

67227-4

67227-4

NO. 67227-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MYRON WYNN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN J. CRAIGHEAD, JUDGE

BRIEF OF RESPONDENT

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2012 OCT 12 PM 3:20
COURT OF APPEALS
STATE OF WASHINGTON

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A. ISSUES

1. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, the evidence would permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence, and all reasonable inferences that may be drawn from the evidence. Felony murder in the first degree based on robbery requires proof that the defendant murdered the victim in the course of or in furtherance of robbing him.

Myron Wynn was the last person seen with Bob Wykel. Wykel's body has never been found, and there has been no indication since his disappearance in 1996 that Wykel is alive. Wynn had taken a \$1,000 deposit from Wykel for a car that Wynn was unable to produce, and Wykel had expressed his determination to either get the car or get his money back. Within days of Wykel's disappearance, Wynn presented his girlfriend with a diamond that bore an amazing resemblance to the diamond in the ring Wykel always wore. Wynn made numerous inconsistent statements to police, and incriminating statements to a friend.

Was there sufficient evidence to support the jury's verdict that Wynn was guilty of felony murder based on robbery?

2. A jury instruction must be read as an ordinary, reasonable juror would read it. The jury instruction defining robbery told jurors that the force used must be “to obtain or retain possession of the property.” The last sentence of that instruction told jurors that the taking constitutes robbery even if death precedes the taking, where the taking and the homicide are part of the same transaction. Would an ordinary, reasonable juror read the last sentence as a directive relating to the *timing* of the taking, and not as a complete exception to the nexus between the force and the taking set out earlier in the same instruction?

3. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. There was no evidence presented at trial on which a jury could find any motive for this murder other than robbery. Even if the challenged jury instruction could be read as eliminating the requirement for a nexus between the homicide and the taking, is the error nevertheless harmless beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Myron Wynn¹ was charged by information and amended information with Felony Murder in the First Degree based on Robbery in the First Degree or Robbery in the Second Degree.² CP 1-17, 56. The victim, Robert Wykel, disappeared in 1996; he has never been heard from again, and his body has never been found. CP 2. In 2003, the King County Medical Examiner declared Wykel to be deceased. CP 2. The State alleged that Wynn killed Wykel during the time period between February 21 and March 13, 1996, in the course of robbing Wykel of thousands of dollars and the diamond ring that Wykel always wore. CP 2-14, 56.

Wynn's first trial ended in a mistrial when the jury was unable to reach a unanimous verdict. CP 178-80. The jury at a second trial found Wynn guilty as charged. CP 93.

Following his conviction, Wynn moved for arrest of judgment under CrR 7.4 or, in the alternative, a new trial under CrR 7.5.

¹ Myron Wynn is sometimes known as "Mike." "Wynn" is Myron Wynn's stepfather's last name. Myron Wynn sometimes goes by his birth name, Holdredge. Myron Wynn is referred to by all of these names at different points in the report of proceedings. See, e.g., Ex. 120 at 1-2; Ex. 130 at 1-2.

² The State initially charged Wynn in the alternative with premeditated first degree murder, but ultimately amended the information to charge first degree felony murder only. CP 1, 16, 56.

CP 181-88. Under CrR 7.4, Wynn argued that the evidence was not sufficient to prove that Wynn killed Wykel, or that he robbed him. CP 182-84. Wynn repeated this argument under CrR 7.5.³ CP 186. The State responded, citing the standard for sufficiency of the evidence and detailing the evidence, both direct and circumstantial, that supported the jury's verdict. CP 276-98.

The trial court denied the motions. RP (5/13/11)⁴ 34-35; CP 142-43. The court sentenced Wynn within the standard range. RP (5/13/11) 66; CP 134-41.

2. SUBSTANTIVE FACTS.

a. The Scam And The Murder.

Myron Wynn had long been accustomed to getting his money the easy way. He didn't need much – his girlfriend, Lynn Malaspino, largely supported him, and he rarely had to work. RP⁵ 908-10. When he needed a little cash, he employed a scam that seemed to work pretty well for him – he would offer to serve as

³ Wynn also argued that juror misconduct merited a new trial. CP 184-86. He does not pursue this argument on appeal.

⁴ The sentencing hearing is contained within the very first volume of the report of proceedings; that volume contains pretrial proceedings held on 2/28/11, as well as the sentencing proceedings held on 5/13/11.

⁵ Much of the verbatim report of proceedings from the second trial is consecutively paginated, and will be referred to in this brief simply as "RP." The earlier and later volumes, which are separately paginated, will be referred to by date.

a middleman in obtaining goods or services, take money up front, fail to deliver, proffer endless excuses, and count on the hapless victim finally getting tired of asking for the money to be returned.

Wynn had worked this swindle successfully on a number of people. When his girlfriend's sister, Debbie Banghart, needed a washer and dryer for her new house, Wynn told her that he had a friend in construction who could get her a good price. Banghart gave Wynn somewhere between \$150 and \$300, but she never got the washer or dryer, and she never got her money back from Wynn – only endless excuses. RP 986-88.

Banghart's husband, Ken Banghart, once gave Wynn \$40 to obtain a special-edition "Christmas Barbie" that Ken planned to give to his wife for Christmas. Wynn had "all kinds of excuses" for failing to come through on his promise; eventually, Ken just gave up on trying to get his money back. RP 892-94.

Wynn even managed to swindle the parents of a "Pony League" baseball team that he coached for a season. He told the boys' parents that he was enrolling the team in a tournament, and that he needed \$50 "up front" from each parent to secure a spot. A number of parents paid Wynn, but the promised tournament

never materialized. Despite their efforts, the parents were not successful at getting their deposits back. RP 1046-50.

Wynn did not even exempt his own family when it came to this scam. He once offered to obtain a computer for his sister, Robyn.⁶ Robyn recalled giving Wynn \$180 worth of marijuana and \$50 in cash. She never got the computer, and she never got her “down payment” back. RP 1106-08.

Some of Wynn’s Texas relatives had opinions of Wynn that corresponded to these experiences. Leslie Holland, Wynn’s cousin, had lived near Wynn when the two were teenagers, but had lost touch with him for a number of years. RP 1373-74. Explaining why she thought that a diamond Wynn showed up with in Texas might be “hot,” Holland said that Wynn was a “hustler” who did not always operate on the “straight and narrow,” and who knew how to get money when he needed it. RP 1378, 1401-03. Similarly, Wynn’s Aunt, Nell Terrell, described him as a “scammer” and a “hustler.” RP 1427.

But living off his girlfriend must have had its limits. Wynn had medical bills that were overdue for payment, and several

⁶ Myron Wynn and Robyn Wynn share the same mother, but have different biological fathers. RP 1052-53. To avoid confusion, Robyn Wynn will be referred to in this brief by her first name.

small-claims judgments against him. These obligations amounted to several thousand dollars. RP 1566-68, 1571-74.

Wynn decided to work his tried-and-true scam again, for higher stakes this time. He was pretty sure he had found a suitable “mark” in Bob Wykel. Wykel was a 66-year-old retired sheet metal worker who was in good health and looked younger than his years. RP 115, 185, 186, 406, 1087; CP 2, 199. Wykel was divorced, but he had kept at least one thing that his ex-wife, Joan, had given him – a diamond ring that he wore all the time. RP 108, 120, 164, 268, 433-34, 600; CP 202-09.

Wykel loved outdoor activities such as hunting and fishing, and he loved to travel. RP 115, 147, 161, 175, 185, 405, 665; CP 200. Wykel had another passion as well – restoring old cars. He would buy a car, fix it up, and sell it. RP 115-16, 184, 599, 666; CP 229-30. As with virtually everything he purchased, Wykel paid for the cars in cash. RP 120, 184-85, 432, 465, 603. Here is where Wynn saw his opportunity.

Wykel was part of a group of men, mostly retired, who met regularly at a local McDonald's for breakfast, coffee and conversation. RP 131-32, 477, 769-71; CP 224. At some point,

Wynn started showing up as well. RP 771-72; Ex. 58.⁷ He interacted mostly with Wykel. Ex. 58. Just before Wykel disappeared, he and Wynn were overheard talking about a car that Wynn was offering to show Wykel. Ex. 58.

Wykel had another regular social group – his weekly poker game. The group started out playing at the home of John Ogdon, who lived across the street from Wykel, but after several years it moved to the home of another neighbor, Ernest DeLadd. RP 403, 410-12, 663-64. Around the time of Wykel's disappearance, the weekly game switched from Wednesday night to Thursday night. RP 411, 597.

Right before he disappeared, Wykel told his poker buddies that he was going the next morning to look at a vintage Thunderbird that he had been wanting to buy. RP 417, 602, 671, 673. Wykel had been talking about the car for a couple of weeks; he said that he had given a middleman a deposit, but was still waiting for the

⁷ Ex. 58 is a DVD of the deposition of Rex Shepperd, a member of the McDonald's breakfast group. There is no transcript of the deposition in the record, and it does not appear that the jury was given a transcript to follow along while the DVD was played for them. RP 753-54. The deposition is a relatively brief one.

deal to happen.⁸ RP 416, 673. Wykel said that the middleman was someone from his McDonald's breakfast group. RP 673-74.

Wykel had been getting frustrated; he had \$5,000 in cash for the deal,⁹ but the middleman was "jerking him around." RP 416-17, 569, 602. He told his friends that if he didn't get the car the next day, he was going to get his deposit back. RP 417, 569. In spite of his frustration, however, he seemed confident that he would finally get the car the next day, and happy and excited at the prospect. RP 569-70, 674.

The date of this last poker game could not be pinpointed with certainty. Two of the men in the group, Mike Nelson and Ernest DeLadd, believed that the game had by that time moved to Thursday nights. RP 597-98, 664. A third, John Ogdon, thought that the game was still on Wednesday nights at that time, although he could not be certain. RP 413-14, 489-92. Ogdon believed that, if the game was on a Wednesday, the Wednesday in question was February 21, 1996. RP 414. All agreed that Wykel did not show up

⁸ John Ogdon, one of the poker group members, recalled the deposit as either \$1,000 or \$1,500. RP 416.

⁹ Wykel's bank records showed a withdrawal of \$5,200 on February 12, 1996. RP 1011.

for the next poker game, or for any game thereafter. RP 418-19, 604, 678-80.

All evidence points to Wynn as the last person to have seen Bob Wykel. On Friday, February 23, Wynn's stepsister, Robyn Wynn, got a call from Wynn saying that he was going to be stopping by with a friend, on the way to look at a Thunderbird in Lakewood.¹⁰ RP 1078, 1081-82, 1084, 1092. Robyn was at that time living in a house on the Wynn family's 140-acre camping resort, "Mother Nature's Acres," located in Nisqually, Thurston County. RP 1056, 1067.

Mother Nature's Acres was at that time heavily wooded, and included an 11-acre spring-fed lake that was said to have "no bottom." RP 1057-58. Most of the property was undeveloped. RP (3/29/11) 120. Any roads were dirt roads. RP 1057. The property included a long ridge, with several viewpoints; the terrain on the ridge was steep, heavily treed, and covered with blackberries and other foliage. RP (3/29/11) 122-23. There was a

¹⁰ At trial, Robyn equivocated, saying that the visit was on either Thursday, February 22nd, or Friday, February 23rd. RP 1080-82. When interviewed by Detective Tripp in April of 1996, however, and after checking her records, Robyn had told Tripp that the visit was on February 23rd. RP 1082-83, 1215. Phone records confirm that date, showing two calls from Wynn's girlfriend Lynn Malaspino's phone to Robyn's number on the morning of February 23rd. RP 1111 (Robyn's number is 360-456-3650); Ex. 96 at 5 (showing calls to that number on February 23, 1996 at 9:10 a.m. and 9:19 a.m.).

road toward the top of the ridge that paralleled the viewpoints.
RP (3/29/11) 123. The resort was surrounded by undeveloped
land. RP 1059.

Wynn arrived in Wykel's Mercedes, with Wykel driving.
RP 1085. Robyn described Wykel as a "younger looking older
man" and an "incredible gentleman." RP 1086, 1087. While
casually dressed, he was wearing a diamond ring and a gold
necklace. RP 1087, 1096-97. He was in a good mood. RP 1087.
Wykel and Wynn seemed to be getting along well; Robyn detected
no animosity or tension in the relationship. RP 1097-98. They all
had coffee at Robyn's house, and Wynn took Wykel on a tour of the
property. RP 1087. Robyn believed that she saw them leave the
property together, but she acknowledged that her memory of that
day was "a little bit scattered." RP 1098, 1122-23, 1137-38.

At around this same time, Wynn suddenly came into
possession of a diamond. Wynn's girlfriend, Lynn Malaspino, first
saw the diamond during a shopping expedition to Southcenter Mall
to get a gift for Malaspino's sister's birthday. RP 912-13. Wynn
and Malaspino had split up during the shopping trip, and Wynn
presented the diamond when they met up again. RP 913-14. The
only time that Wynn had ever bought Malaspino jewelry before, he

had used her credit card for the purchase. RP 912. The diamond was mounted in a pendant when Wynn presented it to Malaspino, but it had no chain; she eventually put it on a chain that she already had. RP 912-13, 915, 978; Ex. 146. Wynn told Malaspino that he found the diamond at the Burien park-and-ride. RP 911-12, 914.

Malaspino showed the diamond to her mother and her sister at a birthday party. RP 914. Malaspino's mother's birthday is on February 14th; Malaspino's sister Debbie's birthday is on February 22nd. RP 980, 983. The family typically marked the two birthdays at a single celebration, usually on a Sunday. RP 983-85. While there was some variation in the plan from year to year, they usually celebrated on the Sunday after Debbie's birthday. RP 896, 915, 985. In 1996, the Sunday following Debbie's birthday would have been February 25th. RP 915, 985.

Sometime around Christmas of 1996, Malaspino asked Wynn to move out. RP 921. Wynn wanted the diamond back. RP 922. He also demanded that Malaspino obtain a cash advance of \$5,000 on her credit card for him. RP 922. She complied with both demands "[t]o get rid of him." RP 922. Wynn never repaid the loan. RP 923-24.

At some point after his visit to Mother Nature's Acres, Wynn ended up staying with Robyn for a couple of weeks. RP 1108-09. Robyn thought this was in March of 1996, but it could have been later that year. RP 1109. Wynn had a "substantial amount" of money at that time. RP 1109-10. Robyn and her husband eventually put Wynn on a train to Texas. RP 1109.

b. The Diamond And The Investigation.

John Ogdon, Wykel's neighbor and poker friend, was the first to become concerned when Wykel stopped coming to the poker games. RP 418-19. When he discovered that Wykel's unclaimed mail was building up, he attempted to contact Wykel's landlord, Kim Baker. RP 419-20. Baker, however, had left on a business trip to Malaysia on February 23rd, and did not return until March 4th. RP 798-99, 802-03. Ogdon contacted Baker within days of her return, and the two entered Wykel's apartment. RP 420, 804-05.

Inside Wykel's apartment, Ogdon and Baker discovered food left out, dishes in the sink, and an unmade bed.¹¹ RP 421, 805.

¹¹ Rebecca Lee, Wykel's daughter, came to Seattle in mid-March and also saw the disarray in her father's apartment, including moldy food and dirty dishes; she said that her father was not in the habit of leaving things like that when he went on a trip. RP 199, 201-04, 211.

There was an "Auto Trader" magazine, opened to a page that included an ad for a Thunderbird.¹² RP 204-05, 230-33, 423-25, 805.

There were quite a few messages on Wykel's answering machine. RP 421-23, 806. Three of the messages were from Wynn. RP (3/29/11) 139-41. In the first message, Wynn said that he hadn't spoken to Wykel in over a week, and he referred to Wykel being on a trip. RP (3/29/11) 144. The second message is similar, with Wynn noting that he has not heard from Wykel, and asking for a call. RP (3/29/11) 144. In the third message, Wynn mentioned that he had received a call back from Wykel.¹³ RP (3/29/11) 144, 147.

Ogdon notified police of Wykel's disappearance, but the police would not take a report because "a person has a right to go missing if they want to." RP 426-27. After Wykel's Mercedes was

¹² Detective Tripp contacted the person who was selling the Thunderbird through Auto Trader; he found no indication that Wykel had made an offer on that car, or had even called about the car. RP 1179-81.

¹³ The parties did not agree on what Wynn said in this third message. RP (3/29/11) 145-46. The tape was played for the jury, both during trial and again during deliberations. RP (3/29/11) 143, 145-46; RP (4/5/11) 4, 13.

towed from the Burien park-and-ride on March 11th, however, police decided to investigate.¹⁴ RP 427, 1033-38.

There was ample reason to think that Wykel had not voluntarily decided to "go missing." While most of his family lived in Chicago, he kept in close touch by phone with his ex-wife Joan, his daughter Rebecca, and his granddaughter Jessica. RP 94-95, 181; CP 209. When Rebecca and other family members were unable to reach Wykel in late February, and their calls were not returned, they became concerned. RP 188.

Moreover, Wykel had made specific plans for the upcoming months. His granddaughter Jessica was getting married in June, and Wykel was planning to make an ice sculpture for the wedding. RP 95-96, 186-87. In addition, Wykel was planning to visit his son Jack in Chicago at some point during the spring of 1996. RP 151-52.

Wykel was also actively seeking a female companion. He was communicating in early 1996 by telephone and mail with a woman named Ginger Ensby who lived in Kingston, New York. RP 723-24. Wykel had sent Ensby a gold locket for her February

¹⁴ The Mercedes had first been tagged on March 8th, indicating that it had been there at that point for no less than 72 hours. RP 1025-26, 1029-30.

15th birthday, and as recently as February 18th he had sent her a book about Washington state that he had inscribed "from an ardent admirer." RP 724, 726, 732. Wykel had even made tentative plans to visit Ensby as part of a trip to the east coast to look at a car. RP 732-33; Ex. 26. When Rebecca Lee went into her father's apartment after his disappearance, she found a photograph of Ensby on Wykel's refrigerator. RP 210-11.

After his disappearance, an undated draft of a letter found among Wykel's effects indicated that he was exploring the idea of returning to Argentina.¹⁵ RP 224-27; Ex. 28. In the letter, Wykel proposed placing an ad in the "personals" column of an Argentinian newspaper seeking a potentially permanent relationship with a suitable woman. RP 226-27; Ex. 28. Importantly, Wykel wrote that he was "planning to return to Argentina *sometime after June of '96.*" RP 226; Ex. 28 (italics added). Wykel had also mentioned a trip to Argentina to his daughter Rebecca; he told her that he was planning the trip for *after* Jessica's wedding (planned for June 30, 1996).¹⁶ RP 95, 224.

¹⁵ Wykel and his wife had lived in Argentina for a period of time in the 1980s, and Wykel often spoke of returning there. RP 178-79, 223-24.

¹⁶ Wykel doted on Rebecca's two children, Kristopher and Jessica. RP 457-58. When Wykel had previously lived in Argentina, the grandchildren had visited him there. RP 179.

Wykel was not one to leave town without notifying family and friends. Neighbor John Ogdon reported that Wykel would usually tell him when he was going on a trip; Wykel would leave his Mercedes in Ogdon's fenced yard, and ask a neighbor to pick up his mail. RP 407-08, 473-74. Wykel would typically also notify his landlord, Kim Baker, if he was going away on a trip. RP 807-08. While Rebecca Lee occasionally had to remind her father to let her know when he was going out of town, Wykel *always* told her when he was leaving the country. RP 386.

Nor would Wykel have left his Mercedes at a park-and-ride. Rebecca Lee said that her father had a lot of pride in the cars he fixed up, and would never leave his car at a park-and-ride. RP 237. Jack Wykel echoed this belief, pointing out that his father was "very particular about his cars," especially the Mercedes, and would not leave it at a park-and-ride. RP 154. John Ogdon said that Wykel would not have left the Mercedes at a park-and-ride overnight, but would instead have brought it over to Ogdon's house. RP 427-28.

The things Wykel left behind also strongly suggest that he did not simply go away on a trip. Wykel's clothes and luggage were still in his apartment when Rebecca Lee got there, as were his shaving kit and other toiletries. RP 205. Lee identified a particular

suitcase that her father *always* took when he visited her in Chicago. RP 216. Wykel also left his passport behind, as well as his hunting rifles and fishing gear. RP 217, 384. He left more than \$48,000 in his bank account.¹⁷ RP 1016-17; RP (3/29/11) 64-65.

Neither friends nor family ever heard from Bob Wykel again after he disappeared in February 1996. RP 101, 125, 153-54, 279, 388, 435, 604, 679-80, 736, 821; CP 210. Although his body has never been found,¹⁸ recurring inquiries into national databases have never yielded a response indicating that he is alive. RP 1685-87; RP (3/29/11) 118; CP 2. Wykel was eventually declared legally deceased. RP 266; CP 2.

Although suspicion fell almost immediately on Wynn (RP 1202), early investigation did not turn up a definitive answer to the mystery of Wykel's disappearance.¹⁹ Fingerprints from the

¹⁷ Other than a withdrawal by Rebecca Lee for money needed in settling Wykel's estate, there was no activity on the account after Wykel disappeared. RP 242, 279, 1017; RP (3/29/11) 64-65.

¹⁸ Two searches conducted over limited areas of Mother Nature's Acres in 2004 and 2005 using cadaver dogs yielded no human remains. RP 1683-85; RP (3/29/11) 119-29.

¹⁹ The basis for the early suspicion was primarily Wynn's statements to police, which are detailed in § B.2.c., *infra*.

Mercedes and from Wykel's apartment did not match any known person, including Wynn.²⁰ RP 1515-18, 1525-27.

Then Wynn's sister, Robyn Wynn, came forward with information about a diamond. By that time, Detective Tripp had retired, and Detectives Sue Peters and Jon Holland had taken over the case. RP 1583-84.

Robyn said that she had been at a family reunion in Honey Grove, Texas, and had seen her Aunt Nell (Terrell) in possession of a diamond that Wynn had sold to Terrell. RP 1113, 1586, 1672-73. Immediately interested because Wykel had worn a diamond ring, the detectives went to talk to Robyn again.²¹ RP 1586, 1672-73. Robyn's information precipitated a trip to Texas to obtain more information about the diamond. RP 1591, 1674.

Wynn's cousin, Leslie Holland, said that Wynn had returned to Texas toward the end of 1997.²² He had in his possession a diamond "solitaire" pendant without a chain. RP 1378. Wynn first told Holland that he had found the diamond at a bus stop. RP 1379. He later said that he had bought it from a guy at work for

²⁰ Police had no known prints from Wykel for comparison purposes. RP 1513.

²¹ Detective Tripp had first talked to Robyn on April 15, 1996. RP 1215.

²² Wynn told police that, when he left Washington, he went to Denver and worked for a time with a relative putting in hardwood floors; from there he eventually went to Texas. Ex. 120 at 41-43; Ex. 130 at 16.

\$2,500. RP 1379, 1381-82. Wynn said he would take \$2,000 for the diamond, and Holland's mother, Nell Terrell, bought it.

RP 1372, 1383, 1412. Wynn told Terrell that he got the diamond when he was helping a friend clean out a garage after the friend's father or grandfather had passed away. RP 1411.

When detectives came around in March of 2000 asking about the diamond, Terrell said that she didn't have it. RP 1384-87, 1414-15. Terrell lied because she was scared ("that's when it hit me that I bought something that I shouldn't have bought").

RP 1415. Holland ultimately convinced Terrell to tell police the truth, and Terrell turned the diamond over to the detectives.

RP 1388, 1390, 1415-16.

The detectives then enlisted the help of Wykel's daughter, Rebecca Lee, to determine whether the diamond that Wynn had sold to his aunt had come from Wykel's diamond ring. Lee had seen her father's ring many times; she couldn't remember a time when he did not have the ring, and he always wore it. RP 268. Lee recalled that she used to grab her father's hand and look at the ring, and try to convince him to clean it; he wore it when he worked on cars, and there were nicks in the diamond with grease embedded in the stone. RP 269.

Since no one had a close-up picture of Wykel's ring, Lee worked with a gemologist and a goldsmith to try to come up with a detailed description and a drawing of her father's ring. RP 270-72. Lee told the experts that she had been told that the stone was either a "Ruby" cut or an "Old European" cut. RP 273. She told them that the stone was round and that there was a space between the stone and the bottom of the setting; the stone did not come down to a point, almost as if the point had been cut off. RP 274, 278. They settled on the size by drawing a number of circles for reference. RP 275-76.

Leigh Anne Butterbrodt, a custom jeweler, specializes in recreating pieces of jewelry for her clients. RP (3/30/11) 117-18. The recreation process involves asking a lot of questions, drawing pictures, and using a gauge with graduated disk-shaped holes. RP (3/30/11) 119-21. Butterbrodt works with "Old European" cut stones on a regular basis; stones cut in this manner are round, and have the "very notable distinction" of having a flat bottom (i.e., the stone does not come to a point).²³ RP (3/30/11) 122-23.

²³ The "Old Mine" cut shares this distinction, but it is rectangular in shape. RP (3/30/11) 123.

Butterbrodt worked with Rebecca Lee in February of 2000 to create a drawing of a diamond ring. RP (3/30/11) 123-25. She knew nothing about the ring other than what Lee told her. RP (3/30/11) 125. Using the gauge, they arrived at a diameter of seven millimeters. RP (3/30/11) 126. This is roughly equivalent to 1.25 carats.²⁴ RP (3/30/11) 131.

Gemologist Ted Irwin received a diamond "solitaire" pendant from the King County Sheriff's Office in 2000.²⁵ RP (3/30/11) 106. He was asked to provide a fair market appraisal, as well as dimensions and estimated weight. RP (3/30/11) 106-07. Irwin identified the cut as "Old European." RP (3/30/11) 107. He estimated its carat weight as 1.28. RP (3/30/11) 112. Irwin noted nicks and abrasions on the diamond, and small chips around the outside diameter. RP (3/30/11) 113. He estimated the diamond's fair market value at \$5,000. RP (3/30/11) 112.

²⁴ While estimates by witnesses varied considerably, Joan Wykel, who had purchased the diamond for her husband, estimated the stone as "[a]bout a carat." CP 208-09. Gemologist Ted Irwin noted that a mounting can make a diamond look larger than it is. RP (3/30/11) 114-15.

²⁵ The diamond that detectives obtained from Nell Terrell is Ex. 70. RP 1593. When Irwin was shown Ex. 70, he said that it was "remarkably similar to, if not the same, stone" that he had examined in 2000, but he would need a microscope to be certain. RP (3/30/11) 109.

c. Wynn's Conflicting Statements.

Right from the start, Wynn tried to convince anyone who would listen that Wykel had planned to go out of town on a trip of uncertain duration. When Wynn showed up at landlord Kim Baker's apartment early in the morning on March 26, 1996, he told Baker that Wykel had mentioned a trip to Nevada. RP 813. Baker had already been in contact with several of Wykel's neighbors, but no one other than Wynn had said anything about this trip. RP 809, 815.

Wynn mentioned even more possibilities during his phone conversation with Rebecca Lee on that same morning. Wynn tried to convince Lee that her father was on vacation and would certainly return. RP 256. Wynn added that Wykel had talked about going to Nevada to buy a car, and that Wykel had also mentioned a city in California. RP 257. Finally, Wynn told Rebecca that her father was planning a trip to Argentina. RP 258. Rebecca had spoken with her father's neighbors, and with men from both the poker group and the McDonald's breakfast group; no one but Wynn had talked about these out-of-state trips. RP 257, 263, 380-81.

Later on that same day, Wynn repeated the story of the Nevada car-buying trip when he spoke to Detective Tripp. Ex. 93 at 7, 10.

But perhaps more telling was what Wynn did *not* say. When Wynn knocked on landlord Kim Baker's door early in the morning on March 26, 1996, allegedly worried about his missing friend, Wynn failed to mention his visit with Wykel to Mother Nature's Acres. RP 810-13, 817. When he called Rebecca Lee at her hotel in Seattle that same morning, Wynn assured her of his eagerness to help in locating her missing father, but said *nothing* to Rebecca about having been at Mother Nature's Acres with Wykel on February 23rd. RP 381. Rather, he told Rebecca that he had last seen Wykel earlier that week, on Sunday, February 18th and Tuesday, February 20th. RP 252-56.

Wynn repeated this lie to Detective Tripp later that same day. Ex. 93 at 6. But here he went even further, telling Tripp that Wykel had planned to go to an abandoned car auction on Friday after the Tuesday when Wynn claimed to have last seen Wykel – the very Friday on which Wynn took Wykel to Mother Nature's Acres. Ex. 93 at 10. Again, Wynn said nothing about the trip to Mother Nature's Acres. RP 1195-96.

Wynn also told varying stories about how he had obtained the diamond. He told his girlfriend, Lynn Malaspino, that he had found the diamond at the Burien park-and-ride. RP 911-12. He initially told this same story to his cousin, Leslie Holland, but later changed it to say that he bought the diamond from a guy at work who had inherited it from his aunt as part of a brooch that also included two rubies. RP 1379-80. Wynn told his aunt, Nell Terrell, that a friend's father or grandfather had passed away, and Wynn had gotten the diamond in a stickpin when he helped the friend clean out a garage full of boxes. RP 1411.

Wynn also changed important parts of his story in response to varying information that he got from detectives. When detectives confronted Wynn on March 8, 2000, with their knowledge that he had sold a diamond to his Aunt Nell, he stuck to the story of the Burien park-and-ride.²⁶ Ex. 120 at 28-33. He said that he found the diamond in June of 1996. RP 1628; RP (3/29/11) 71.

But when the detectives went back to Texas and talked to Wynn again in 2004, they told him that Wykel's DNA had been

²⁶ Detectives Holland and Peters obtained the diamond from Nell Terrell on March 8, 2000 at her home in Texas. RP 1592-93. After finding out from Terrell where Wynn lived, the detectives went to his residence and obtained a taped statement. RP 1603-04; Ex. 120.

found on the diamond.²⁷ RP (3/29/11) 71. Wynn now recalled for the first time that he had showed the diamond to Wykel a couple of weeks before Wykel disappeared, and Wykel told him he didn't think it was real. RP (3/29/11) 71-72, 80; Ex. 130 at 9-10.

Wynn had also been equivocal about whether he had ever driven Wykel's car. In his 2000 statement, he told detectives that "I sat in it, but I never drove it, drove it." EX. 120 at 7. Then he backed off this statement, saying, "I don't know if I did or didn't . . . I don't think I did." Ex. 120 at 8. Then, in the same statement, Wynn expanded the possibilities: "I don't *think* I drove it. . . . I'm not sure. . . . I don't remember if I did or didn't . . . I mean, I may have drove it that day, when we was at the park. I may have . . . drove the car around the tour. Uh, I can't remember if I did or didn't." Ex. 120 at 12 (*italics in original*).

But again, Wynn's story changed when detectives confronted him with new "information" four years later. They told him that his prints had been found in Wykel's car.²⁸ RP (3/29/11)

²⁷ This was not true, but was a ruse that the detectives used to see if Wynn would change his story. RP 1608-09.

²⁸ This was another ruse aimed at gauging Wynn's reaction; none of the three fingerprints of comparison value that were lifted from Wykel's Mercedes matched Wynn. RP 1515-17.

72. Suddenly, Wynn's recall was much more specific – he had driven Wykel's car “[t]wo or three” times. Ex. 130 at 12.

Wynn was similarly flexible about when he had last seen Wykel. In 1996, Wynn had said that he last saw Wykel on Tuesday, February 20th. RP 255-56; Ex. 93 at 6. But when detectives in 2000 confronted Wynn with their knowledge of his trip to Mother Nature's Acres with Wykel, Wynn's memory again improved, and he now recalled that he had seen Wykel twice at McDonald's *after* that trip (which occurred on Friday, February 23rd).²⁹ RP 1619, 1623; Ex. 120 at 9, 23.

Wynn also made a number of statements to family members and friends in Texas that, singly or in combination, implicated him in Wykel's disappearance and pointed to murder. Wynn showed his confidence that no one would miss Wykel for a while when he told Nell Terrell that Wykel was a nice old man, but that he had a habit of going off and no one would know where he would be. RP 1417.

Wynn was not as kind in a comment heard by Mary Jane Clark, a close friend of Wynn's sister Pletha.³⁰ Wynn had told Clark that he could never go back to Washington because “they think I

²⁹ RP 1082-83, 1215.

³⁰ Pletha (Brenda) Oats had passed away by the time of trial. RP 1441.

killed someone.” RP 1444. Clark later overheard Wynn say to Pletha, “I don’t understand what the big F’ing deal was. The guy was a weasel, he was a crook.” RP 1445. Wynn told Mary Jane’s husband, Marvin Clark, that the man police were investigating Wynn for killing was not a nice person, that he was “[k]ind of a derelict type.” Ex. 108 at 30.

Wynn seemed confident that police did not have much of a case against him. He told Marvin Clark that he wasn’t really worried that Washington detectives would come down to Texas and get him; he seemed to think they had no evidence. Ex. 108 at 28-30.

But Wynn made the most damning statements to William Kent Alexander, Jr.. Alexander was born and raised in Honey Grove, Texas. Ex. 113 at 15. He was a friend of Wynn’s sister, Brenda (Pletha) Oats. Ex. 113 at 18-19. Alexander had previously sold and used marijuana, but had been clean and sober for almost three years at the time of his testimony.³¹ Ex. 113 at 16-18.

In the late 1990s, Alexander and Wynn worked together at Southwest Building Enclosures. Ex. 113 at 20. Wynn sometimes

³¹ Alexander’s testimony from the first trial was read to the jury at the second trial, as medical problems and impending surgery prevented him from traveling. RP 1464-72, 1475-77, 1510.

stayed at Alexander's house when they were working together, and both of them smoked marijuana at the time. Ex. 113 at 22-24.

Wynn at one point recounted a visit by police from Washington; they were investigating a murder that happened in Washington, and they talked to Wynn at Pletha's house.³² Ex. 113 at 24, 32-33. Alexander was not present at this interview. Ex. 113 at 32.

After the visit, Wynn told Alexander that he (Wynn) had nothing to worry about because "[t]hose clowns aren't even in the right ballpark." Ex. 113 at 24. Wynn assured Alexander that the police didn't have the evidence to prove anything against him. Ex. 113 at 24. "As far as he [Wynn] was telling me, if you wanted to get away with murder, all you had to do is not have a witness, a body and get rid of the weapon." Ex. 113 at 24-25. Wynn said that the way to get rid of a body was to put it in a duffle bag, put chains around it, and throw it in the river. Ex. 113 at 26. Wynn also said that the first time is the hardest, and after that it's a piece of cake. Ex. 113 at 120-21.

³² Alexander referred to the police as U.S. Marshals. Ex. 113 at 24. The Washington detectives were actually accompanied by Texas Rangers. RP 1384, 1414.

Alexander acknowledged that he had suffered a serious head injury in a motorcycle accident in 1995. Ex. 113 at 26-27. As a result, he suffered from seizures and had difficulty remembering things that happened before the accident; he continued to have difficulty with mental focus.³³ Ex. 113 at 26-28. Alexander was not concerned about his recollection of Wynn's statements, however: "How could you forget something like that?" Ex. 113 at 28.

C. ARGUMENT

1. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT OF FELONY MURDER BASED ON ROBBERY.

Wynn contends that the evidence presented at trial was insufficient to support the jury's conclusion that Robert Wykel's death occurred in the course of a robbery.³⁴ He accordingly urges reversal and dismissal of his conviction for felony murder. This

³³ Wynn discounts Alexander's testimony, arguing that cross-examination suggests "profound mental health issues." Brief of Appellant at 25 n.11. Aside from the obvious fact that a skilled attorney can easily confuse a witness who has difficulty focusing, there is the fact that Alexander knew something about Bob Wykel: that Wykel was well-traveled and could be gone two or three months before anyone would notice. Ex. 113 at 25-26. This is very similar to what Wynn told Nell Terrell (RP 1417), and enhances Alexander's credibility, i.e., that he was recounting things that Wynn had said to him.

³⁴ Wynn does not challenge the sufficiency of the evidence that he killed Robert Wykel. The strong evidence that Wykel did not voluntarily disappear, but is dead; the fact that Wynn is the last person known to have seen Wykel; Wynn's motive to kill Wykel to, at a minimum, retain the \$1000 deposit he had taken from Wykel by pretending to broker a car deal; and Wynn's inconsistent and sometimes directly incriminating statements, together establish sufficient evidence that Wynn murdered Wykel. See § B.2, supra.

claim must be rejected. Under the proper standard of review, the evidence presented to the jury was more than sufficient to establish that Wynn killed Wykel, and that robbery was the sole motive for the murder.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, the evidence would permit a rational trier of fact to find the essential elements of the crime charged beyond a reasonable doubt. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficiency admits the truth of the State's evidence, as well as all reasonable inferences that may be drawn from that evidence. Id. Circumstantial evidence is on a par with direct evidence – both types of evidence are equally reliable. Id. Credibility determinations are left to the trier of fact, and are not subject to review on appeal. Id. The reviewing court will defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

The crime of robbery is defined by statute:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or

overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. The intent to steal is an essential, nonstatutory element of the crime of robbery. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

The State set out its theory in opening statement. After detailing the evidence the State intended to present, the prosecutor summed up:

This is an allegation of Felony Murder in the First Degree during the course of a robbery. You will recall, the defendant took money up front from Bob Wykel; that he was supposed to produce a car. When that vehicle wasn't produced, Bob probably confronted him. He told his friends "I am going to either get that car or get my money back." And the defendant killed him.

RP (3/7/11 p.m.) 31.

The State maintained this theory through closing argument. The prosecutor told the jury that, once Wynn figured out that Wykel was interested in cars:

[H]e becomes friendly with the guy and do[es] what he always did, is make him an offer, take the money, and then not come through. And the person will just let it go.

This time though he overreached. This was too much money, and this was Bob Wykel, the wrong guy and too much money.

[Wykel] wasn't just going to let it go like everyone else did. He was a man who wasn't going to let himself be conned. The excuses that had worked with other people weren't going to work with Bob Wykel.

This time, when the defendant promised something that he wouldn't deliver, and had no intention of ever delivering, he picked a man who had been around the block a few times, a man who was getting angry and wanted his money back, who told his friends, tomorrow I'm getting my car or I'm getting my thousand dollars.

Bob Wykel couldn't know he wasn't going to get his car and he wasn't going to get his thousand dollars when he left that day with the defendant. But he was the kind of man, maybe the first one ever, to call the defendant's bluff.

[T]his was someone who had enough, called the bluff, probably threatened to take action, and did not get his car, did not get his thousand dollars, and got killed for it.

RP (4/4/11 a.m.) 42-44. The prosecutor reiterated this theory in rebuttal closing argument, telling the jury: "Robbery; you can take \$1,000 from somebody up front, you can retain it and then kill them, that's still robbery." RP (4/4/11 p.m.) 78.

Wynn relies primarily on State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006), for the proposition that, to constitute robbery, "the force must relate to the taking or retention of the property,

either as force used directly in the taking or retention or as force used to prevent or overcome resistance 'to the taking.'" 159 Wn.2d at 13 (Alexander, C.J., dissenting) (quoting State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005)). Citing State v. Larson, 60 Wn.2d 833, 835, 376 P.2d 537 (1962), Wynn argues that merely taking property from an unconscious person is not robbery, unless the victim's unconscious state was specifically induced for the purpose of taking the property. Brief of Appellant at 33.

There is no dispute about these legal principles. The problem for Wynn is that the evidence shows much more than a mere taking from an unconscious person.

To start with, Wynn was the last person to have been seen with Bob Wykel. That fact alone raises a reasonable inference that Wynn had something to do with Wykel's disappearance. But there was much more, including strong evidence of motive and opportunity.

The mission that the two were on when they stopped at Mother Nature's Acres, according to Wynn's own statements, and corroborated by Robyn Wynn, was for Wykel to look at a Thunderbird that he might wish to purchase. RP 1084, 1092; Ex. 120 at 9-10; Ex. 130 at 2-3. Wykel had told friends in his poker

group, likely the night before that final trip, that he was going the next morning to look at a vintage Thunderbird that he was hoping to buy. RP 417, 602, 671, 673.

Wykel had told his poker friends that the middleman for the Thunderbird deal was someone from his McDonald's breakfast group. RP 673-74. Wynn was by his own admission a part of that group. RP 814; Ex. 93 at 1-2. Rex Shepperd, another member of the McDonald's breakfast group, identified Wynn as the middleman on the Thunderbird deal. Ex. 58, 59, 60.

And there was evidence that Wynn had made himself the middleman on other "deals," where he took the money, but didn't hold up his end of the bargain. Four different people testified that they had fallen victim to some version of Wynn's "middleman" scam, all with the same result: they lost their deposits and they never received the promised goods, only endless excuses until they finally gave up. RP 892-94, 986-88, 1046-50, 1106-08.

But Bob Wykel was starting to show his frustration. He had given the middleman at least a thousand dollars as a deposit on the Thunderbird. RP 416. Wykel told his friend John Ogdon that he was being "jerked around" by the middleman in the Thunderbird deal. RP 569. One of the last things that Wykel said to Ogdon was

that he was either going to get the car or get his money back.

RP 569.

When Wykel and Wynn headed south toward Lakewood to look at the nonexistent Thunderbird,³⁵ Wynn must have realized that he was running out of excuses. The stop at Mother Nature's Acres was likely just another stalling action, albeit a last-ditch one. Based on Wykel's reported good mood,³⁶ he still believed they were headed to see the car.

But a confrontation was at that point inevitable. Wynn may have tried one last excuse, and Wykel would have none of it. Wynn may well have panicked, as the State hypothesized;³⁷ desperate because he no longer had the thousand dollars that Wykel was demanding he return, Wynn killed Wykel and left his body somewhere on the extensive and heavily-wooded property of Mother Nature's Acres.

And it is well within the realm of reason that Wynn was motivated by more than a desire to retain his ill-gotten thousand dollars. Robert Wykel's diamond ring was visible to one and all,

³⁵ RP 1084.

³⁶ RP 1087.

³⁷ RP (4/4/11 p.m.) 89.

and he never took it off. RP 120, 268, 433-34. And it was no secret that Wykel paid for things, including cars, in cash, and often had a fair amount of it with him. RP 432 (“It was not unlike Bob to have a big wad of cash in his money clip.”), 603 (“He always paid cash [for cars].”).³⁸ For a man in Wynn’s position, with no visible means of supporting himself beyond the food and shelter that his girlfriend provided, Wykel’s ring and money would have been powerful motivators in the murder.

Within days of the Mother Nature’s Acres excursion, the normally penniless Wynn presented his girlfriend with a diamond, giving her a story about “finding” it at a bus stop that any mother would immediately suspect if put forth by a child. RP 911-12. And when the romance soured, Wynn took the ring back and sold it to his aunt in Texas for two thousand dollars. RP 921-22, 1378-84, 1409-12. This diamond bore an amazing resemblance to the diamond that once adorned Bob Wykel’s ring. RP 269-78; RP (3/30/11) 106-15, 123-39.

Wynn derided the police as “clowns” to his friends in Texas, and discounted the evidence against him. Ex. 108 at 29-30;

³⁸ Wykel’s empty wallet was found in his Mercedes; he ordinarily kept his cash separate from his wallet, but there was no cash found in the car. RP 239.

Ex. 113 at 24. Upon his arrest, he said he would “take [his] chances in court,” as the police “only [had] circumstantial evidence.” RP (3/29/11) 137-38.

But Wynn miscalculated the value of a mountain of circumstantial evidence. He may not have understood that jurors would be entitled to weigh circumstantial evidence just as they would weigh direct evidence. And he may not have known that jurors would be entitled to draw reasonable inferences from *all* of the evidence.

Perhaps more importantly, Wynn may have thought that his statements to police would not hurt him that much, as he had never directly confessed to them that he killed Bob Wykel. But these statements lead to another point that Wynn may have failed to consider: the jury’s paramount role as the judges of credibility. Wynn’s three recorded statements to police are rife with evasive and inconsistent answers, and important omissions. These, along with his abrupt changes to his story when confronted by detectives with new information (some of it untrue), seriously damaged his credibility.

The trial judge recognized this. In denying Wynn’s motion for arrest of judgment, Judge Craighead noted that the jury had

asked to hear all three of Wynn's statements for a second time during their deliberations, consuming almost an entire day. RP (4/5/11) 2-13; RP (5/13/11) 34-35. The judge pointed out that "[t]he statements were in total one of the strongest aspects of the State's case with respect to Mr. Wynn's involvement in Mr. Wykel's death," and concluded that "[i]t's very difficult for me to say that this jury was not reasonable." RP (5/13/11) 35.

The trial court was correct. Given the standard of review, the evidence presented at trial, and the inferences that reasonably could be drawn from that evidence, there was sufficient evidence that Wynn killed Bob Wykel, that his purpose in killing him was robbery, and that the murder was thus in furtherance of robbery.

2. THE JURY INSTRUCTION DEFINING ROBBERY IS NOT A BASIS FOR REVERSAL.

Wynn next argues that the final sentence of the jury instruction defining robbery, which addresses the timing of the taking in relation to a homicide, improperly relieved the State of its burden to prove all of the elements of felony murder based on robbery beyond a reasonable doubt.

This challenge to a standard WPIC³⁹ should be rejected. When read as a whole and in a commonsense manner, the instruction properly states the applicable law. In any event, Wynn waived this claim by telling the trial court that he had no objection to it, and he cannot show a manifest constitutional error under the facts of this case. Nor was it ineffective assistance of counsel to fail to object to this standard pattern jury instruction. Finally, even if the instruction was erroneous, it was harmless under the facts of this case.

- a. The Instruction Did Not Relieve The State Of Its Burden Of Proof.

Jury instructions are sufficient when they allow trial counsel to argue their respective theories of the case, are not misleading, and, when read as a whole, properly inform the jurors of the applicable law. State v. Killingsworth, 166 Wn. App. 283, 288, 269 P.3d 1064, review denied, 174 Wn.2d 1007 (2012); State v. Gordon, 172 Wn.2d 671, 677, 260 P.3d 884 (2011). When reviewing a challenge to the adequacy of a jury instruction, the appellate court will read the instruction as an ordinary, reasonable juror would. Killingsworth, 166 Wn. App. at 288.

³⁹ Washington Pattern Jury Instructions: Criminal.

A jury instruction is not misleading if it is “readily understood by the ordinary mind.” State v. Noel, 51 Wn. App. 436, 440, 753 P.2d 1017, review denied, 111 Wn.2d 1003 (1988). The issue is not whether it is *possible* to interpret the challenged instruction as Wynn urges, but whether the *ordinary juror* would so interpret it. See id.

Wynn challenges the jury instruction defining robbery that was given at both of his trials:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

The taking constitutes robbery, even if death precedes the taking, whenever the taking and a homicide are part of the same transaction.

CP 72, 106. This instruction is identical in relevant part to WPIC 37.50.

In arguing that the last sentence of this instruction relieved the State of its burden to prove that the defendant's purpose in killing the victim was to facilitate obtaining or retaining the unlawfully taken property, Wynn reads the sentence in isolation

from the rest of the same instruction. That is not how this Court must evaluate Wynn's claim.

Reading this instruction as an ordinary, reasonable juror would read it does not lead to Wynn's strained interpretation. By the time jurors at Wynn's trial reached the last sentence of the instruction, they already had been told that robbery requires that "[t]he force or fear must be used *to obtain or retain possession of the property or to prevent or overcome resistance to the taking.*" CP 106 (italics added). Thus, the required nexus between the force and the taking had already been established. In light of this, the ordinary, reasonable juror would have seen the last sentence as addressing only the *timing* of such a taking, not as a complete *exception* to the nexus requirement.

Reading the instruction as Wynn urges this Court to do does not comport with the ordinary, reasonable way that jury instructions are read and must be reviewed. The definition of robbery given here did not relieve the State of its burden of proof.

b. Wynn Cannot Show Manifest Constitutional Error.

The jury instructions proposed by the State in the second trial were the same as in the first trial. RP (3/31/11) 70-71;

CP 154-77. The State's proposed instructions included the one challenged here, the definition of robbery contained in WPIC 37.50. CP 166. The court gave this instruction at both trials. CP 72, 106.

When the parties discussed the jury instructions with the court at the close of the second trial, there were only a few issues raised: adding a couple of sentences to the concluding instruction informing jurors that they would not be getting transcripts that had been marked, but not admitted into evidence; whether to give a "missing witness" instruction or allow the defense to argue this to the jury; and whether to reiterate a limiting instruction that had already been given at the time of the testimony to which it applied. RP (3/31/11) 70-78; RP (4/4/11 a.m.) 3-25; CP 59, 116.

Once these issues had been resolved, the trial court asked: "Any other instructional issues?" Wynn's counsel responded: "I don't believe so, your Honor." RP (4/4/11 a.m.) 25.

An appellate court may refuse to review a claim of error that was not raised in the trial court. State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); RAP 2.5(a). An exception will be made for a "manifest error affecting a constitutional right." Id. "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable

consequences in the trial of the case.” State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Even if the instruction was erroneous, in that it could have led the jury to understand that they need not find a nexus between the homicide and the taking or retention of property, Wynn cannot make this “plausible showing” of “practical and identifiable consequences.” There was simply *no evidence* to support *any other purpose* for Wynn to kill Bob Wykel, other than to retain or obtain Wykel’s property.

According to Robyn Wynn, when she saw Wynn and Wykel together at Mother Nature’s Acres, they were in a good mood and appeared to be getting along well. RP 1097-98. She observed no animosity between them, no fighting, and no tension. RP 1097-98. Nor was there anything else presented to the jury about Wynn’s relationship with Wykel that could support any motive for Wynn to kill Wykel – except the thousand dollars that Wynn had conned Wykel into giving him, and which Wykel was determined to get back.⁴⁰

⁴⁰ And, as a bonus, Wykel’s cash and his diamond ring.

Since there is no basis for finding that anything *other* than financial gain precipitated the murder, Wynn cannot make a plausible showing that the claimed error could have had practical and identifiable consequences in his trial. This Court should decline to review this claim of error.

c. Wynn's Attorneys Were Not Ineffective.

Wynn nevertheless argues that his attorneys were ineffective in failing to object to the final sentence in the instruction defining robbery. He can show neither deficient performance nor prejudice.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687.

To prevail on this claim, the defendant must first show that his attorney's representation was deficient; this requires a showing that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Id. In judging the performance of trial counsel, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

Next, the defendant must show that he was prejudiced by counsel's deficient performance. Id. at 687. This requires a showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

Wynn cannot meet his burden of showing deficient performance. The challenged jury instruction was a standard WPIC. Wynn has cited no case that directly questions this instruction, and the failure to challenge it cannot be deficient. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) ("*LeFaber* [the case questioning WPIC 16.02] had not been decided at the time of [the defendant's] trial, so his counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02.>").

In support of his claim of deficient performance, Wynn cites State v. Kylo, 166 Wn.2d 856, 215 P.3d 177 (2009). In that case, the court found deficient performance where trial counsel proposed a jury instruction on self-defense that was a standard WPIC (former WPIC 17.04), albeit an incorrect one. Id. at 868-69. But the error at issue in

Kyllo had been identified and addressed much more directly, in several cases, than the error that Wynn claims here. See Kyllo, 166 Wn.2d at 866-68. More importantly, the erroneous standard WPIC *directly contravened the self-defense statute*. Id. at 865; RCW 9A.16.020(3).⁴¹

The final sentence of WPIC 37.50 (definition of robbery), as argued above, would be read by a reasonable person to address the *timing* of the death with respect to the robbery, not to completely contradict the definition of robbery already set out in the same instruction. While appellate counsel does his job well in raising this issue, trial counsel cannot be faulted for failing to do so. Wynn has failed to show deficient performance.

Nor can Wynn show the requisite prejudice. As argued above in § C.2.b. (re manifest constitutional error), there was simply no evidence on which to conclude that Wynn murdered Wykel for any reason *other* than to retain the thousand dollars he had already taken from Wykel, and/or to take Wykel's diamond ring and the cash Wykel had undoubtedly brought with him to purchase the Thunderbird.

⁴¹ Former WPIC 17.04, the "act on appearances" self-defense jury instruction, used the term "great bodily harm" to describe the injury that a person must perceive before he can act in self-defense. Kyllo, 166 Wn.2d at 865. The self-defense statute, however, establishes that the use of force is lawful "[w]hen used by a party about to be *injured*." RCW 9A.16.020(3) (italics added).

d. Any Error Was Harmless.

Even if a court determines that a claim raises a manifest constitutional error, it may still be subject to a harmless error analysis. O'Hara, 167 Wn.2d at 98. "The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal." Id. at 99.

Error of constitutional magnitude may nevertheless be harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). As pointed out above, there is absolutely no evidence that Wynn killed Wykel for any reason *other than* to retain or obtain Wykel's property. Under these circumstances, clarifying the jury instruction on robbery as Wynn suggests (Brief of Appellant at 44) would have made no difference in the outcome of Wynn's trial.⁴² Any error in the instruction was harmless beyond a reasonable doubt.

⁴² Wynn argues that it is "highly likely" that the claimed error in the instruction led to the verdict of guilty in Wynn's second trial. Brief of Appellant at 47. This argument ignores the fact that the same instruction was given in the first trial (CP 72, 106), and the jury did *not* reach a unanimous verdict of guilty.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Wynn's conviction for Murder in the First Degree.

DATED this 12th day of October, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **David B. Koch**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent** in **STATE v. MYRON WYNN**, Cause No. **67227-4-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

10/12/12

Date