

NO. 34861-6

COURT OF APPEALS  
WASHINGTON

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERTA ELMORE, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Vicki Hogan  
The Honorable Rosanne Buckner

No. 96-1-04747-5

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the defendant entitled to relief when she cannot establish that Lieutenant Adamson commented on the defendant's guilt, there was a legitimate trial strategy for defense counsel not to object, and any error that may have been committed was harmless based on the evidence presented? (Appellant's Assignment of Error #1).
2. Are both the law of the case doctrine and the burglary anti-merger statute directly applicable, and even if they did not apply, do the defendant's crimes fail to merge? (Appellant's Assignment of Error #2, 3, 10).
3. Does the defendant's claim of prosecutorial vindictiveness fail when she is attempting to raise issues that could have easily been raised in a prior appeal and the State properly alleged aggravating factors as required by law? (Appellant's Assignment of Error #5, 10)
4. Is the defendant entitled to relief under the mandatory joinder rule when any error was harmless under the facts of this case? (Appellant's Assignment of Error #7).
5. Can the defendant establish a double jeopardy claim when such a claim is inapplicable to sentencing proceedings and the

State requested the same sentences following each of the defendant's trials? (Appellant's Assignment of Error #6)

6. Does the legislature's 2005 amendments to the Sentencing Reform Act which bring it into conformity with the procedural requirements of *Blakely* apply to this case, and does the exceptional sentence imposed conform with the requirements of RCW 9.94A.537? (Appellant's Assignment of Error #4, 8).

7. Did the defendant receive constitutionally effective assistance of counsel? (Appellant's Assignment of Error #9, 10).

B. STATEMENT OF THE CASE.

1. Procedure<sup>1</sup>

On December 12, 1996, ROBERTA JEAN ELMORE, hereinafter "defendant," was charged with murder in the first degree and two counts of robbery in the first degree. CP 1-4. All three charges also alleged firearm enhancements. *Id.* On December 19, 1996, an amended information was filed, which listed the name of the defendant's accomplices. CP 5-11. On March 7, 1997, a second amended information was filed, charging the defendant with murder in the first degree, burglary in the first degree, kidnapping in the first degree, and assault in the first degree, all with firearm enhancements. CP 12-17. The second amended

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<sup>1</sup> A chart summarizing each amended information is contained in the respondent's brief as appendix "A."

information also charged the defendant with criminal conspiracy to commit robbery in the first degree. *Id.*

On August 6, 1997, a third amended information was filed, charging the defendant with murder in the first degree. CP 27. The defendant entered a plea of guilty to the third amended information. CP 18-26. The defendant was sentenced to 400 months of confinement. CP 28-38. In an unpublished opinion, this court allowed the defendant to withdraw her plea. Appendix "B," June 23, 2000, Court of Appeals Opinion.

On January 12, 2001, a fourth amended information was filed, again charging the defendant with murder in the first degree, burglary in the first degree, kidnapping in the first degree, and assault in the second degree, all with firearm enhancements. CP 95-99. The fourth amended information again charged the defendant with criminal conspiracy to commit robbery in the first degree. *Id.* On September 17, 2001, the State added a firearm sentencing enhancement to the charge of criminal conspiracy to commit robbery in the first degree in the fifth amended information. CP 684-707. The defendant proceeded to trial, was convicted of murder in the first degree, burglary in the first degree, kidnapping in the first degree, assault in the second degree, and criminal conspiracy to commit robbery in the second degree, and was ultimately sentenced to a total of 797 months of confinement. CP 810-824. The defendant appealed her convictions, and this court reversed for a second

time and remanded for a new trial. Appendix “C,” May 25, 2004, Court of Appeals Opinion. The Washington Supreme Court affirmed this court’s remand for a new trial. Appendix “D,” November 10, 2005, Washington Supreme Court Opinion.

On January 23, 2006, the State filed a sixth amended information. CP 237-242. It charged the defendant with murder in the first degree, burglary in the first degree, kidnapping in the first degree, and conspiracy to commit robbery in the second degree, all with firearm enhancements. *Id.* It also alleged that each crime demonstrated a high degree of planning and/or sophistication and that each crime was committed in the presence of three physically handicapped persons and their caregivers. *Id.* It was further alleged that the crimes of murder in the first degree and burglary in the first degree had a reasonably foreseeable severe impact on both Ernest Schaefer and Dennis Robertson. *Id.* The State alleged that the crimes of kidnapping in the first degree and assault in the second degree had a reasonably foreseeable severe impact on Ernest Schaefer, and that the crime of conspiracy to commit robbery in the second degree had a reasonably foreseeable severe impact on Dennis Robertson. *Id.* Finally, the information alleged that for the crimes of burglary in the first degree and criminal conspiracy to commit robbery in the second degree that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance. *Id.*

On March 6, 2006, the State filed the seventh amended information. CP 386-390. It eliminated several of the aggravating circumstances alleged in the sixth amended information. *Id.* The seventh amended information alleged that each crime was committed with a firearm and done with a high degree of planning and/or sophistication. *Id.* On the charge of burglary in the first degree, it was further alleged that the victim was particularly vulnerable or incapable of resistance, and that it was committed while the victim of the burglary was present. *Id.* The seventh amended information also alleged that the crime of conspiracy to commit robbery in the second degree. *Id.*

On March 31, 2006, the defendant was found guilty of all five counts. CP 108-119, 588-601. The jury found the defendant did not commit any of the crimes with a high degree of planning or sophistication. CP 590, 594, 598, 601. The jury did find that the defendant committed the burglary against a victim that was particularly vulnerable or incapable of resistance, and that the victim was present at the time the burglary was committed. CP 594. The jury also found that the defendant committed conspiracy to commit robbery in the second degree against a victim that was particularly vulnerable or incapable of resistance. CP 601. Finally, the jury found that the defendant committed all of the offenses while armed with a firearm. CP 589, 592, 596, 600, 795<sup>2</sup>.

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<sup>2</sup> March 21, 2006 Special verdict form 4A, designated by supplemental designation.

The defendant was sentenced to 797 months of confinement—the same sentence she received after her first trial. CP 120-122<sup>3</sup>; 611-623. The defendant filed a timely notice of appeal on May 15, 2006. CP 631-643.

## 2. Facts

Dennis Robertson was a quadriplegic man who had suffered from cerebral palsy since early childhood. RP 180. Robertson could not walk or talk, but was mentally sound. *Id.* Robertson could communicate with computer software that translated Morse Code. RP 182-183. He attended Foss and Wilson high schools and graduated from Pacific Lutheran University with a degree in print journalism. RP 182.

Robertson used his head to tap Morse Code into a computer attached to his wheelchair via sensors mounted next to his head. RP 182-183. Robertson owned a home that he shared with two other men who also had cerebral palsy, Bob Stevens and Bernie Searcy. RP 183-184.

Dennis Robertson's sister, Diana Craig, testified that Robertson was born in 1955. RP 179-180. He died in October of 2004, at the age of 49. RP 180. Robertson lived at 10302 Irene Avenue South in Lakewood

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<sup>3</sup> It appears that the clerk did not include all of the pages when determining the numbering for the warrant of commitment and judgment and sentence from November 30, 2001. Per the clerk's preparation, there are only three pages to the document. In reality, however, there are 17 pages in the document.

with the two other disabled men. RP 184. All three men had care attendants that cared for them 24 hours a day. *Id.* Scott Claycamp was one of Robertson's attendants. RP 185. Robertson's monthly income was approximately \$1,200 to \$1,300. RP 186. Of that income, approximately half of it went to rent. *Id.* On December 11, 1996, Robertson kept his valuables in a locked safe that was by his bed. RP 188. Robertson indicated that the most he ever had in his safe was \$200. CP 825-831 (exhibit 137, page 439<sup>4</sup>). Robertson never had thousands of dollars in his safe. *Id.* Craig never saw thousands of dollars in the safe, and Robertson did not have access to that kind of money. RP 189.

April's Escorts began operation in 1990. RP 125. It operated by a customer calling the service wanting to meet an escort. RP 125. April's Escorts would read the customer descriptions of an escort, and a background check on the client would be conducted. RP 125. An escort would have 30 minutes to be ready to go out on a call. RP 128. An escort would be sent out to the client accompanied by a driver. RP 125. Before the escort would go in the client's home, she would check identification to

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<sup>4</sup> The prior testimony of Dennis Robertson was read into the record, but not retranscribed. RP 225. For convenience of reference, when referring to previously taken testimony, the State will cite to the exhibit record, the exhibit number, and the page number from the exhibit page numbers.

make sure it was the correct house and the correct client. RP 129. The escorts were to collect their fee up front. RP 129. When the escort received payment, she was to call the escort service and indicate that everything was fine. *Id.* The driver would later pick the escort up and drive her back to the service. RP 125. In 1996, the hourly rate for an escort was \$160 per hour. That amount was split up with \$80 going to the escort, \$20 to the driver, and \$60 to the service. *Id.*

In 1996, the defendant was an employee of April's Escorts. RP 115, 126, 784. On or about December 4, 1996, the defendant was sent on a call to a quadriplegic client. RP 130, 787. The client was Dennis Robertson. CP 825-831 (exhibit 137, page 431); RP 787. Robertson had used the service previously. RP 130. Christine Emineth was working at 10302 Irene Avenue Southwest as a caregiver in 1996. RP 326. On December 4, 1996, Emineth called April's Escorts on Robertson's behalf. CP 825-831 (exhibit 137, page 431-432); RP 328. In response to her call, the defendant was sent to the residence. RP 330. Emineth paid the defendant \$160 from Robertson's safe. CP 825-831 (exhibit 137, page 432-433); RP 332. The safe was located in Robertson's bedroom. CP 825-831 (exhibit 137, page 433). Upon seeing Robertson, the defendant stated that she could not do this, that it was disgusting and he was

disgusting. RP 333. The defendant indicated that she was not that kind of girl, and left. CP 825-831 (exhibit 137, 435).

Emineth followed the defendant and asked for the money she had given to the defendant back. RP 334. The defendant just kept walking toward the car. RP 335. Brian Foster worked as a driver for April's Escorts. RP 313-314. On December 4, 1996, Foster drove the defendant to the residence at 10302 Irene Avenue Southwest. RP 316. He recalled that the client was a handicapped man. RP 317. Within minutes after dropping the defendant off at the residence, Foster received a page to go back and pick her up. RP 317-318. During the time the defendant was sent to see Robertson, Abb Benton, the owner of April's Escorts, received a call from Foster indicating that things were not going well on the call. RP 124-125, 130-131. There had been a discrepancy over money, and Benton instructed Foster to give the client back his money and that the defendant was to receive nothing. RP 131.

After Foster spoke with the caregiver, he determined that the defendant was to return the money paid to her. RP 319. The defendant did not want to return the money and thought she should have received payment. RP 319. Foster told Emineth that they would send someone else. RP 335. He got the money back from the defendant, gave it to Emineth, and apologized. RP 335. The defendant was very angry. *Id.*

Foster then told the defendant that the agency no longer wanted to employ her and he drove her to her car. RP 321. During the drive to her car, the defendant was still angry that she had not been paid. RP 321.

Benton understood that the defendant did not realize that the client was quadriplegic, and had become unhappy with the situation and left. RP 131. The next day, the defendant called April's Escorts and was very upset. RP 132. She indicated that she had been treated unfairly and had not received payment. *Id.* She told Abb Benton that she was going to get even with him. *Id.* She also told him that she did not know how she could make any money with that "damn quadriplegic." RP 133. The same day Benton received a call from the client's caregiver, and Benton gave the caregiver the defendant's telephone number so that calls from that number could be blocked. RP 134.

In 1996, Carolyn Hammett was a caregiver in the home of Dennis Robertson. RP 227. On December 6, 1996, Hammett was at Robertson's residence. RP 233. She answered the telephone at the residence and a woman requested to speak with "Chris." RP 233. Hammett told the caller that she did not know when Chris would be in, and the caller hung up. RP 233-234. Almost immediately after the first call, the woman called again. RP 234. This time the woman was very agitated and was screaming. *Id.* The woman said that she had been at Robertson's house for a date and that

Robertson owed her money. RP 234. The woman threatened to call the police if she did not get the money. *Id.* The woman indicated that she was owed \$160. RP 235.

Ernest Schaef was a caregiver in the Robertson home. RP 259-260. December 5, 1996, Schaef was at the Robertson residence and checked the telephone messages. RP 266. There was a message on the telephone from a woman indicating that there was money owed and it needed to be paid. RP 266.

Thorsten Jerde testified that in December of 1996, he had known the defendant for approximately one month. RP 360. In December of 1996, the defendant discussed committing a robbery with Jerde. RP 362. The defendant indicated to him that there was a house that had a safe full of money in it and that it would be easy because the people inside were in wheelchairs. RP 363-364. The defendant told Jerde that she had been in the house when she worked for an escort service. RP 363. She told him that she wanted to go to the house and take the money because they had “ripped her off.” RP 363. The defendant told Jerde that there was \$5,000 in the bedroom safe and that she saw it. RP 364. Jerde and the defendant had three or four conversations about committing the robbery. *Id.* During a later interview, Jerde told Detective Adamson that the defendant had indicated that she wanted everyone in the house to get hurt. RP 712.

The defendant drove Jerde and her friend Gordon Crockett by the Robertson home approximately three times. RP 365. During a drive past the Robertson home the defendant pointed to a bedroom where the safe was located. RP 366. There was a discussion that the money obtained would be divided equally. RP 366. Jerde thought that the defendant wanted the people inside the house hurt. *Id.*

Gordon Crockett agreed to commit the robbery. RP 367. He and Jerde discussed using Jerde's handgun during the robbery for intimidation. RP 367. On December 10<sup>th</sup>, Crockett attempted to recruit Dale Allen to participate in the robbery. CP 825-831 (exhibit 107<sup>5</sup>). The first discussion of the plan was what the defendant wanted done. *Id.* Crockett told Allen that a friend of his worked for an escort service and had worked at a paraplegic man's house but that they had not paid her. *Id.* The girl wanted the man and his caretaker "taken care of." *Id.* Crockett told him that if they took care of the caretaker, the girl would take care of them "financially, sexually, maybe both." *Id.* Allen was told that there were thousands of dollars in a safe in the house, which was to be the reward for doing the job. *Id.*

Crockett told Jerry Wilms that Crockett's girlfriend had performed some type of dance for someone, and had gotten "ripped off." RP 438.

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<sup>5</sup> Video deposition of Dale Allen, which was played for the jury on March 27, 2006. RP 624.

Crockett had been asked to go collect the money owned. *Id.* Crockett had indicated that his girlfriend was livid about getting ripped off. RP 438. Someone made a statement about someone being in a wheelchair. RP 439. Crockett told Wilms that his girlfriend had been to the house and that there was a small lock box or safe with checks, credit cards, and money inside. RP 439. According to Jerde and Crockett, the safe contained a significant amount of money. RP 439.

In a separate conversation, Crockett, Allen, Bob and Carol Edwards, and Michael Kunz talked about the robbery. *Id.* Crockett wanted to get the money from the house and indicated that he was going to take a gun that he had. *Id.* Allen saw the gun that Crockett had. *Id.* Crockett wanted Allen to go to the door of the house and ask for directions while Crockett stood to the side of the door. *Id.*

The same day, approximately an hour and a half later, Allen, Crockett, and Kunz walked to the house Crockett wanted to rob. *Id.* They observed the house from a field across the street, and Crockett walked by the front of the house to get an idea of how many people were inside. *Id.* Allen and Kunz then refused to participate in the robbery. *Id.*

Before the robbery, Jerde asked the defendant for bullets for the gun, which the defendant provided. RP 368. The defendant later told Lieutenant Adamson that she had retrieved the bullets from her closet and given them to Crockett. RP 681. Before the robbery, Jerde, Crockett,

Jerde's girlfriend Denise Chamberlain, and the defendant went to a rock quarry to use the gun for target practice. RP 362, 368.

In the morning hours of December 11, 1996, Jerde, Crockett, Wilms and Carol Edwards were at Jerde's apartment and in the "spur of the moment" decided to break into the Robertson residence. RP 369-370. Jerde, Crockett and Carol Edwards got in Wilms's car and he agreed to drive them to the house. RP 442. At the residence, Jerde, Crockett, and Edwards got out of the car and Wilms waited. RP 443.

Edwards knocked on the front door, and Crockett was with her. RP 372. On December 11, 1996, Schaef was working at the Robertson residence. RP 276. At approximately 6:15-6:20 a.m. Schaef answered a knock at the door. RP 284. He saw a woman standing on the front porch of the residence asking for directions. RP 285. He felt that there was something wrong about the situation so he tried to close the door. RP 285. Schaef had recently returned to work after a hernia operation. RP 264. As he tried to close the door he saw movement out of the corner of his eye. *Id.* He was trying to shut the door when another person came in, hit the door and pushed. RP 285. Schaef was standing on a throw rug that was on top of linoleum, and he slid across the floor. *Id.* The man came in, brandishing a firearm and demanded that Schaef get on the floor. RP 286.

The firearm was a .357 Python magnum. RP 287. The man then went to the back door and let another man inside. RP 287.

Jerde was at the back door of the residence. RP 372. Ultimately, Crockett opened the back door for Jerde. RP 372. Crockett had the gun that was loaded with the bullets provided by the defendant. RP 373. Jerde put a stocking over his face to hide his appearance. RP 373. Once inside the residence, Jerde saw someone lying on the floor and Crockett told the person to stay there. RP 373-374. Jerde went to look for the safe in the room that the defendant had described for him. RP 374. Schaefer heard the two men talking to each other and indicating that the safe was in the back. RP 288. They then proceeded to Dennis Robertson's bedroom. *Id.* Once in the room where the safe was located, Jerde saw one person on the floor and one person on a bed. RP 374. Crockett was holding the people at gunpoint. RP 374-375. Jerde picked up the safe and left the room. RP 375. As Jerde was walking out of the door he heard a gunshot. RP 375. Schaefer was still in the hallway when he heard a shot, heard Robertson screaming, and saw the two men coming out with a safe. RP 289.

When Crockett and Jerde returned to the car they were carrying a lock box. RP 444. Once in the car, Jerde asked Crockett about the gunshot sound. RP 378. Crockett told him "it just went off." RP 378. Jerde, Wilms, Edwards, and Crockett went back to Jerde's apartment

where they broke open the safe. RP 379. Inside the safe were some papers and a few dollars. RP 379. Schaefer stated that at the time of the robbery the safe contained \$30 to \$40 at the most. RP 305. Edwards, Wilms, and Crockett later told Dale Allen that there was \$12 in the safe. CP 825-831 (exhibit 107). There was not \$5,000 in the safe and Jerde was angry. RP 379. If the defendant had not told him that the safe had contained \$5,000, Jerde probably would not have gone to the residence and robbed it. RP 381. If the defendant had not shown Jerde the location of the residence, he would not have gone back to the house and stolen the safe. *Id.*

On the morning of December 11<sup>th</sup>, Crockett returned to the Edwards' home. CP 825-831 (exhibit 107). Allen saw Crockett flip a shell casing in the air and say, "I finally got to use one of these." *Id.* Crockett told Allen to get rid of the gun. *Id.*

The next day, Allen, Edwards, and Wilms attempted to forge and cash one of Robertson's checks. RP 449-450. Wilms was interrogated and confessed his knowledge of what had occurred at the Robertson residence the night before. RP 452-453.

The murder was described on television during the following days. RP 595-596. Lanthan Kelley, Jr. watched the television newscast in disbelief as he recalled the defendant and her husband having discussed robbing a quadriplegic man. *Id.* Kelley notified the police and gave them

the defendant's name. *Id.* After the defendant was arrested and in custody, she called Kelley and threatened to kill him. RP 596.

Pierce County Sheriff Deputy Donato and Deputy Wulick responded separately to the report of a shooting at 10302 Irene Avenue Southwest in Lakewood, Washington. RP 142-143, 575-577. Ernest Schaefer was waving the deputies down in a frantic manner. RP 144, 578. Schaefer indicated that his friend was hurt bad. *Id.* Upon entering the house, Deputy Donato went to the far west room and observed a man in a bed covered up to his neck with blankets and a man on the ground with a gunshot wound to the back of his head. RP 145. The man on the ground was later identified as Scott Claycamp. *Id.* The man in the bed was identified as Dennis Robertson. *Id.*

When Deputy Donato observed Claycamp, he was laying with his hands underneath him and his face on the ground. *Id.* There was a large pool of blood on the back of his head. RP 145-146. Deputy Donato described Robertson's demeanor as terrified. RP 150. He was shaking. *Id.* Deputy Donato was able to communicate with Robertson. RP 151. Robertson indicated that Claycamp was lying on the floor when he was shot and that he was not physically fighting with the suspects. RP 151-152.

Dr. Werschkul, the chief of neurosurgery at Madigan Army Medical Center, testified that he treated Scott Claycamp. RP 512, 514. Dr. Werschkul determined that Claycamp had sustained a gunshot wound to the head, and was severely injured. RP 514. Surgery was performed to remove blood clots on the inside of the cranial cavity in hopes of reducing pressure on the brain, but the chance of Claycamp surviving his injuries was poor. RP 515. The surgery did not help Claycamp and he died shortly thereafter. RP 516. Dr. Roberto Ramoso, an associate medical examiner for Pierce County, performed the autopsy on Claycamp. RP 518, 520. He determined that the cause of Claycamp's death was a gunshot wound to the head. RP 534.

The defendant testified on her own behalf. RP 776. She agreed that April's Escorts had sent her to the Robertson house, but she left after she observed Robertson naked. RP 786-787, 794. She testified that she had called the Robertson house later and that a woman there had agreed to pay her the \$160 to not involve Robertson further. RP 801. Elmore stated that she was going to accept the money and that she had discussions with Crockett about the money. RP 802. She asked Crockett to go get the money for her. RP 803. The defendant admitted that she had a conversation with Crockett during which he suggested that they rob the Robertson residence. RP 843. She also admitted that she drove Crockett,

Jerde, and Chamberlain by the Robertson residence and pointed it out to them. RP 856.

C. ARGUMENT.

1. LIEUTENANT ADAMSON DID NOT COMMENT ON THE DEFENDANT'S GUILT, DEFENSE COUNSEL HAD A LEGITIMATE TRIAL STRATEGY IN NOT OBJECTING TO HIS TESTIMONY, AND ANY IMPROPER OPINION TESTIMONY THAT WAS ADMITTED WAS HARMLESS GIVEN THE OVERWHELMING EVIDENCE.

Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant “because it invades the exclusive province of the jury.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). “Opinion testimony” means evidence that is given at trial while the witness is under oath and is based on one’s belief or idea rather than on direct knowledge of facts at issue. *State v. Demery*, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001). Washington courts have “expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” *State v. Demery*, 144 Wn.2d at 760, quoting *Heatley*, 70 Wn. App. at 579. In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the

circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 758-59.

The following has been found not to constitute improper opinion testimony: a taped confession which included a detective's questions that essentially accused the defendant of lying, *Demery, supra*; an officer's opinion based solely on his experience and his observation of the defendant's physical appearance and performance on the field sobriety tests that he was "obviously intoxicated and affected by the alcoholic drink . . . [and] could not drive a motor vehicle in a safe manner" *Heatley*, 70 Wn. App. at 576, 579-80; a CPS worker's statement - "I believe you"- to a child in an out of court interview said to encourage the child to disclose; *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994). The Supreme Court has required compliance with ER 103 before considering claims of improper admission of opinion testimony. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In the case now before the court, defendant asserts that there was improper admission of opinion testimony during the testimony of Lieutenant Adamson. Brief of Appellant at page 15-19. Defendant asserts that the following statement made by Lieutenant Adamson was improper:

We were at a point where the interview was going back and forth, and she was at points being evasive, being untruthful. I sensed deception, and I finally got to the point where I confronted her that I believed that she participated in the robbery, and that was based on the identification by Mr. Schaefer.

RP 687.

Defendant also asserts that it was error for Lieutenant Adamson to state the following:

Detective Farrar had to leave to go to the Calico Cat Motel. And when he came back we took more computer time, more time to complete the montages, and then a lot of the inconsistencies and evasiveness of the information that she was providing, provided us, she was gradually giving us more and more information. I didn't feel at that point that we had basically come to a point where I felt that we were going to get more information if we continued the interview.

RP 689.

Because there was no objection to this allegedly improper evidence, defendant has failed to comply with ER 103 and this error has not been preserved for review. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993), *review denied*, 123 Wn.2d 1002, 868 P.2d 871 (1994). Because the defendant did not object to the statements made by Lieutenant Adamson, she is precluded from review.

- a. In order to reach the issue on appeal, this court must make a determination as to whether the statements were explicit or implicit comments on the defendant's credibility.

While some issues of constitutional magnitude may be raised for the first time on appeal, not every constitutional issue qualifies. *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court.

Rather, the asserted error must be “manifest”--i.e., it must be “truly of constitutional magnitude.” The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. *State v. McFarland*, 127 Wn.2d 322, 333, 889 P.2d 1251 (1995).

In *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994), the defendant sought review of two instances of allegedly improper opinion testimony of a CPS caseworker in a child abuse case; only one statement had been objected to in the trial court. *Id.* at 812-813. The court examined the unobjected-to statement -“I believe you”- in the context it was made which was as a statement of reassurance to encourage the child victim to respond. *Id.* at

812. The court found that as this comment was not an express statement by the witness to the jury that she believed the victim, it did not constitute manifest constitutional error. *Jones*, 71 Wn. App. at 812-813.

In order to be found to be an issue that can be raised for the first time on appeal, this court must make a preliminary finding that the statements made by Lieutenant Adamson were explicit or almost explicit comments on a witness's credibility, thereby creating a potential manifest error. *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007). In *Kirkman*, detectives testified about competency protocols that they used to determine if a victim had the ability to tell the truth. *Id.* at 930, 934-935. In *Kirkman* the court looked at several statements made and determined that they were not explicit, and therefore the issue could not be raised for the first time on appeal. *Id.* at 938. The court found that such statements were not explicit and therefore the issue was not properly preserved for appeal. *Id.* at 936. An "explicit statement" is one that is clear and unmistakable. *See State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *cert. denied*, \_\_\_ S. Ct. \_\_\_ (2009).

In the present case, this court must first address whether Lieutenant Adamson's statements were explicit statements regarding the defendant's credibility. Assuming, arguendo, that this court finds that the statements were explicit, the defendant still cannot establish that the statements were prejudicial in light of the overwhelming evidence or that counsel's failure to object was not a tactical decision.

b. Even if the defendant can show that the statements made were explicit, she cannot establish prejudice.

i. **Defense counsel's decision not to object to Lieutenant Adamson's testimony was tactical, and therefore the defendant cannot establish any prejudice.**

The defendant is not asserting that trial counsel was ineffective for failing to object to Lieutenant Adamson's testimony. When Lieutenant Adamson's comments are read in context, there was a clear strategic reason for defense counsel to want such testimony to be introduced, and therefore the defendant cannot establish any prejudice. The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir.1987), *cert. denied*, 488 U.S. 948 (1988).

In context, it appeared that Lieutenant Adamson believed that the defendant was being deceptive and evasive about her involvement because Schaefer had identified her as the woman who knocked on the door of the residence immediately before the robbery. RP 687-688. As the State elicited, the identification made by Schaefer was incorrect. *Id.* Therefore, counsel may have wanted Lieutenant Adamson's statements introduced to

illustrate that he sensed deception where, at least in part, the defendant was not being deceptive, thereby making Lieutenant Adamson less credible. There is a legitimate strategic explanation as to why defense counsel would want such testimony introduced—because it could be beneficial to the defendant’s theory. Therefore, the defendant cannot establish any prejudice. There is a legitimate strategic reason for counsel to have allowed such testimony therefore, the defendant’s claim fails.

**ii. Based on the overwhelming evidence presented, and the defendant’s own admissions during her trial testimony, any error was harmless.**

Even if this court were to find that the defendant’s claim raises a manifest constitutional error, a harmless error analysis is still applicable. *State v. Kirkman*, 159 Wn.2d 918 at 927, citing *State v. McFarland*, 127 Wn.2d 322, 33, 899 P.2d 1251 (1995), *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

First, any error committed in this case was harmless because the defendant herself provided contradictory statements at trial and the State did not argue Lieutenant Adamson’s comments in closing<sup>6</sup>. Lieutenant

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<sup>6</sup> The defendant asserts in her opening brief that the State used the defendant’s deceptiveness to the officers as evidence of guilt during closing argument. Brief of Appellant at page 15. Such assertion mischaracterizes the State’s closing arguments. Moreover, the citation the defendant offers in support of such assertion is incorrect, and therefore the State is unable to respond to a particular place in the record on which the defendant is basing her argument.

Adamson indicated that the defendant did not tell him in the interview that she had driven Crockett and Jerde past the Robertson home. RP 690. During her trial testimony, however, the defendant stated that she did drive Crockett and Jerde past the home. RP 856. When asked if she had told Lieutenant Adamson that she had driven the others past the home, the defendant stated, "I couldn't remember everything in detail. He was accusing me of murder." RP 862. The defendant also denied telling Lieutenant Adamson the full details of her involvement with the robbery. RP 863. The defendant, by her own admission, did not disclose the extent of her participation to Lieutenant Adamson. Such admission clearly supports Lieutenant Adamson's testimony that the defendant was being evasive in the interview.

Moreover, the State argued in closing argument that the defendant was not cooperative and that she did not tell Lieutenant Adamson that she had driven the other participants past the house and that she drove them to test fire the gun that was used in the robbery. RP 908. The defendant essentially acknowledged her own evasiveness. The State did not argue that the defendant was not credible because Lieutenant Adamson believed she was being deceptive. Rather, Lieutenant Adamson's statements are supported by the defendant's own admissions that she did not fully disclose her level of participation in the crimes. Based on the defendant's own testimony, she did not disclose her own role in the robbery and murder when she was interviewed by Lieutenant Adamson. Because the

defendant admitted at trial that she did not fully disclose her actions to Lieutenant Adamson, his comment that the defendant was being deceptive was harmless.

The jury was instructed similarly to the jury in *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007). In *Kirkman*, the court determined the instruction was “relevant (and curative) in claims of judicial comment on the evidence.” The juries in *Kirkman* and in the case at bar were both instructed that they “are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each.” *Kirkman*, 159 Wn.2d at 937, see *State v. Ciskie*, 110 Wn.2d 263, 280, 282-283, 751 P.2d 1165 (1988). In the present case, the jury was instructed, “You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.” CP 491-536 (instruction #1). Because the jury, similar to the jury in *Kirkman*, was instructed that they alone are the judges of credibility, any possible error was alleviated.

Second, any error was harmless because of the overwhelming evidence presented. In *State v. Saunders*, 120 Wn. App. 800, 86 P.3d 232 (2004), a police officer testified on several occasions that Saunders had made conflicting statements to the police. *Id.* at 811. The officer testified that Saunders’ answers to questions “weren’t always truthful.” *Id.* at 812. While the court agreed that such a statement was improper, the court

found that such error was harmless given the overwhelming untainted evidence. *Id.* at 813.

In addition to any error being harmless because the defendant acknowledged at trial that she did not disclose her full involvement to Lieutenant Adamson, any error was also harmless in light of the overwhelming evidence presented. The jury heard testimony from Jerde that he and the defendant had discussed committing the robbery. RP 360. Jerde also testified that the defendant told him that there was a safe full of money inside the Robertson house. RP 363-364. Jerde later reported that the defendant wanted everyone in the house to get hurt. RP 712. The jury heard testimony that the defendant even drove Jerde and Crockett by the Robertson house three times and that the defendant pointed out the bedroom where the safe was located. RP 365-366. The defendant also gave bullets to Crockett that were later used in the murder. RP 368, 373, 381, 681. The defendant, Jerde, Crockett, and Chamberlain went to Jerde's uncle's house to fire the gun. RP 646, 724, 779, 810, 853, 863. The defendant herself admitted at trial that she drove Crockett, Jerde, and Chamberlain by the Robertson house and that she had asked Crockett to go to the Robertson house to get money for her. RP 803, 856. Jerde testified that he probably would not have gone to the victim's home if the defendant had not told him about a safe containing \$5,000. RP 381. Based on the overwhelming evidence presented, any error committed by Lieutenant Adamson's statements was harmless.

In *State v. Jones*, 117 Wn. App. 89, 68 P.3d 1153 (2003), a case relied upon by the defendant, the court reversed the defendant's conviction when a police officer witness testified that he did not believe the defendant during an interview. *Id.* at 91. As argued above, however, this case is factually different from *Jones*. In the present case, the officer's perception of deceptive behavior was mistaken.

The defendant also relies on *State v. Romero*, 113 Wn. App. 779, 54 P.3d 1255 (2002), and *State v. Keene*, 86 Wn. App. 589, 938 P.3d 839 (1997), but both cases are factually distinguishable. In *State v. Romero*, the police officer testified at trial that Romero was "somewhat uncooperative" in a holding cell. *Romero*, 113 Wn. App. 779 at 785. Romero objected, and the objection was sustained. *Id.* The officer then stated that Romero was advised of his *Miranda*<sup>7</sup> warnings and did not want to talk to him. *Id.* The court held that Romero's defense was "built around his cooperativeness and openness with nothing to hide." *Id.* at 793. The court held that Romero's testimony and concessions were likely undermined by the officer's comment. *Id.* The court ultimately found that the error was not harmless, holding that ". . . the jury could have been swayed by Sergeant Rehfield's testimony, which insinuated Mr. Romero was hiding his guilt." *Id.* at 795.

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<sup>7</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

In the present case, Lieutenant Adamson indicated on one occasion that he believed the defendant was being deceptive about whether she was present at the time of the robbery. As argued above, the defendant was not in fact present at the time of the robbery and was therefore not being deceptive. Moreover, the defendant in the present case failed to object. This case is distinguishable from *Romero*, where Romero's entire defense centered around Romero's own credibility. In this case, Lieutenant Adamson's testimony regarding the defendant being deceptive was actually favorable testimony for the defendant because Lieutenant Adamson erroneously believed her to be deceptive regarding her presence at the time of the incident. Moreover, the testimony in *Romero* extended to more than a single statement, and included testimony that Romero did not want to talk to the police. Such comments are more egregious than the statements made by Lieutenant Adamson.

The defendant also relies on *State v. Keene*, 86 Wn. App. 589, 938 P.2d 839 (1997). In *Keene*, the detective testified that she left telephone messages for the defendant indicating that if she did not hear back from him she would be forwarding the case to the prosecuting attorney. *Id.* at 592. In closing argument, the State told the jury, in discussing the fact that Keene did not return the detective's calls, that, "It's your decision if those are the actions of a person who did not commit these acts." *Id.* at 592.

In *Keene*, there was a direct comment on the defendant's silence. *Id.* at 594. The State then suggested in closing argument that the defendant's action was an admission of guilt. *Id.* at 594. In the present case, Lieutenant Adamson did not comment on the defendant's silence and the State did not mention Lieutenant Adamson's statement in closing. As argued above, the defendant cannot establish prejudice in light of the overwhelming evidence presented. The authority cited by the defendant is distinguishable from the case at bar, and the defendant's claim is without merit.

2. THE LAW OF THE CASE DOCTRINE AND BURGLARY ANTI-MERGER STATUTE ARE BOTH DIRECTLY APPLICABLE, AND EVEN IF PRINCIPLES WERE INAPPLICABLE, THE DEFENDANT'S CRIMES DO NOT MERGE.

- a. The law of the case doctrine is directly applicable, the defendant could have easily raised this issue in her prior appeal, and therefore she should be precluded from raising the merger claim in this appeal.

The defendant alleges for the first time in this appeal that the trial court erred in imposing a sentence for both burglary and felony murder. Brief of Appellant at pages 23-24. The law of the case doctrine precludes such review unless the defendant can demonstrate an application of law that was clearly erroneous and that it would be a manifest injustice to apply the doctrine. *State v. Worl*, 129 Wn.2d 416, 425-26, 918 P.2d 905

(1996). The court has held that the law of the case doctrine applies not only when an issue has been litigated in a prior appeal, but when an issue could have been determined if it had been presented. *Id.* at 425. The court stated:

It is also the rule that questions determined on appeal, *or which might have been determined had they been presented, will not again be considered on a subsequent appeal* if there is no substantial change in the evidence at the second determination of the cause.

*Id.* at 425, quoting *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988) (emphasis added).

The court has further held:

Under the doctrine of “law of the case,” as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are “authoritatively overruled.” Such a holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.

*Id.* at 426, citing *Greene v. Rothschild*, 68 Wn.2d 1, 10, 402 P.2d 356, 414 P.2d 1013 (1965).

In the present case, the defendant could have raised her claim that the trial court improperly sentenced her to both felony murder and burglary in the appeal following the defendant’s first trial. The defendant concedes that such a claim was not raised in any prior appeal. Brief of Appellant at page 30. As argued below, the defendant cannot establish

that any error occurred, and therefore fails to show that the trial court's action was clearly erroneous. This court should apply the law of the case doctrine and refuse to consider this issue.

b. The anti-merger statute is directly on point and applicable.

In determining whether the crimes involved the same intent, RCW 9A.52.050 clearly permits the charging of and punishment for burglary and *any* other crime committed during the course of the burglary. *State v. Lessley*, 118 Wn.2d 773, 781-782, 827 P.2d 996 (1992); *State v. Bonds*, 98 Wn.2d 1, 15, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831, 104 S. Ct. 111, 78 L. Ed. 2d 112 (1983). As a result, a sentencing judge has discretion under the burglary anti-merger statute, to punish burglary separately from crimes committed during burglary, even if both crimes involved the same criminal conduct. *State v. Sweet*, 138 Wn.2d 366, 980 P.2d 1223 (1999); *Lessley*, 118 Wn.2d 781; *State v. Kisor*, 68 Wn. App. 610, 618, 844 P.2d 1084 (1993), *review denied*, 121 Wn.2d 1023, 854 P.2d 1084 (1993).

In this case, the defendant asserts that her conviction for burglary in the first degree merges into her murder conviction. Brief of Appellant at page 24. By the clear and express language of the anti-merger statute, RCW 9A.52.050, the burglary can be punished separately from the murder conviction.

To support her argument, the defendant relies in part on *State v. Williams*, 131 Wn. App. 488, 128 P.3d 98 (2006), *adhered to on remand*, 158 Wn.2d 1006, 143 P.3d 596 (2006). *Williams* is easily distinguishable. In *Williams*, the defendant was asserting that his convictions for murder and *robbery* merged. *Id.* at 497-498. Williams was not convicted of burglary, and therefore the burglary anti-merger statute was not implicated, unlike the case at bar.

Similarly, in *State v. Fagundes*, 26 Wn. App. 477, 614 P.2d 198 (1980), *review denied*, 94 Wn.2d 1014 (1980), another case on which the defendant relies, Fagundes was convicted of felony murder, rape in the first degree, kidnapping in the first degree, theft in the first degree, and taking of a motor vehicle. *Id.* at 478. The court found that the jury could not properly return guilty verdicts on first degree rape and first degree kidnapping because the defendant was convicted of felony murder, based on the fact that the kidnapping and rape charges provided essential elements of the felony murder conviction. *Id.* at 485. Fagundes was also not charged with a burglary, and therefore the burglary anti-merger statute was not applicable.

In the present case, the anti-merger statute clearly applies. The defendant was charged and convicted of first degree felony murder and burglary. CP 589-594. Even if, as the defendant alleges, the crimes constitute the same criminal conduct, RCW 9A.52.050 allows the court to

sentence the defendant for each crime separately. See *State v. Lessley*, 118 Wn.2d 773 at 781.

The defendant also alleges that the kidnapping and burglary convictions merge. As argued above, the anti-merger statute precludes merger of burglary and *any other crime*. The defendant, citing *State v. Weber*, 159 Wn.2d 252, 149 P.3d 646 (2006), *cert. denied*, 127 S. Ct. 2986 (2007), asserts that it is not the burglary that merges, but is the kidnapping. Brief of Appellant at page 36. Such analysis is flawed. Under the clear terms of the burglary anti-merger statute, the kidnapping conviction and burglary conviction would not merge. Moreover, under the defendant's analysis, any "lesser" crime that was committed during the course of a burglary would merge. Such argument is in direct contradiction to the burglary anti-merger statute.

The defendant attempts to distinguish *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999), but it is applicable to the case at bar. The defendant asserts that the court, in dicta, stated that a defendant could be charged separately with burglary in the first degree, rape in the first degree, and kidnapping in the first degree and could be punished separately for each charge under the burglary and merger statute. Brief of

Appellant at page 37<sup>8</sup>. First, the defendant incorrectly categorizes the holding of *Sweet* as dicta. The conclusion the court reached in *Sweet* was that the burglary anti-merger statute precluded the merging of first degree burglary committed by means of assault, and assault in the first degree. *Id.* at 478-479. The holding of *Sweet* is directly applicable to the case at bar. In the present case, the burglary anti-merger statute applies and the defendant's claim that the kidnapping and burglary charges must merge fails.<sup>9</sup>

Second, the defendant asserts that the *Sweet* court erred in citing to *State v. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992). The defendant asserts that the *Sweet* court's reliance on *Collicott* for the proposition that a burglary, kidnapping, and rape could be punished separately is misplaced. Brief of Appellant at page 37. The defendant argues that

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<sup>8</sup> The defendant provides an incomplete quotation in her brief, accompanied by an incorrect citation. The complete quotation is as follows:

In *Bonds* we concluded that burglary does not merge with first degree rape, and also concluded in *State v. Collicott* that a defendant could be charged separately with burglary in the first degree, rape in the first degree and kidnapping in the first degree and, upon conviction, punished for each charge. Based upon our decision in *Bonds* and *Collicott*, we conclude in this case that under the burglary "anti-merger" statute, RCW 9A.52.050, the offenses of first-degree assault and first-degree burglary may be separately charged and separately punished upon conviction for both.

*State v. Sweet*, 138 Wn.2d 466, 478-479, 980 P.2d 1223 (1999)(internal footnotes omitted).

<sup>9</sup> Because the burglary anti-merger statute specifically precludes the merger of the burglary and kidnapping convictions, an analysis as to whether the restraint used was incidental is unnecessary.

“Sweet cited to Collicott for that broad statement. Sweet, 138 Wn.2d at 477. But Collicott did not so hold.” Brief of Appellant at page 37. The defendant is mistaken. Both *Sweet* and *Collicott* hold that the burglary anti-merger statute is applicable when a burglary and another crime is committed. In *Collicott*, the court specifically states:

But in this case, we must additionally consider the burglary antimerger statute, RCW 9A.52.050. . . In this case Mr. Collicott was charged with burglary in the first degree (count 1), rape in the first degree (count 2) and kidnapping in the first degree (count 3). This is proper under RCW 9A.52.050. Under that statute it is proper also for Mr. Collicott to be punished for each of the three offenses for which he has been charged. There is no conflict between the burglary antimerger statute and the SRA.

*Collicott*, 118 Wn.2d 649 at 657-658.

The defendant’s claim that the burglary anti-merger statute somehow does not apply is wholly without merit. It is directly applicable to the facts of this case.

- c. Even if the burglary anti-merger statute did not apply, the defendant's crimes do not merge.<sup>10</sup>

RCW 9.94A.400(1)(a) provides in part:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct than those current offenses shall be counted as one crime.

Two or more current offenses meet the same criminal conduct test if the crimes (1) require the same criminal intent; (2) are committed at the same time and place; (3) involve the same victim. RCW 9.94A.400(1)(a); *State v. Garza-Villareal*, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993); *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990).

In this case, the defendant alleges that the burglary and murder convictions merge, and that the burglary and kidnapping convictions merge. Brief of Appellant at 24, 36. First, with respect to the burglary and murder convictions, it is clear that they do not satisfy the same

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<sup>10</sup> The defendant asserts that nothing in the burglary anti-merger statute states that it would be proper to convict the defendant of both burglary and another crime if there was insufficient evidence to support both convictions. The defendant is not asserting insufficient evidence for any of the crimes for which she was convicted. An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Because the defendant raises insufficiency of the evidence merely in passing and provides no argument, the State does not address it further, but asserts that there was sufficient evidence for all of the defendant's convictions.

criminal conduct test. The victim of the murder, Scott Claycamp, is only one of three victims of the burglary—Claycamp, Schaefer, and Robertson. CP 386-390. Schaefer is the victim of the kidnapping and assault. *Id.* The victims for the murder, kidnapping, and burglary are not the same. Therefore, the defendant cannot establish that the crimes are the same criminal conduct, even if this court were to find that the burglary anti-merger statute did not apply.

3. THE DEFENDANT IS NOT ENTITLED TO RELIEF UNDER A PROSECUTORIAL VINDICTIVENESS CLAIM WHEN SHE IS ATTEMPTING TO RAISE ISSUES THAT COULD HAVE EASILY BEEN RAISED IN A PRIOR APPEAL AND THE STATE PROPERLY ALLEGED AGGRAVATING FACTORS AS REQUIRED BY LAW.

A prosecutor has great discretion in determining how and when to file criminal charges. *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006) (citing *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990)). RCW 9.94A.441(2) provides that “[c]rimes against persons will be filed if sufficient admissible evidence exists.” In looking to claims of prosecutorial vindictiveness, there are separate standards to be applied that are dependent on whether the amendment occurred in a pretrial setting, after withdrawal of a guilty plea, or following a successful appeal after a trial conviction.

When the amendment occurs in a pretrial setting, there is no presumption of vindictiveness. *State v. Bonisisio*, 92 Wn. App. 783, 791, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024, 980 P.2d 1285 (1999). When the amendment occurs after withdrawal of a guilty plea, there is still no presumption of prosecutorial vindictiveness. *State v. Korum*, 157 Wn.2d 614 at 630-632. In a post-trial setting, the filing of more serious charges after a successful appeal gives rise to a presumption of prosecutorial vindictiveness. *State v. Bonisisio*, 92 Wn. App. 783 at 791.

- a. Defendant should be precluded from alleging prosecutorial vindictiveness for the State alleging additional predicate crimes following the defendant's first successful appeal.

Questions which might have been considered on a first appeal had they been presented will not be considered in a subsequent appeal on the same case absent a substantial change in evidence. *Clark v. Fowler*, 61 Wn.2d 211, 377 P.2d 998 (1963). In this case, the defendant asserts that the State acted vindictively when the State added allegations that she committed murder in the first degree while committing or attempting to commit robbery in the first degree and/or burglary in the first degree. Brief of Appellant at page 51. Prior to the defendant's first appeal, the State had alleged that she had committed murder in the first degree while committing or attempting to commit robbery in the first degree.

The assertion by the defendant that the State acted vindictively in proceeding on the allegations contained in the fifth amended information is a matter that should have properly been raised in her second appeal. While the defendant now asserts that her appellate counsel was ineffective during her second appeal for failing to raise a prosecutorial vindictiveness claim, she provides no further analysis.

In *State v. Worl*, 129 Wn.2d 416, 918 P.2d 905 (1996), the court held that questions which might have been determined on a prior appeal, had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence. *Id.* at 425. The court will “reconsider only those decisions that were clearly erroneous and that would work a manifest injustice to one party if the clearly erroneous decision were not set aside.” *Id.* In the present case, the defendant clearly could have raised a vindictiveness claim when the State filed the fifth amended information, or raised it in her second appeal. The defendant did neither. Aside from merely stating that her attorneys were ineffective, she has offered this court no authority to support her claim that the law of the case doctrine<sup>11</sup> should not apply in this situation. The issue the defendant seeks to raise has to do with her first trial, not the current one. The defendant is not entitled to relief. As discussed below, even if this court

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<sup>11</sup> The State has provided the law regarding the law of the case doctrine in section 2(a), and incorporates that law into this section by reference.

were to consider the defendant's claim in this appeal, she is still not entitled to relief.

b. The defendant cannot establish a presumption of vindictiveness.

A presumption of vindictiveness arises when a defendant proves that “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.” *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006) (citing *United States v. Meyer*, 258 U.S. App. D.C. 263, 810 F.2d 1242, 1245 (1987)). There is a rebuttable presumption of vindictiveness when the *same* trial judge presides over two or more trials and the last sentence is more severe than the previous one. *State v. Ameline*, 118 Wn. App. 128, 133, 75 P.3d 589 (2003) (citing *North Carolina v. Pearce*, 395 U.S. 711, 724-726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)). The presumption of vindictiveness does not, however, apply in all circumstances in which a defendant received a more severe sentence. When there were different judges involved in sentencing, a presumption of vindictiveness does not apply. *State v. Parmelee*, 121 Wn. App. 707, 710-711, 90 P.3d 1092 (2004). While there is a presumption of prosecutorial vindictiveness when the prosecutor files additional charges in response to the defendant filing an appeal, as discussed below, that is not what factually occurred in the case at bar. See *State v. Bonisio*, 92 Wn. App. 783, 791, 964 P.2d 1222 (1998).

In *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), a case relied on by the defendant, the Court ruled that a prosecutor could not “up the ante” by filing more serious charges against a defendant who chose to pursue an appeal. *Id.* at 27. The court found that due process is not implicated in all possibilities of increased punishment following an appeal, but that it is offended if there is a realistic likelihood of vindictiveness. *Id.* In *Blackledge*, the court held that the charging of a more serious crime after a successful appeal raised a realistic likelihood of vindictiveness and justified a presumption of illegal motives. *Id.* at 27.

In the present case, the State did not “up the ante” by adding more serious charges after the defendant’s second successful appeal. The charges the defendant faced after her second appeal were the same or less serious charges that she faced in the current case. At her first trial, the defendant faced the following charges:

- (1) murder in the first degree
- (2) burglary in the first degree
- (3) kidnapping in the first degree
- (4) assault in the second degree
- (5) criminal conspiracy to commit robbery in the first degree.

CP 684-707.

In the most recent trial, the defendant faced the following charges:

- (1) murder in the first degree
- (2) burglary in the first degree
- (3) kidnapping in the first degree

- (4) assault in the second degree
- (5) conspiracy to commit robbery in the second degree.

CP 386-390.

The only changes from the fifth amended information (on which the defendant went to trial on the first time) to the seventh amended information (on which the defendant went to trial on the second time) is that the State alleged additional predicate crimes for murder and kidnapping, which is discussed below.<sup>12</sup>

The defendant alleges that the State “gave no reason for adding the new predicate crimes to the felony murder and kidnapping after the first successful appeal.” Brief of Appellant at page 60. The defendant also asserts that there was nothing in the record to justify the addition of a new firearm enhancement after a successful appeal. In this case the defendant cannot establish that all of the circumstances of the case, when taken together, support a realistic likelihood of vindictiveness.

First, the State properly pursued a firearm sentencing enhancement to the conspiracy charge. The firearm enhancement was added following the defendant’s successful withdrawal of a guilty plea, in the fifth

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<sup>12</sup> The defendant challenges only the addition of new predicate crimes to the murder and kidnapping charges, as well as the firearm enhancement on the conspiracy charge. Brief of Appellant at page 60. The defendant does not challenge the amendment from conspiracy to commit robbery in the first degree to conspiracy to commit robbery in the second degree, to which the defendant cannot assert a prosecutorial vindictiveness claim because the penalties the defendant faced for the amended charge of conspiracy to commit robbery in the second degree was lower than the penalty for conspiracy to commit robbery in the first degree.

amended information. CP 684-707. Under such circumstances, as discussed below, the State could properly add additional allegations.

- c. Even if this court finds that the defendant can properly raise a prosecutorial vindictiveness claim that should have been raised in her second appeal, the defendant cannot show that the State acted vindictively in adding a firearm sentencing enhancement to the 5<sup>th</sup> amended information, which was filed after the defendant withdrew her guilty plea.

In the pretrial setting, courts typically apply the actual vindictiveness standard, rather than a presumption of vindictiveness. *State v. McDowell*, 102 Wn.2d 341, 685 P.2d 595 (1984). A defendant in a pretrial setting bears the burden of proving that either actual vindictiveness occurred or that there was a realistic likelihood of vindictiveness would give rise to a presumption of vindictiveness. *State v. Bonisio*, 92 Wn. App. 783, 791, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024, 980 P.2d 1285 (1999) (citing *U.S. v. Wal*, 37 F.3d 1443, 1447 (10<sup>th</sup> Cir. 1994)).

“Plea bargaining is a legitimate process, so long as it is carried out openly and above the table.” *State v. Lee*, 69 Wn. App. 31, 847 P.2d 25, *review denied*, 122 Wn.2d 1003, 859 P.2d 602 (1993). This process includes the adding of charges where a defendant refuses to enter a plea as originally charged:

In declining to apply a presumption of vindictiveness, the Court [in Bordenkircher] recognized that “additional” charges obtained by a prosecutor could not necessarily be characterized as an impermissible “penalty.” Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation -- in often what is clearly a “benefit” to the defendant -- changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial “vindictiveness.” An initial indictment --from which the prosecutor embarks on a course of plea negotiation -- does not necessarily define the extent of the legitimate interest in prosecution. For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.

*United States v. Goodwin*, 457 U.S. 368, 379-90, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1977)). Furthermore, “[i]f a prosecutor could not threaten to bring additional charges during plea negotiations, and then obtain those charges when plea negotiations failed, an equally compelling argument could be made that a prosecutor’s initial charging decision could never be influenced by what he hoped to gain in the course of plea negotiation.” *Bordenkircher*, 434 U.S. at 364-365.

In *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006), the court held that there was no distinction between a defendant’s failure to plead guilty and a defendant’s decision to withdraw a guilty plea. *Id.* at 630.

The court stated:

Although *Bordenkircher* and *Goodwin* both involved situations where plea negotiations failed, this case is not distinguishable on the basis that Korum withdrew his guilty plea. There is no analytically relevant distinction between a defendant's failure to plead guilty and a defendant's decision to withdraw a guilty plea. The plea bargaining process encourages a defendant to forgo his trial rights in the attempt to resolve a case. A plea bargain must be knowing, intelligent, and voluntary precisely because the defendant surrenders his constitutional trial rights. *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). A defendant's failure to plead guilty and a defendant's decision to withdraw a plea both amount to a failure of the plea bargaining process and return the defendant and the prosecutor to square one, at which point the defendant may exercise his right to proceed to trial. Thus, the concern over prosecutorial vindictiveness in relation to rejecting a plea and withdrawing a plea is the same—because it interferes with a defendant's exercise of his constitutional trial rights.

*Moreover, there is support for the proposition that bringing additional charges after the withdrawal of a guilty plea does not give rise to a presumption of vindictiveness.*

*Id.* at 630 (emphasis added).

In this case, the defendant asserts that the prosecution acted vindictively when it added a firearm enhancement to the conspiracy charge in the fifth amended information. Brief of Appellant at page 60. First, the State could properly add the firearm sentencing enhancement after the defendant successfully withdrew her guilty plea. As stated above, bringing additional charges following a withdrawal of a guilty plea does not give rise to a presumption of vindictiveness, rather the defendant

must show actual vindictiveness.<sup>13</sup> In *Korum, supra*, the court specifically found that the filing of additional charges following the withdrawal of a guilty plea was permissible, and did not give rise to a presumption of prosecutorial vindictiveness. The defendant is required, therefore, to produce additional facts to support his or her claim. In this case, the defendant has no additional facts.

The defendant cannot establish that the State acted vindictively in adding a firearm sentencing enhancement to the conspiracy charge following the defendant's withdrawal of her guilty plea. As argued above, under *Korum* the State can add charges after a successful withdrawal of a guilty plea. While the defendant now asserts that the State somehow abandoned that enhancement during the first trial, and then revived it in the second trial, there are no facts to support such assertion. It appears that the State legitimately charged the enhancement following the withdrawal of plea, failed to instruct the jury on it following the first trial, and the correctly instructed the jury on it following the second trial. This is not a situation in which the State "upped the ante" following the defendant's second appeal—the State proceeded on a firearm sentencing

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<sup>13</sup> The defendant appears to argue that the State had charged, then abandoned, the firearm enhancement on the conspiracy charge during the defendant's first trial. Brief of Appellant at page 52. It appears that the State inadvertently failed to seek jury instructions on that enhancement during the first trial, as the information included the enhancement and it was never dismissed.

enhancement that was alleged in the defendant's first trial. The State did not add the enhancement after the first trial, and did not punish the defendant for successfully appealing her first trial conviction. There is no presumption of vindictiveness that applies here, where the enhancement was added after withdrawal of a guilty plea, not after an appeal. The defendant's claim fails.

- d. The defendant's claim that the State vindictively alleged additional predicate crimes is without merit when no additional predicate crimes were alleged following the defendant's second appeal.

The defendant asserts that the prosecutor acted vindictively in adding additional predicate crimes for the murder and kidnapping counts. Brief of Appellant at page 60. The additions and subtractions of the predicate crimes occurred as follows:

<b>Second Amended Information<sup>14</sup> CP 12-17</b>	<b>Fifth Amended Information CP 684-707</b>	<b>Seventh Amended Information CP 386-390</b>
<i>Murder 1 predicates:</i> Robbery 1	<i>Murder 1 predicates:</i> Robbery 1 Robbery 2 Burglary 1	<i>Murder 1 predicates:</i> Robbery 2 Burglary 1
<i>Kidnapping 1 predicates:</i> Robbery 1	<i>Kidnapping 1 predicates:</i> Robbery 1 Robbery 2 Burglary 1	<i>Kidnapping 1 predicates:</i> Robbery 2 Burglary 1

The predicate crimes that the State alleged in the seventh amended information are the same as those on which the defendant went to trial on previously. The only difference is that the State proceeded *without* the robbery in the first degree predicate. A dismissal of one of the alleged predicate crimes can hardly be seen as “upping the ante” as the defendant suggests. Moreover, as argued above, if the defendant attempts to challenge the addition of the robbery in the second degree and burglary in the first degree predicates, she could have easily done so in her second appeal, after she went to trial on charges where those predicates were included. The defendant cannot show that she was somehow subjected to additional penalties due to the deletion of some of the alleged predicate

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<sup>14</sup> Even the defendant concedes that the State would not be bound to the charges contained in the third amended information, the information to which the defendant entered a plea. Brief of Appellant at page 59. The third amended information does not even contain the charge of kidnapping. CP 27. Therefore, the State provides a summary of the second amended information for purposes of its argument.

crimes. To the extent she had a challenge to the addition of predicate crimes in the fifth amended information, she should have raised such challenge when the fifth amended information was actually at issue before this court.

- e. The defendant cannot establish prosecutorial vindictiveness when the State alleged aggravating factors in accordance with *Blakely*.

To the extent that the defendant is challenging the addition of any aggravating factors that were added by the State in the seventh amended information, those aggravating factors were properly alleged following a substantial change in the law. On June 24, 2004, the United States Supreme Court issued *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which stated that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 542 U.S. at 301 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Therefore in alleging the aggravating factors in the seventh amended information, the State was merely complying with current law, not acting vindictively.

The defendant asserts that because the aggravating factors proven to the jury in her second trial were not the same as the aggravating factors

found by the court in the first trial, that somehow the State acted vindictively. The defendant states “Here, the prosecution had already tried Elmore—and had her sentenced—based upon the kidnapping, assault, and conspiracy base crimes, with no aggravating factors.” Brief of Appellant at page 65.

The defendant cannot show prosecutorial vindictiveness in any way, and therefore is not entitled to relief. It appears the defendant is arguing that the State acted vindictively in the sentence it requested. The State is unaware of any authority, and the defendant cites to none, that supports a prosecutorial vindictiveness claim regarding a sentence. All of the cases cited by the defendant are relevant to the addition of charges, not to the sentence requested. In fact, the defendant received the same sentence, in terms of months of incarceration, after each trial. CP<sup>15</sup> 120-122, 611-623, 795-807. The only substantive difference in the defendant’s sentence is that a greater portion of the sentence was converted to flat time for the additional firearm sentencing enhancement on the conspiracy charge, which the State pursued and proved in the second trial. Clearly, the State believed that the defendant received an appropriate sentence of 797 months after her first trial, and asked for the same amount of time

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<sup>15</sup> It appears that the warrant of commitment and judgment and sentence from April 14, 2006, has been designated twice, and therefore has been assigned two sets of clerk’s numbers—CP 611-623 and CP 795-807. For the court’s convenience, the State is referencing both sets of numbers.

after the second trial. The State has been consistent in the sentence it was seeking<sup>16</sup>. Therefore, the defendant cannot establish that the State acted vindictively.

Finally, the defendant asserts that both her trial counsel and appellate counsel were ineffective for failing to raise this issue in the defendant's subsequent or in a prior appeal. Merely asserting ineffective assistance of counsel does not then allow the defendant to raise an issue that should have been raised at an earlier point. To allow the defendant to raise such a claim now, as argued above, would be improper, but would also give the defendant an unfair benefit of waiting to see what would happen at her retrial and then complaining about issues that were not raised in her prior successful appeal. To allow the defendant to raise a vindictiveness claim for an information that was filed in 2001 would allow her to then wait and see what crimes she was convicted of on her retrial before raising the issue. Assuming, arguendo, that the court does elect to address this issue, the defendant cannot establish any kind of vindictiveness. The State was entitled to add charges or enhancements after the defendant withdrew her appeal, and the State did not add any charges after the defendant's first trial. Therefore, even if the defendant is

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<sup>16</sup> A discussion about the continuity of the sentences the defendant received after each trial is contained in section (6) below and is incorporated by reference.

permitted to raise this issue, she cannot establish that counsel was ineffective.

As argued above, the State did not “up the ante” after each of her appeals, as the defendant alleges. While the amended informations grew more specific in nature, the State did not seek to add multiple new crimes after each appeal. The defendant cannot prove any kind of prosecutorial vindictiveness in this case. The defendant is not entitled to relief.

4. THE DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE MANDATORY JOINDER RULE WHEN THE STATE ADDED AN ALTERNATIVE MEANS OF COMMITTING BURGLARY AND ANY VIOLATION THAT OCCURRED WAS HARMLESS UNDER THE FACTS OF THIS CASE.

A prosecutor has broad discretion in determining the content of the initial information. CrR 2.1(a); *State v. Haner*, 95 Wn.2d 858, 631 P.2d 381 (1981). Amendments are liberally allowed unless the court finds that the substantial rights of the defendant are prejudiced or when the amendment is part of a plea agreement which the court finds is not in the interests of justice. CrR 2.1(d); *Haner*, 95 Wn.2d at 864-865. The right to add a charge is not unlimited, however, and a criminal defendant always has the opportunity to seek severance of multiple offenses. *See* CrR 4.3(a); CrR 4.4.

Generally, the criminal rules require the prosecution to file any and all “related offenses” in a single charging document. CrR 4.3(a), CrR 4.3.1. Under the mandatory joinder rule, two or more offenses must be joined if they are related. CrR 4.3.1(b)(3). Offenses are related if they are within the jurisdiction and venue of the same court and are based on the same conduct. CrR 4.3.1(b)(1). “Same conduct” is conduct involving a single criminal incident or episode. *State v. Lee*, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997). The possible consequences for failing to join related offenses are set forth in CrR 4.3.1(b), which provides in the relevant part:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense. . . The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

CrR 4.3.1(b)(3).

The “mandatory joinder” rule has been applied to prevent the prosecution from adding an alternative means of committing a crime after the defendant has been to trial on one means. *State v. Anderson*, 96 Wn.2d 739, 638 P.2d 1205, (“*Anderson II*”) *cert. denied*, 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982). Anderson was originally charged

and found guilty of first degree murder by the alternative means of extreme indifference to human life. *State v. Anderson*, 94 Wn.2d 176, 616 P.2d 612 (1980) (“*Anderson I*”). On appeal the Supreme Court found that the “extreme indifference” alternative could not apply on the facts of the case, and dismissed without prejudice to refile. *Anderson I*, 94 Wn.2d at 192. On remand the prosecution did not file a lesser included charge, but opted to again charge first degree murder but under a different alternative means—premeditated murder. *Anderson II*, 96 Wn.2d at 743. The Supreme Court dismissed the second, or re-filed, first degree murder charge because it violated the mandatory joinder rule. *Anderson II*, 96 Wn.2d at 740-41. See also *State v. Russell*, 101 Wn.2d 349, 678 P.2d 332 (1984). (Russell was charged with first degree (premeditated) murder; the jury acquitted on that charge but hung on the lesser degree crime of second degree (intentional) murder. After the mistrial, the State tried to file an alternative crime of second degree (felony) murder. The court held that the mandatory joinder rule prohibited the prosecution from adding that crime prior to the second trial.) After *Russell* and *Anderson*, the general rule is that once a case has gone to trial, the prosecution is precluded from adding any charges for a second trial, and the second trial can proceed only on the original charges and/or any lesser included offenses of those original charges.

The defendant asserts that the State improperly added a new alternative means of committing burglary. Brief of Appellant at page 60. The State concedes that the addition of an alternative means of committing the burglary was a violation of the mandatory joinder rule. The error that was committed here, however, was harmless because the jury made special findings that the defendant committed the burglary both while armed with a deadly weapon *and* by assaulting a person therein. CP 593.

Appellate courts have consistently held that a trial court's decision on any theory supported by the record and the law can be affirmed. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997). Moreover, courts have found that where a trial court makes a dual finding and one basis is later invalidated, the remaining valid basis can be affirmed. In *State v. Cardenas*, 129 Wn.2d 1, 914 P.2d 57 (1996), the trial court enumerated multiple reasons for imposing an exceptional sentence. *Id.* at 12. The Supreme Court invalidated two of the three reasons the court gave for the sentence. *Id.* The court held, however, that the exceptional sentence was still lawful because the trial court would have imposed the same sentence based on only the one remaining factor. *Id.* Similarly, in *State v. Gaines*, 122 Wn.2d 502, 859 P.2d 36 (1993), the court stated that an exceptional sentence may be upheld on appeal even where all but one of the trial court's reasons for the sentence have been overturned. *Id.* at 512.

The reasoning of *Michielli*, *Cardenas*, and *Gaines* can easily be applied to the facts of the case at bar. In the present case, the jury was asked to answer two questions by way of a special verdict:

(1) Did the defendant or an accomplice commit the crime of burglary in the first degree by means of unlawfully entering or remaining in the dwelling, with the intent to commit a crime against a person or property therein, and while armed with a deadly weapon?

(2) Did the defendant or an accomplice commit the crime of burglary in the first degree by means of unlawfully entering or remaining in the dwelling, with intent to commit a crime against a person or property therein, and assaulted a person therein?

CP 593.

In this case, the jury answered “yes” to both questions. *Id.* As stated above, the State agrees that the alternative means of committing burglary by assaulting a person in the residence was improperly added, but the jury—in both trials—found that the defendant or an accomplice was armed with a deadly weapon at the time of the burglary. CP 111, 112, 593. The defendant has not contested the sufficiency of the evidence on either of the jury’s findings on the special verdict form. Even though one of the two aggravating factors was improperly added, a valid factor remains. Therefore, any error was harmless and this court should affirm the defendant’s burglary conviction.

5. THE DEFENDANT CANNOT ESTABLISH A DOUBLE JEOPARDY CLAIM BECAUSE SUCH ASSERTION IS INAPPLICABLE TO SENTENCING PROCEEDINGS, AND THE DEFENDANT CANNOT ESTABLISH ANY IMPROPRIETY BY THE STATE SEEKING ADDITIONAL ENHANCEMENTS WHEN THE STATE REQUESTED THE SAME SENTENCES FOLLOWING EACH TRIAL.

The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following conviction or acquittal, and (2) multiple punishments for the same offense. *State v. Hescoek*, 98 Wn. App. 600, 603-04, 989 P.2d 1251 (1999). Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). “Among other things, double jeopardy principles bar multiple punishments for the same offense.” *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007), *cert. denied*, 128 S. Ct. 1098, 169 L. Ed. 2d 832 (2008). When a defendant’s acts support charges under two statutes, “the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question.” *Borrero*, 161 Wn.2d at 536; *State v. Gaworski*, 138 Wn. App. 141, 156 P.3d 288, 291 (2007) (citing *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981))).

If the legislature did intend to impose cumulative punishments for the crime, double jeopardy is not offended. *Borrero*, 161 at 536 (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)). Washington courts primarily rely on the test announced in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), to determine legislative intent in these cases. *Borrero*, 161 Wn.2d at 536-537. Under the *Blockburger* test, “two offenses are not the same if each contains an element not contained in the other.” *State v. Corrado*, 81 Wn. App. 640, 649, 915 P.2d 1121 (1996) (citing *Blockburger*, 284 U.S. at 304). If the crimes meet this test, the court presumes that the legislature intended separate punishment. *Gaworski*, 138 Wn. App. at paragraph 8 (citing *Freeman*, 153 Wn.2d at 772). The *Blockburger* presumption may be rebutted by evidence of contrary legislative intent. *Id.*

In this case, the defendant asserts that after the defendant’s second successful appeal, the State sought to convict her of “enhanced” versions of conspiracy, kidnapping, and assault, by requesting additional aggravators for those crimes, thereby violating her double jeopardy rights. Brief of Appellant at page 66. The defendant, in essence, is asserting that she received a higher sentence for the crimes of conspiracy, kidnapping, and assault after her second trial than after her first trial, causing a double jeopardy violation.

Double jeopardy protections, however, are inapplicable to sentencing proceedings. *State v. Eggleston*, 164 Wn.2d 61, 71-72, 187

P.3d 233 (2008), *cert. denied*, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), citing *Monge v. California*, 524 U.S. 721, 728, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998). Washington courts have specifically declined to extend double jeopardy protection against retrial to noncapital sentencing aggravating factors. *Id.*, see also *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (finding that the double jeopardy clause does not bar the imposition of a longer sentence following retrial). The defendant relies on *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), but it is a capital case and its analysis is limited to capital cases. *Id.* at 111.

The present case is somewhat different from both *Eggleston* and *Sattazahn* in that in both cases the State was attempting to retry each defendant on the same aggravators as from a previous trial. In the present case, however, the defendant was sentenced based on aggravating factors not tried and proven to a jury in a previous trial because the State was not required to do so at time. As the defendant concedes, the State could not have anticipated *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and could not have foreseen the need to allege aggravating factors the information. Therefore, by the time the defendant was tried for the second time, the State did specify the aggravating factors on which it was relying. The State is not bound in this case, under either a prosecutorial vindictiveness or double jeopardy claim, from seeking to

have the defendant sentenced on different aggravating factors after the defendant's second trial.

The defendant is asserting that the defendant's rights were violated when the State sought enhanced sentences on the conspiracy and kidnapping<sup>17</sup> charges, which it did not seek on the defendant's previous trial. Brief of Appellant at page 66. The defendant's argument, however, ignores the fact that the State requested, and the defendant received, the same sentence after each trial. Following her first trial, the State requested an exceptional sentence on the murder and burglary convictions. CP 754-792. The court ultimately sentenced the defendant to a total of 797 months of incarceration. CP 120-122. Following the second trial, the State pleaded and proved aggravating factors for burglary, kidnapping, and conspiracy, and again asked the court to impose the same sentence that the defendant received after her first trial—797 months. CP 611-623.

In *State v. Tili*, 148 Wn.2d 350, 60 P.3d 1192 (2003) (*Tili II*), the court held that a trial court could properly impose an exceptional sentence on a resentencing when the court declined to impose an exceptional sentence originally. *Id.* at 363. In *Tili II*, the defendant was convicted of three counts of rape in the first degree, burglary in the first degree and assault in the second degree. *Id.* at 356-357. At sentencing, the trial court

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<sup>17</sup> It is unclear why the defendant is challenging the "enhanced version" of the kidnapping charged when the jury found the defendant not guilty of the aggravating factors for that charge. CP 598.

indicated that it did not believe an exceptional sentence would be sustained on appeal because the rapes were considered separate and distinct conduct. *Id.* at 357. The trial court further held that if the multiple rapes were considered the same criminal conduct on appeal, the same sentence would be imposed as an exceptional sentence. *Id.* The defendant appealed, and the appellate court found that the rapes were the same criminal conduct, and remanded the case for resentencing. *Id.* At the resentencing, the trial court sentenced the defendant to the same length of incarceration, but as an exceptional sentence. *Id.* The Washington Supreme Court upheld the trial court's exceptional sentence, finding in part that the court's prior ruling that the rapes were the same criminal conduct would result in a standard range that the trial court perceived as clearly too lenient. *Id.* at 363.

Similarly, in the present case, the defendant was convicted after her first trial of murder in the first degree, burglary in the first degree, kidnapping in the first degree, assault in the first degree and criminal conspiracy to commit robbery in the first degree. CP 120-122. The court imposed an exceptional sentence of 797 months of incarceration, based in part on exceptional sentences on the murder and burglary convictions. *Id.* Following the second trial, a different sentencing court found itself in a different situation from the first sentencing court. Similar to the change in circumstances that presented itself to the trial court in *Tili II* after the appellate courts found that the rape convictions were the same criminal

conduct, the second sentencing court in the present case had different aggravating factors to consider.

Following the first trial, the court found aggravating factors for the murder and burglary charges. The aggravating factors found by the court after the first trial were that the murder and burglary: involved a high degree of planning and sophistication, the victim Dennis Robertson was particularly vulnerable, and that the burglary was committed while victims were present. CP 124-158. Following the second trial, however, the jury did not find any aggravating factors for the murder or kidnapping convictions. CP 590, 598. The jury did find aggravating factors for the burglary and conspiracy convictions. CP 594, 597. The jury found the same aggravating factors present on the burglary conviction as the previous sentencing court—that the victims were particularly vulnerable and incapable of resistance and that the burglary was committed while the victim was present at the time. CP 124-158, 594. On the conspiracy conviction, the jury found that the victim was particularly vulnerable. CP 601.

Overall, the only difference between the aggravating factors from the first trial to the second is that the aggravating factor for the murder case was eliminated, and the aggravating factor for conspiracy was added. Given this minimal change, the State requested an identical sentence both times, even though the sentencings occurred before different courts. It is clear that the defendant was not placed in greater peril as she now

suggests—she received the exact same sentence. Each sentencing court clearly found that the sentence of 797 months was appropriate—just as the court in *Tili II* thought that its sentence was appropriate. The defendant’s prosecutorial vindictiveness and double jeopardy claims both fail. Because the defendant’s claim is without merit, she also cannot establish that she received ineffective assistance of counsel.

6. THE LEGISLATURE’S 2005 AMENDMENTS TO THE SRA WHICH BRING IT INTO CONFORMITY WITH THE PROCEDURAL REQUIREMENTS OF **BLAKELY** APPLY TO THIS CASE; THE EXCEPTIONAL SENTENCE IMPOSED BELOW CONFORMED WITH THE REQUIREMENTS OF RCW 9.94A.537.

- a. The defendant’s assertions that the aggravating factors were both improperly submitted to the jury and improperly considered by the sentencing court are mutually inconsistent and wholly without merit.

The defendant asserts that the aggravating factors were improperly submitted to the jury because *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007) does not apply to her case.<sup>18</sup> Under this argument, the defendant states, “Based on the plain language of the 2005 amendments, there was not authority to submit the aggravating factors to the jury and the subsequent exceptional sentences must be reversed.” Brief of

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<sup>18</sup> A discussion of *Pillatos* and its application to the present case is discussed below.

Appellant at page 44 (footnotes omitted). Under this argument, the defendant appears to be arguing that it should have been the judge, not the jury, who determined the presence of the aggravating factors.

In a separate section of the defendant's brief, however, she asserts that the sentencing court applied the wrong standard in determining the presence of the aggravating factors, that a jury is required to determine the presence the aggravators beyond a reasonable doubt. Brief of Appellant at page 73. These two arguments by the defendant appear to be mutually exclusive—she cannot seek relief from this court for having the aggravators submitted to the jury when it should have been the judge, and then also argue that the judge had no authority to determine the presence of those aggravators.

In this case, the defendant received the benefit of having both the jury determine the presence of aggravating factors beyond a reasonable doubt *and* the court also find the presence of the same aggravators by a preponderance of the evidence. The defendant cannot possibly claim that the aggravators were improperly found—they were found by two separate mechanisms. As discussed below, the State believes that the jury was required to find the presence of the aggravators beyond a reasonable doubt, and the fact that the court also found the aggravating factors by a preponderance of the evidence is surplusage.

- b. The aggravating factors were properly submitted to the jury.

The court's primary duty in interpreting any statute is to discern and implement the intent of the legislature. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). The court starts with "the statute's plain language and ordinary meaning." *Id.* When the plain language is unambiguous, in that the statutory language admits of only one meaning, the legislative intent is apparent and the statute needs no construction. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Courts may not add words or clauses to an unambiguous statute when the legislature has chosen not to include that language; nor may courts delete language from an unambiguous statute. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). The plain meaning of a statute may be discerned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002); *State v. Clausing*, 147 Wn.2d 620, 630, 56 P.3d 550 (2002) (Owens, J., dissenting).

“Conflicts in statutes are to be reconciled and effect given to each if this can be achieved with no distortion of the language used.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920, 121 S. Ct. 1356, 149 L. Ed. 2d 286 (2001); *State v. Becker*, 59 Wn. App. 848, 852, 801 P.2d 1015 (1990). If the statutes cannot be harmonized the court looks to the legislative treatment of the statutes. *Becker*, 59 Wn. App. at 852. When the court is called upon to interpret an ambiguous statute or conflicting provisions, it should arrive at the legislature’s intent by applying recognized principles of statutory construction. A “reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.” *Delgado*, 148 Wn.2d at 733 (Madsen, J., dissenting); *see also State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983). Generally, provisions of a more recent specific statute will prevail in a conflict with a more general predecessor statute. *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 36-37, 785 P.2d 447 (1990).

Laws of Washington 2005 (Senate Bill 5477), referred to as the “*Blakely* fix statute,” states, in part:

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentenced will be based.

In *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007), the Washington State Supreme Court held that the 2005 amendments to the Sentencing Reform Act, Laws of 2005 (“*Blakely* Fix”) were applicable to all cases where the trial had not yet begun or a guilty plea entered prior to its effective date. *Id.* at 470. The court stated “Laws of 2005, chapter 68, by its terms, applies to all pending criminal matters where trials have not begun or pleas not accepted.” *Id.*

In this case, the defendant had entered a plea of guilty on August 6, 1997. CP 18-26. On June 23, 2000, the defendant successfully appealed and the defendant elected to withdraw her plea. CP 42, 89-94. On October 16, 2001, the defendant was again convicted of crimes relating to the murder of Scott Claycamp. CP 108-117, 120-122. On December 15, 2005, the defendant again successfully appealed her convictions, and the court remanded the case for a new trial. CP 193-236. On March 31, 2006, the defendant was again convicted of multiple offenses. CP 589-601.

In the defendant’s trial, the State alleged and proved to a jury aggravating factors that were the basis for the defendant’s exceptional sentence. The defendant now asserts that the “*Blakely* Fix” does to apply to her case because the statutory language states that it applies “At any time prior to trial or entry of the guilty plea. . .” and that the original date of her guilty plea occurred in 1997. To hold that the “*Blakely* Fix” applied to the original, vacated plea, would lead to an absurd interpretation of the law. The defendant voluntarily elected to withdraw her 1997 plea.

She then elected to appeal her 2001 convictions. Both the 1997 and 2001 convictions were vacated by appellate courts. The *Pillatos* court held that the *Blakely* fix statute applied to all pending criminal matters where trials have not begun or pleas had not been accepted. The defendant's case was still pending trial in 2006, therefore the *Blakely* fix statute is applicable to the defendant's case.

The defendant asserts that hers is one of the few cases which, by its terms, is exempt from the *Blakely* fix statute. Brief of Appellant at page 41. Under the defendant's analysis, however, any appellant who was convicted before 2005 and successfully obtained a retrial of the charges would be exempt from the statute. Such reasoning does not satisfy the legislature's intent or the plain and ordinary meaning of the statute. Therefore the defendant's claim fails.

c. The proper standard was used for the imposition of the exceptional sentence.

As the court in *Blakely* held, aggravating factors must be proven to a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301-302, 124 S. Ct. 2531, 159 L. Ed. 2d 403(2004). In the present case, as the defendant acknowledges, the jury was correctly instructed on the aggravating factors presented, and found the aggravating factors beyond a reasonable doubt. The test to determine whether an error is harmless is "whether it appears beyond a reasonable doubt that the error complained

of did not contribute to the verdict obtained.” *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Stated another way, “[a]n error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred .... A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

In the present case, the jury was instructed that they had to answer the special verdicts affirmatively if they found that the answer was “yes” beyond a reasonable doubt. The fact that the trial court later found the same aggravating factors to have been committed is merely surplusage and is harmless. The defendant asserts that the error somehow shows defense counsel’s lack of attention to details. Brief of Appellant at page 73. That is not the correct standard to determine if an error is harmless. In this case, because the jury was correctly instructed on the law, the defendant cannot possibly assert that the outcome would have been different but for this additional language contained in the findings of fact. The defendant’s claim is without merit.

7. THE DEFENDANT RECEIVED  
CONSTITUTIONALLY EFFECTIVE  
ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Article 1, Sec. 22 of

the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgement or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986).

The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not

functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

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

*Id.* See also **State v. Walton**, 76 Wn. App. 364, 884 P.2d 1348 (1994), review denied, 126 Wn.2d 1024, 896 P.2d 63 (1995); **State v. Denison**, 78 Wn. App. 566, 897 P.2d 437 (1995), review denied, 128 Wn.2d 1006, 907 P.2d 297 (1995); **State v. McFarland**, 127 Wn.2d 322, 899 P.2d 1251 (1995); **State v. Foster**, 81 Wn. App. 508, 915 P.2d 567 (1996).

The Washington Supreme Court, in **State v. Lord**, 117 Wn.2d 829, 822 P.2d 177 (1991), gave further clarification to the intended application of the **Strickland** test. The **Lord** court held the following:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel’s challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel’s conduct.

**Strickland**, at 689-90.

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would

have been different.” *Strickland*, at 694. Because [the defendant] must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient.

*Strickland*, at 697. *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788 (1996). Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689.

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489. If defense counsel’s trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *Lord*,

117 Wn.2d at 883. Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *McFarland*, 127 Wn.2d at 336. Defendant may not supplement the record on direct appeal. *Id.* Finally, in determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993).

In this case defendant has failed to establish that the trial attorney's assistance was deficient and that any deficiency resulted in prejudice to defendant. The defendant also asserts that her previous appellate counsel was ineffective. With respect to ineffective assistance of *appellate* counsel, a defendant must first show that the legal issue that appellate counsel failed to raise had merit. *In re PRP of Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). Second, the defendant must show that he or she was actually prejudiced by appellate counsel's failure to raise the issue. *Id.* In this case, as argued above, issues that could have been raised by appellate counsel would have been without merit, and therefore the defendant's claim fails.

As argued above, no prejudice occurred to the defendant.

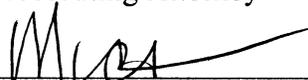
Therefore, she cannot establish that she received ineffective assistance of counsel.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that the defendant's convictions and sentence be affirmed.

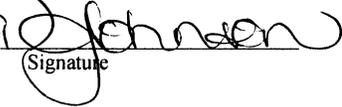
DATED: MAY 29, 2009

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/29/09   
Date Signature

COURT OF APPEALS  
DIVISION II  
MAY 29 PM 2:00  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

# **APPENDIX “A”**

*Informational Chart*

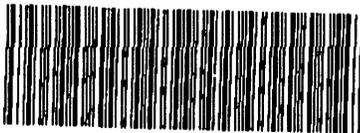
	Information	Charges
12/12/96	Original CP 1-4	I. Murder in the First Degree (with Firearm Enhancement) II. Robbery in the First Degree (with Firearm Enhancement) III. Robbery in the First Degree (with Firearm Enhancement)
12/19/96	First CP 5-11	I. Murder in the First Degree (with Firearm Enhancement) II. Robbery in the First Degree (with Firearm Enhancement) III. Robbery in the First Degree (with Firearm Enhancement)
3/7/97	Second CP 12-17	I. Murder in the First Degree (with Firearm Enhancement) II. Burglary in the First Degree (with Firearm Enhancement) III. Kidnapping in the First Degree (with Firearm Enhancement) IV. Assault in the Second Degree (with Firearm Enhancement) V. Criminal Conspiracy to Commit Robbery in the First Degree
8/6/97	Third CP 27	I. Murder in the First Degree
1/12/01	Fourth CP 95-99	I. Murder in the First Degree (with Firearm Enhancement) II. Burglary in the First Degree (with Firearm Enhancement) III. Kidnapping in the First Degree (with Firearm Enhancement) IV. Assault in the Second Degree (with Firearm Enhancement) V. Criminal Conspiracy to Commit Robbery in the First Degree
9/17/01	Fifth CP 684-707	I. Murder in the First Degree (with Firearm Enhancement) II. Burglary in the First Degree (with Firearm Enhancement) III. Kidnapping in the First Degree (with Firearm Enhancement) IV. Assault in the Second Degree (with Firearm Enhancement) V. Criminal Conspiracy to commit Robbery in the First Degree (with Firearm Enhancement)
1/23/06	Sixth CP 237-242	I. Murder in the First Degree (with Firearm Enhancement) a. High degree of planning and/or sophistication b. Reasonably foreseeable severe impact that the crime had upon Dennis Robertson and Ernest Schaefer c. Crime committed in the presence of three physically handicapped persons and their two caregivers during the commission of the crime II. Burglary in the First Degree (with Firearm Enhancement) a. Victim was particularly vulnerable or incapable of resistance b. High degree of planning and/or sophistication c. Reasonably foreseeable severe impact that the crime had on Dennis Robertson and Ernest Schaefer d. Crime committed in the presence of three physically handicapped persons and their two caregivers during the commission of the crime  *Burglary in the First Degree was charged alternatively under RCW 9A.52.020(1)(b)

		<ul style="list-style-type: none"> <li>III. Kidnapping in the First Degree (with Firearm Enhancement) <ul style="list-style-type: none"> <li>a. High degree of planning and/or sophistication</li> <li>b. Reasonably foreseeable severe impact that the crime had upon Ernest Schaeff</li> <li>c. Crime committed in the presence of three physically handicapped persons and their two caregivers</li> </ul> </li> <li>IV. Assault in the Second Degree (with Firearm Enhancement) <ul style="list-style-type: none"> <li>a. High degree of planning and/or sophistication</li> <li>b. Reasonably foreseeable severe impact that the crime had upon Ernest Schaeff</li> <li>c. Crime committed in the presence of three physically handicapped persons and their two caregivers</li> </ul> </li> <li>V. Conspiracy to Commit Robbery in the Second Degree (with Firearm Enhancement) <ul style="list-style-type: none"> <li>a. Victim particularly vulnerable or incapable of resistance</li> <li>b. High degree of planning and/or sophistication</li> <li>c. Reasonably foreseeable severe impact on Dennis Robertson</li> <li>d. Crime committed in the presence of three physically handicapped persons and their two caregivers</li> </ul> </li> </ul>
3/6/06	Seventh CP 386-390	<ul style="list-style-type: none"> <li>I. Murder in the First Degree (with Firearm Enhancement) <ul style="list-style-type: none"> <li>a. High degree of planning and/or sophistication</li> </ul> </li> <li>II. Burglary in the First Degree (with Firearm Enhancement) <ul style="list-style-type: none"> <li>a. Victim particularly vulnerable or incapable of resistance</li> <li>b. High degree of planning and/or sophistication</li> <li>c. Current offense is a burglary and the victim of the burglary was present at the time the crime was committed</li> </ul> <p>*Burglary in the First Degree was charged alternatively under RCW 9A.52.020(1)(b)</p> </li> <li>III. Kidnapping in the First Degree (with Firearm Enhancement) <ul style="list-style-type: none"> <li>a. High degree of planning and/or sophistication</li> </ul> </li> <li>IV. Assault in the Second Degree (with Firearm Enhancement)</li> <li>V. Conspiracy to Commit Robbery in the Second Degree (with Firearm Enhancement) <ul style="list-style-type: none"> <li>a. Victim particularly vulnerable or incapable of resistance</li> <li>b. High degree of planning and/or sophistication</li> </ul> </li> </ul>

**APPENDIX “B”**

*Court of Appeals Opinion*

COURT OF APPEALS OF THE STATE OF WASHINGTON



96-1-04747-5 4947886 MND 02-06-06

DIVISION II

No. 22647-2-II

FILED  
IN COUNTY CLERK'S OFFICE  
A.M. DEC 13 2000 P.M.  
PIERCE COUNTY, WASHINGTON  
TELEPHONE COUNTY CLERK  
K.C. [Signature]

MANDATE

Pierce County Cause No.  
96-1-04747-5

Respondent,

v.

ROBERTA JEAN ELMORE,

Appellant.

The State of Washington to: The Superior Court of the State of Washington  
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on June 23, 2000 became the decision terminating review of this court of the above entitled case on December 5, 2000. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 12<sup>th</sup> day of December, 2000.

[Signature]  
Clerk of the Court of Appeals,  
State of Washington, Div. II

Sheri Lynn Arnold  
Attorney At Law  
PO Box 7718  
Tacoma, WA. 98406

Grant L. Anderson  
Pierce Co Superior Court Judge  
930 Tacoma Ave So  
Tacoma, WA 98402

John Christopher Hillman  
Pierce Co Depty Pros Atty  
930 Tacoma Ave S Rm 946  
Tacoma, WA. 98402

Indeterminate Sentence Review Board

818 2/7/2006 88859

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 22647-2-II

Respondent,

v.

ROBERTA JEAN ELMORE,

UNPUBLISHED OPINION

Appellant.

Filed:

JUN 23 2000

BRIDGEWATER, C.J.--Roberta Jean Elmore appeals her conviction, on plea of guilty, of first degree felony murder. Under our decision in the case of a codefendant, *State v. Jerde*, 93 Wn. App. 774, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999), we hold that the State breached the plea agreement, we reverse the conviction, and we remand for resentencing before a different judge, with Elmore being permitted to withdraw her plea or elect specific performance of the agreement.

The facts of the offense are set forth in the codefendant's case. *Jerde*, 93 Wn. App. at 775-777. Elmore agreed to plead guilty to murder in the first degree in exchange for the State's dismissal of the remaining charges outlined in the second amended information. As part of the

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No. 22647-2-II

plea bargain, the State agreed to recommend a sentence of 320 months, the high end of the standard range of 240-320 months.

All five defendants were present at the sentencing hearing where the court heard victim impact statements from several witnesses. At the conclusion of the statements, the prosecutor addressed the court and outlined the legal and factual grounds upon which the court could rely in imposing "high-end" sentences.<sup>1</sup> This presentation included a discussion of four factors, applicable to all of the defendants, which the prosecutor asserted "have been used as factors for exceptional sentences in other cases." When another codefendant's attorney objected, the prosecutor insisted that the State was adhering to the plea agreements. She then proceeded to describe how the crime involved a high degree of sophistication and planning, particularly vulnerable victims, the presence of an eyewitness, and an invasion of the victim's zone of privacy.

At Elmore's individual sentencing, a second prosecutor stated that the State recommended the high end of the standard range, and then described how Elmore's participation in the crime supported that recommendation. The second prosecutor made no reference to aggravating factors. Elmore did not object to either prosecutor's comments.

After hearing statements from Elmore and her attorney, the court imposed an exceptional sentence of 400 months. The court cited three factors to justify the exceptional sentence: the crime involved a high degree of planning and sophistication; the crime was an invasion of the victims' zone of privacy; and the victims were particularly vulnerable.

---

<sup>1</sup> A complete recitation of the prosecutor's comments is set forth in *State v. Jerde*, 93 Wn. App. 774, 777 n.2, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999).

No. 22647-2-II

The State contends there are distinctions that make this case different from *Jerde*. The State argues three theories:

(1) Because Elmore did not object below, we should not address her appeal. *In re James*, 96 Wn.2d 847, 849, 640 P.2d 18 (1982), *review denied*, 100 Wn.2d 1023 (1983) (citations omitted) held that violation of a plea agreement “presents an issue of constitutional magnitude.” *See also State v. Miller*, 110 Wn.2d 528, 533, 756 P.2d 122 (1988). A defendant’s right to enforce a plea agreement is “constitutionally based,” involving “fundamental rights of the accused,” and “constitutional due process considerations.” *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Under RAP 2.5(a)(3), a matter can be raised at any time if it is a manifest error affecting a constitutional right. To be considered “manifest,” the facts necessary to review the claim on appeal must be in the record and the defendant must show actual prejudice. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). This case involves a constitutional right. The State’s authority of *State v. Giebler*, 22 Wn.App. 640, 591 P.2d 465, *review denied*, 92 Wn.2d 1013 (1979) is inapposite. Here, the record includes the prosecutor’s comments and therefore contains the facts necessary for review. If there was a breach of the plea agreement in this case, there was prejudice. Thus, this issue falls within the ambit of RAP 2.5(a)(3).

(2) The State was recommending a high end sentence, not a midrange as in *Jerde*. In *Jerde*, we emphasized that the prosecutor’s comments exceeded the level necessary to justify a mid-range recommendation. We distinguished *State v. Coppin*, 57 Wn. App. 866, 791 P.2d 228, *review denied*, 115 Wn.2d 1011 (1990), where the prosecutor enumerated possible factors justifying an exceptional sentence, but only after the judge specifically asked. *Jerde*, 93 Wn.

No. 22647-2-II

App. at 781-782. Although Elmore's agreement with the State was for a high-end sentence like Coppin's, the prosecutor's comments in this case are more egregious than those in *Coppin* because they were given without any prompting from the court. The prosecutor did not just explain why a high-end sentence was justified for Elmore; she set forth specific grounds for imposing an exceptional sentence. Therefore, as in *Jerde*, the prosecutor's comments cannot be explained as simply supporting the recommended sentence; the prosecutor "effectively undercut the plea agreement in a transparent attempt to sustain an exceptional sentence." *Jerde*, 93 Wn. App. at 782.

(3) Unlike the second prosecutor in *Jerde*, the prosecutor who spoke at Elmore's individual sentencing did not enumerate any aggravating factors. But, the prosecutor who spoke in the first part of the sentencing hearing applied her comments to all of the defendants and set forth four exceptional sentence factors, including two that were not included in the pre-sentence report. It seems clear that the judge understood the prosecutor's comments as advocating an exceptional sentence for all the defendants because he adopted all but one of those recommended factors in his order. Therefore, this is a distinction without difference.

Because of our disposition we need not address other issues raised by Elmore.

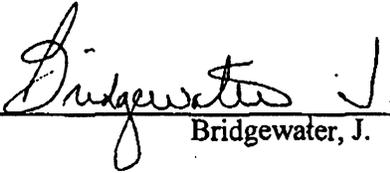
Reversed and remanded for Elmore to elect either to withdraw her plea of guilty or to enforce the plea bargaining agreement before a different judge.<sup>2</sup> *Jerde*, 93 Wn. App. at 783 (citing *Miller*, 110 Wn.2d at 535).

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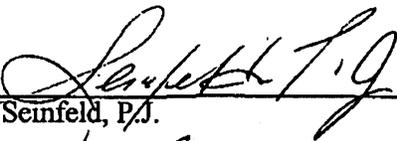
<sup>2</sup> The rule requires sentencing before a judge other than the judge who presided at the original sentencing hearing. Here, we recognize that the original sentencing judge no longer serves on the Pierce County Superior Court.

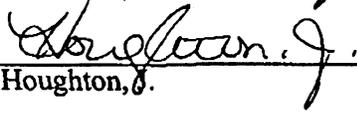
No. 22647-2-II

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

  
Bridgewater, J.

We concur:

  
Seinfeld, P.J.

  
Houghton, J.

**APPENDIX “C”**

*Court of Appeals Opinion*

Westlaw.

90 P.3d 1110  
 121 Wash.App. 747, 90 P.3d 1110  
 (Cite as: 121 Wash.App. 747, 90 P.3d 1110)

Page 1

**H**

Court of Appeals of Washington,  
 Division 2.  
 STATE of Washington, Respondent,  
 v.  
 Roberta J. ELMORE, Appellant.  
 No. 28146-5-II.

May 25, 2004.

**Background:** Defendant was convicted in the Superior Court, Pierce County, Rosanne Buckner, J., of first degree felony murder, second degree robbery, first degree burglary, first degree kidnapping, second degree assault, and second degree conspiracy. Defendant appealed.

**Holdings:** The Court of Appeals, Armstrong, J., held that:

(1) trial court's dismissal of juror during deliberations constituted reversible error, and  
 (2) trial court improperly intruded into jury deliberations by further questioning two jurors about another juror's conduct after determining that the jurors disagreed at least in part because of different views of the merits of the case.

Reversed and remanded.

West Headnotes

**[1] Criminal Law 110**  **1166.16**

110 Criminal Law  
 110XXIV Review  
 110XXIV(Q) Harmless and Reversible Error  
 110k1166.5 Conduct of Trial in General  
 110k1166.16 k. Impaneling Jury in  
 General. Most Cited Cases

**Jury 230**  **149**

230 Jury  
 230VI Impaneling for Trial, and Oath

230k149 k. Discharge of Juror or Jury Pending Trial. Most Cited Cases  
 Trial court's dismissal of juror based upon his refusal to participate in deliberations at times and refusal to follow the law constituted reversible error, as record disclosed a reasonable possibility that the dismissed juror, even if critical of the law, also questioned the sufficiency of the State's evidence.

**[2] Constitutional Law 92**  **4601**

92 Constitutional Law  
 92XXVII Due Process  
 92XXVII(H) Criminal Law  
 92XXVII(H)4 Proceedings and Trial  
 92k4598 Trial in General  
 92k4601 k. Course and Conduct of  
 Trial in General. Most Cited Cases  
 (Formerly 92k268(1))

**Constitutional Law 92**  **4756**

92 Constitutional Law  
 92XXVII Due Process  
 92XXVII(H) Criminal Law  
 92XXVII(H)7 Jury  
 92k4755 Selection and Qualifications;  
 Voir Dire  
 92k4756 k. In General. Most Cited  
 Cases

(Formerly 92k268(1))  
 When a trial judge's ruling implicates either selection or management of the jury or trial, the reviewing court must determine whether the judge's decision affects the defendant's due process right to a fair trial. U.S.C.A. Const.Amend. 6, 14; West's RCWA Const. Art. 1, §§ 3, 21, 22, as amended by Amend. 10.

**[3] Jury 230**  **33(2.10)**

230 Jury  
 230II Right to Trial by Jury  
 230k30 Denial or Infringement of Right  
 230k33 Constitution and Selection of Jury

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230k33(2) Competence for Trial of Cause

230k33(2.10) k. In General. Most Cited Cases

**Jury 230**  149

230 Jury

230VI Impaneling for Trial, and Oath

230k149 k. Discharge of Juror or Jury Pending Trial. Most Cited Cases

Included in the promise of a fair and impartial jury is the promise that a holdout juror will not be excused for failing to deliberate or follow the law where there is some evidence that the juror simply disagrees with other jurors about the merits of the State's case. U.S.C.A. Const.Amend. 6, 14; West's RCWA Const. Art. 1, §§ 3, 21, 22, as amended by Amend. 10.

**[4] Jury 230**  33(2.10)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(2) Competence for Trial of Cause

230k33(2.10) k. In General. Most Cited Cases

Whenever it appears that a jury may be reconstituted in order to reach a particular result, the guarantee of a fair and impartial jury is meaningless to a defendant and creates unwarranted mistrust and suspicion among members of the public. U.S.C.A. Const.Amend. 6, 14; West's RCWA Const. Art. 1, §§ 3, 21, 22, as amended by Amend. 10.

**[5] Criminal Law 110**  864

110 Criminal Law

110XX Trial

110XX(J) Issues Relating to Jury Trial

110k864 k. Communications Between Judge and Jury. Most Cited Cases

Trial court improperly intruded into jury delibera-

tions by further questioning two jurors about another juror's conduct after determining that the jurors disagreed at least in part because of different views of the merits of the case; court became in essence a thirteenth and presiding juror to rule on what the jurors said during deliberation.

**[6] Jury 230**  149

230 Jury

230VI Impaneling for Trial, and Oath

230k149 k. Discharge of Juror or Jury Pending Trial. Most Cited Cases

Where the record shows any reasonable possibility that the impetus for a juror's dismissal stems from his views on the merits of the case, the dismissal is error.

**[7] Criminal Law 110**  1139

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 k. In General. Most Cited Cases

In deciding whether defendant was denied her constitutional rights to a fair and impartial jury, the Court of Appeals does not apply an abuse of discretion standard, but rather, it reviews claims of manifest constitutional error de novo. U.S.C.A. Const.Amend. 6, 14; West's RCWA Const. Art. 1, §§ 3, 21, 22, as amended by Amend. 10.

**[8] Criminal Law 110**  1139

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 k. In General. Most Cited Cases

Whether a trial court violates a defendant's Sixth Amendment right to a jury trial by excusing a juror for good cause and replacing that juror with an alternate is a question of law which the Court of Ap-

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peals reviews de novo. U.S.C.A. Const.Amend. 6.

[9] **Jury 230** ↪ 143

230 Jury  
 230VI Impaneling for Trial, and Oath  
 230k143 k. Constitution of Jury for Trial of  
 Cause. Most Cited Cases

**Jury 230** ↪ 149

230 Jury  
 230VI Impaneling for Trial, and Oath  
 230k149 k. Discharge of Juror or Jury  
 Pending Trial. Most Cited Cases  
 Washington state rules allow alternate jurors, and  
 thus, if the judge excuses a juror, an alternate steps  
 in and the defendant is still guaranteed a unanimous  
 12 person verdict.

[10] **Jury 230** ↪ 149

230 Jury  
 230VI Impaneling for Trial, and Oath  
 230k149 k. Discharge of Juror or Jury  
 Pending Trial. Most Cited Cases  
 Dismissing a deliberating juror implicates broader  
 constitutional problems than a unanimous  
 12-person jury; these include the guarantee that  
 jury deliberations will remain secret and the guar-  
 antee that a juror will not be excused in a manner  
 that appears to facilitate the rendering of a guilty  
 verdict. U.S.C.A. Const.Amend. 6, 14; West's  
 RCWA Const. Art. 1, §§ 3, 21, 22, as amended by  
 Amend. 10.  
 \*\*1111 \*749 John Christopher Hillman, Pierce  
 County Prosecuting Attorney, Tacoma, WA, for  
 Respondent.

Eric Broman, Attorney at Law, Seattle, WA, for  
 Appellant.

PART PUBLISHED OPINION

ARMSTRONG, J.

Roberta J. Elmore appeals her convictions for first  
 degree felony murder, second degree robbery, first  
 degree burglary, first degree kidnapping, second  
 degree assault, and second degree conspiracy. She  
 argues that the trial court violated her due process  
 rights when it dismissed a juror who, although crit-  
 ical of the law, may have also refused to convict  
 because he believed the defendant, not the State's  
 witnesses. Because the record discloses a reason-  
 able possibility that the dismissed juror, even if  
 critical of the law also questioned the sufficiency of  
 the State's evidence, we reverse and remand for a  
 new trial.

FACTS

Roberta J. Elmore worked as an escort for a com-  
 pany called April's Escorts. On December 4, 1996,  
 she was hired to provide company and sexual ser-  
 vices for Dennis Robertson at Robertson's home.

Robertson is a quadriplegic with cerebral palsy. He  
 shared a home with two other cerebral palsy pa-  
 tients. All three men required 24-hour care. At that  
 time, one of the caregivers was Scott Clayclamp  
 from Northwest Services.

When Elmore arrived at Robertson's home on  
 December 4, 1996, she requested payment. She saw  
 the caretaker remove \$160 from a small safe in  
 Robertson's bedroom. Elmore took the money, but  
 she refused to provide services to Robertson. She  
 then telephoned the escort service and \*750 argued  
 with them over the phone. Without refunding  
 Robertson's money, she angrily left the house.

On December 10, 1996, two men and a woman  
 entered Robertson's home, took a wallet, some  
 checks, and a small amount of cash. One of the men  
 shot and killed Clayclamp during the robbery. The  
 State presented evidence that Elmore initiated and  
 planned the robbery.

The State charged Elmore with (1) first degree  
 felony murder, (2) first degree burglary, (3) first  
 degree kidnapping, (4) second \*\*1112 degree as-

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 121 Wash.App. 747, 90 P.3d 1110  
 (Cite as: 121 Wash.App. 747, 90 P.3d 1110)

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sault, and (5) conspiracy to commit first degree robbery.

The trial began September 17, 2001, and the jury began deliberating on October 10, 2001. On October 12, 2001, juror 5 (the presiding juror) and juror 12 independently sent notes to the court. Juror 5 stated,

Your Honor: As the presiding juror, I feel compelled to ask your assistance. We have a juror on the panel who has made statements which lead me to believe he was predisposed to *not* follow the instructions given by you or to follow the law contained in those instruction[s].

Prior to adjourning on Thursday, this juror said[,] "I don't care what the judge said. The law is shit and I won't convict anyone based on what the law says."

This juror has disregarded every witness statement regarding the defendant as credible.

Ex. 129.

Juror 12 wrote,

Jurrer [sic] # 8

I don't care what law says

Will not lissen [sic] to deliberation

s

Nuts

Criminal

Related

Or all of above

From # 12

Ex. 128.

\*751 Outside the presence of any other juror, the

trial court questioned jurors 5 and 12. Each verified his note and said his statements were true. Juror 12 told the trial court that juror 8 refused to participate in deliberations. When the jury would deliberate, juror 8 would walk around, get something to eat, and "kind of ignore the whole process." Report of Proceeding (RP) at 1167.

The State asked the trial court to excuse juror 8. The defense objected. After considerable discussion with the attorneys, the trial court decided to question juror 8.

Again outside the presence of other jurors, juror 8 denied telling the other jurors that he did not care what the law said, what the judge said, that "the law was shit," and that he would not convict anyone based on "what the law says." RP at 1182-83. He admitted telling the other jurors "it does not matter what this paper says," but he explained:

I said that it does not matter what this paper says, it matters if we believe-on what the witnesses have to say, if we believe the witnesses are credible. If we believe the witnesses are credible, then we vote one way. But if we do not believe what the witnesses say, then we are obligated to vote the other way. And what's in the thing doesn't mandate how we have to vote. It's what we believe the testimony-you know, is the testimony credible?

RP at 1183.

The trial court then ruled that juror 8's "own statements are sufficient to show that he has manifested unfitness by reason of bias or prejudice with respect to the instructions on the law as a whole in this matter." RP at 1186. The trial court excused juror 8 from the jury over the defense objection.

Later in a written ruling, the trial court found that juror 8 was disqualified because he refused to participate in deliberations at times and refused to follow the law. It also found that the written and verbal statements of jurors 5 and 12 were credible.

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It concluded that juror 8 was unfit “by \*752 reason of bias and prejudice and by reason of conduct incompatible with proper and efficient jury service.” Clerk's Papers (CP) at 322-23. Finally, the court found that juror 8 was not disqualified because of any valid disagreements with other jurors, including disagreements regarding the credibility of witnesses.

The trial court seated an alternate juror and ordered deliberations to begin anew. On October 16, 2001, the jury found Elmore guilty of (1) first degree felony murder; (2) second degree robbery; (3) first degree burglary; (4) first degree kidnapping; (5) intent to facilitate first degree robbery, second degree robbery, and first degree burglary; (6) second degree assault; and (7) conspiracy to commit second degree robbery.

#### \*\*1113 ANALYSIS

[1] Elmore argues that the court erred by even inquiring into the allegations of juror 8's misconduct because the notes from jurors 5 and 12 were ambiguous as to whether juror 8 was refusing to deliberate and follow the law or was simply disagreeing with the other jurors as to who was credible. Elmore relies on *United States v. Thomas*, 116 F.3d 606 (2nd Cir.1997), *United States v. Brown*, 823 F.2d 591 (D.C.Cir.1987), *United States v. Symington*, 195 F.3d 1080 (9th Cir.1999), and *Garcia v. People*, 997 P.2d 1 (Colo.2000).

In *Brown*, a juror asked to be discharged. *Brown*, 823 F.2d at 594. The judge granted the request after the juror explained that he could not “go along” with the law because of “the way it's written and the way the evidence has been presented.” *Brown*, 823 F.2d at 594. On appeal, the court first cautioned that, “a court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations.” *Brown*, 823 F.2d at 596. And the record was ambiguous as to whether the juror wanted to be excused because he could not follow the law or because he did not ac-

cept the government's evidence. Given \*753 the ambiguity and the trial court's limited authority to intrude into the jury's deliberations, the court held that if the record discloses “any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request.” *Brown*, 823 F.2d at 596. Accordingly, the court reversed the convictions. *Brown*, 823 F.2d at 600.

In *Thomas*, one juror complained during deliberations that the jury would not be likely to reach a verdict because another juror had a “ ‘predisposed disposition.’ ” *Thomas*, 116 F.3d at 611. The court interviewed each juror; at least five reported that the juror “was unyieldingly in favor of acquittal for all of the defendants.” *Thomas*, 116 F.3d at 611. Some jurors reported that the holdout juror wanted to acquit because the defendants “were his ‘people,’ ” the defendants were good people, drug dealing was commonplace, and the defendants dealt in drugs because of economic necessity. *Thomas*, 116 F.3d at 611. But several jurors said the holdout discussed the evidence and said he thought the prosecution's testimony was insufficient and unreliable. *Thomas*, 116 F.3d at 611. And the holdout juror said he was simply looking for “ ‘substantive evidence’ ” establishing guilt. *Thomas*, 116 F.3d at 611. The Court of Appeals followed *Brown*, holding that the trial judge had committed reversible error in dismissing the juror because the record raised the possibility that the juror was simply not persuaded by the government's case. *Thomas*, 116 F.3d at 623-24. Again the court emphasized the trial court's limited authority to investigate alleged juror misconduct during deliberations:

The mental processes of a deliberating juror with respect to the merits of the case at hand must remain largely beyond examination and second-guessing, shielded from scrutiny by the court as much as from the eyes and ears of the parties and the public. Were a district judge permitted to conduct intrusive inquiries into-and make extensive findings of fact concerning-the reasoning behind

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a juror's view of the case, or the particulars of a juror's (likely imperfect) understanding or \*754 interpretation of the law ... this would not only seriously breach the principle of the secrecy of jury deliberations, but it would invite trial judges to second-guess and influence the work of the jury.

*Thomas*, 116 F.3d at 620.

In *Symington*, the Ninth Circuit followed *Brown* with one modification. The trial court dismissed a juror who "appeared confused and unfocused." *Symington*, 195 F.3d at 1083. After questioning each juror, the court found that the holdout juror was " 'unwilling or unable to deliberate.' " *Symington*, 195 F.3d at 1083-84. On appeal, the defendant argued that the dismissal violated his Sixth Amendment right to an impartial jury (the defendants in *Brown* and *Thomas* claimed Sixth Amendment violations of their rights to unanimous juries). The Ninth Circuit reversed the defendant's convictions because there was "considerable evidence to suggest that the other jurors' frustrations with her decision primarily from the fact that she held a position opposite to theirs on the merits of the case." \*\*1114*Symington*, 195 F.3d at 1088. But the Ninth Circuit was unwilling to adopt *Brown's* "any possibility" test. Rather, the court held that "if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Symington*, 195 F.3d at 1087. Again the court emphasized the trial court's narrow authority to investigate alleged juror misconduct during deliberations: "In such cases a trial court lacks the investigative power that, in the typical case, puts it in the 'best position to evaluate the jury's ability to deliberate.' " *Symington*, 195 F.3d at 1086 (quoting *U.S. v. Beard*, 161 F.3d 1190, 1194 (9th Cir.1998)).

State courts have also been cautious about allowing a trial court to find juror misconduct during deliberations. In *Garcia*, the Colorado Supreme Court reversed the defendant's conviction, finding that the

trial court had impermissibly invaded jury deliberations in questioning the jury foreperson and the holdout juror about a report that the \*755 juror refused to follow his oath or the instructions of the court. *Garcia*, 997 P.2d 1. But the court focused its concern on "a trial court removing a deliberating juror in a manner that appears to facilitate the rendering of a guilty verdict" because "[w]henver it appears that a jury may be reconstituted in order to reach a particular result, the guarantee of a fair and impartial jury is meaningless to a defendant and creates unwarranted mistrust and suspicion among members of the public." *Garcia*, 997 P.2d at 8.

In *People v. Cleveland*, 25 Cal.4th 466, 106 Cal.Rptr.2d 313, 21 P.3d 1225 (2001), the jury asked to have one juror replaced during deliberations because he was unwilling to apply the law and did not " 'feel that there [was] a valid charge.' " *Cleveland*, 25 Cal.4th at 470, 106 Cal.Rptr.2d 313, 21 P.3d 1225. But he also questioned whether there was any evidence to support the charge. *Cleveland*, 25 Cal.4th at 470, 106 Cal.Rptr.2d 313, 21 P.3d 1225. The Supreme Court held that the trial court erred in excusing the juror because the record did not establish as a " 'demonstrable reality' " the juror's refusal to deliberate. *Cleveland*, 25 Cal.4th at 485, 106 Cal.Rptr.2d 313, 21 P.3d 1225. And the California court also stressed the need to assure " 'the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes.' " *Cleveland*, 25 Cal.4th at 475, 106 Cal.Rptr.2d 313, 21 P.3d 1225. The court reasoned that:

Many of the policy considerations underlying the rule prohibiting post-verdict inquiries into the jurors' mental processes apply even more strongly when such inquiries are conducted during deliberations. Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of their deliberations could affect those delibera-

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tions.

*Cleveland*, 25 Cal.4th at 476, 106 Cal.Rptr.2d 313, 21 P.3d 1225.

[2][3][4] Elmore is entitled to a trial by a fair and impartial jury. U.S. CONST. amend. VI, XIV § 1; WASH. CONST. art. I, §§ 3, 21, 22; *Duncan v. State of Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). “When a trial judge’s ruling implicates either selection or management of the jury or \*756 trial, the reviewing court must determine whether the judge’s decision affects the defendant’s due process right to a fair trial.” *State v. Latham*, 100 Wash.2d 59, 66, 667 P.2d 56 (1983) (citing *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)). Included in the promise of a fair and impartial jury is the promise that a holdout juror will not be excused for failing to deliberate or follow the law where there is some evidence that the juror simply disagrees with other jurors about the merits of the State’s case. See *Garcia*, 997 P.2d at 8, *Brown*, 823 F.2d at 596, *Symington*, 195 F.3d at 1087. We agree with the Colorado Court that “[w]henver it appears that a jury may be reconstituted in order to reach a particular result, the guarantee of a fair and impartial jury is meaningless to a defendant and creates unwarranted mistrust and suspicion among members of the public.” *Garcia*, 997 P.2d at 8.

[5][6] And we agree with *Symington* that where the record shows any reasonable possibility that the impetus for a juror’s dismissal stems from his views on the merits of the \*\*1115 case, the dismissal is error. Here, the record shows such a reasonable possibility; it also demonstrates that the trial judge improperly intruded into jury deliberations.

The foreperson’s first note reported his view that juror 8 was not willing to follow the court’s instructions. It also reported juror 8’s comments about the law. But the note concluded that juror 8 “has disregarded every witness statement regarding the defendant as credible.” Ex. 129. Thus, at best, the note gave conflicting reasons for juror 8’s conflict

with the other jurors. It could have been because juror 8 refused to follow the law or it could have been because he alone believed the defendant, not the State’s witnesses.

Juror 12’s note contained the same ambiguity. He reported that juror 8 did not care “what [the] law says” but also characterized juror 8 as “nuts-criminal-related-or all of above.” Ex. 128. The latter descriptions suggest not that juror 8 was unwilling to follow the law but that he took a different view of the evidence, apparently with considerable\*757 vigor of the case, siding with the defendant, not the State.

Finally, juror 8 explained his comments about the instructions: that they did not require a conviction if he believed the defendant and not the State’s witnesses.

This record amply demonstrates that the jurors disagreed at least in part because of different views of the merits of the case. The court’s inquiry should have ended at this point. By finding that the foreperson and juror 12 were credible and juror 8 was not, the court improperly intruded into the jury deliberations, becoming in essence a thirteenth and presiding juror to rule on what the jurors said during deliberation. And this sanctuary the court may not enter, at least for the purpose of ruling on conflicting reports about the jurors’ discussions. *Thomas*, 116 F.3d at 620.

[7][8] But the State argues that our standard of review is abuse of discretion and we should defer to the trial court’s finding that juror 8 was not excused “because of any valid disagreement he may have had with other jurors.” CP at 65. The State relies on *State v. Jorden*, 103 Wash.App. 221, 11 P.3d 866 (2000), where we upheld the trial court’s dismissal of a juror without holding a hearing. In *Jorden*, the trial judge dismissed a juror who had apparently been sleeping during trial testimony. The State reported witnessing the juror’s conduct and the trial judge also saw it. In affirming the dismissal, we applied an abuse of discretion standard. *Jorden*, 103

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Wash.App. at 226, 11 P.3d 866. Because the *Jorden* juror was not excused during deliberations for statements she made during deliberations, we did not face the constitutional questions at issue here. In deciding whether Elmore was denied her constitutional rights to a fair and impartial jury, we do not apply an abuse of discretion standard. Rather, “[w]e review claims of manifest constitutional error de novo.” *State v. Stanley*, 120 Wash.App. 312, 85 P.3d 395, 396 (2004) (citations omitted). And “[w]hether a trial court violates a defendant’s Sixth Amendment right to a jury trial by excusing a juror for good cause and replacing that juror \*758 with an alternate is a question of law which we review de novo.” *Perez v. Marshall*, 119 F.3d 1422, 1426 (C.A.9 (Cal.) 1997).

[9] The State also argues that the federal cases do not apply because of differences between the federal rules of civil procedure and the state rules. Specifically, at the time of the federal decisions, the federal rules did not provide for alternate jurors. Thus, if the trial judge excused a juror, the jury continued with only 11 members. But our state rules allow alternate jurors. Thus, if the judge excuses a juror, an alternate steps in and the defendant is still guaranteed a unanimous 12 person verdict. We disagree for several reasons.

[10] First, although *Brown* and *Thomas* framed the issue as the need for a unanimous verdict, in *Symington*, the defendant argued that dismissing the juror violated his right to an impartial jury. Moreover, dismissing a deliberating juror implicates broader constitutional problems than a unanimous 12-person jury. These include the guarantee that jury deliberations will remain secret and the guarantee that a juror will not be excused “in a manner that appears to facilitate the rendering of a guilty verdict.” \*\*1116*Garcia*, 997 P.2d at 8. Accordingly, we reject the State’s argument that we should not follow the federal cases because of procedural differences.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed

in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

#### PRO SE STATEMENT OF ADDITIONAL GROUNDS

Pro se, Elmore raises four points.

Elmore first objects to the prosecution’s “master mind theory.” Stmt. at 1. But she does not clearly identify the “nature and occurrence” of the alleged error as RAP 10.10(c) requires. Therefore, we decline to address this issue.

Elmore next argues that Lathan Kelley and Jerry Wilms perjured themselves.

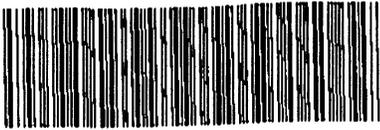
The State violates the defendant’s due process rights by knowingly presenting perjured testimony on a material point. *In re Rice*, 118 Wash.2d 876, 887 n. 2, 828 P.2d 1086 (1992).

There is no evidence here that the State knowingly introduce perjured testimony from either of these witnesses. And we do not consider matters outside the record on direct appeal. *State v. McFarland*, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted). Furthermore, Elmore has again failed to clearly identify the “nature and occurrence” of the alleged error as RAP 10.10(c) requires.

Finally, Elmore contends that the prosecution failed to prove that she was an accomplice. We disagree. One witness testified that he had two or three conversations with Elmore about committing the robbery; Elmore told him that she had seen a safe full of cash in a bedroom at the house; they discussed splitting the robbery proceeds equally; and Elmore drove the witness and others past the residence and described where the safe was located. An accomplice is a person who solicits, encourages, requests or commands another person to commit a crime, or aids or agrees to aid another in planning or committing a crime, with “knowledge that it will promote or facilitate the commission of the crime.” RCW

**APPENDIX “D”**

*Court of Appeals Opinion*



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STATE OF WASHINGTON  
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A.M. DEC 15 2005 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
DEPUTY

# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ROBERTA JEAN ELMORE,

Respondent.

)  
)  
) MANDATE  
)  
) NO. 75637-6  
)  
) C/A No. 28146-5-II  
)  
) Pierce County Superior Court  
)  
) No. 96-1-04747-5  
)  
)

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington  
in and for Pierce County.

The opinion of the Supreme Court of the State of Washington filed on November 10, 2005, became final in the above entitled cause on November 30, 2005. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No costs bills having been timely filed costs are deemed waived.



I have affixed the seal of the Supreme Court of the State of Washington and filed this Mandate this 8<sup>th</sup> day of December, 2005.

C. J. MERRITT

Clerk of the Supreme Court, State of Washington

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cc: Hon. Rosanne Buckner, Judge  
Pierce County Superior Court  
John Christopher Hillman  
Eric Broman  
Courts of Appeal Div II  
Reporter of Decisions

**FILE**

IN CLERKS OFFICE  
SUPREME COURT, STATE OF WASHINGTON

DATE **NOV 10 2005**

*Jerry L. Alexander, C.J.*  
CHIEF JUSTICE

**FILED**

**DEC 12 2005**

THOMAS R. FALLOQUIST  
SPOKANE COUNTY CLERK

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Petitioner,
v.
ROBERTA JEAN ELMORE,
Respondent.

NO. 75637-6

EN BANC

FILED NOV 10 2005

BRIDGE, J.—Roberta Elmore appeals her convictions for first degree murder, first degree burglary, first degree kidnapping, second degree assault, and conspiracy to commit robbery in the second degree, all of which were based on her complicity in the invasion of the home of a severely disabled man and the shooting death of one of his caregivers. Elmore contends that her rights to an impartial jury, a unanimous jury verdict, and due process under the federal and state constitutions were violated when the trial judge dismissed a deliberating juror after other jurors accused him of refusing to convict under any view of the facts and refusing to follow the law.

We recognize that in the rare case where a deliberating juror is accused of attempting jury nullification,<sup>1</sup> the trial judge is faced with a “delicate and complex task,” in that he or she must adequately investigate the allegations, but also must take care to respect the principle of jury secrecy. *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997). We hold that in analyzing the evidence obtained from investigation, the trial judge must apply a heightened evidentiary standard: a deliberating juror must not be dismissed where there is any reasonable possibility that the impetus for dismissal is the juror’s views of the sufficiency of the evidence. However, once the trial court has applied the correct standard, the court’s conclusion as to whether the juror should be dismissed is reviewable only for abuse of discretion. Here, the trial court based its decision to dismiss the deliberating juror on very limited evidence, and there is no indication that it applied a heightened evidentiary standard in making the dismissal decision. We affirm the Court of Appeals and remand to the superior court for a new trial.

## I

### Facts and Procedural History

In December 1996, Roberta Elmore was hired by an escort service. Elmore went on her first call to the home of Dennis Robertson, a quadriplegic man who shared his home with two other disabled gentlemen. But after a misunderstanding as to what was expected of her, Elmore left Robertson’s home and the escort

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<sup>1</sup> Nullification is a juror’s “knowing and deliberate rejection of the evidence or refusal to apply the law . . . because the result dictated by law is contrary to the [juror’s] sense of justice, morality, or fairness.” BLACK’S LAW DICTIONARY 875 (8th ed. 2004).

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service forced Elmore to return Robertson's payment and fired her. Elmore expressed anger to various friends about the incident and reportedly enlisted Gordon Crockett and Thorsten Jerde to rob the Robertson residence, giving them details about the location of the safe she had seen in the bedroom and showing them where Robertson lived. In addition, Elmore reportedly gave Crockett and Jerde bullets for the gun that they planned to use during the robbery.

In the early morning hours of December 11, 1996, Crockett and Jerde enlisted two others to help with the robbery. After gaining entry to the house on a ruse, Crockett and Jerde entered Robertson's bedroom and Crockett ordered Scott Claycamp, Robertson's caregiver, to the floor. Jerde grabbed the safe and left the room. Crockett shot Claycamp in the back of the head and Claycamp died later that day.

All of the participants, including Elmore, initially pleaded guilty to first degree felony murder, *State v. Jerde*, 93 Wn. App. 774, 776, 970 P.2d 781 (1999), but the Court of Appeals reversed and remanded for Elmore to elect either to withdraw her guilty plea or to enforce the plea agreement before a different judge. Elmore elected to withdraw her guilty plea, and the State proceeded to trial on charges of first degree felony murder, first degree burglary, first degree kidnapping, second degree assault, and conspiracy to commit murder in the first degree. Jerde and another participant testified at Elmore's trial, but Crockett did not. Elmore took the stand and admitted that she had asked Crockett to collect the money she believed Robertson owed her and that she showed Crockett and Jerde

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where Robertson lived. However, she asserted that her husband had given bullets to Crockett and Jerde, and she denied encouraging the men to rob Robertson or hurt anyone in the house.

The jury began deliberations on the morning of October 10, 2001. On the morning of October 12, the court received two notes from individual jurors claiming that Juror 8 was refusing to follow the instructions:

Jurrer [sic] #8  
 I don't care what law says  
 Will not lissen [sic] to deliberation  
 Is  
     Nuts  
     Criminal  
     Related  
 or all of the above  
 From #12

Ex. 128.

Your Honor:

As the presiding juror, I feel compelled to ask your assistance. We have a juror on the panel who has made statements which lead me to believe he was predisposed to not follow the instructions given by you or to follow the law contained in those instructions.

Prior to adjourning on Thursday, this juror said "I don't care what the judge said. The law is shit and I won't convict anyone based on what the law says."

*This juror has disregarded every witness statement regarding the defendant as credible.*

Ex. 129 (emphasis added). The trial judge discussed the notes with counsel and then questioned the presiding juror, verifying that the second note was accurate and that it referred to Juror 8. The court then questioned Juror 12 about the first note and clarified that the top line, "I don't care what [the] law says," was a quote from

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Juror 8. Ex. 128. When Juror 12 tried to explain the circumstances of the statement, the judge cut him off, apparently being careful not to delve into the details of deliberations.

The trial judge then heard argument from counsel as to whether the information provided was sufficient to remove Juror 8 and replace him with an alternate pursuant to RCW 2.36.110 (making it the duty of the trial judge to excuse any juror who, in the opinion of the trial judge, has manifested unfitness by reason of bias or prejudice) and Criminal Rule (CrR) 6.5 (allowing replacement of a deliberating juror with an alternate but requiring the jury to begin deliberations anew). The prosecutor argued that the notes and testimony from the two complaining jurors were sufficient to support removal of Juror 8, even without testimony from Juror 8 himself. Defense counsel argued that the notes were insufficient to support either questioning Juror 8 or discharging him.

Without questioning Juror 8, the trial court concluded that the notes and testimony were sufficient by themselves to show that Juror 8 was refusing to follow the law and refusing to deliberate. The trial judge was reluctant to inquire of Juror 8, presumably because doing so could delve into his mental processes as a juror or prejudice him against the State. Even though the note from Juror 5 also commented as to witness credibility, the trial court determined that this fact did not overcome Juror No 8's reported refusal to follow the law. Thus, based only on the notes and testimony from the complaining jurors, the trial judge found that under

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RCW 2.36.110 she “must excuse him as being unfit for jury duty.” Report of Proceedings (RP) at 1174.

Defense counsel objected, emphasizing the trial judge’s failure to interview Juror 8. The prosecutor agreed and encouraged the judge to interview Juror 8 for the purpose of supplementing the record with a determination as to the credibility of each testifying juror. The trial judge indicated that she did not believe an interview was necessary because the statements from the other jurors were sufficient to support the dismissal, and she expressed concern that even if Juror 8 denied making the comments, he could not continue to deliberate and a mistrial might be required. Eventually, the trial judge reiterated that her decision was final but agreed to question Juror 8 to supplement the record.

Upon questioning by the trial judge, Juror 8 denied stating that the law was “shit” and denied refusing to follow the law or convict, no matter what the law said. RP at 1182-83. He explained that the comment occurred during a discussion of “whether evidence was credible or not and whether a witness was credible:”

I did not say it that way.

I said that it does not matter what this paper says, it matters if we believe—on what the witnesses have to say, if we believe the witnesses are credible. If we believe the witnesses are credible, then we vote one way. But if we do not believe what the witnesses say, then we are obligated to vote the other way. And what’s in the thing doesn’t mandate how we have to vote. It’s what we believe the testimony—you know, is the testimony credible?

RP at 1183. After Juror 8’s testimony, the prosecutor asked the trial court to either make a determination as to the relative credibility of the jurors or to question more

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jurors about their perceptions of Juror 8's comments. Defense counsel asked the trial judge to reconsider her decision to dismiss Juror 8 or, in the alternative, to grant a mistrial. The trial judge concluded that

Juror No. 8 denies that he said it the way the presiding juror and Juror No. 12 had written it. And then he proceeded to tell us further that it does not matter what this paper says, it matters whether we believe what the witnesses have to say, if we believe the witnesses are credible. And I believe that his own statements are sufficient to show that he has manifested unfitness by reason of bias or prejudice with respect to the instructions on the law as a whole in this matter.

So for that reason, I will be denying the request to bring out further jurors and also to reconsider my decision in this case.

RP at 1185-86. The trial judge also denied the motion for mistrial. She then entered a written order disqualifying Juror 8, finding that he had at times refused to participate in deliberations, and he refused to follow the law as instructed. She also found that Jurors 5 and 12 were credible. Finally, the trial court expressly found that "Juror #8 is not disqualified because of any valid disagreement he may have had with other jurors, including disagreements regarding the credibility of witnesses." Clerk's Papers (CP) at 65. Rather, in an order resulting from posttrial motions, the trial court made an additional finding that Juror 8 was not credible.

Juror 8 was replaced by an alternate juror and deliberations began anew. The reconstituted jury found Elmore guilty of first degree murder, first degree burglary, first degree kidnapping, second degree assault, and criminal conspiracy to commit robbery in the second degree. A posttrial defense motion for a new trial based on Juror 8's dismissal was denied after briefing from both sides.

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Elmore appealed, arguing that the trial court erred by dismissing Juror 8 where there was evidence that he simply disagreed with the other jurors as to the credibility of witnesses and the merits of the case. *State v. Elmore*, 121 Wn. App. 747, 752, 90 P.3d 1110 (2004). Elmore asserted that because the notes from Jurors 5 and 12 were ambiguous as to the source of conflict with Juror 8, the trial court erred by further inquiring into the allegations. *Id.*

Because there is no binding Washington case law on this question, the Court of Appeals considered cases from other jurisdictions. *See id.* at 752-55. The Court of Appeals applied a de novo standard of review, explaining the case involved a question of manifest constitutional error. *Id.* at 757. The court also held that where the record shows “any reasonable possibility” that the request for the juror’s dismissal stems from his views of the merits of the case, then dismissal of that juror would violate the defendant’s right to a fair and impartial jury. *Id.* at 756. The Court of Appeals ultimately concluded both that there was a reasonable possibility that the conflict among the jurors arose out of Juror 8’s views of the merits of the case and that the trial judge improperly intruded into jury deliberations “[b]y finding that the foreperson and juror 12 were credible and juror 8 was not . . . becoming in essence a thirteenth and presiding juror to rule on what the jurors said during deliberation.” *Id.* at 757.<sup>2</sup> Thus, the Court of Appeals reversed and remanded to the superior court for a new trial. *Id.* at 749.

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<sup>2</sup> Relying on *Elmore*, another panel of Division Two of the Court of Appeals recently reached the same conclusion in a similar case. *See State v. Johnson*, 125 Wn. App. 443, 459, 105 P.3d 85 (2005).

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The State filed a petition for review, which this court granted. *State v. Elmore*, noted at 153 Wn.2d 1008 (2005). We affirm the Court of Appeals.

## II

### Analysis

In Washington, the dismissal of an unfit juror is governed by statute:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110. While the statute governs what justifies dismissal of a juror for unfitness, CrR 6.5 outlines the specific procedure for such a dismissal in a criminal case. The rule provides that after deliberation has begun, alternate jurors may be recalled at any time that a regular juror is unable to serve. CrR 6.5. "If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew." *Id.*

*Standard of Review:* The parties dispute the standard of review that an appellate court must apply when reviewing a trial court's dismissal of a deliberating juror for unfitness under RCW 2.36.110. The Court of Appeals concluded that because Elmore's appeal implicates her constitutional rights to a fair and impartial jury, appellate review should be de novo. *Elmore*, 121 Wn. App. at 757. However, the State asserts that whether a juror should be dismissed for

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unfitness is a question that, by statute, rests within the discretion of the trial court and can be reviewed only for abuse of that discretion. See RCW 2.36.110.

Before we can decide whether the trial court in this case properly dismissed Juror 8, we must first determine the proper evidentiary standard that trial courts must apply when considering whether a juror is unfit to continue deliberating. The question of the appropriate standard of proof is a question of law, and our determination on review is de novo. See, e.g., *In re Det. of Petersen*, 145 Wn.2d 789, 807-08, 42 P.3d 952 (2002) (Ireland, J., dissenting) (characterizing the question of the proper standard of proof as a question of law, subject to de novo review, and noting that the majority had analyzed the question de novo); see also *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832, 100 P.3d 791 (2004) (questions of law reviewed de novo); *Rozner v. City of Bellevue*, 56 Wn. App 525, 536, 784 P.2d 537 (1990) (“The choice of standard [of proof] is an issue of law.”), *rev'd on other grounds*, *Rozner v. City of Bellevue*, 116 Wn.2d 342, 804 P.2d 24 (1991); *In re D.T.*, 212 Ill. 2d 347, 818 N.E.2d 1214, 1220 (2004) (issue of proper standard of proof is a question of law subject to de novo review); *Boccanfuso v. Connor*, 89 Conn. App. 260, 873 A.2d 208, 224 (2005) (same).

Even so, RCW 2.36.110 states that the trial court may dismiss a juror “*who in the opinion of the judge*” has manifested unfitness as a juror. (Emphasis added.) Thus, the plain language of the statute suggests that once the proper standard of proof is applied, the determination of whether or not to dismiss a juror ought to be at the discretion of the trial judge. Washington courts, as well as the great majority

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of other courts reviewing juror dismissal, have applied an abuse of discretion standard and found that so long as the trial court has applied the proper legal standard of proof to the evidence, the trial court's decision deserves deference.<sup>3</sup>

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<sup>3</sup> See *State v. Jordan*, 103 Wn. App. 221, 226, 11 P.3d 866 (2000) (reviewing a trial court's decision, before deliberations, to dismiss a juror for inattentiveness); *State v. Johnson*, 90 Wn. App. 54, 73, 950 P.2d 981 (1998) (reviewing the replacement of a deliberating juror who asked to be excused because she was so overwhelmingly shy that she could not deliberate fairly); *State v. Ashcraft*, 71 Wn. App. 444, 461, 463, 859 P.2d 60 (1993) (reviewing the replacement of a deliberating juror after a snowstorm delayed deliberations for several days and the juror had plans for an overseas vacation). Many federal circuit courts have also applied an abuse of discretion standard when evaluating a district court's dismissal of a deliberating juror. See, e.g., *United States v. Peterson*, 385 F.3d 127, 134 (2d Cir. 2004) (“[T]he trial judge is in a unique position to ascertain an appropriate remedy, having the privilege of ‘continuous observation of the jury in court’” (quoting *United States v. Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976))); *United States v. Edwards*, 303 F.3d 606, 631 (5th Cir. 2002); *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001). Even in cases involving the special problem of attempted jury nullification, courts have acknowledged that the proper standard of review is abuse of discretion. See, e.g., *Abbell*, 271 F.3d at 1302; *United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999); *Perez v. Marshall*, 119 F.3d 1422, 1426 (9th Cir. 1997) (“On direct review, a district court's decision to excuse a juror for just cause is reviewed for abuse of discretion.”); *Thomas*, 116 F.3d at 612; *People v. Cleveland*, 25 Cal. 4th 466, 21 P.3d 1225, 1230, 106 Cal. Rptr. 313 (2001). But see *People v. Gallano*, 354 Ill. App. 3d 941, 821 N.E.2d 1214, 1223, 290 Ill. Dec. 640 (2004) (applying a de novo standard). The trial court is simply in the best position to evaluate the jurors' candor and their ability to deliberate. *Symington*, 195 F.3d at 1085; see also *United States v. Cox*, 324 F.3d 77, 87 (2d Cir. 2003).

Federal Rule of Criminal Procedure Rule 23(b) provides that a district court can excuse a juror for just cause after the jury has retired to consider its verdict. If the court does so, it may, in its discretion, allow a verdict by the remaining 11 jurors. FED. R. CRIM. P. 23(b)(3). The State argues that this ability to proceed with only 11 jurors distinguishes all federal cases, and they should not be relied upon as persuasive authority. However, none of the federal courts cited herein express this 11 juror option as a basis for its decision. In addition, in at least one case, the trial court *did* substitute an alternate. *Symington*, 195 F.3d at 1084; see also FED. R. CRIM. P. 24(c)(3).

The *Perez* court also noted that whether a trial court violated a defendant's Sixth Amendment right to a jury trial by excusing a juror for good cause and replacing that juror with an alternate is a question of law subject to de novo review, a statement on which the Court of Appeals in this case relied in adopting its de novo standard. *Perez*, 119 F.3d at 1426; *Elmore*, 121 Wn. App. at 757-58. The *Perez* court does not explain how these seemingly conflicting articulations of the standard of review can be reconciled.

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*Special Considerations:* Generally, questions of juror bias or incompetence focus on “some event, or . . . relationship between a juror and a party, that is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process.” *United States v. Symington*, 195 F.3d 1080, 1087 n.6 (9th Cir. 1999) (quoting *Thomas*, 116 F.3d at 621); see also *United States v. Edwards*, 303 F.3d 606, 632-33 (5th Cir. 2002). For example, accusations that a deliberating juror has discussed or considered extrinsic evidence, *Edwards*, 303 F.3d at 630, that the deliberating juror was dishonest during voir dire, *Sanders v. Lamarque*, 357 F.3d 943, 946-47 (9th Cir. 2004), or that the juror is biased because she knows the defendants, *United States v. Peterson*, 385 F.3d 127, 133-34 (2d Cir. 2004), all can be investigated without direct discussion of the juror’s views about the merits of the case. But accusations that a juror intends to engage in nullification “go to the quality and coherence of the juror’s views on the merits.” *Symington*, 195 F.3d at 1087-88 n.6. Such a case is relatively rare, but it presents special problems, in part because the line between a refusal to follow the law and a decision based on the juror’s perception of the facts is often a fine one:

In eighteenth-century America, the transplanted jury took root and flourished as never before. Lay citizens’ common sense was exalted over the specialized knowledge of judges and lawyers; jury independence became an article of faith. The jury gained, and then held for more than a century, the right to decide what the law was, even if the judge thought differently. In criminal cases the jury’s right to acquit on grounds of conscience became firm. Although these two threads of jury power are often tangled under the label “jury nullification,” they are distinct and have met different fates. Law-defining by juries is no more, but the jury’s right to acquit for conscience’s sake lives on. And jury discretion—the ability to make the law make sense, to temper the law’s iron logic with fairness, moderation, and mercy—endures and thrives.

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WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE* 62-63 (2002). Thus, cases in which a juror is accused of refusing to follow the law require special consideration. *Edwards*, 303 F.3d at 632-33; *Symington*, 195 F.3d at 1085, 1087-88 n.6.

First, investigation into a claim that a juror is engaging in nullification risks violation of the cardinal principle that juror deliberations must remain secret. See *State v. Cuzick*, 85 Wn.2d 146, 149, 530 P.2d 288 (1975); *Thomas*, 116 F.3d at 618 (“The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system.”). If a trial court inquires into the reasoning behind ongoing deliberations, then it might be tempted to second-guess the jury and influence the jury’s verdict. *Symington*, 195 F.3d at 1086. More importantly, exposure of deliberations to public scrutiny would chill debate and “jeopardize the integrity of the deliberative process.” *Id.* Thus, trial courts investigating such allegations must take special care not to delve into the substance of deliberations or the thought process of any particular juror.

On the other hand, a trial court must also take care not to violate the defendant’s right to a unanimous jury verdict by granting a dismissal that stems from the juror’s doubts about the sufficiency of the evidence. *Id.* at 1085. A discharge stemming from a juror’s doubts about the sufficiency of the evidence would violate the right to a unanimous jury verdict because it “would enable the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case.” *Sanders*,

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357 F.3d at 945 (quoting *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)).<sup>4</sup> Courts have recognized that

ten or eleven members of a jury that have collectively reached agreement on a case's outcome may thereafter collectively agree that the one or two hold-outs—instead of honestly disagreeing about the merits—are actually refusing to apply the law as instructed by the court in an impermissible attempt to nullify the verdict. The jury's majority may very well further agree to request the court's intervention with regard to those one or two dissenting jurors who are, according to the majority, refusing to apply the law.

*United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001).<sup>5</sup> It is not hard to imagine, as counsel noted at oral argument, that had the option been available to Lee J. Cobb in *12 Angry Men*,<sup>6</sup> he would have sent a note to the trial judge asking that Henry Fonda be dismissed from the jury, rendering moot that cinematic paean to the virtues of the American jury system.<sup>7</sup>

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<sup>4</sup> Although the federal right to a unanimous verdict does not extend to the states through the Fourteenth Amendment, *Apodaca v. Oregon*, 406 U.S. 404, 416 (plurality opinion), 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); *id.* at 369, 374 (Powell, J., concurring), this court has concluded that article I, section 21 of the Washington Constitution gives criminal defendants the right to a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (explaining that by allowing verdicts of nine or more only in civil cases, article I, section 21 “implicitly recognizes unanimous verdicts are required in criminal cases”). The State does not present any argument that the state constitutional right would be less extensive than the federal one in this context. Thus, while the federal cases discussing violations of the federal right to a unanimous jury verdict are not binding, they are instructive.

<sup>5</sup> Where a juror asks to be dismissed, the court must be equally careful that the request does not stem from the juror's wish to avoid the unenviable position of holdout juror, even though the juror has doubts as to the sufficiency of the evidence. *See Thomas*, 116 F.3d at 621-22; *Brown*, 823 F.2d at 595-97.

<sup>6</sup> 12 ANGRY MEN (Orion-Nova Productions 1957).

<sup>7</sup> *See also Thomas*, 116 F.3d at 622 (“The group of jurors favoring conviction may well come to view the ‘holdout’ . . . not only as unreasonable, but as unwilling to follow the court's instructions on the law.”).

Dismissal of a holdout juror also risks violating the Sixth Amendment right to an impartial jury. U.S. CONST. amend. VI; *see also* WASH. CONST. art. I, § 22. If it appears that a trial court is reconstituting a jury in order to reach a particular result, then the right to an impartial jury is sacrificed. *People v. Gallano*, 354 Ill. App. 3d 941, 821 N.E.2d 1214, 1224, 290 Ill. Dec. 640 (2004); *Garcia v. People*, 997 P.2d 1, 8 (Colo. 2000). If a holdout juror is dismissed in a way that implies his dismissal stems from his views on the merits of the case, then the reconstituted jury may be left with the impression that the trial judge prefers a guilty verdict. *Garcia*, 997 P.2d at 8.

Thus, respect for these rights requires that where a trial court concludes that there is a reasonable possibility that the impetus for removal of a deliberating juror is disagreement with the juror's view of the sufficiency of the evidence, the trial court must send the jury back to deliberate with instructions that the jury continue to try to reach a verdict. Otherwise, the defendant is entitled to a mistrial. *Symington*, 195 F.3d at 1085-86; *Brown*, 823 F.2d at 596.

In sum, accusations that a juror is attempting nullification by refusing to follow the law present a difficult situation. The trial court must balance the cardinal principle of jury secrecy against the need to protect the right of both parties to an impartial jury and the defendant's right to a unanimous jury verdict. In this case, the Court of Appeals concluded that the trial court's inquiry should have ended when it became clear that "the jurors disagreed at least in part because of different views of the merits of the case." *Elmore*, 121 Wn. App. at 757. In

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addition, the Court of Appeals held that “where the record shows any reasonable possibility that the impetus for a juror’s dismissal stems from his views on the merits of the case, the dismissal is error.” *Id.* at 756. Thus, balancing the principles described above, this court must determine both to what extent a trial court should investigate allegations that a juror is engaging in nullification and what evidentiary standard the trial court must apply when deciding whether to dismiss a juror for refusing to follow the law.

*Scope of Investigation:* RCW 2.36.110 and CrR 6.5 place a “continuous obligation” on the trial court to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit, even if they are already deliberating. *See State v. Jordan*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). A juror is unfit if he or she exhibits prejudice by refusing to follow the law or participate in deliberations. *See* RCW 2.36.110. Moreover, *both* the defendant *and the State* have a right to an impartial jury. *State v. Hughes*, 106 Wn.2d 176, 185, 721 P.2d 902 (1986). Thus, the trial court has a duty to investigate if it comes to its attention during deliberations that a juror may be attempting nullification.

Washington and other courts have granted broad discretion to the trial judge in conducting an investigation of jury problems. *Jordan*, 103 Wn. App. at 229 (“[T]he trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party.”); *Peterson*, 385 F.3d at 135 (granting trial court discretion as to whether to conduct further inquiry, but noting that the court must take care not to taint the jury

unnecessarily); *Edwards*, 303 F.3d at 634 (“[T]he district court continues to enjoy wide discretion to determine the proper scope of an investigation into whether just cause to dismiss a juror exists as long as the content of the deliberations is left undisturbed.”). Even so, a study of the case law reveals that some general guidelines have emerged.

First, if a juror or jurors accuse another juror of refusing to deliberate or attempting nullification, the trial court should first attempt to resolve the problem by re-instructing the jury. *See, e.g., Abbell*, 271 F.3d at 1290; *Symington*, 195 F.3d at 1083; *People v. Cleveland*, 25 Cal. 4th 466, 21 P.3d 1225, 1228, 106 Cal. Rptr. 2d 313 (2001). If re-instruction is not effective and problems continue, any inquiry should remain as limited in scope as possible. *See Cleveland*, 21 P.3d at 1237; *see also Garcia*, 997 P.2d at 7 (“Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils—protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity.” (quoting *Thomas*, 116 F.3d at 623)). The inquiry should focus on the conduct of the jurors and the *process* of deliberations, rather than the *content* of discussions. The court’s inquiry should cease if the trial judge becomes satisfied that the juror in question is participating in deliberations and does not intend to ignore the law or the court’s instructions. Finally we recognize that if inquiry occurs, it should reflect an attempt to gain a balanced picture of the situation; it may be necessary to question the complaining juror or jurors, the

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accused juror, *and* all or some of the other members of the jury. *See Abbell*, 271 F.3d at 1290; *Symington*, 195 F.3d at 1083; *Thomas*, 116 F.3d at 611; *Cleveland*, 21 P.3d at 1228-29.

We emphasize that the trial court retains discretion to investigate accusations of juror misconduct in the manner most appropriate for a particular case, and the procedures outlined above are only guidelines. However, we note that the trial court here departed from the general guidelines discussed above in several ways. First, upon receiving the notes from Jurors 5 and 12, the trial court investigated and took immediate action, rather than re-instructing the jury and allowing them to continue with deliberations. RP at 1161-62. Then, the trial court made an initial decision based only upon the content of the notes and testimony from the complaining jurors. RP at 1173-74. Even though she eventually questioned Juror 8, the trial judge made it clear beforehand that she was merely supplementing the record, and she was not inclined to change her mind. RP at 1180. We caution that the better practice would be to conduct a more balanced investigation into such allegations because of the risk that jurors may confuse a disagreement on the merits of the case for a refusal to follow the law. *See Abbell*, 271 F.3d at 1302; *Thomas*, 116 F.3d at 622. Although courts must take care not to delve into the substance of deliberations, it is possible to focus on the jurors' process, i.e., whether a juror has been participating in deliberations and whether the juror has openly expressed an intent to defy the law or the court's instructions.

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*Evidentiary Standard:* As for the evidentiary standard that the trial court must apply when weighing whether a juror should be dismissed for refusal to follow the law, several different approaches have been adopted in various federal and state courts. The Ninth Circuit Court of Appeals has recognized that in the rare case where a request for juror dismissal focuses on the quality of a juror's thoughts about the case and his ability to communicate those thoughts to the rest of the jury, the need to protect the secrecy of jury deliberations will often render the trial court unable to investigate thoroughly enough to come to a definite determination as to whether the juror's vote is the result of prejudice or his view of the merits of the case. *Symington*, 195 F.3d at 1086.

Both the Second Circuit and the District of Columbia Circuit have also recognized this dilemma. *Thomas*, 116 F.3d at 622; *Brown*, 823 F.2d at 596. Those courts held that "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Symington*, 195 F.3d at 1087 (emphasis added) (quoting *Brown*, 823 F.2d at 596). The Ninth Circuit slightly amended this evidentiary standard, concluding that if the record evidence discloses "any *reasonable possibility* that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Id.* at 1087; *see also Gallano*, 821 N.E.2d at 1224 (adopting the "any reasonable possibility" standard). The Ninth Circuit reasoned that the "any reasonable possibility" standard was "attentive to the twin imperatives of

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preserving jury secrecy and safeguarding the defendant's right to a unanimous verdict from an impartial jury," and any lower evidentiary standard could lead to improper dismissal of a juror based on his or her view of the sufficiency of the evidence. *Symington*, 195 F.3d at 1087. Where there is a reasonable possibility that the impetus for the complaint is the juror's views on the merits, "the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial." *Id.*

In contrast, the California Supreme Court expressly rejected the *Symington* standard, instead concluding that a juror's inability to perform his or her duty must appear in the record as a "demonstrable reality" that the juror is unwilling to deliberate. *Cleveland*, 21 P.3d at 1236-37 (quoting *People v. Marshall*, 13 Cal. 4th 799, 919 P.2d 1280, 55 Cal. Rptr. 2d 347 (1996)). Thus, the California standard seems to flip the presumption, allowing dismissal if there is a demonstrable reality that the juror was acting improperly, rather than prohibiting dismissal if there is any reasonable possibility that the juror was acting properly.<sup>8</sup>

Finally, the Eleventh Circuit has adopted a standard similar to *Symington's* but has also emphasized the trial court's discretion to remove deliberating jurors for good cause. Where a juror has been accused of engaging in impermissible

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<sup>8</sup> However, in application, the California standard may not produce different results in most cases. In *Cleveland*, the juror's method of analysis differed from that of his fellow jurors, he halfheartedly participated in deliberations, he listened unsympathetically to his colleagues, and his explanations of his position were inarticulate, but there was no demonstrable reality that he was refusing to follow the law. *Cleveland*, 21 P.3d at 1238.

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nullification, the juror should be excused “only when no ‘substantial possibility’ exists that she is basing her decision on the sufficiency of the evidence.” *Abbell*, 271 F.3d at 1302 (citing *Thomas*, 116 F.3d at 621-22; *Brown*, 823 F.2d at 596). The court explained that this amounts to a “‘beyond a reasonable doubt’” standard; a juror should not be dismissed unless the court can conclude, beyond a reasonable doubt, that the juror is not basing his decision on the merits of the case. *See id.* However, once a trial court has applied the correct evidentiary standard, abuse of discretion applies, and the resulting findings of fact are reviewable only for clear error. *Id.* at 1303-04 (holding that the trial court had not abused its discretion when it found, beyond a reasonable doubt, that the juror in question was refusing to follow the law). By emphasizing both the heightened evidentiary standard and the deferential standard of review, the Eleventh Circuit struck a balance between protecting important constitutional rights and allowing the trial courts discretion where they are in the best position to make fact and credibility determinations.

While all of the above evidentiary standards would provide some guidance to a trial court attempting to resolve a similar problem, the Ninth Circuit’s “reasonable possibility” standard, when combined with the Eleventh Circuit’s emphasis on the abuse of discretion review, seems to best balance the rights at issue in these cases. The “any reasonable possibility” standard is not insurmountable, but it is sufficiently high to err on the side of protecting important constitutional rights. *See Symington*, 195 F.3d at 1087 n.5 (The reasonable possibility standard, in this context, “is a threshold at once appropriately high and

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conceivably attainable.”). Moreover, this standard takes into account our presumption that jurors have followed the court’s instructions in that it requires the court, where there is conflicting evidence, to retain a juror if there is any reasonable possibility that the dispute among the jury members stems from disagreement on the merits of the case. See *State v. Brunson*, 128 Wn.2d 98, 109, 905 P.2d 346 (1995); *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991). Emphasis on the trial judge’s discretion recognizes that the trial court is “uniquely situated to make the credibility determinations that must be made in cases like this one: where a juror’s motivations and intentions are at issue.” *Abbell*, 271 F.3d at 1303.

We affirm the Court of Appeals’ adoption of the “any reasonable possibility” standard; where a deliberating juror is accused of refusing to follow the law, that juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence. Yet we also emphasize that this standard is applicable only in the rare case where a juror is accused of engaging in nullification, refusing to deliberate, or refusing to follow the law. In addition, we adopt the Eleventh Circuit’s position that once the proper evidentiary standard is applied, the trial court’s evaluation of the facts is reviewable only for abuse of discretion.

Turning to the facts of this case, the difficulty here arises because the record contains conflicting evidence. Jurors 5 and 12 both reported that Juror 8 expressed an intent to ignore the law, and Juror 12 claimed that Juror 8 was not participating

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in deliberations. Meanwhile, the last line of the note from Juror 5 (Ex. 129) indicates that Juror 8 disagreed with the other jurors as to witness credibility. Furthermore, Juror 8's testimony reveals that in his view, the case hinged on witness credibility:

If we believe the witnesses are credible, then we vote one way. But if we do not believe what the witnesses say, then we are obligated to vote the other way. And what's in the thing doesn't mandate how we have to vote. It's what we believe the testimony—you know, is the testimony credible?

RP at 1183. Juror 8 shared this opinion with the jury, and Juror 12 reported arguing about the evidence with Juror 8. RP at 1167, 1183. Thus, there are indications in the record that Juror No 8 was participating in deliberations. RP at 1183. In addition, Juror 8's emphasis on credibility seems reasonable, given the particular facts of this case. Elmore's guilt depended upon her level of involvement in the crime, and the jurors' determination of her involvement necessarily depended upon which witnesses they believed.

On the other hand, the trial court entered findings that Jurors 5 and 12 were credible and Juror 8 was not. The trial court also concluded that Juror 8's dismissal was not based on "any valid disagreements he may have had with other jurors, including disagreements regarding the credibility of witnesses." CP at 65; *see Edwards*, 303 F.3d at 634 (juror's holdout status did not insulate him from dismissal where the trial court "expressly disavowed any possibility that Juror 68 was being dismissed because of his view of the evidence"). However, this finding seems to recognize that Juror 8 had expressed *some* valid disagreement with the

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other jurors' views of the evidence. CP at 65. The State admits that the trial court saw two bases for Juror 8's position: his evaluation of the witnesses' credibility *and* his refusal to follow the law. According to the State, the refusal to follow the law was enough to justify the juror's dismissal. Suppl. Br. of Pet'r at 6.

However, there is no indication that, when weighing the conflicting evidence in this case, the trial court applied the heightened evidentiary standard we adopted above. Such a heightened standard is required to protect the defendant's rights to an impartial jury and a unanimous jury verdict. Where there is conflicting evidence as to the reasoning behind a juror's position, the heightened standard requires the trial court to err on the side of allowing the juror to continue to deliberate if there is *any reasonable possibility* that the juror's views are based on the sufficiency of the evidence. The heightened standard is especially necessary where the court's information is limited. *See Symington*, 195 F.3d at 1086 (noting that the trial court "will likely prove unable to establish conclusively the reasons underlying' the request for dismissal" (quoting *Brown*, 823 F.2d at 596)). In this case in particular, the trial court's initial decision was made on the limited information offered by the complaining notes and their authors' testimony. Even after receiving conflicting testimony from Juror 8, the court did not interview other jurors. Therefore, the application of the "any reasonable possibility" standard in this case would have served to balance against the limited information being considered by the trial court.

Cases in which the appellate court has deferred to the trial court's dismissal of a deliberating juror under similar circumstances have made it clear that those courts applied the heightened evidentiary standard. *See Abbell*, 271 F.3d at 1303 (explaining that the trial court found there was no substantial possibility that the juror's position was based on her evaluation of the merits of the case); *see also Brown v. United States*, 818 A.2d 179, 187 (D.C. Cir. 2003) (upholding dismissal, even on conflicting evidence, where the judge found just cause existed beyond a reasonable doubt, satisfying the *tough legal standard* of reasonable possibility). In contrast, the trial court here failed to apply any sort of heightened standard. Thus, we hold that the trial court erred by failing to apply a more exacting evidentiary standard before removing Juror 8 for refusing to follow the court's instructions. We affirm the Court of Appeals.

### III

#### Conclusion

The founders of our republic viewed the jury as “the very palladium of free government” and for over two centuries our civic culture has valued its wise dispensation of justice laced with common sense.<sup>9</sup> The rare case in which a deliberating juror is accused of engaging in jury nullification presents a “delicate and complex” problem. *Thomas*, 116 F.3d at 618. The trial court has a duty to adequately investigate such charges but also must take care to respect the principle

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<sup>9</sup> WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE*, at I (2002) (quoting *The Federalist Papers*).

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of jury secrecy. In order to protect the defendant's rights to an impartial jury and a unanimous jury verdict, once the evidence is gathered, the trial court must apply a heightened evidentiary standard. We adopt the test set forth in *Symington*: a deliberating juror may not be dismissed where there is any reasonable possibility that the impetus for dismissal is the juror's views of the sufficiency of the evidence. However, once a trial court has applied the correct evidentiary standard, that court's determination of whether the juror should be dismissed is reviewable only for abuse of discretion. Here, the trial court based its decision on very limited evidence, and it failed to apply a heightened evidentiary standard. We affirm the Court of Appeals and remand for a new trial.

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Bridg, J.

WE CONCUR:

Alexander, C. J.

Glenon

Madsen, J.

Sandus, J.

Chambers, J.

Olwe, J.

Fairhurst, J.

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J.M. JOHNSON, J. (dissenting)—Defendant Roberta Elmore

orchestrated and facilitated a series of crimes that culminated in the home invasion of a disabled man and the brutal murder of innocent caretaker, Scott Claycamp. Elmore was convicted by the requisite unanimous jury of first degree murder, first degree burglary, first degree kidnapping, second degree assault, and conspiracy to commit robbery. The majority now reverses this conviction because one juror who refused to follow the law was replaced by an alternate in accordance with Washington law.

Washington's statute is designed to protect the right to an impartial jury by requiring the judge to remove (excuse) from jury service those who will not or cannot properly perform jury service. The requirement is mandatory. According to the statute:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110.

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There is no showing the judge below did not fully comply with the statute. Indeed, I assume that every judge in this state—at least every trial judge—reads and scrupulously applies this mandatory statute, which is designed to protect the right to jury provided in both the United States and Washington State Constitutions.

Three things readily apparent from reading this statute are worth reiterating. First, the language makes clear the obligation of the judge is mandatory: “It shall be the duty of a judge . . . .”

Second, the statute charges the trial judge with the discretion as well as the duty to make requisite findings: “any juror, who *in the opinion of the judge, . . .*” (Emphasis added.)

Finally, the test for “manifested unfitness as a juror” includes bias or prejudice or “conduct or practices incompatible with proper and efficient jury service.”

The Washington jury system also provides for alternate jurors to be selected, thus allowing the replacement of any juror incapacitated or found in violation of the above statute. Under CrR 6.5,

[an] alternate juror may be recalled at any time that a regular juror is unable to serve, including a second phase of any trial that is bifurcated. If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror,

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the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

In this case, 14 jurors were selected and sworn by the judge to “well and truly try the case.” Report of Proceedings (RP) at 217. One such juror was properly discharged and replaced with an alternate. After several days’ deliberation, the resulting jury unanimously convicted defendant of murder, robbery, kidnapping, assault, and conspiracy to commit robbery. Clerk’s Papers (CP) at 116-27.

Defendant appealed, contending that she was deprived of her constitutional right to a unanimous verdict by a fair and impartial jury and thus denied due process of law. The Court of Appeals held for defendant. *See State v. Elmore*, 121 Wn. App. 747, 90 P.3d 1110 (2004). Without expressly stating whether its decision rests upon the United States or Washington State Constitution or otherwise, this court agrees. The majority rewards the defendant with a new trial, requiring victims and witnesses (those not now dead or unavailable) to face still another trial.

Because I conclude the trial judge did not violate the United States Constitution or the Washington State Constitution by faithfully following our statute to assure a proper jury, and because I doubt the wisdom of encouraging gaming of our justice system, I dissent.

## DISCUSSION

Article I of our state constitution provides that “[t]he right of trial by jury shall remain inviolate.” WASH. CONST. art. I, § 21; *see also* U.S. CONST. amend. VI. Trial by jury serves as an important check and balance upon the executive and judicial branches, protecting the rights of individuals and providing the sovereign people of the State with an important, direct role in the administration of justice. *See* WASH. CONST. art. I, § 1 (“All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”).

Pursuant to our state constitution, this court has held that a criminal defendant in superior court has a right to be tried by 12 jurors. *State v. Lane*, 40 Wn.2d 734, 736-37, 246 P.2d 474 (1952); *State v. Ellis*, 22 Wash. 129, 60 P. 136 (1900). Our state constitution has also been held to implicitly recognize that unanimous verdicts are required in criminal cases. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).<sup>1</sup>

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<sup>1</sup> By contrast, there is neither a federal constitutional guaranty of a 12 member jury in criminal cases nor a unanimous verdict requirement in such cases. *See Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970); *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972).

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There are no cases in this court that challenge a trial judge's decision to remove a deliberating juror for cause, presumably because judges faithfully perform their duties. The few cases in the Court of Appeals have generally stated the law in a correct manner and so have not been reviewed by this court. *See State v. Jordan*, 103 Wn. App. 221, 11 P.3d 866 (2000) (holding standard of review for juror removal during trial is abuse of discretion); *State v. Ashcraft*, 71 Wn. App. 444, 859 P.2d 60 (1993) (holding standard of review for juror removal during deliberation is abuse of discretion).

However, in this case the majority relies primarily upon a handful of federal cases that interpret the different federal rules and creates a new "heightened" standard: "[W]here a deliberating juror is accused of refusing to follow the law, that juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence." Majority at 22. The majority supplements this standard with a set of "guidelines" that includes a de facto rule requiring a judge to reinstruct the whole jury where one deliberating juror refuses to follow the law. Majority at 17. The majority faults this judge *not* for abusing her discretion but for failing to engage in the future-telling or mind-

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reading required to apply the majority's new standard and guidelines, instead of the existing statute.

The majority's standard, largely adopted from the federal case of *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), ignores this court's long standing rule that a trial court's ruling is presumed correct. *State v. Michaels*, 60 Wn.2d 638, 641, 374 P.2d 989 (1962). *See also State v. Muller*, 114 Wash. 660, 661, 195 P. 1047 (1921). The long standing rule requires a reviewing court to accept a trial court's ruling as correct unless an affirmative showing to the contrary is made.

Our Court of Appeals cases requiring a showing of abuse of discretion in reviewing trial judge's dismissal of jurors are consistent with this rule. *See Jorden*, 103 Wn. App. 221; *Ashcraft*, 71 Wn. App. 444. The majority's standard cuts against this rule by requiring that the juror cannot be removed for refusing to follow the law or instructions if there is *any* possibility that said juror has been accused of refusing to follow the law because of the juror's views on the case.

The majority's standard is not only contrary to our case law but also clearly unworkable. It may allow a blatantly unfit juror to remain if a scintilla of evidence can be produced that the request for removal has any

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connection with that juror's view on the merits. Such a scintilla of evidence will nearly always be available, usually rendering trial courts powerless to remove unfit jurors once deliberations have begun.<sup>2</sup>

Ironically, the majority's standard does not protect a defendant's constitutional right to an unbiased jury. Under the majority's standard, a trial court could not remove a deliberating juror who refuses to follow the law (for example, by professing that the State need only prove one out of four elements of a crime to convict), if that juror also evidences a view on the sufficiency of the State's evidence. The majority's standard places a serious strain upon a trial court's ability to enforce RCW 2.36.110 and to thereby ensure an impartial and unbiased jury pursuant to the United States and Washington State Constitutions.<sup>3</sup>

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<sup>2</sup> The majority's standard would not permit a trial judge to dismiss a juror who visits the crime scene, contacts the witnesses, or researches the case on the Internet if there is also reasonable possibility of that juror's disagreement with other jurors over the evidence.

<sup>3</sup> Juries embody the voice of the people, and the majority's cited reference distinguishing between law-defining juries and conscience-driven juries is important. Majority at 12-13. Our constitution and laws do not permit intrusions into the inviolate conscience of jurors, but the majority's standard seriously hampers a trial judge's ability to excuse jurors who manifest unfitness through refusal to follow the law.

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California, which has a statutory provision much like Washington's allowing for the replacement of a removed juror with an alternate,<sup>4</sup> employs a more workable standard. In *People v. Cleveland*, 25 Cal. 4th 466, 21 P.3d 1225, 101 Cal. Rptr. 2d 313 (2001), the California Supreme Court rejected the reasoning here and in *Symington* and held that a juror could be constitutionally discharged if "it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." *Id.* at 484. This standard is sufficiently high to protect the defendant's right to an impartial jury from judicial manipulation while allowing a judge prudential power to protect the parties from a biased or unfit juror.

Applying the "demonstrable reality" standard to facts of this case, I would hold the trial judge's decision is abundantly supported. A digression to the facts is appropriate because these facts are an unusually strong

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<sup>4</sup> Compare Cal. Penal Code § 1089 ("If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate . . .") with RCW 2.36.110 ("It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.") and CrR 6.5 ("[an] alternate juror may be recalled at any time that a regular juror is unable to serve . . .").

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example of a judge's appropriate removal and replacement of such a juror with an alternate.

After the case was submitted to the jury, the jury foreman sent a note to the judge noting:

Your Honor:

As the presiding juror, I feel compelled to ask your assistance. We have a juror on the panel who has made statements which lead me to believe he was predisposed to not follow the instructions given by you or to follow the law contained in those instruction [sic].

Prior to adjourning on Thursday, this juror said, "I don't care what the judge said. The law is shit and I don't convict anyone based on what the law says."

This juror has disregarded every witness statement regarding the defendant as credible.

Pl.'s Ex. 129.

A second juror sent a note that was less clear. This juror later confirmed that the first line of the note quoted the challenged juror as saying "I don't care what law says." Pl.'s Ex. 128.

Out of an abundance of caution, the judge held a brief hearing outside the presence of the jury in which the two jurors were separately asked whether the notes were written by them and were true and correct. Upon hearing this evidence, the judge indicated the record was probably sufficient

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to remove Juror 8. Counsel and the judge agreed to briefly question Juror 8 directly. At this inquiry:

Juror #8 admitted that he did say to the other jurors "that it does not matter what the paper says," referring to the court's instructions to the jury.

Br. of Resp't at 5 (quoting RP at 1183).

The judge excused the juror and replaced him with one of the alternates. In a final written ruling the judge made the findings, which under the statute required removal:

1. Juror #8 has at times refused to participate in deliberations.
2. Juror #8 has stated that he refuses to follow the law as provided by the court including the statements, "I don't care what the judge said. The law is shit and I won't convict anyone based on what the law says," and "I don't care what the law says."
3. The court finds the written and verbal statements of Jurors #5 and #12 credible.

Br. of Resp't at 5-6.

The judge went even further to find that she had not relied upon an improper cause to remove the juror:

Juror number 8 . . . was not disqualified from further jury service because of any valid disagreement he may have had with other jurors, including disagreements regarding the credibility of witnesses.

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Br. of Resp't at 7 (CP at 293-324 (Finding 74))

And the judge also concluded:

Juror number 8, Sidney Britton, manifested unfitness as a juror by reason of bias and prejudice and by reason of conduct incompatible with proper and efficient jury service.

Br. of Resp't at 7 (CP at 293-324 (Conclusion of Law 9)).

The juror was properly removed in accordance with the statute setting out the judge's "duty." *See* RCW 2.36.110. There is *no* suggestion that the members of the jury who convicted Elmore were in any way unreasonable, unfair, or biased. From the record it is clear that there was a "demonstrable reality" that the dismissed juror was unable or unwilling to follow and apply the law. Accordingly, the trial judge did not abuse her discretion in dismissing the juror.

The majority, however, posits a new standard with corresponding guidelines and contends that "the trial court here departed from the general guidelines . . . in several ways." Majority at 18. Here, "several" refers to the judge's decision not to reinstruct the jury, as well as the judge's initial determination to exclude the juror prior to the testimony of the questionable (discharged) juror.

The majority improperly transforms a discretionary trial court decision concerning jury reinstruction into a categorical requirement. None of the majority's cited cases support this new requirement, and there is no good reason for it. A decision to reinstruct the jury involves consideration of particularized variables and contingencies that require discretionary decision-making by any trial judge. Jury reinstruction might be of help in certain circumstances, but it might not be in others. A judge could reasonably find that such an instruction would be futile in some cases for the reason that a repeated instruction would mean nothing to a juror who has professed an unwillingness to follow the law and instructions, as was the case with the juror here.

A trial judge could also reasonably find that the instruction could cause disruption to jury deliberation by placing the judge at odds with a particular juror or driving a wedge between deliberating jurors. It was undoubtedly apparent to the trial judge here that a juror who had vehemently refused to be bound by the court's jury instructions the first time was even less likely to be bound through a repetition of those instructions.

Furthermore, the majority incorrectly admonishes the trial court for investigating the alleged juror misconduct and taking immediate action

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“rather than reinstructing the jury and allowing them to continue with deliberations.” Majority at 18. The majority disregards the fact that the trial judge heard testimony from the dismissed juror and issued specific findings supporting the dismissal. In those findings, the judge clearly indicated that the juror’s disregard of the law was the basis for the dismissal and also specifically found that the juror’s views about the evidence did *not* provide the basis for the dismissal.

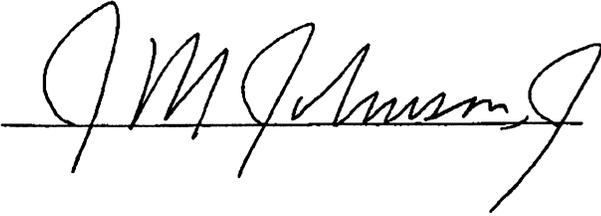
Since it would be difficult to conclude that the judge’s conduct amounts to an “abuse of discretion” or to declare that her findings shouldn’t be trusted, the majority finds refuge for its second-guessing of the trial judge through enactment of the new “any reasonable possibility” standard. By placing the trial judge’s decision into a netherworld where discretion was not abused but where an as-yet-unannounced rule was not fathomed and applied by the judge, the majority justifies overturning the trial judge—and the jury verdict—in this case.

#### CONCLUSION

There is no claim here that our statute requiring judges to remove jurors who are unfit or unwilling to faithfully perform their duties is unconstitutional. The judge here properly applied the statute to a juror who

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refused to follow the law and thereby acted to assure a fair and impartial jury. The majority creates a new standard not found in the constitution for removing an unfit juror. Because the majority decision argues this new standard is not in the interests of justice and not required by our statute or the constitution, I dissent.

A handwritten signature in black ink, appearing to read "J. M. Johnson", is written over a horizontal line. The signature is cursive and somewhat stylized.