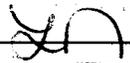


FILED  
COURT OF APPEALS

No. 34133-6-II

APR 12 2007

BY: 

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IN THE  
COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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**STATE OF WASHINGTON,  
Respondent,**

v.

**JAYSON THOMAS SMITH,  
Appellant.**

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**APPELLANT'S BRIEF**

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PM 4/12/06

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## A. ASSIGNMENTS OF ERROR

### Assignments of Error

1. The superior court erred in finding that a description of a person was not hearsay under the provision of the evidence rules allowing the “identification” of a person to be admitted. RP9 at 4-5 & 10-17.<sup>1</sup>
2. The superior court erred in admitting two suggestive and unreliable in-court identifications of the defendant’s photo. RP6 at 114 & 160.
3. The superior court erred in admitting the recorded recollection of a witness who was incompetent at the time she gave her recorded statement. RP8 at 45.
4. The superior court erred in allowing the defendant to be tried in violation of his constitutional rights to competent counsel. RP8 at 45 & 8-19.
5. The superior court erred in denying defendant’s requests for two lesser-included-offense jury instructions. RP11 at 5-8.

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<sup>1</sup> As used in this brief, RP refers to various Verbatim Reports of Proceedings. When the Reports are numbered, Appellant has referred to the Report by “RP” plus the arabic numeral designating the volume number on the report. When the Reports are unnumbered, Appellant has assigned a specific designation for the Report.

### **Issues Pertaining to Assignments of Error**

1. Did the trial court err in permitting a police officer to testify as to a witness's description of a person made after perceiving them when ER 801(d)(1)(iii) permits only the admission of "*identification* of a person made after perceiving them"? This issue pertains to Assignment of Error No. 1.

2. At trial, two witnesses identified as the perpetrator a photograph of the defendant taken at the time of his arrest in 1991. The identification of the defendant's photograph was made from a single photograph presented to the witnesses by the State. The witnesses had likely seen the perpetrator for less than two minutes fourteen years prior to this identification. Under these circumstances, did the trial court violate the defendant's due process rights in allowing the suggestive and unreliable identification? This issue pertains to Assignment of Error No. 2.

3. Did the trial court err in admitting a witness's recorded recollection when the evidence showed that the witness was a long-time daily drug user at the time she gave the statement and thus was an incompetent witness? If the trial court did not err on the evidence before it, was trial counsel ineffective for failing to raise this objection to the admission of the hearsay statement? This issue pertains to Assignments of Error Nos. 3 & 4.

4. When the State charged the defendant with premeditated murder and extreme indifference murder and the evidence also supported inferences that murder in the second degree or manslaughter had been committed, did the trial court err in refusing to give the requested lesser-included-offense jury instructions? This issue pertains to Assignment of Error No. 5.

5. If none of the individual trial errors requires reversal, does the cumulative error doctrine nevertheless mandate reversal in this case, as the errors deprived the defendant of a fair trial?

### **Standards of Review**

Issues 1 & 3: Appellate courts review questions of law on a *de novo* basis. *See State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996) (citation omitted) (question of law subject to *de novo* review).

Issue 2: Whether an identification is suggestive is reviewed *de novo*. *See State v. Vickers*, 107 Wn. App. 960, 968, 29 P.3d 752 (2001) (court “independent[ly]” reviewed photo montage). Whether a suggestive identification is nonetheless reliable is reviewed under the same standard. *State v. Rogers*, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986).

Issue 3: Appellate courts review a claim of ineffective assistance of counsel *de novo*. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

Issue 4: Appellate courts review a denial of a requested lesser-included-

offense jury instruction on a *de novo* basis. See *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005) (reviewing issue *de novo*).

## **B. STATEMENT OF THE CASE**

### **Procedural History**

The State first charged the defendant in this case, Jayson Thomas Smith, on July 30, 1991. The original two-count information charged the following crimes, both occurring on July 22, 1991: 1) murder in the first degree committed with the premeditated intent to cause the death of Willie Greenlee or another person, by shooting Willie Greenlee in the head in violation of RCW 9A.32.030(1)(a) and 2) assault in the second degree of Cynthia Davis with a deadly weapon, a firearm, in violation of RCW 9A.36.021(1)(c). Clerk's Papers (CP) at 34-35.

Pursuant to a plea agreement, on February 3, 1992, the State filed an amended information charging second degree felony murder in violation of RCW 9A.32.050(1)(b) and second degree assault with a firearm in violation of RCW 9A.36.021(1)(c). CP at 40-41. Mr. Smith pleaded guilty to the amended information and entered a Statement of Defendant on Plea of Guilty the same day. CP at 36-39. The court, the Honorable J. Kelly Arnold presiding, sentenced Mr. Smith on June 18, 1992, to 298 months in prison on the murder charge and 63 months on the assault charge, to be served concurrently. CP at 42-52. At the

same time, the court sentenced Mr. Smith to an assault conviction arising from an incident occurring in the Pierce County Jail. For that conviction, the court imposed a 63-month sentence to be served consecutively to the first sentence. *State v. Smith*, 74 Wn. App. 844, 875 P.2d 1249 (1994).

On direct appeal, this Court affirmed the validity of Mr. Smith's guilty plea but reversed the consecutive sentence and remanded for resentencing. *Smith*, 74 Wn. App. 844. On remand, the court determined that exceptional circumstances warranted the consecutive sentence and imposed the 63-month sentence for assault to run consecutively to the 298-month sentence.

On March 15, 2005, Mr. Smith filed a *pro se* motion for relief from judgment pursuant to CrR 7.8. CP at 53-59. In the motion, he argued that his conviction for second degree felony murder, with second degree assault as the felony, was invalid on its face after *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002) and *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004). Accordingly, he asked the court to vacate his conviction for second degree felony murder and remand for further proceedings.

After a hearing held on June 6, 2005, the court, the Honorable Ronald Culpepper presiding, entered an order vacating Mr. Smith's sentence for the second degree murder conviction pursuant to *Andress/Hinton*. CP at 1-2. At the same time, the court entered an order withdrawing the defendant's guilty plea,

granting the State's motion to allow it to withdraw the amended information, and reinstating the original information filed July 30, 1991. CP at 4.

On September 2, the court, the Honorable Thomas J. Felnagle presiding, held another hearing. *Verbatim Report of Proceedings (Motions) for September 2, 2005* (RPM) at 4-5. Mr. Smith argued the State was prohibited from filing any charge except one equal to or less than the charge to which he pleaded guilty. RPM at 9-18. The State argued that *Andress* and *Hinton* did not prevent it from refileing the original information. RPM at 19-22. The court held that Mr. Smith had two choices, either to enforce the original plea agreement or to withdraw the plea. It held that he could not both keep the benefit from the plea bargain of the lower charge and withdraw the plea. As Mr. Smith wished to exercise his right to trial, the court held that the original charge was reinstated. RPM at 24-25.

The parties also debated whether the State could amend the original information to include an alternative means of committing the murder, extreme indifference. The parties ultimately agreed that the alternative was available at the time the instant crime was committed, but that it was not widely used. RPM at 26-30. The court held that amending the information would not be unfair to Mr. Smith and allowed the State to file the new information. RPM at 31. Mr. Smith waived a reading of the information and entered pleas of not guilty to both counts. RPM at 32. Finally, the court ordered the State to provide Mr. Smith with a list of

witnesses “they have now and ongoing” within one week of the hearing. RPM at 32-33.

The amended refiled information alleged two counts: 1) murder in the first degree committed with the premeditated intent to cause the death of another person in violation of RCW 9A.32.030(1)(a) or, in the alternative, murder in the first degree committed under circumstances manifesting an extreme indifference to human life and creating a grave risk of death in violation of RCW 9A.32.030(1)(b) and 2) assault in the second degree with a deadly weapon, a firearm, in violation of RCW 9A.36.021(1)(c). CP at 10-12.

On November 7 and 8, 2005, the court convened to resolve issues related to the State’s alleged delay in providing Mr. Smith with information regarding some of the witnesses the State planned to call at trial. *Verbatim Report of Proceedings for November 7, 2005 (RP1)*; *Verbatim Report of Proceedings for November 8, 2005 (RP2)*. Declining to dismiss the case, the court ruled that certain of the witnesses would be struck and others, whose testimony the court held would not unfairly prejudice Mr. Smith, would be permitted to testify. RP2 at 64-68. The court reserved ruling on additional witnesses who still had not been contacted. RP2 at 69.

On November 14, the court heard motions *in limine*. *Verbatim Report of Proceedings for November 14, 2005 (RP3)*. Among other rulings, the court

granted the State's motion to exclude witnesses, with the exception of Detective Barnes and a defense investigator. RP3 at 49-50. Mr. Smith agreed with the State's motions regarding the criminal history of certain of the witnesses, although he objected to the State's motion regarding Barbara Steele. RP3 at 51-52. The court denied the State's motion to exclude evidence of the two photomontages originally shown witnesses. RP3 at 64-65. It granted the State's request to allow it to use transcripts of witness statements made at the time of the crime to refresh witnesses' recollection, but it reserved ruling on whether the State could play the actual tapes for the jury. RP3 at 73-74. The court kept to its earlier resolve not to allow a witness the State wanted for ballistics testimony, but stated that the witness might be allowed on rebuttal and that the State could renew its motion at the end of its case. RP3 at 88. It granted Mr. Smith's motion that no references be made to the fact that he had previously pleaded guilty in this case. RP3 at 94.

Next the court held the CrR 3.5 hearing. The arresting officer and Mr. Smith both testified as to statements Mr. Smith made on the day of his arrest. RP3 at 122-74. The court credited the testimony of the officer over that of Mr. Smith and held all the statements admissible. RP3 at 185; CP at 60-71.

A final pretrial hearing was held on November 15, 2005. *Verbatim Report of Proceedings for November 15, 2005* (RP4). The court agreed that the State could call two witnesses, Travis Greenlee and Casey Greenlee, who had recently

been located, when the State made them available to Mr. Smith shortly after they were found. RP4 at 17-18. Mr. Smith did not seek to exclude three other recently-located State's witnesses. RP4 at 20. The parties discussed the photomontages again. The court ruled that it would not exclude references to the montages but that it would exclude the montages themselves without a proper foundation. RP4 at 29-30; 35 & 47. In addition, over Mr. Smith's objection, the court agreed to allow the State to show witnesses for identification purposes the 1991 booking photo of Mr. Smith. RP4 at 43-44.

Jury selection and trial followed. Among other issues that arose at trial was Mr. Smith's objection on *Crawford* grounds to the admission of his mother's recorded recollection taken in July 1991. The parties discussed questioning Ms. Steele about the extent of her drug use at the time of the statement, but neither the court nor the parties directly raised the issue of her competency to give the statement. RP8 at 7-22.

Mr. Smith also objected to the State's offer of the testimony of a law enforcement officer to testify about how a witness had described the perpetrator in 1991, during the investigation. RP9 at 4-5. The State offered the testimony as "identification of a person after perceiving them." RP9 at 4. The court allowed the testimony. RP9 at 4-5.

Mr. Smith requested two lesser-included-offense jury instructions, murder in the second degree as to the premeditated murder charge and manslaughter in the first degree as to the extreme indifference murder charge. The State opposed the instructions. RP10 at 144-45, 149-50 & RP11 at 8-10. The court denied both instructions. While if found that the crimes met the legal test for lesser included offenses, it ruled that the facts did not support the charges. In particular, it stated that the facts did not support a finding of intent without premeditation when the State's evidence only showed premeditation and Mr. Smith denied that he was involved in the shooting at all. In addition, it ruled that the only degree of recklessness supported by the facts was extreme recklessness. RP11 at 5-8.

Mr. Smith was convicted after trial on both alternate means of committing murder and on the assault charge. RP13 at 12-16.

At sentencing, the parties agreed that Mr. Smith's offender score was 9 or more on both counts. *Verbatim Report of Proceedings for December 2, 2005* (RPS) at 5. The parties agreed that the standard sentence range for murder in the first degree was 411 to 548 months and for assault in the second degree 63 to 84 months. RPS at 6. The court sentenced him to 548 months on the murder charge and 84 months on the assault, to run concurrently to each other and to assault convictions entered during Mr. Smith's incarceration. RPS at 17-18; CP at 20-31.

This appeal followed. CP at 19.

## **Substantive Facts**

### **Introduction**

On appeal, Mr. Smith maintains that certain trial errors or their cumulative effect deprived him of a fair trial and resulted in his conviction. In particular, he argues that the court erred in admitting an inadmissible hearsay statement, the prior statement of a then-incompetent witness, and two suggestive and unreliable photo identifications. Further, he maintains that reversal is required when the court refused to instruct the jury as to two lesser-included-offenses. Finally, he asserts that if this Court finds the individual errors do not require reversal, it should hold that all the error taken together requires reversal.

### **The Facts at Trial**

Willie “Junior” Greenlee was shot shortly before 8:45 p.m. on July 22, 1991, in Tillicum, a high-crime area near Tacoma. See RP5 at 31 & 40. The gunshot killed him. See RP7 at 16-17 & 113-21. Cynthia Davis was shot in the shoulder during the same incident. She was wounded and survived. RP5 at 39; RP7 at 12-13 & 122-23. Arriving at the scene just after the shooting, police chased a fleeing individual carrying a gun who was wearing a blue baseball cap, a blue jacket and light colored pants. RP5 at 35-36.

Accordingly to Mr. Greenlee’s brother, Casey, Casey had arrived back at the Greenlee apartment just before the shooting. As he returned, he met his

brothers Willie and Travis, and friends Thomas Kennedy, Clyde Moore, Cynthia Davis, and Taz, who were all out in the parking lot. They proceeded to head from the parking lot into the Greenlee's apartment together. At the time of the shooting, everyone had entered the apartment except Willie and Casey, who were on their way in. Casey heard gunshots and saw his brother fall. He entered the apartment, closed the door, and one or two more shots came through the window. Ms. Davis was shot through the window while in the apartment. RP7 at 24-27 & 31-33.

Mr. Greenlee's other brother, Travis, remembered the incident somewhat differently. He remembered that everyone was inside the apartment when Willie stepped outside for a phone call. Travis heard a gunshot, opened the door and saw Willie fall to the ground. Travis shut the door, heard another shot come through the window and saw Ms. Davis get hit. RP7 at 87-88.

Various witnesses described hearing from three to ten gunshots. *See, e.g.*, RP5 at 75-76; RP6 at 94-95 & RP7 at 26-27. Possible bullet holes were identified as having hit a Dodge Omni which was in the direction of the freeway, and a Buick. RP7 at 46-48. Another bullet penetrated the kitchen window of the Greenlee apartment and one penetrated the kitchen wall. RP7 at 48-55. Two brass shell casings were recovered outside the apartment. RP7 at 55-59. An intact, unfired bullet was found in the Ford Fairmont belonging to Desiree Lee.

RP7 at 63. Her vehicle was found in the middle of the street at the scene of the crime, with the keys still in the ignition. See RP5 at 37.

The State also provided evidence of the bullets' trajectories, the types of bullets fired, and the likely type of weapon used. A bullet fired from the street in front of the Greenlee apartment building would reach the freeway at a relatively high velocity, even if it had to penetrate a typical wooden fence board. RP6 at 18-21 & 29-58.

Travis and Willie Greenlee were drug dealers at the time of the shooting. RP7 at 33. Mr. Smith had recently begun selling drugs for Travis. On the day of the shooting, Travis confronted Mr. Smith near Mr. Smith's apartment in Lakewood, on the other side of the freeway from the Greenlee apartments. Travis wanted drug money Mr. Smith owed him but could not pay. Although initially denying this fact, Travis ultimately admitted that he fired a shot at Mr. Smith after this confrontation. RP7 at 74-78 & 80-81.

Travis remembered that he shot at Mr. Smith at about one or two in the afternoon and his brother was shot around 5 or 6 in the evening. He stayed at home with friends from shortly after the incident with Mr. Smith to the shooting. RP7 at 81. Although he spent some time hanging out in the parking lot of his apartment building, nobody in a car came up to him, he only spoke with his brothers while there. RP7 at 101-02.

Prior to the shooting, Travis's girlfriend called him to say that Mr. Smith had just left with a pistol to come and kill Travis. RP7 at 86. When he saw his brother and Ms. Davis shot, Travis ran into his bedroom and grabbed a gun. Through the bedroom window he saw Mr. Smith running. Travis chased Mr. Smith to try to kill him. RP7 at 87-89. He was apprehended while running toward Mr. Smith's apartment to shoot his family. RP7 at 92.

Mr. Smith denied involvement in the shooting. Not long before the shooting, he had fallen on difficult times. Thus, when approached by Travis, he agreed to sell drugs for him. However, he spent the drug money he owed Travis on necessities for his girlfriend, Desiree Lee, and his new baby boy. After Travis confronted him about the debt, Mr. Smith got Desiree's car to look for Travis. It was then that Travis shot at him. At this point he became angry and afraid for his family. He packed up some things from Desiree's apartment, then spent some time at a friend's apartment trying to figure out what to do. To get away from Travis and divert the danger from his family, he decided to go to Seattle to stay with his grandmother. RP10 at 68-73.

Mr. Smith heard about the shooting on the news and talked to his mother about it. She was a drug user and became confused about their conversation when she later spoke to the police. She had wanted him to turn himself in, but he told her he did not do anything, the police would say it was premeditated and he would

not turn himself in. RP10 at 69-76. He remained in the Seattle area for a few days, learning he was a suspect in the shooting. Finally, he and Desiree decided that he should turn himself in so that they could clear up the confusion and get on with their lives. RP10 at 76-77.

He turned himself in on July 30, 1991, having made an agreement with the police that he would be allowed to see Desiree and his son. Once in custody, he did not remember being read his rights until he was at the jail. He did not remember seeing the warrant either. As the officers questioned him on the drive to Tacoma, the twenty-one-year-old Mr. Smith became afraid they would renege on the deal to see his son. For this reason, he told them what they wanted to hear about the gun, that it had been destroyed, even though he knew nothing of the gun. He said the officers wanted him to cooperate and make a statement, but there was nothing he could tell them because he had done nothing. He told them he did not want them to be mad at him, but he did not want to talk to them. When the officers told him that it would be easier on him if he cooperated, he asked what kind of time could someone get on a crime like this. In addition, he told the officers that the fact that he was wanted for this crime he did not do was eating away at him. He told them he had spent a lot of time at the beach and at outdoor places because he knew it would be a long time before he would be able to do that

again. Finally, he told them that when he gets angry he blacks out and cannot remember things. RP10 at 77-79; 128 & 132-37.

The arresting officer relayed Mr. Smith's words somewhat differently. While the two agreed as to most of Mr. Smith's statements, the officer said that he showed Mr. Smith the warrant and read him his *Miranda* rights upon arrest. In addition, he remembered that Mr. Smith stated that he hoped the officers would not be mad, but he did not want to give a statement about the shooting at that time. Further, he remembered that Mr. Smith asked how long the officer thought he, Mr. Smith, would be incarcerated. Finally, the officer remembered that Mr. Smith told him the thing had been eating away at him since it happened and he had not really talked to anyone about what took place. RP9 at 52-61.

Mr. Smith's mother, Barbara Steele, having been a drug addict much of her life, having had a stroke, and now in a nursing home, could remember almost nothing of the events of July 1991. In particular, she could not remember giving a statement about a conversation she had with Mr. Smith before his arrest. However, she did acknowledge that a tape recording purporting to be of her statement to the police in July 1991 was her statement. RP8 at 26-33, 41-4. The State played the recorded statement. RP8 at 45.

At the time of her recorded statement, Ms. Steele used drugs "very, very bad" and on a daily basis. She had been using drugs for six years at the time of

her statement. RP8 at 49. The recorded statement related a conversation she said she had with her son after the shooting. She remembered he said he did not shoot at anyone, he shot a gun toward a crowd of people trying to scare them because they were going to shoot Desiree and his baby. She remembered him saying that he had had enough time to get a gun so that it would be premeditated.

Desiree Lee remembered only pieces of the events of July 22, 1991. The State had her use the statement she gave to police the night of the shooting to refresh her recollection and as recorded recollection. In that statement, Ms. Lee said that she witnessed Travis shoot at Mr. Smith as he drove by in her car on the day Willie Greenlee was killed. RP8 at 55-60. Mr. Smith was upset and angry over the incident. RP8 at 61. In her statement, she had told police Mr. Smith said “he was going to take care of Travis before Travis took care of him.” RP8 at 86.

Ms. Lee told police that after Travis took the shot at Mr. Smith, she went over to Travis’s girlfriend’s apartment, which was near her own, and together they decided to call Travis’s house. RP8 at 88-89. Later she saw that Mr. Smith had change into a dark blue sweatshirt and blue pants. RP8 at 90-91. At about quarter to nine that night, Mr. Smith left her apartment, telling her that he was going to Travis’s house. RP8 at 92-94. When Ms. Lee later heard sirens, she headed to the Tillicum area, where she saw Travis in the back of a police car. At the time, she believed Travis had shot Mr. Smith. RP8 at 98-102.

Five of Willie Greenlee's neighbors at the time of the shooting testified to witnessing the shooting in some way. None of these witnesses identified the present-day Mr. Smith in court as the shooter. However, two witnesses, Patsy Hardy and Catherine Weisenbach, identified a photo of Mr. Smith taken at the time of his arrest in 1991 as the person who did the shooting. In July 1991, Mr. Smith was about six feet tall and weighed about 175 pounds. RP10 at 80.

Patsy Hardy returned to the Greenlee apartment building, where she also lived, about a half hour prior to the shooting. In the parking lot she saw the man she later identified as the shooter and another man, plus Travis and Willie Greenlee, all talking together. RP5 at 68-69. She assumed they were discussing a drug deal. RP5 at 91. The tone of voices was conversational. RP5 at 92. When the shooter and his companion left, anywhere between five and twenty minutes before the shooting, RP5 at 90, their car engine was "revved up . . . a little bit . . . to let you know that they were leaving." RP5 at 72. She believed that the sound of the car meant that they were not happy they were leaving. RP5 at 92-93.

Ms. Hardy went to another neighbor's apartment in the apartment building, Michelle's. RP5 at 72. The windows of Michelle's apartment provided a full view of the parking lot. The windows and drapes were open. RP5 at 73. At some point she heard what she thought were "pretty loud" firecrackers. RP5 at 75-76. She "dropped down" from fear. She also remembered trying to shut the

window and the drapes while Michelle called the police. At one point she saw the shooter shooting the gun in her direction. He was by the blue four-door car, pointing his gun. RP5 at 76-77. She saw the shooter leave the car and move toward the Greenlee apartment, running. RP5 at 79-80. When he ran by the window, she was possibly three or four feet from the shooter. RP5 at 86.

At the time this was all happening, Ms. Hardy was “terrified,” she believed she would die. RP5 at 105-06. After seeing the shooter approach the apartment, she did not see the shooter again. RP5 at 94. During the incident, she heard the shots stop and start up again. RP5 at 77. A lot of noise was coming from the Greenlee’s apartment; Ms. Hardy believed someone had gotten shot. RP5 at 77-78. She heard someone screaming “Junior, wake up,” and then someone yelling obscenities at the shooter from outside the Greenlee’s apartment. RP5 at 80-81.

Ms. Hardy had never seen the shooter and his companion before. RP5 at 69. She was able to look at them for up to a minute and a half when she first saw them in the parking lot. RP5 at 70. They were associated with a blue four-door car which she identified as the one belonging to Desiree Lee. RP5 at 69 & 72. The shooter was wearing a baseball cap, but she did not remember what the other man wore. RP5 at 70 & 79. She saw a little bit of peach fuzz on one of the men’s faces. RP5 at 70. The shooter was a light-skinned black man of medium build between five foot eight and five foot eleven. RP5 at 71-72 & 78. At the time of

the crime, however, Ms. Hardy believed that the shooter was five foot seven to five foot eight. RP5 at 84. He was wearing a blue t-shirt with a round collar but she could not remember the pants. RP5 at 78 & 90.

Back in July 1991, Ms. Hardy did not identify Mr. Smith as the shooter from the photo montage she was shown. RP10 at 54-55. Looking at Mr. Smith in court in 2005, Ms. Hardy could not identify Mr. Smith as the shooter. She “kind of” recognized him, stating that the person she remembered “was younger, but he does look familiar,” without explaining the context of her familiarity with Mr. Smith. RP5 at 81. However, when the State handed her a single photo of Mr. Smith taken at the time of his arrest, Ms. Hardy positively identified him as the shooter. RP5 at 82 & 105.

Michelle Broughton was another neighbor who witnessed the shooting. She was at home in her apartment at the time. RP6 at 94. She remembered falling to the floor when she first heard the gunshots. RP6 at 95. However, her memory was very vague as to the incident, to the point where reading the statement she gave at the time of the incident did not refresh her recollection. RP6 at 98-100. She was permitted to read part of the police report detailing her statement, in which she described the shooting by a “black male, 18 to 19 years old, approximately 5'8", medium build, wearing a dark blue baseball cap,” a dark blue sweatshirt and light green or light blue pants. RP6 at 102. She also read that

she was certain the shooter got out of the driver's side of the suspect vehicle. RP6 at 104. In contrast to Ms. Hardy's recollection, her statement did not describe calling the police, but rather closing the curtains. RP6 at 102.

Alanda Richard also witnessed the shooting. Her apartment was across the street from the Greenlees. She was in the backyard playing with her daughter at the time of the shooting. RP6 at 107. Upon hearing the shots, she ran into her apartment and looked out the front window, through which she viewed the shooter. RP6 at 108.

Ms. Richard recalled the shooter to be a dark-skinned black male, about eighteen years old, medium build and six feet tall. From the contemporaneous statement she had given to the police, she remembered that he wore a blue hat and a blue shirt. RP6 at 110 & 116. She remembered him running and firing the gun at the same time. He was running toward the apartments across the street from her. RP6 at 111. She recalled that the shooter was associated with a blue vehicle. RP6 at 112.

Ms. Richard could not remember how long she saw the person doing the shooting, nor if she got a good look at the person's face. She did not recall seeing Mr. Smith before. However, she did remember seeing Mr. Smith when shown the single photo of him taken at the time of his arrest. She could not remember where or when she had seen Mr. Smith, however, and did not identify him as the shooter.

RP6 at 114. She positively remembered that the shooter was a dark-skinned black man. RP6 at 116. Shortly after the shooting, she identified a person other than Mr. Smith as the shooter from a photo montage. RP6 at 118-22.

Later in the trial and over Mr. Smith's objections, the State called Marsha Stril, a sergeant with the sheriff's department, to testify about what Ms. Richard had told her during the investigation of the shooting. RP9 at 4-5 & 10-17. Stril testified that when the shooting happened, she was in the midst of a traffic stop. She would have tried to quickly complete that matter and attend to the dispatch signal. After finishing that matter, she did not go directly to the site of the shooting. Instead, she set her car up at a location on the perimeter of the scene so that she might learn something about the suspect who had apparently fled. RP9 at 11-14.

At some point she became aware that a canine track had been conducted and failed. After the canine track was abandoned, she went to the Greenlee apartment complex to interview witnesses. She contacted Ms. Richard (then Ms. Miller) who gave her a description of a person she saw running southbound from the scene. The officer relayed that Ms. Richard described the man to her as a light-skinned black male, six foot tall, slim, and wearing all blue. See RP9 at 14-17.

Jack Kline, the man who lived in the apartment above Ms. Richard, also testified. He recalled hearing gunshots and running toward the front of his apartment to see what was going on. He saw a person running away with a gun in his hand. As he watched, the person turned and fired a shot. RP6 at 125-27. Mr. Kline remembered that the person turned around and headed back toward his apartment, because a police car was behind him, at which point Mr. Kline began to shout obscenities at him. Mr. Kline remembered the man pointing the gun at him at that point. However, he did not look at the man's face. RP6 at 130-32.

Having observed the shooter from about fifty feet at the closest, Mr. Kline remembered seeing either a black man with very light skin or a white man with very dark skin. The person was wearing a blue pullover shirt and a black hat, was clean shaven and had a military-style haircut. RP6 at 138.

Catherine Weisenbach, another neighbor, was outside playing with her children the evening of the shooting. About an hour before the shooting, she had seen Desiree Lee's blue car in the parking lot. A light-skinned black man and a dark-skinned black man were associated with the car. They were out of the car when she saw them. Willie, Travis and two females were talking with them. RP6 at 144-46 & 157.

At about the time she brought her children in to get ready for bed, she heard sounds like fireworks going off. She learned that the sounds were actually

gunshots when she saw a person walking across the parking lot with a gun. RP6 at 142-44. The person with the gun was the same person she had seen in the parking lot talking earlier that day. He was a light-skinned black male, about five foot seven or eight, about 150 or 145 pounds. RP6 at 148. She also noticed there was a blue car in the middle of the road, the one she had seen earlier that day. However, she did not see the shooter come from the car. RP6 at 144-45.

Shortly after the shooting, Ms. Weisenbach was not able to pick out anyone from the photo montage she was shown. RP6 at 158. She did not recognize Mr. Smith in court. RP6 at 159. However, when shown in court a single photo of Mr. Smith taken at the time of his arrest, she identified him as the person in the parking lot holding a gun. RP6 at 160.

### **C. ARGUMENT**

#### **Point I: Mr. Smith was Prejudiced When The Trial Court Erroneously Permitted a Police Officer to Testify as to a Witness's Description of a Person When ER 801(d) Permits Only the Admission of "*Identification of a Person Made after Perceiving Them*"**

The trial court erred in permitting an officer to testify as to a statement given by a witness, prejudicing Mr. Smith and requiring reversal. The Rules of Evidence provide that when a declarant testifies and is subject to cross examination, a statement "of identification of a person made after perceiving the person" is not hearsay and is, thus, admissible. ER 801(d)(1)(iii). In this case, the

court violated the rule by admitting the description of a person, not the identification of a person, in as evidence.

In the State's case in chief, the court allowed the testimony of officer Stril under ER 801(d)(1)(iii). RP9 at 4-5. Stril testified that Alanda Richard had told her on the night of the shooting that the person she saw do the shooting was a light-skinned black man. RP9 at 14-17. Because this was not an identification but a description, its admission violated ER 801(d)(1)(iii). *See State v. Grover*, 55 Wn. App. 252, 255-56, 777 P.2d 22 (1989) (reading rule "literally" to apply to all identifications).

This error prejudiced Mr. Smith, a light-complected man, when his theory of the case was that another person was the shooter. At trial, Ms. Richard repeatedly affirmed that the shooter was a dark-skinned black man. See RP6 at 116; 117 & 119. Thus, her testimony strongly bolstered Mr. Smith's defense. Yet she was the only eye-witness who did not recall a light-skinned black man. Thus, when the State was permitted to use inadmissible hearsay through another witness to refute Ms. Richard's in-court statements, Mr. Smith lost much of the opportunity to show that another person had committed the crimes. Without that defense, his case was badly damaged. For these reasons, the trial court's error was not harmless and this Court should reverse Mr. Smith's convictions.

**Point II: The Trial Court Violated Mr. Smith's Due Process Rights in Permitting the In-Court Identification of His Photo Under Suggestive Circumstances When the Identification Was Not Otherwise Reliable**

The in-court identification in this case, in which the State showed two witnesses a single photo of Mr. Smith, was both impermissibly suggestive and unreliable, creating an irreparable probability of misidentification, violating Mr. Smith's due process rights, and requiring reversal. *See State v. Ramires*, 109 Wn. App. 749, 761, 37 P.3d 343 (2002) (citing *State v. Vickers*, 107 Wn. App. 960, 967, 29 P.3d 752 (2001); *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984); U.S. Const. amend. XIV; Wash. Const. art. I § 3.

First, the identification was suggestive. "The presentation of a single photograph is, as a matter of law, impermissibly suggestive." *State v. Maupin*, 63 Wn. App. 887, 896, 822 P.2d 355 (1992), citing *Manson v. Brathwaite*, 432 U.S. 98, 116, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977) (parties and courts assumed identification suggestive when witness was shown a single photograph, one of the defendant). Suggestive identifications must be closely scrutinized. As the Supreme Court cautioned forty years ago: "A major factor contributing to the high incidence of miscarriage of justice has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *United States v. Wade*, 388 U.S. 218, 228, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1966), quoted in, *Grant v. City of Long Beach*, 2003 Cal.

Daily Op. Service 5670, 2003 D.A.R. 7135, 2003 U.S. App. LEXIS 13038 (9th Cir. 2003).

Once a defendant has proven that an identification procedure is suggestive, a court looks at the totality of the circumstances to determine whether the procedure created a substantial likelihood of irreparable misidentification. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing *Vaughn*, 101 Wn.2d at 610-11). Considering those factors here, the identifications were unreliable and this Court should reverse Mr. Smith's convictions.

In considering the reliability of an identification, a court should consider: “(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.” *Linares*, 98 Wn. App. at 401. Applying these factors, courts have found otherwise suggestive identifications to be reliable when the witnesses gave accurate contemporaneous description of the defendant and made the identification within a week of the incident. Counsel found no cases in which suggestive identifications were nevertheless reliable when made more than fourteen years after a brief look at the perpetrator.

In *Traweck*, the lineup was unnecessarily suggestive when the witness described the robber as blonde and the defendant was the only blonde suspect. *State v. Traweck*, 43 Wn. App. 99, 103, 715 P.2d 1148 (1986), *overruled on other grounds*, *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). The identification was reliable, however, given the other circumstances of the case. There, the witness was suspicious of the robbers as soon as they entered her store, she had the opportunity to watch them closely in a well-lit store, her description of the robbers was accurate – down to the color of the stripes on one of the robbers' shirts, she made the identification within 48 hours of the crime, and she identified the defendant at the lineup positively and immediately. *Traweck*, 43 Wn. App. at 104.

Similarly, in *Burrell*, an identification was suggestive when none of the other individuals in the array closely resembled the defendant, the defendant's photo was a closer view than the others, and the suspect was described as having a frizzy Afro hairstyle and defendant was the only subject in the montage fitting that description. *State v. Burrell*, 28 Wn. App. 606, 611, 625 P.2d 726 (1981). The identification was nevertheless reliable when the witnesses observed the assailant closely, gave accurate descriptions, were certain in their identifications, and made the identifications within four days of the crime. 28 Wn. App. at 611.

Another suggestive identification, one where the defendant was the only person in the array in a dark shirt, was also deemed reliable given the circumstances. In *Ramires*, the identification was made by a police officer, trained in observing suspects' faces, who became alert as he approached the defendant's car with a flashlight and was able to provide a sufficient description to apprehend the suspect within 12 hours. *Ramires*, 109 Wn. App at 762.

By contrast, a suggestive in-court identification was not reliable when the witness directly observed the suspect for only two to three minutes at the time of the crime, the initial description of the suspect's clothing was inaccurate, and the witness initially chose the wrong person in a lineup, despite the fact that it was conducted only 22 hours after the incident. *State v. McDonald*, 40 Wn. App. 743, 747, 700 P.2d 327 (1985) (identification suggestive when officer had pointed out defendant and witness saw defendant in handcuffs prior to trial). Similarly, suggestive identifications were not reliable when the victims viewed their assailants for only a few minutes or seconds and did not identify the defendant until three months after the incident, after having tentatively identified another man. *Grant v. City of Long Beach*, 2003 Cal. Daily Op. Service 5670 (array suggestive when defendant's features bore little resemblance to others in the array and his skin tone was significantly lighter).

Here, two witnesses, Ms. Hardy and Ms. Weisenbach, identified the 1991 photo of Mr. Smith as the gunman. As an initial matter, both witnesses testified that they had seen the shooter in the parking lot of the Greenlee apartment complex earlier on the day of the shooting, speaking with Casey and Travis Greenlee. But the testimony of Casey Greenlee, Travis Greenlee and Mr. Smith makes clear that they did not talk to Mr. Smith in the parking lot on the day of the shooting. Thus, the person Ms. Hardy and Ms. Weisenbach saw in the parking lot and later with the gun was not Mr. Smith. For this reason alone, their identification of Mr. Smith as the shooter was not reliable.

In addition, application of the five factors and comparison with the cases compel the conclusion that the identifications were not reliable. First, the witnesses' opportunity to view the shooter and their degree of attention (factors 1 & 2) tend to show a lack of reliability. Similar to the witnesses in *McDonald* and *Grant*, Ms. Hardy had less than two minutes to observe the person who was in the parking lot and doing the shooting. Indeed, she fell to the floor when she heard the shots, so her ability to have seen anything is questionable. Although she said she closed the curtains while Michelle called the police, Michelle remembered closing the curtains and no one from the Greenlee apartment complex called the police.

Although Ms. Weisenbach likely had a longer period of time in which to observe the person in the parking lot, as explained above, that person may have been the shooter, but he was not Mr. Smith. Moreover, unlike the alerted witness in *Traweck* or the trained police witness in *Ramires*, at the time both women saw the person in the parking lot, they did not have a reason to pay undue attention to him. While their reason to observe was intensified when they saw the man shooting or with a gun, this factor is counterbalanced by the fear that would likely have lessened their accuracy. See RP5 at 105-06.

In addition, the accuracy of the witnesses descriptions of the shooter (factor 3) tends also to show the unreliability of their in-court identifications. Both descriptions were extremely generic, applicable to myriad individuals. The women described a light-skinned black man of medium build somewhere between five foot seven and five foot eleven, wearing a blue t-shirt. When these descriptions could fit many individuals, they do not provide sufficient indicia of reliability to justify a suggestive identification. *Cf. Traweck*, 43 Wn. App. at 104 (highly detailed description deemed reliable).

Next, both witnesses described a significantly shorter and slighter individual compared to Mr. Smith, who in 1991 was about six foot tall and 175 pounds. RP10 at 180. At the time of the shooting, Ms. Hardy described a person

five foot seven to five foot eight, although fourteen years later she had decided the shooter was between five foot eight and five foot eleven. RP5 at 84; RP5 at 71-72 & 78. Ms. Weisenbach also described a light-skinned black male, about five foot seven or eight, about 150 or 145 pounds. RP6 at 148. When these descriptions of the shooter do not match Mr. Smith's size, the witnesses' in-court identifications of Mr. Smith as the shooter cannot be seen to be reliable.

Perhaps most significantly, both women failed to identify Mr. Smith as the shooter from photo montages they were shown in July, 1991. Thus, the reliability of their in-court identifications was similar to that of the witness in *McDonald*, who was found to be unreliable for, *inter alia*, having chosen the wrong witness in a lineup shortly after the crime.

Further, while the witnesses' certainty in the identifications (factor 4) would tend to be factor indicating reliability, their certainty is negated by the time that elapsed between the viewing and the identification (factor 5) – fourteen years. The length of time between the crime and the identification strongly militates against a finding of reliability. In all the cases where suggestive identifications have been found to be reliable, they were made within a week of the crime. *Traweek*, 43 Wn. App. at 104 (48 hours); *Burrell*, 28 Wn. App. at 611 (four days); *Ramires*, 109 Wn. App. at 754-56 (the next day). Indeed, when an identification

occurred a mere three months after the crime, the elapsed time was held to have contributed to the identification's unreliability. *Grant v. City of Long Beach*, 2003 Cal. Daily Op. Service 5670. In this case, the greater-than-fourteen-years time lapse between the crime and the identification prohibits any finding of reliability.

For all of these reasons, the suggestive identifications in this case were unreliable and the procedure created a substantial likelihood of irreparable misidentification. Its admission at trial violated Mr. Smith's due process rights. Accordingly, Mr. Smith's conviction should be reversed. *See McDonald*, 40 Wn. App. 743, 747-48 (reversing and remanding when a suggestive identification was not otherwise reliable); *see also State v. Weddel*, 29 Wn. App. 461, 476, 629 P.2d 912 (1981) (when no constitutional violation, the validity of the identification procedure and the weight to attach to it were questions for the jury).

**Point III: The Trial Court Erred in Admitting a Witness's Recorded Recollection When the Witness Was Incompetent at the Time of the Statement or Trial Counsel Was Ineffective for Failing to Raise this Ground to Exclude the Admission of the Hearsay Statement**

The trial court erred in admitting the recorded recollection of Mr. Smith's mother, who admitted to "very bad" daily drug use at the time the recording was made. A witness's competency is a precondition to admission of her hearsay statements and must be determined by the trial court. *State v. Ryan*, 103 Wn.2d

165, 173-74, 691 P.2d 197 (1984) (in case involving testimony of children, noting: “The trial court did not determine whether the children were competent when they made the statements. If they were not, their statements must be excluded as being unreliable.”). “Competency is a matter to be determined by the trial court within the framework of RCW 5.60.050 and CrR 6.12(c).” *State v. Froehlich*, 96 Wn.2d 301, 304, 635 P.2d 127 (1981).

RCW 5.60.050 provides that intoxicated persons and persons of unsound mind are incompetent to testify:

The following persons shall not be competent to testify: (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050. CrR 6.12(c) provides the same rule for the first class – those of unsound mind or intoxicated.

When evidence showed that Ms. Steele was likely intoxicated on illegal drugs or of unsound mind at the time she gave her statement, her statement should not have been admitted at trial even if its admission did not violate a hearsay rule. “If the declarant was not competent at the time of making the statements, the statements may not be introduced through hearsay repetition.” *Ryan*, 103 Wn.2d 165, 173. In this case, the court allowed Ms. Steele’s recorded statement to be

played for the jury despite the following clear indications that she was intoxicated or of unsound mind at the time of her examination: 1) she remembered almost nothing about giving the statement, 2) she admitted using drugs “very bad” at the general time of the statement and 3) she admitted daily illegal drug use dating back for six years. RP8 at 49. Indeed, in the argument before the testimony was allowed, the parties discussed questioning Ms. Steele about the extent of her drug use at the time of the statement. RP8 at 20-22. Under these circumstances, the court erred in not determining whether Ms. Steele was competent when she gave her statement. When she in fact was not competent, the court erred in allowing the recorded recollection.

In addition, the testimony was not harmless error. It allowed the State to show that his mother told the police Mr. Smith had all but admitted not only committing the crimes, but committing the crimes with premeditation. Moreover, few types of testimony can be so damaging as a mother’s indictment of her own son. The only other testimony coming close to the content of Ms. Steele’s testimony was that of Travis Greenlee, who said he saw Mr. Smith fleeing from the crime scene. But this testimony could not damage Mr. Smith the way his mother’s could. Mr. Greenlee, a drug dealer to whom Mr. Smith owed money and who initially lied to the jury about shooting at Mr. Smith, could arguably have

been either mistaken or lying. Ms. Steele could have no similar reason to condemn her son. Under these circumstances, Mr. Steele's recorded recollection was exceedingly prejudicial, its admission cannot be seen as harmless error and this Court should reverse Mr. Smith's convictions.

If this Court finds that the trial court did not need to make a competency finding without a specific objection by trial counsel, counsel was ineffective in failing to raise competency as a bar to the testimony. Mr. Smith's State and federal constitutional rights to effective counsel were violated by his attorney's failure.

A defendant's right to counsel includes the right to effective counsel. See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability that the result of the proceeding would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citations omitted). If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984). In this case, counsel's performance was both deficient and prejudicial and can in no way be viewed as tactical.

Counsel's performance at trial was deficient when he failed to raise a competency ground to the incompetent recorded recollection of Ms. Steele. The failure to state an objection on the correct grounds may be a basis for finding ineffective assistance of counsel. *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980) (regarding objection to jury instruction that incorrectly set out elements of crime). Here, as was true in *Ermert*, counsel failed to state the correct basis for the objection. In this case, the proper basis would have resulted in exclusion of the testimony. Moreover, the failure to voice the objection could not be construed as tactical when counsel objected to the testimony, but on the wrong grounds. See RP8 at 8-22 (counsel brought up witness's drug use at time of statement but objected to evidence on *Crawford* grounds). Accordingly, counsel's performance was clearly deficient. Moreover, but for the deficient performance, Mr. Smith would not have been convicted. For the reasons given above, counsel's error prejudiced Mr. Smith.

For all these reasons, either the court erred in admitting the recorded recollection of the incompetent witness and the error was not harmless or Mr.

Smith's right to the effective assistance of counsel was violated. In either case, this Court should reverse his conviction.

**Point IV: The Trial Court Erred in Refusing to Give Lesser-included-Offense Instructions When the Evidence Supported an Inference that the Other Crimes had been Committed**

When the evidence permitted the inference that the two lesser-included offenses had been committed, the court erred in failing to give the suggested instructions and this Court should reverse. To establish that an offense is a lesser included offense, a two-part test is applied, consisting of a legal prong and a factual prong. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong requires that each of the elements of the lesser offense are a necessary element of the offense charged. The factual prong requires that the evidence in the case supports "an inference that the lesser crime was committed." *State v. Gamble*, 154 Wn.2d 457, 463, 114 P.3d 646 (2005) (discussing *Workman* standard and *State v. Berlin*, 133 Wn.2d 541, 545-46, 550, 947 P.2d 700 (1997)).

In this case, Mr. Smith asked the court to instruct the jury as to the elements of second degree murder as an alternative to premeditated murder and first degree manslaughter as an alternative to extreme indifference murder. RP10 at 144-45. There is no dispute that the legal prong of the test was met as to both proposed lesser-included-offense instructions. See RP11 at 8. The only issue is

whether evidence in the case supports “an inference that the lesser crime was committed.”

Notably, the factual prong of the *Workman* test does not require that the evidence supporting the lesser charge coincide with the defendant’s theory of the case. All it requires is that *any* evidence support the inference that the lesser crime was committed. In a seminal case on the matter, our Supreme Court held that a lesser-included instruction should be given “unless the evidence positively excludes any inference that the lesser crime was committed”:

The rule [denying a lesser-included-offense instruction] has no reference to the weight of testimony, but is applicable only to those cases where there is no testimony whatever to weigh tending to show the commission of the lesser degree of crime. “Conversely, it is also the rule that the lesser degree of crime must be submitted to the jury along with the greater degree, unless the evidence positively excludes any inference that the lesser crime was committed.”

*State v. Gallagher*, 4 Wn.2d 437, 447, 103 P.2d 1100 (1940) (quotation omitted).

In *Gallagher*, as in the instant case, the lesser-included-offense instruction did not comport with the defendant’s theory of the case. There, the defendant had gotten into a confrontation with the victim. He tried to hit the victim with a stick but the victim took the stick from him. The defendant retreated into his house, followed by the victim. The defendant got a gun and fired two shots at the victim, as the victim continued to threaten the defendant. The victim left the house, was

taken to a hospital and died of complications from the gunshot wounds.

*Gallagher*, 4 Wn.2d at 439-40.

In *Gallagher*, it was the defendant who objected to the lesser-included instruction of manslaughter with regard to the first degree murder charge. His position was that he was either guilty of second degree murder due to self defense or not guilty at all. He maintained that the manslaughter instruction should not be given as there was no evidence that the killing was involuntary or unintentional. 4 Wn.2d at 441, 447-48.

The court reiterated the rule that a lesser-included offense instruction must be given if the evidence does not “positively exclude” the inference that the lesser crime was committed and upheld the instruction. “In view of the fact that the evidence does not positively exclude the inference that the lesser crime was committed, it follows that the lesser degree of crime should have been submitted to the jury along with the greater degree.” *Gallagher*, 4 Wn.2d at 448. The Court recited the evidence that provided an inference of an unintentional killing and admonished that the decision was one for the jury to make: “It was for the jury to determine from the evidence whether appellant intended to effect the death of [the victim].” *Id.*

For the reasons the lesser-included-offense instruction should have been given in *Gallagher*, it should have been given here with regard to Mr. Smith's request for an instruction on second degree murder in addition to the premeditated murder instruction. Second degree murder requires evidence supporting "an inference," *Gamble*, 154 Wn.2d at 463, that Mr. Smith killed intentionally but without premeditation. RCW 9A.32.050. As the trial court noted, Mr. Smith's position was that he was not the shooter. RP11 at 6. Thus, as was true in *Gallagher*, the lesser-included instruction did not comport with the defendant's theory of the case. However, as was also true in *Gallagher*, that observation is not dispositive.

The evidence at trial was susceptible to additional inferences beyond premeditated murder or innocence. Evidence also tended to show that Mr. Smith had been provoked by Travis Greenlee when Greenlee shot at him, and that sometime later he headed toward Mr. Greenlee's apartment with a gun in the heat of anger and fired off several shots. Under these circumstances, several scenarios could support the inference of intentional but not premeditated killing. For example, Mr. Smith could have gone to the apartment intending to threaten or warn Travis off, but then the earlier provocation resulted in an intent to kill. Thus, "the evidence [did] not positively exclude the inference that the lesser crime

was committed.” Whether the weight of the evidence supported this inference was beyond the court’s authority to decide. *See Gallagher*, 4 Wn.2d at 447.

For these reasons, as was similarly held in *Gallagher*, the jury should have been able to determine whether the facts required a finding that the killing was premeditated or intentional but not premeditated. Accordingly, the trial court erred in failing to instruct the jury as to the lesser included offense of second degree murder and this Court should reverse Mr. Smith’s conviction.

For similar reasons, the trial court also erred in failing to give the lesser included offense instruction of first degree manslaughter with regard to the extreme indifference murder charge. First degree manslaughter requires the inference that Mr. Smith recklessly caused the death of another. RCW 9A.32.060. Again, while the charge is inconsistent with Mr. Smith’s theory of the case, it should still have been given if the evidence did not “positively exclude” the inference that Willie Greenlee was killed through recklessness.

The evidence at trial permitted an inference of simple reckless behavior. The evidence showed that the shooter fired several shots at the Greenlee apartment building when other people were nearby and that the shots could have reached the freeway near the apartment building. While the evidence also

supported a finding of extreme recklessness, it did not “positively exclude” a finding of simple recklessness.

At trial, the State relied on two cases upholding the denial of first degree manslaughter jury instructions as lesser included offenses of extreme indifference murder. Those cases are readily distinguishable on their facts. In both of those cases the defendants indiscriminately shot a gun out of a moving vehicle toward another vehicle driving in traffic. *State v. Pastrana*, 94 Wn. App. 463, 471, 972 P.2d 557 (1999).

In *State v. Pettus*, 89 Wash. App. 688, 697-98, 951 P.2d 284 (1998), this Court found the lesser-included-offense instruction was not warranted when the defendant had fired at least four gunshots from a moving vehicle in the direction of another moving vehicle and in the general direction of children playing on a school playground. *Pettus*, 89 Wash. App. at 692. Similarly, in *State v. Pastrana*, 94 Wn. App. 463, 469, 972 P.2d 557 (1999), the defendant fired a gun out of a moving vehicle at another moving vehicle on a crowded freeway, killing the passenger of the targeted car.

The recklessness involved in firing a gun from a moving vehicle at a vehicle moving in traffic, with the snowballing consequences that could easily result from a high-speed traffic accident, is different in kind from the recklessness

involved in firing a gun toward an apartment building. For this reason, the conclusions of *Pettus* and *Pastrana* should not be extended to apply to the instant facts. To hold that these facts require a finding of extreme indifference recklessness as a matter of law would elevate any death by shooting, except at point blank range, into extreme indifference murder. Such an extension of the law is not merited.

Finally, in erroneously denying Mr. Smith's proposed lesser-included-offense jury instructions, the court decided issues of fact that are exclusively within the province of the jury, violating Mr. Smith's constitutional rights to a jury trial. See U.S. Const. amend. VI; Wash. Const. art. 1 § 21. While the right to a lesser-included-offense instruction in general is a statutory right, *Gamble*, 154 Wn.2d at 462-63, once the evidence provides an inference that the lesser crime was committed, failure to give the lesser-included-offense instruction unconstitutionally removes a factual matter from the jury. See *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

**Point V: Mr. Smith's Conviction Should be Reversed Under the Cumulative Error Doctrine**

If this Court does not find any of the above-described errors to require reversal individually, this Court should order a reversal as the total effect of the errors deprived Mr. Montgomery of his right to a fair trial. The cumulative error

doctrine applies when individual trial errors may not be sufficient to compel a new trial, but taken together, deprived the defendant of a fair trial. See, e.g., *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, the errors described above, taken together, deprived Mr. Smith of a fair trial and require reversal.

#### **D. CONCLUSION**

For all of these reasons, Jayson Thomas Smith respectfully requests this Court to reverse his convictions.

Dated this 21st day of July, 2006.

Respectfully submitted,



Carol Elewski, WSBA # 33647  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I certify that on this 21st day of July, 2006, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, Kathleen Proctor, Deputy Prosecuting Attorney, 930 Tacoma Avenue S, Tacoma, Washington, 98402-2102, and one copy of the brief, postage prepaid, to Mr. Jayson T. Smith, DOC No. 663639, Clallam Bay Correctional, 1830 Eagle Crest Way, F/H3, Clallam Bay, WA 98326-9723.



Carol Elewski, WSBA # 33647