were lacerations, long cuts. *Well, what could have happened? We don't know that part.*

10/9/2014RP 248, 298 (emphasis added).

Further, the State could point to nothing in the record that Mr. Gomez-Monges used a knife, seeming to rely on the orange box cutter but acknowledged there was insufficient DNA to point to one person but that Mr. Gomez-Monges, Ms. Mendez and Mr. Blizzard could not be excluded. This was hardly substantial evidence to support a verdict that Mr. Gomez-Monges was the principal in killing Mr. Holbrook.

The State's alternative theory was that Mr. Gomez-Monges as wan accomplice to the murder. To prove Mr. Gomez-Monges was an accomplice, the State had to prove beyond a reasonable doubt that he (1) knew his actions would promote or facilitate this crime, (2) was present and ready to assist in some manner, and (3) was not merely present at the scene with some knowledge of potential criminal activity. RCW 9A.08.020(3). Taking the evidence in the light most favorable to the State, although there was evidence that Mr. Gomez-Monges was present at the house where Mr. Holbrook was killed, that he drove with Ms. Mendez to the house, and that he was aware that Ms. Mendez was going to kill Mr. Holbrook, the evidence failed to show that.

In order to find Mr. Gomez-Monges was an accomplice to Ms. Mendez, the jury would have had to reject her version of the events. Thus, according to Mr. Gomez-Monges' testimony, he drove with Ms. Mendez to the house in Tieton where Ms. Mendez met with Mr. Holbrook. 10/9/2015RP 150-51. While waiting in the car with Ms. Mendez's children, he heard a sound like breaking a coconut. 10/9/2015RP 154. He went inside the house to investigate and saw Ms. Mendez standing over Mr. Holbrook hitting him with a rock in the

head. 10/9/2015RP 155. He took the rock away from Ms. Mendez and they left and drove back to Yakima. 10/9/2015RP 155-56.

Even looking at this evidence in the light most favorable to the State, there is insufficient evidence that Mr. Gomez-Monges acted as an accomplice. While it was arguably the case that he knew of the plan and was present when Ms. Mendez struck the fatal blows; he was in the car when those blows were struck, thus he did not engage in any conduct which encouraged or assisted Ms. Mendez nor was he ready to assist. At best, Mr. Gomez-Monges was guilty of rendering criminal assistance for taking the murder weapon from Ms. Mendez and escorting her from the home.

This Court should accept review and find the State failed to prove Mr. Gomez-Monges was guilty of first degree murder.

2. Prosecutor Hagarty's inflammatory and unethical letter to the trial judge violated the Separation of Powers Doctrine.

The separation of powers doctrine is not specifically enunciated in either the Washington or federal constitutions, but is universally recognized as deriving from the tripartite system of government established in both constitutions. *See, e.g.*, U.S. Const. arts. I, II, and III (defining legislative, executive, and judicial branches); Const. arts. II,

III, and IV (establishing the legislative department, the executive, and judiciary); *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997); *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). The doctrine of separation of powers divides the political power into three co-equal branches of government. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). “The doctrine serves mainly to ensure that the fundamental functions of each branch remain inviolate.” *Carrick*, 125 Wn.2d at 135. The “concept of separation of powers” is exemplified by “the very structure of the Constitution.” *Miller v. French*, 530 U.S. 327, 341, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (internal quotation marks omitted).

Executive actions which contravene the principle of separation of powers are unconstitutional. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441-46, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); *Buckley v. Valeo*, 424 U.S. 1, 18-24, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam); *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935). The Supreme Court has placed it beyond dispute that the doctrine of

separation of powers is vital for constitutional government. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. at 441-46.

This court relies on federal principles regarding the separation of powers doctrine in interpreting and applying the state's separation of powers doctrine. *Blilie*, 132 Wn.2d at 489; *Carrick*, 125 Wn.2d at 135 n. 1.

Here, Prosecutor Hagerty's *ex parte* letter violated the separation of powers doctrine. "If without cause shown a judge could be removed at the whim of the Commonwealth, based solely on allegations contained in the petition, the purpose of an independent judiciary would be frustrated." *Com. v. McAndrew*, 361 Pa. Super. 60, 64, 521 A.2d 472, 474 (1987).

Indeed, if appearances were gauged without reference to the full and true facts, then false appearances of impropriety could be manufactured with ease by anyone with personal or political *animus* toward a judge. If such were the case, then the hope of an independent judiciary would have been less than an evanescent dream, it would have been cruel charade and a dangerous snare for an ethical and unsuspecting judiciary.

In re Neely, 2017 WY 25, 108, 390 P.3d 728, 759 (Wyo. 2017).

Prosecutor Hagerty attempted to use his office, and the power of the Executive branch, to remove Judge Reukauf from this case solely on his false perception of her inability to be fair to the State.

Mr. Gomez-Monges asks the Court to find that Prosecutor Hagerty's actions violated the separation of powers doctrine.

3. The prosecutor's letter constituted outrageous government conduct thereby violating Mr. Gomez-Monges' right to due process and a fair trial, and his CrR 8.3 motion should have been granted.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct deprives a defendant of the constitutionally right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); see *State v. Reed*, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984).

In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial, *i.e.*, did the misconduct

prejudice the jury thereby denying the defendant a fair trial? *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

Therefore, the ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the petitioner's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

CrR 8.3(b) reads, in relevant part:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

"Fairness to the defendant underlies the purpose of CrR 8.3(b)."

State v. Koerber, 85 Wn.App. 1, 3, 931 P.2d 904 (1996).

The trial court here found Prosecutor Hagarty's actions constituted prosecutorial misconduct; a finding not disputed by the State. In addition, Prosecutor Hagarty's actions arguably constituted a crime:

Under RCW 9A.72.160:

(1) A person is guilty of intimidating a judge if a person directs a threat to a judge because of a ruling or decision of the judge in any official proceeding, or if by use of a threat directed to a judge, a person attempts to influence a ruling or decision of the judge in any official proceeding.

“[T]he legislative intent behind RCW 9A.72.160(1) is to protect judges from the threat of harm [] by retaliatory acts because of past official actions....” *State v. Hansen*, 122 Wn.2d 712, 717, 862 P.2d 117 (1993).

This is precisely what Prosecutor Hagarty was attempting to do; either retaliate against Judge Reukauf or influence her rulings based solely on his perception of Judge Reukauf’s past rulings.

This Court should grant review and find that Prosecutor Hagarty’s actions were grossly improper and constituted outrageous governmental misconduct under CrR 8.3.

4. This Court should apply structural error to the analysis of Prosecutor Hagarty’s actions.

Only those errors that are “structural” require automatic reversal. *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Structural error is a special category of constitutional error that “affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Where there is structural error ““a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.””

Id., quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (citation omitted). Once there is a finding that a structural error occurred, prejudice is presumed and the remedy is remand for a new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This is because a structural error “resists” a harmless error analysis as “it taints the entire proceeding.” *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

Put another way, structural errors “infect the entire trial process.” *Neder*, 527 U.S. at 8, *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Structural errors are said to “defy” harmless error review because they “deprive defendants of ‘basic protections’ without which ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.’” *Neder*, 527 U.S. at 8-9 (alteration in original), quoting *Clark*, 478 U.S. at 577-78.

The United States Supreme Court has suggested that prosecutorial misconduct could be considered structural error:

Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of

the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. Cf. *Greer v. Miller*, 483 U.S. 756, 769, 107 S.Ct. 3102, 3110, 97 L.Ed.2d 618 (1987) (Stevens, J., concurring in judgment).

Brecht, 507 U.S. 638 n.9

Separation of powers and denial of a fair trial traditionally have required a finding of prejudice. But, this case presents a scenario suggested by the *Brecht* Court, where the injury or harm to Mr. Gomez-Monges caused by the prosecutor's misdeed cannot be assessed or quantified. Finding structural error here is the best way to provide a remedy and deter this type of conduct by prosecutors. It is impossible to determine if the trial judge was affected by the letter, and if so, to what extent. In addition, the letter amounted to an attack on the integrity of the judicial system itself. There are procedures in place to seek a judge's recusal, but instead, the elected prosecutor decided to deliver an intimidating letter that questioned the neutrality of the trial judge. This Court cannot allow this conduct to go unpunished. Applying structural error to this misconduct will be the only way to deter this conduct in the future.

This Court should accept review to determine whether a structural error analysis applies, reverse Mr. Gomez-Monges' conviction, and order the matter dismissed.

F. CONCLUSION

For the reasons stated, Mr. Gomez-Monges asks this Court to grant review and reverse his conviction with instructions to dismiss. Alternatively, Mr. Gomez-Monges asks that the Court grant review, reverse his conviction, and remand for a new trial.

DATED this 16th day of November 2018.

Respectfully submitted,

s/Thomas M. Kummerow

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Washington Appellate Project – 91052

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APPENDIX

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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 32919-4-III
Respondent,)	
)	
v.)	
)	
LUIS GOMEZ-MONGES,)	UNPUBLISHED OPINION
)	
Appellant.)	

SIDDOWAY, J. — Luis Gomez-Monges appeals his conviction for the first degree murder of Vern Holbrook, challenging the sufficiency of the evidence, the trial court’s refusal to dismiss the charge against him despite finding prosecutorial misconduct, and the imposition of discretionary legal financial obligations (LFOs) without a sufficient inquiry into his ability to pay.

The trial court’s refusal to dismiss murder charges on account of prosecutorial misconduct was addressed in this court’s decision in the appeal of Daniel Blizzard, another individual convicted of Mr. Holbrook’s murder. The refusal to dismiss the murder charges was upheld because while prosecutorial misconduct was demonstrated, deprivation of Mr. Blizzard’s right to a fair trial before a fair tribunal was not. The same

is true here. For that reason, and because the evidence was sufficient, we affirm the conviction. We remand the judgment and sentence with directions to strike the LFOs.

FACTS AND PROCEDURAL BACKGROUND

Vernon Holbrook owned and served as the real estate broker for Aspen Real Estate in Yakima. On May 25, 2013, he was found beaten and with his throat cut, lying in a pool of blood in a vacant house he had arranged to show to a couple earlier that day. Mr. Holbrook later died of his injuries.

Mr. Holbrook was known by co-workers to “[do] everything with his cellphone,” but on the night he was found injured, his phone was not at the crime scene or in his truck, which was found parked outside. Report of Proceedings (RP)¹ at 1522. Yakima County Sheriff’s Detective Sam Perrault made an exigent circumstances request to the telephone carrier within hours of Mr. Holbrook being found and determined that Mr. Holbrook’s phone was no longer active. By the next day, the detective had been able to obtain Mr. Holbrook’s call records and determine that the last call to connect with his phone had been made at 11:15 a.m. on May 25, from a phone owned by Adriana Mendez. On May 27, 2013, detectives met with Ms. Mendez and were provided with the names of Luis Gomez-Monges, Daniel Blizzard, and Jill Taylor.

¹ Unless otherwise noted, all report of proceedings citations refer to RP (Jan. 10, 2014).

Concluding that Mr. Gomez-Monges had been the hit man in a murder for hire scheme, the State charged him with attempted first degree murder and first degree assault. Ms. Mendez, Ms. Taylor, and Mr. Blizzard were also charged in connection with the crime. Mr. Blizzard had done the hiring; he was Mr. Holbrook's former business partner and the beneficiary of a \$1.58 million keyman life insurance policy acquired before the two men had a falling out. Before the May 25 attack, Mr. Blizzard had tried to recruit others to kill Mr. Holbrook. His relationship with his sometimes-girlfriend, Ms. Taylor, led him to Ms. Taylor's roommate, Ms. Mendez, and Ms. Mendez led him to her boyfriend, Mr. Gomez-Monges.

During the pretrial phase of the cases against the four defendants, the trial judge received a copy of a letter, critical of her, that had been directed to the presiding judge by the county's elected prosecutor.² This court's opinion in Mr. Blizzard's appeal of his murder conviction describes the court's handling of the letter:

In the letter,³ the prosecutor alleged the trial judge had "a bias and prejudice against the Yakima County Prosecuting Attorney's Office." He criticized the trial judge's handling of Mr. Blizzard's case as well as others. The prosecutor claimed the trial judge personally disliked several prosecutors and "bent over backwards" to favor the defense. He alleged the trial judge's bias made it "impossible for the State to get a fair trial." Ultimately, the prosecutor requested the trial judge recuse herself or be removed by the presiding judge.

² The elected prosecutor who wrote the letter no longer holds office.

³ The letter appears at pages 338-41 of the clerk's papers in this appeal.

The trial judge brought the letter to the parties' attention. The judge noted she had consulted with the state's judicial ethics advisory committee. She expressed concern that the letter was improper ex parte contact and constituted an attempt to intimidate the court. The trial judge provided the State with a deadline for filing a formal recusal motion and set a briefing schedule.

The State never filed a formal motion for recusal. Instead, the State's lead deputy prosecutor assigned to this case filed a notice of abandonment, disavowing the recusal request. Mr. Blizzard, in turn, filed a motion to dismiss under CrR 8.3(b) for prosecutorial misconduct based on the letter. The trial court denied Mr. Blizzard's motion and continued to hear the case.

State v. Blizzard, 195 Wn. App. 717, 723-24, 381 P.3d 1241 (2016) (citations omitted), *review denied*, 187 Wn.2d 1012, 388 P.3d 485 (2017).

Mr. Gomez-Monges filed his own motion to dismiss the charges against him under CrR 8.3(b) based on the prosecutor's letter, which he, too, characterized as prosecutorial misconduct. The trial court heard argument of dismissal motions in all four pending prosecutions at the same time and denied all of them. It proceeded to preside at the two trials that eventually took place. Ms. Mendez and Ms. Taylor were offered plea deals and turned State's evidence.

At Mr. Gomez-Monges's trial, Ms. Mendez testified that in February 2013 she learned from Ms. Taylor that Mr. Blizzard was willing to pay \$10,000 to have a man killed, shared the information with Mr. Gomez-Monges, and the two of them approached Mr. Blizzard about the offer. Through Ms. Mendez, who acted as translator (Mr. Gomez-

Monges's primary language is Spanish⁴), Mr. Gomez-Monges told Mr. Blizzard "that he was going to do it." RP at 2058.

A couple of weeks before the assault, Mr. Blizzard suggested that Ms. Mendez and Mr. Gomez-Monges carry out the crime by pretending to be in the market to buy a home and arranging to have Mr. Holbrook show them some properties. Ms. Mendez testified that as May 25 approached, Mr. Gomez-Monges told her "[t]o go ahead and set up the appointment." RP at 2066.

On May 25, Mr. Gomez-Monges borrowed his mother's car and drove Ms. Mendez and her three children to a house in Tieton where Ms. Mendez had arranged for the couple to meet Mr. Holbrook. They met Mr. Holbrook at the house around noon. He showed them that house and another house nearby. According to Ms. Mendez, the children waited in the car both times as she and Mr. Gomez-Monges looked at the homes.

Ms. Mendez testified that during the tour of the second home, "[o]ut of the corner of my eye I see Luis getting ready to hit Holbrook." RP at 2078. She saw Mr. Gomez-Monges's left hand pull back, saw him starting to swing at Mr. Holbrook, and then she walked out of the room. She testified that, "As I walk I see him—I felt Holbrook hit the floor." RP at 2079. After that, she turned around and saw Mr. Gomez-Monges lean over Mr. Holbrook and hit him. She described Mr. Gomez-Monges as hitting Mr. Holbrook

⁴ According to Ms. Mendez, Mr. Gomez-Monges understands English and can speak it some, but struggles with conversation.

“on his head,” with his fist, “four, five times.” RP at 2081. When Ms. Mendez saw blood flowing from underneath Mr. Holbrook, she walked outside. She said she “didn’t want to see more.” RP at 2083. She waited outside, and Mr. Gomez-Monges came out of the house a few minutes later. They took Mr. Holbrook’s cellphone, which they broke and discarded. At Mr. Gomez-Monges’s suggestion, she sent a text message to Mr. Blizzard to let him know the job was done. She and Mr. Gomez-Monges then drove back to Yakima together.

Two days after the assault, on May 27, Ms. Mendez received \$12,000 from Mr. Blizzard that she claimed to have given to Mr. Gomez-Monges the same afternoon. By that time, Detective Perrault had contacted her to ask about the call placed from her phone to Mr. Holbrook. She agreed that the detective could pick her up for questioning and told Mr. Gomez-Monges that it would not be a good idea for him to be present when the detective arrived. According to her, Mr. Gomez-Monges said not to worry because she “didn’t do anything.” RP at 2147.

Mr. Gomez-Monges testified at trial and accused Ms. Mendez of the murder. He claimed to have known nothing about a plan to kill someone for money. According to Mr. Gomez-Monges, he had cleaned up and repaired a trailer that his mother wanted to sell, and on the day Mr. Holbrook was assaulted, Ms. Mendez told him they were going to meet with a man who was interested in the trailer. At Ms. Mendez’s direction, Mr. Gomez-Monges drove to the house in Tieton where they met Mr. Holbrook, whom they

followed to a second home. At the second home, Mr. Gomez-Monges claimed Ms. Mendez sent him outside to roll down the car windows for the waiting children, and as he was walking back to the house, he heard a sound “like when you break a coconut with something.” RP (Oct. 9, 2014) at 154. Rushing in, he encountered Ms. Mendez “screaming and . . . standing there and the man was laying between her legs and she was hitting him, it was with a rock, like a big rock.” RP (Oct. 9, 2014) at 155. He claims to have pulled her off of Mr. Holbrook and taken the rock. She refused to tell him what was going on and insisted that they leave. He testified that Ms. Mendez threw the rock and Mr. Holbrook’s cell phone out the car window as they drove back to Yakima and that she never gave him \$12,000.

Four medical experts testified at trial: Robert Padilla, M.D., the emergency room physician who attended to Mr. Holbrook at Yakima Valley Memorial Hospital the night of the assault; Ronald Pauldine, M.D., an anesthesiologist intensivist who attended to Mr. Holbrook after he was transferred to Harborview Medical Center; Jeffrey Reynolds, M.D., the forensic pathologist who performed the autopsy of Mr. Holbrook; and Carl Wigren, M.D., a forensic pathologist engaged by the defense. Mr. Holbrook had remained in a chronic vegetative state until passing away on January 26, 2014, so the autopsy was performed 8 months after the assault.

The two pathologists agreed that the cause of Mr. Holbrook’s death was severe blunt force trauma to his head and that he had three injuries to his skull. They agreed that

the injuries were not caused by blows with a fist. Dr. Reynolds testified that blows with a fist “would leave a different kind of tear in the skin,” and given the force with which the injuries were delivered, such a blow “would fracture every bone in your hand.” RP at 2338. He surmised that the injury was inflicted by something with a slightly rounded edge. He testified that someone stomping on the head was a “possible” cause of the injuries. *Id.*

The defense expert, Dr. Carl Wigren, did not dispute that stomping on Mr. Holbrook’s head was consistent with the severity of the blows if it had been done by someone wearing a “really hard-edged sole,” but testified that it would ordinarily leave a patterned abrasion and “a surgeon would probably remark on that and a forensic nurse examiner would probably photograph that.” RP at 2370-71. When cross-examined, he agreed it was “possible” that a victim’s head could be stomped on without leaving a visible patterned abrasion. RP at 2380.

Mr. Holbrook had also sustained a large cut across the front part of his neck that extended into his larynx but had not injured his carotid arteries. A box cutter with reddish brown stains on its blade was found in the trunk of the car Mr. Gomez-Monges drove on the day of the assault, but there was insufficient DNA⁵ evidence on the handle or blade to compare it to DNA samples from Mr. Gomez-Monges, Ms. Mendez and Mr.

⁵ Deoxyribonucleic acid.

Holbrook. The box cutter was the only item found by law enforcement that might have been used as a weapon in the assault.

Dr. Wigren, when questioned whether the box cutter could have caused the neck injury, expressed the view that if the blade had been extended far enough to account for the depth of the wound, the blade would have broken off. The three other medical experts expressed their view that a box cutter or utility knife could have caused the injury, however.

The jury found Mr. Gomez-Monges guilty of first degree murder but answered “no” to three special verdicts, including one asking if Mr. Gomez-Monges had been armed with a deadly weapon at the time of the assault.⁶ Clerk’s Papers (CP) at 1864. The trial court sentenced him to 320 months’ confinement and imposed \$20,860.50 in LFOs, \$19,210.50 of which was restitution. After briefly discussing Mr. Gomez-Monges’s ability to pay the court imposed fines of \$600.00 for his court appointed attorney and \$500.00 for the cost of incarceration. Mr. Gomez-Monges did not object.

Mr. Gomez-Monges appeals.

⁶ The others asked whether the defendant manifested deliberate cruelty to the victim or knew Mr. Holbrook was particularly vulnerable.

ANALYSIS

I. SUBSTANTIAL EVIDENCE SUPPORTS THE CONVICTION

Mr. Gomez-Monges concedes that “[t]he State provided evidence *ad nauseum* of a plan by Mr. Blizzard to kill Mr. Holbrook” and had “proved that Mr. Gomez-Monges had knowledge of th[e] plan[and] was present when Mr. Holbrook was killed.” Br. of Appellant at 15. But emphasizing the jurors’ special verdict finding that Mr. Gomez-Monges was not armed with a deadly weapon and the pathologists’ agreement that the head injuries could not have been inflicted by blows with a fist, Mr. Gomez-Monges argues that “there was no evidence that Mr. Gomez-Monges killed Mr. Holbrook.” *Id.*

A defendant’s challenge to the sufficiency of the evidence requires us to view the evidence in the light most favorable to the State and determine “whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt.” *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Mr. Gomez-Monges is wrong when he argues that the State failed to prove its case because it presented no evidence of a weapon used to strike the head blows. When

conducting substantial evidence review, “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). In an analogous case, *State v. Slaughter*, 70 Wn.2d 935, 425 P.2d 876 (1967), our Supreme Court affirmed a conviction for assault with a deadly weapon even though no deadly weapon was seen by the victim or by the witness to the immediate aftermath of the crime, and no deadly weapon was ever found. As the court explained,

In addition to the circumstantial evidence, we have the testimony of Mr. McFerrian that defendant struck him, knocked him down, and, although he did not see the weapon which produced them, the blows inflicted the wounds which required suturing and medical care. The sight of a blade in defendant’s hand would have added little to the direct evidence that he struck his victim, knocked him down, and in so doing inflicted two cutting wounds. Viewed in the light of the argument between Mrs. Ruiz and defendant, followed immediately with her leaving the two men alone in the hallway, and the complete absence of any other evidence explaining or implying that the wounds could have been inflicted by another person, or by accident, we have proof of circumstances rivaling in persuasiveness direct evidence that the victim saw a weapon in defendant’s hand when the blow was struck.

Id. at 938.

He overstates Dr. Wigren’s refutation of the possibility that Mr. Gomez-Monges produced the injuries by stomping on Mr. Holbrook’s head, a possibility consistent with Ms. Mendez’s testimony that when she walked outside Mr. Gomez-Monges was standing over Mr. Holbrook, who was on the floor. We disagree with Mr. Gomez-Monges’s argument that because only the pathologists had the benefit of the close examination that can be done post-mortem, the jurors should have accepted their opinions over that of a

treating physician, Dr. Padilla, who testified that the head injuries could “[p]erhaps” have been inflicted by “a very hard [blow] with a fist, elbow, [or] knee.” RP at 1458. (He believed another object was more likely.) As the jurors were instructed, they were “not . . . required to accept” the opinion of any expert witness. CP at 1845 (Jury Instruction 7).

We disagree that the jurors’ answer to the deadly weapon special verdict belies a finding of guilt beyond a reasonable doubt. Mr. Gomez-Monges was charged with premeditated first degree murder, not murder with a deadly weapon. The deadly weapon instruction was relevant to only the aggravating circumstance charged by the State. Jurors could have concluded that no deadly weapon was used or might have answered “no” because they inferred that one was used but were reluctant to make the finding absent direct evidence. In other words, the special verdict might not be inconsistent or it might be; either way, it is not a basis for rejecting a verdict that is otherwise supported by substantial evidence. *State v. Goins*, 151 Wn.2d 728, 734, 92 P.3d 181 (2004). “Juries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity.” *Id.* at 733 (citing *Dunn v. United States*, 284 U.S. 390, 393-94, 52 S. Ct. 189, 76 L. Ed. 356 (1932)); *see also State v. Holmes*, 106 Wn. App. 775, 780, 24 P.3d 1118 (2001) (holding that a jury could reasonably conclude that a utility knife was not likely to or to easily produce death).

Finally, Mr. Gomez-Monges was charged as an accomplice, and jurors, or some of them, might have believed his testimony that Ms. Mendez inflicted the fatal injuries with a rock but disbelieved his claim that assistance he provided before and after the crime was without the intent to assist.⁷ “[A] jury is not required to determine which participant acted as a principal and which participant acted as an accomplice.” *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 524, 158 P.3d 1193 (2007).

The evidence was sufficient.

II. THE TRIAL COURT DID NOT ERR IN DENYING MR. GOMEZ-MONGES’S MOTION TO DISMISS THE CHARGE AGAINST HIM

Mr. Gomez-Monges next argues that the Yakima County prosecutor’s letter complaining about the trial judge and asking that she be removed from the case violated separation of powers and constituted outrageous government misconduct, violating Mr. Gomez-Monges’s rights to due process and a fair tribunal. The same arguments were made in Mr. Blizzard’s earlier appeal and were rejected. *Blizzard*, 195 Wn. App. at 724-29. Mr. Gomez-Monges has identified no difference between the letter’s impact on Mr. Blizzard’s trial and his own; instead, he implies that we should reconsider the decision in *Blizzard*. We stand by the reasoning of *Blizzard*. The trial court did not err in denying the motion to dismiss the charge.

⁷ Jurors inquired during their deliberations as to whether Mr. Gomez-Monges was the perpetrator or an accomplice.

III. IMPOSITION OF LFOs WITHOUT A SUFFICIENT *BLAZINA*⁸ INQUIRY

Finally, Mr. Gomez-Monges argues that the trial court erred when it imposed discretionary LFOs without conducting the individualized inquiry into his ability to pay required by RCW 10.01.160(3) and *Blazina*.

In response, the State informs the court that “in the interest of judicial economy, the State agrees to waive both discretionary costs if the Court allows the issue to be considered for the first time on appeal.” Br. of Resp’t at 37. A majority of the panel would consider the issue for the first time on appeal, so we accept the State’s waiver of discretionary costs. We remand with directions to strike them.

Affirmed and remanded with directions to strike both discretionary LFOs.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

⁸ *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	COA NO. 32919-4-III
v.)	
)	
LUIS GOMEZ-MONGES,)	
)	
Petitioner.)	

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<input checked="" type="checkbox"/> TAMARA HANLON [tamara.hanlon@co.yakima.wa.us] YAKIMA CO PROSECUTOR'S OFFICE .128 N 2 ND STREET, ROOM 211 YAKIMA, WA 98901-2639	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> LUIS GOMEZ-MONGES 378372 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE WALLA WALLA, WA 98584	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____

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