

No. 38034-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL L. SUBLETT, and
CHRISTOPHER LEE OLSEN,

Appellants.

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

The Honorable Christine Pomeroy, Judge
Cause Nos. 07-1-00312-0
07-1-01363-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the court's consulting in chambers with counsel about a question from the deliberating jury constituted a closure of the courtroom such as to violate the defendants' right to a public trial.

2. Whether the defendants had a right to be present when the court consulted with counsel and provided a response to the question from the jury during deliberations.

3. Whether it was error for the court to answer the jury question by directing it to reread the instructions rather than specifically answering the question.

4. Whether the defendants' cases should have been severed for trial because they had mutually inconsistent defenses.

5. Whether there was cumulative prosecutorial misconduct, or any prosecutorial misconduct, that rendered the trial unfair.

6. Whether Sublett's California robbery convictions are comparable to a most serious offense in Washington, thus constituting two strikes under the Persistent Offender Accountability Act.

7. Whether Jury Instruction No. 15 permitted the jury to find Olsen guilty of felony murder even if he did not become part of the criminal enterprise until after the victim was killed.

8. Whether Olsen was entitled to have the jury instructed on a lesser included offense of second degree manslaughter.

9. Whether Olsen received ineffective assistance of counsel either because counsel offered a "nonstandard" lesser included instruction for second degree manslaughter or failed to request lesser included instructions for second degree murder or first degree manslaughter.

10. Whether the appellants are entitled to a new trial based upon the affidavit of Katrina Berchtold, which they assert is newly discovered evidence.

11. Whether the unedited recordings of two telephone calls between Olsen and Frazier were unfairly prejudicial.

12. Whether Olsen was denied his right to present a defense because the court excluded certain proffered testimony of Todd Rayan, Mr. Totten's neighbor.

B. STATEMENT OF THE CASE..

1. Substantive facts.

In early 2007, Jerry Totten was 69 years old and lived at 320 West I Street in Tumwater, Washington. He visited his mother, Lois Howarth, in Oregon on January 14, 2007, which was her 91st birthday. After he returned home the following day, she was unable to reach him by telephone. [06/03/08 RP 31-34] On February 8, Ms. Howarth's daughter, Shirley Inman, contacted the Tumwater Police Department by telephone and asked for a welfare check on Totten. She received a report back that everything seemed normal. [06/03/08 RP 41]

Tumwater Police Officer Tim Eikum responded to the request for a welfare check on February 8. He found the east door of Totten's house ajar and the house in disarray, but no indication that a crime had been committed, nor, apparently, any sign of

Totten. [06/03/08 RP 46] Ms. Howarth and Ms. Inman were alarmed enough that they came to Tumwater on February 10. They found his house unlocked, Totten was nowhere around, and they again contacted the Tumwater Police. [06/03/08 RP 36, 41] Officer Eikum responded again to the residence, and found the house in the same condition as it had been two days before. [06/03/08 RP 47] Eikum obtained a list of all vehicles registered to Totten and determined that a 1989 Ford pickup was not at the residence. Ms. Howarth and Ms. Inman made a missing persons report. [06/03/08 RP 51] Later in the afternoon, Eikum was notified that the pickup had been located. [06/03/08 RP

On January 30, 2007, Matthew Gatenbein was moving into a residence on Old Pacific Highway. Around 6:15 p.m. he left to return the U-Haul truck he had been using, and noticed nothing unusual. When he returned to his new home 45 minutes to an hour later, he observed a pickup down an embankment nearby. The headlights were on, the engine was running, and the driver's door was open. [06/03/08 RP 68-70] He called the fire department and requested a fire engine and a sheriff's deputy respond, then checked the vehicle and the nearby area, but did not locate anyone. [06/03/08 RP 71-72] He opened the canopy of the pickup,

which was piled high with "stuff," but did no more than look inside.

[06/03/08 RP 73]

A tow truck from Summit Towing was called to the scene; the pickup was impounded by the State Patrol and taken to a locked impound lot at that business. The pickup was registered to Jerry Totten. It was not searched. [06/03/08 RP 81-82]

Also on February 10, 2007, Thurston County Sheriff's Deputy Mike Stewart was contacted by Elsie Pray-Hicks, who related to him that on January 30 April Frazier had told her that she and two males had killed Jerry Totten, the body was placed into the back of a pickup truck, and the truck driven over an embankment. She said that Frazier also told her that Frazier had discovered that the pickup was towed by Summit Towing. [06/03/08 RP 54-59] Deputy Stewart contacted Summit Towing, confirmed that such a pickup was at the impound lot, and obtained a search warrant. [06/03/08 RP 60-61] The bed of the pickup was packed with items, but as they were removed, the body of Jerry Totten was uncovered. [06/03/08 RP 62-63]

The body was lying on a folded plastic table. [06/04/08 RP 238] Lividity on both sides of the body indicated that it had been moved some time after death. [06/04/08 RP 349] The wrists were

bound together with tape; one hand was covered with a sock and one with a glove. [06/04/08 RP 351-52] There was a strap around the head, neck, and mouth. A wad of paper had been put into the mouth, and there was blood in the mouth. [06/04/08 RP 358] Petechial hemorrhages on the face indicated that pressure had been applied to the neck.[06/04/08 RP 359-60] The body exhibited a number of injuries caused by a blunt instrument, injuries that occurred while Jerry Totten was alive. [06/04/08 RP 369-70] The cause of death was asphyxia due to manual strangulation; he would have endured three to five minutes of continuous pressure before death. [06/04/08 RP 374, 379]

Starting with the name of April Frazier, law enforcement began investigating the murder. Michael Sublett was known to be associated with Frazier because of an incident on February 4, 2007, where the police had been called to a Tumwater hotel where Frazier was causing a disturbance. She claimed Sublett, who was not there when the police arrived, had assaulted her. [06/04/08 RP 217-220] On February 14, police learned that Frazier and Sublett had been arrested and were in custody in Las Vegas, Nevada. [06/05/08 RP 409] Detective Charles Liska went to Las Vegas where he took custody of the personal property taken from them at

the time of their arrest. [06/05/08 RP 411, 440] Among the property taken from Sublett were several items in the name of Jerry Totten: a Washington driver's license, a Sears card, a Costco card, a Visa card, a JCPenney card, a Social Security card, a T-Mobile receipt, and a personal check made out to Sublett and signed by Totten. [06/05/08 RP 441]

Before trial, Frazier made a deal with the State wherein she pled guilty to second degree manslaughter, first degree burglary, and rendering criminal assistance, and agreed to testify for the State. As a result, she was facing approximately 54 months in prison. [06/09/08 RP 564-65] Frazier's testimony during the State's case covered almost 200 pages of transcript. [06/09/08 RP 495-595, 06/10/08 RP 606-697] She testified that she met Totten at an AA meeting toward the end of 2005. He had allowed her to live in a fifth wheel trailer located on his property near his house and gave her a key to the house so she could use the laundry facilities. He treated her like a granddaughter. [06/09/08 RP 497-99] Michael Sublett was Frazier's boyfriend since the latter part of 2005 and often visited her at Totten's property. [06/09/08 RP 501-02] Frazier had permission to be in Totten's house when he was not home and to bring guests with her. Sublett often went into the residence.

[06/09/08 RP 503] In November of 2006, Frazier met Christopher Olsen, who became like a brother to her, a relationship based primarily on their mutual drug use. [06/09/08 RP 505, 507]

In the latter part of January, 2007, Frazier and Sublett returned from a trip to Reno and went to Totten's home, where Sublett stole Totten's checkbook, cell phone, and wallet, which contained several credit cards. [06/09/08 RP 514-16] On January 29, 2007, Frazier and Sublett posted \$1000 bail for Olsen, who was incarcerated in the Thurston County jail. The money had come from Totten's credit card. [06/09/08 RP 509] The purpose for bailing Olsen out of jail was so Olsen could help Frazier and Sublett rob Totten. [06/09/08 RP 519] After Olsen's release, the three went to a hotel room where they drank alcohol and ingested methamphetamines. During that time Sublett and Olsen discussed the robbery. Frazier claimed that she was in another room at the time. [06/09/08 RP 521-22] Frazier discussed her role in the plan only with Sublett. In the early morning hours, which would be January 30, Frazier called Totten to tell him she was coming to his house to finish some laundry she had begun earlier and the three arrived at his house at approximately 1:00 a.m. [06/09/08 RP 523]

Frazier testified that, having lost her key to Totten's house, she went to the front door. Totten let her in and she went to the laundry room, where she opened the back door and admitted Sublett and Olsen. [06/09/08 RP 525-526] Olsen picked up a bat from the utility room and followed Sublett into the house. Frazier remained in the laundry room and the connecting door to the kitchen was closed behind the men. [06/09/08 RP 527-28] Frazier said she heard Totten moan, but then she turned up the music she was listening to so she could no longer hear sounds from the rest of the house. Sublett returned to the laundry room and picked up an orange extension cord; Olsen returned and asked for tape, and both went back inside the house. [06/09/08 RP 529-30] A short time later Frazier went into the living room and saw Totten in a recliner, covered with a blanket; she believed he was dead. Olsen was ransacking drawers while Sublett was searching through the desk. Fifteen minutes later, Sublett took Olsen for a ride to calm him down because he was so upset. [06/09/08 RP 531-32] During the hour they were gone, Frazier collected items of value, mostly electronics, and stashed them in a spare bedroom. She claimed those items were never removed from the house. [06/09/08 RP 532-33] Officer Eikum, who had entered the house while

conducting the welfare check on February 10, noticed a significant amount of electronic items in one of the rooms. [06/03/08 RP 48]

After the killing, Frazier, Sublett, and Olsen returned to their room at the Little Creek Casino Hotel. In the next couple of days, the three of them returned to Totten's house at least twice and perhaps three times. [06/09/08 RP 536] On January 30, the three removed Totten's body by placing it onto a table, pulling it out into the carport, and loading it into the bed of Totten's pickup. According to Frazier, Olsen drove the pickup while Sublett followed in Sublett's car. They returned about an hour later, both in Sublett's car. [06/09/08 RP 540-41] Olsen remarked that he enjoyed what he did and would do it again. [06/09/08 RP 543]

On another trip to Totten's home, the three checked the mail and discovered a letter from Summit Towing, advising that the pickup had been impounded. However, they made no attempt to retrieve the pickup. [06/09/08 RP 546] Frazier and Sublett parted company from Olsen and moved on to another hotel in Tumwater. Frazier borrowed a Chevrolet Suburban from her friend Pete Landstadt, and she and Sublett traveled to Tacoma, Puyallup, Portland, Umatilla, and eventually Las Vegas. [06/09/08 RP 549-52]

During the forensic examination of Totten's house, a fingerprint and partial palm print were lifted from the washer and later identified as those of Sublett. [06/04/08 RP 300-02] DNA samples taken from a wooden bat located in the living room did not contain enough sites that a definite individual could be identified, but neither the victim nor Sublett could be excluded as the donor. Olsen and Frazier could be excluded. [06/04/08 RP 267; 06/05/08 RP 335-36] DNA from a latex glove located in the utility room was identified as coming from Olsen. [06/04/08 RP 257, 06/05/08 RP 338] DNA from blood found on the carpet in the living room proved to be Totten's blood. [06/05/08 RP 339]

Even before Totten's death, Sublett and Frazier had been stealing from him. Coins were sold to a coin dealer [06/03/08 RP 85-88]; two generators were pawned or sold [06/03/08 RP 91-93, 95-96, 104-06; 06/10/08 RP 616-618] His checkbook, wallet, and cell phone were taken shortly before his death. [06/09/08 RP 514-16] While Frazier and Sublett were in Reno before the murder, Sublett persuaded Totten to wire money to them, claiming untruthfully to need money for car repairs. [06/09/08 RP 456, 512] After Totten's death, large amounts were charged to Totten's credit card and wired to Sublett. [06/09/08 457-61] Sublett used Totten's

Citibank card numerous times. [06/09/08 466-472] Several transactions using Totten's credit card occurred at Target stores. [06/10/09 RP 687-91] After January 30, 2007, money was transferred and/or withdrawn from Totten's Key Bank checking account and home equity line of credit to the tune of slightly more than \$51,000. [06/10/08 RP 706, 741-42]

Before local police officers left Thurston County to bring Sublett and Frazier back from Las Vegas, Christopher Olsen had become known to them as a suspect. [06/11/08 RP 773] On February 15 or 16 they began looking for Olsen, and late in the evening of the 16th Lt. Brenna received a phone call from him. Olsen said he would come speak to the officer on February 18. He did not do so. [06/11/08 RP 778-780] On February 22, Olsen was located walking down a street in Olympia. [06/11/08 RP 788] Olsen gave the name of Chris DeShawn, at least until he was confronted with a photograph, as well as the fact he had the name "Olsen" tattooed on his back. [06/11/08 790-91, 811; 06/16/08 RP 887] He appeared to be under the influence of narcotics. [06/11/08 RP 793] He gave a rambling statement to Lt. Brenna, in which he said he was using drugs and alcohol the night of the murder. He claimed that he had not participated in the murder, but that Frazier and

Sublett had forced him to participate in cleaning up the scene of the crime and moving the body. [06/11/08 RP 796-803] He claimed Sublett drove the pickup containing the body while he and Frazier followed in Sublett's car. [06/11/08 RP 803] In a second interview several days later, Olsen said Sublett had pulled a gun on him and forced him to assist them; he claimed to be frightened of both Frazier and Sublett. [06/11/08 RP 809]

Olsen took the witness stand at trial and again denied any part in the killing. He testified he said anything he thought necessary in order to persuade Frazier and Sublett to bail him out of jail, but never agreed to commit robbery, burglary, or murder. [06/16/08 RP 855, 872] Both Frazier and Sublett threatened him, Sublett using a gun. [06/16/08 RP 854-55] Despite the fact that he claimed to be frightened of them and wanted them to be caught for their crimes, he never contacted police, and, in fact, met once with Sublett after he had supposedly escaped from Sublett and Olsen. [06/16/08 883-902]

b. Procedural facts.

Sublett and Olsen were both charged with murder in the first degree by the alternative means of premeditated murder or felony murder committed in the course of first degree burglary or first or

second degree robbery. [Olsen CP 17, Sublett CP 51] The State brought a motion to join the defendants for trial. A hearing was held on May 8, 2009, and over Sublett's objection, the motion was granted. Jury trial began on June 2, 2008, and concluded on June 18. Sublett was found guilty of both premeditated and felony murder, and Olsen was found guilty of felony murder only. [06/18/08 RP 1083] Olsen brought a motion for a new trial which was heard on July 23, 2008, based on newly discovered evidence. The motion was denied. [07/23/08 RP 1123] Sentencing followed the same day. Sublett was sentenced to life in prison as a persistent offender [07/23/08 RP 1153-55] and Olsen received a standard range sentence of 500 months. [07/23/08 RP 1155]

C. ARGUMENT.

1. The defendants were not denied their right to a public trial when the trial court and counsel considered and responded in chambers to a question from the deliberating jury.

The right of a criminal defendant to a public trial is protected by the constitutions of both the United States and the State of Washington. Prejudice is presumed when a violation occurs. State v. Rivera, 108 Wn. App. 645. 652, 32 P.3d 292 (2001). The right to a public trial applies to the evidentiary phases of the trial, and to

other “adversary proceedings.” “Thus, a defendant has the right to an open court whenever evidence is taken, during a suppression hearing, and during voir dire.” Id., at 652-53.

The appellants argue¹ that the trial court closed the courtroom by consulting with counsel and responding to a question from the jury in chambers. They cite to State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), in which a suppression hearing had been closed to the public to protect the identity of an undercover police officer. The Supreme Court found that the closure had not been justified because the trial court had failed to consider five factors, which Sublett sets forth in his brief at pages 10-11, and which are found in Bone-Club, 128 Wn. 2d at 258-59. The Bone-Club court referred to the closure as a “temporary, full closure.” Id., at 257.

Division II of the Court of Appeals, in State v. Wise, 148 Wn. App. 425, 200 P.3d 266 (2009), considered a public trial challenge where, during voir dire, nine potential jurors were questioned on the record, but in chambers, about various sensitive issues. No Bone-Club analysis was conducted. The Wise court considered Bone-Club, where the closure was a “temporary, full closure”, and

¹ Each appellant has adopted and incorporated some of the other’s arguments in his brief. See Olsen’s supplemental brief, page 1, and Sublett’s brief, page 5, fn.1

In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), where the closure was a “permanent, full closure of voir dire.” Wise, 148 Wn. App. at 435. Distinguishing those cases, the Wise court found that there was no order closing the courtroom and the presumption was that it remained open. If closure occurred, it was “temporary and partial, below the ‘temporary, full closure’ threshold of Bone-Club. Therefore, a Bone-Club analysis was not necessary before taking some jurors into chambers for questioning on sensitive matters. Wise, 128 Wn. App. at 436. The Wise court further held that holding part of voir dire in chambers is not a structural error such that prejudice is presumed. Id., at 438.

A similar situation occurred in State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007), *review granted in part*, 163 Wn.2d 1012, 180 P.3d 1291 (2008). Several prospective jurors were questioned in chambers in the presence of the defendant, all counsel, and the court reporter. It was unclear if the door was closed. Id., at 710. There was no record that any member of the public or press was excluded. Id., at 712. The Court of Appeals cited to language in both Bone-Club and Orange that noted it was the motion to close, and the plain language of the ruling closing the courtroom, that triggered the necessity for a Bone-Club analysis.

The right to a public trial exists to “ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)(citing to federal cases). The harms associated with a closed trial have been identified as:

the inability of the public to judge for itself and to reinforce by its presence the fairness of the process, . . . the inability of the defendant’s family to contribute their knowledge or insight to the jury selection, and the inability of the venirepersons to see the interested individuals.

Orange, 152 Wn.2d at 812.

In the present case, the court addressed a question from the jury in the presence of counsel for all parties. [Sublett CP 71] There is no indication that the courtroom was closed. The defendants did not have the right to be present, as will be discussed below. If the defendants did not have the right to be present, then the public most certainly did not. The response to the jury question was a purely legal matter, with no issues of fact and no testimony, and thus none of the above-listed reasons for an open courtroom exist.

Sublett cites to Rogers v. United States, 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975) for the proposition that jury

questions should be responded to in open court and in the presence of the defendant. In Rogers, however, which interpreted a federal rule of criminal procedure, the trial court had responded to a question from the jury without notifying either the defendant or his attorney. Id., at 36. The Supreme Court held that the trial court should, based on Federal Rule Crim. Proc. 43, have answered the question in open court and given defense counsel an opportunity to be heard. Id., at 39.

The trial court in this case followed Washington Superior Court Criminal Rules (CrR) 6.15, which reads, in pertinent part:

(f)(1) Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing.

The record does not reflect that either defense counsel made any objection to the response that the court gave, which was to reread the instructions. [Sublett CP 129] The State has been unable to locate any case that finds this court rule unconstitutional. The requirement that the jury question be answered either in open court or in writing preserves the defendant's right to a public trial, in that the public is able to see what the court did.

Sublett and Olsen have not established that the courtroom was in fact closed, or that the response to a question from a deliberating jury is an adversarial or evidentiary matter that requires an open courtroom. If it could be considered a courtroom closure, it was certainly a “temporary and partial” closure that would not require a Bone-Club analysis. There was no unconstitutional closure of the courtroom and no violation of the defendants’ right to a public trial.

2. The defendants did not have the right to be present when the judge consulted with counsel and prepared a response to the question submitted by the deliberating jury.

A defendant has a constitutional right to be present at all critical stages of the proceedings. A critical stage occurs when evidence is being presented or whenever the defendant’s presence has “a relation, reasonably substantial,” to the opportunity to defend against the charge. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486(1985)). “The defendant does not have the right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least when those matters do not require the resolution of disputed facts.” Id.

The question submitted by the jury [Sublett CP 129] involved interpretation of Instruction No. 21 [Olsen CP 71], the accomplice liability instruction. Sublett argues in his opening brief at page 15 that this is the type of question that a defendant would urge his counsel to answer. That may be, but it doesn't necessarily follow that counsel would agree or that the court would then do so. The issue was a legal one, and only appellants' trial counsel would have been permitted to address the question.

In State v. Bremer, 98 Wn. App. 832, 991 P.2d 118 (2000), the defendant appealed his conviction for attempted residential burglary on the grounds that because he was not present during an in-chambers conference concerning jury instructions he was denied his constitutional right to be present at every stage of the proceedings. The Court of Appeals disagreed.

Jury instructions involve resolution of legal issues, not factual issues. . . . In the absence of some extraordinary circumstance in which Mr. Bremer's presence would have made a difference, a discussion involving proposed jury instructions is not a critical stage of the proceedings. Because Mr. Bremer was fully represented by counsel at the hearing, he would not have had an opportunity to speak.

Id., at 835 (internal cites omitted). If a defendant does not have the right to be present when the jury instructions are decided upon, it

follows he would not have the right to be present when the trial court responds to jury questions about them.

3. It was not error for the court to direct the jury to reread its instructions rather than specifically answering the question.

Whether or not to give further instructions when a deliberating jury submits a question is within the discretion of the trial court. State v. Ng, 110 Wn.2d 32, 42, 750 P.2d 632 (1988); State v. Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008).

Sublett and Olsen contend that the jury's question shows that it found the instruction ambiguous and therefore the court was required to clarify the instruction. In Ng, the jury submitted a question asking whether the defense of duress applied to the lesser included charges. As the court did here, that trial court declined to answer beyond "[P]lease refer to the instructions. The court cannot provide any additional instructions or explanations." Ng, 110 Wn.2d at 42. Ng argued that the court should have answered the question; the Supreme Court disagreed. Id. Ng also argued that the jury question indicated that the jury instructions were ambiguous, but the court responded that "[t]he individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict. . . . '[Q]uestions from the jury are

not final determinations, and the decision of the jury is contained exclusively in the verdict.” Id., at 43.

The appellants in this case are attempting to use the jury question to impeach the verdict. That is no more permissible here than in Ng.

The appellants further argue that the jury question proposed two interpretations of the accomplice liability instruction, and that only one of them is correct. Instruction No. 21 is the pattern instruction, WPIC 10.51, which mirrors the statutory language of RCW 9A.08.020, and which has been approved by the courts, for example, in State v. O’Neal, 126 Wn. App. 395, 418-19, 109 P.3d 429 (2009), *affirmed* 159 Wn.2d 500, 150 P.3d 1121 (2007). Sublett asserts that the second alternative considered by the jury is incorrect, but in Washington there is no real distinction between principal and accomplice liability. State v. Molina, 83 Wn. App. 144, 148, 920 P.2d 1228 (1996). Essentially, all members of a criminal enterprise are liable for the conduct of all other members of that enterprise, and thus both alternatives in the jury question could be correct.

Given the discretion of the court to respond to jury instructions, it cannot be said that this court abused that discretion.

4. The defendants did not have mutually inconsistent defenses, and therefore it was not error for the court to deny Sublett's motion to sever.

Sublett argues that his case should have been severed from Olsen's because his defense of general denial was inconsistent with Olsen's defense of duress. That is not quite accurate. Olsen did not put forth a defense of duress to murder. He raised an alibi defense; he claimed he wasn't even there when it happened. [06/11/08 RP 799-800, 06/16/08 RP 855, 892-93, 914] His attorney argued in closing that the murder had occurred before Olsen was even released from jail. [06/17/08 RP 1035-38] Olsen did claim to have been forced to help move the body and clean up the victim's house, and was frightened into keeping quiet about the murder because Sublett and Frazier threatened him. [06/11/08 RP 809, 827; 06/16/08 RP 853-54, 902] At most, Olsen raised a defense of duress to a crime of rendering criminal assistance, but he was not charged with that.

Duress is not a defense to murder. RCW 9A.16.060(2); State v. Mannering, 150 Wn.2d 277, 281, 75 P.3d 961 (2003). Both Sublett and Olsen denied having committed the murder at all. That does not constitute inconsistent defenses.

Joint trials are preferred in Washington. A court's denial of a motion to sever is reviewed for abuse of discretion. A defendant seeking severance has the burden of establishing that a joint trial would be so prejudicial as to outweigh considerations of judicial economy. Specific prejudice will be found where conflicting defenses are mutually exclusive. State v. Medina, 112 Wn. App. 40, 52-53, 48 P.3d 1005 (2002). In Medina, a group of approximately eight individuals beat and robbed the victim before forcing him into the trunk of his own car and driving him to another location. Three of the defendants, Medina, Hunt, and Aker, were tried together. After Hunt was arrested, he gave a statement in which he admitted limited involvement in the incident but claimed he did not hit the victim. Medina also gave a statement in which he claimed that his involvement also was limited to holding the victim while someone else hit him. Medina moved to sever because the State intended to introduce Hunt's statement at trial. A redacted version of Hunt's statement was admitted, removing all references to Medina. The court found that the defenses were not mutually antagonistic because there were others involved in the crime, and the jury did not necessarily have to disbelieve one defense in order to believe the other. Id., at 53.

The case at issue here is very similar. Olsen gave a statement, and testified, claiming he was not present when the murder occurred. He didn't know what happened or who killed Totten. Sublett did not testify, and his defense was a general denial. During closing arguments, counsel for both Sublett and Olsen concentrated on discrediting Frazier, with Olsen's attorney making only passing reference to Sublett. [06/17/08 RP 1008-28; 1031-68], and specifically argued that the bruises on Frazier's arms came from Totten at the time she was strangling him, not from an assault by Sublett. [06/17/08 RP 1058] The jury had the option of believing both Sublett and Olsen, blaming Frazier for the murder.

To justify severance, a defendant must demonstrate that a joint trial would be "so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). "[M]utually antagonistic defenses are not per se prejudicial as a matter of law." State v. Johnson, 147 Wn. App. 276, 284, 194 P.3d 1009 (2008), citing to State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). An attempt by one defendant to exculpate himself by incriminating a codefendant is not sufficient to require separate trials. Johnson, 147 Wn. App. at 284-85. To show that mutual finger-pointing demands severance, the defendant must

“demonstrate that the conflict is so prejudicial that . . . the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.” *Id.*, at 285, citing to Grisby, 97 Wn.2d at 508.

The Court of Appeals rarely overturns a court’s denial of a motion to sever, even where one defendant attempts to blame the other. Johnson, 147 Wn. App. at 285. Sublett cites to a Louisiana case to support his argument that severance is required when one codefendant claims the other forced him to commit the crime. However, “the rule in Washington is that “the desire of one defendant to exculpate himself by inculpating a codefendant . . . is insufficient to [compel separate trials].”” *Id.*, at 286, citing to other cases. Here, the jury could have believed both Sublett and Olsen, but even if it believed only one of them severance was not required because any conflicting defenses did not rise to the level where the jury would, based on mutual blame, have concluded both were guilty. Clearly the jury did not believe either defense, but the test is not based on the outcome of the trial.

5. There was no prosecutor misconduct, cumulative or otherwise, that rendered the trial unfair and requires reversal.

a. DNA evidence and argument.

Sublett argues that the prosecutor committed misconduct by misstating the probative value of certain of the DNA evidence.

At trial, the State produced testimony from Karen Green, a forensic scientist with the Washington State Patrol Crime Lab, that she analyzed a sample of skin cells from the bat found in the room where Totten was killed. She determined that more than one person had deposited genetic material on the bat, but she was able to obtain only a partial DNA profile. She compared that to the reference samples she had from Totten, Frazier, Olsen, and Sublett, and was able to exclude Frazier and Olsen. Totten was a potential contributor, and Sublett could not be excluded. [06/05/08 RP 335] Based upon the partial profile, she was able to estimate that one in every 130 persons in the United States was a potential contributor to that DNA sample. [06/05/08 RP 336] During closing argument, the prosecutor said this:

That bat was wiped for DNA. Mr. Sublett was not excluded as a DNA contributor, and the probability that he was the contributor to that DNA found on the bat was one in 130. Now, you know, you take that number, one in 130, and consider it in a vacuum, that's a low number, especially when you consider

what was the – Mr. Olsen’s DNA was one in six I don’t know how many gazillions; a lot. So in light of that, one out of 130, that’s a low number, but when you consider that evidence, ladies and gentlemen, one in 130, when you consider that evidence in light of all of the evidence in this case, that was Mr. Sublett’s DNA because Mr. Sublett was at that house. Mr. Sublett was at that house on January 29th. He was the guy that stole the credit cards. He was the guy that had the credit cards stolen from Jerry Totten. His fingerprints were in the utility room. April Frazier put him there and Christopher Olsen. So ladies and gentlemen, I submit the totality of the evidence, Sublett had that bat.

[06/17/08 RP 997]

Sublett argues, citing to federal cases, that this is an example of “prosecutor’s fallacy” which confuses source probability with random match probability, or suggesting that the evidence indicates the probability of the defendant’s guilt rather than the odds of finding a match in a randomly selected sample. [Sublett’s brief, pg. 23] The State maintains that this mischaracterizes the prosecutor’s argument.

Karen Green testified that one in every 130 individuals in the United States is a potential contributor to that DNA sample. The prosecutor argued that the probability that Sublett was a contributor to that sample is one in 130. Since Sublett is in the United States, and one in every 130 individuals is a potential contributor, than there is a one in 130 chance that he contributed to the sample. The

prosecutor did not misstate the evidence. Further, he did not rely on the DNA evidence alone, but argued that the evidence established that Sublett had been in Totten's house, thus making it even more likely that the DNA was Sublett's. There was no evidence that hundreds of people had been in the house, potentially handling the bat. The prosecutor argued that the "totality of the evidence," of which the DNA was a part, established Sublett's guilt.

The defendant bears the burden of establishing that a prosecutor's comments were both improper and prejudicial. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Allegedly improper arguments are to be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Graham, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986) A conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict. State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). Failure to object to an improper remark constitutes a waiver of the error unless the remark is so flagrant and ill-intentioned that it causes an enduring prejudice that could

not have been neutralized by a curative instruction. Hoffman, 116 Wn.2d at 93.

Here, the prosecutor's remark was not only not improper, but Sublett's attorney made the same "fallacious" argument:

But if you think about it, it doesn't really exclude, you know—if there's 130 people in these two rooms, it doesn't exclude somebody else that's within this immediate area.

[06/17/08 RP 1028] Sublett did not object to the remark or ask for a curative instruction, so he must establish that the remark was flagrant and ill-intentioned. He has not done so. Nor has he shown what prejudice resulted, apart, presumably, from the fact that he was convicted. There was no error.

b. Visual aids.

Sublett argues that the prosecutor used an inadmissible visual aid that misstated the evidence and mislead the jury. He does not identify what that was. The State assumes he is referring to these portions of the State's closing argument:

MR. WOODROW: Your Honor, I'm gonna object at this time. The State is using unadmitted exhibits in this case. I'd ask that that exhibit be taken down.

Thank you.

THE COURT: Thank you, counsel.

I will ask you to—ladies and gentlemen of the jury, we are going to take—

MR. BRUNEAU: Well, how about if I just move along, Your Honor?

THE COURT: Thank you

[06/17/08 RP 977-78]

MR. WOODROW: Your Honor, I'm going to object again to unadmitted evidence in the State's closing.

MR. BRUNEAU: When you consider the----

MR. WOODROW: Objection. I'd ask Your Honor to make a ruling on that.

THE COURT: I'm going to ask that we move on, that you take that picture off. Thank you, counsel.

[06/17/08 RP 1003]

The only indication in the record as to what those exhibits were is Sublett's statement at sentencing that one of them was his picture enclosed in a red circle and with the word "guilty" over his face, with arrows pointing toward it. [07/23/08 RP 1152-53]

This court cannot rule when there is an inadequate record; it cannot speculate upon the existence of facts which are not in the record. State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977). The exhibit is not part of the record, and even if Sublett is correct, there is quite likely more to it than he describes. If there were arrows pointing toward the word "guilty" superimposed upon his picture, the reasonable assumption would be that the image also listed

various pieces of evidence which indicated his guilt, and the arrows were pointing from those pieces of evidence toward his face. He has not provided a sufficient record upon which this court can decide this issue.

Further, Sublett provides no authority for his argument that it was improper for the prosecutor to show such a visual aid. It would be improper for the prosecutor to use evidence not admitted at trial, but a picture of Sublett with the word "guilty" over his face is hardly a piece of evidence. The fact that defense counsel mischaracterized it as evidence or that the court asked him to take it down is not proof that it was improper. The State has found no cases that prohibit counsel for either party from using visual aids to illustrate their arguments. Nor would such a photograph have been prejudicial. The prosecutor argued for 28 pages of transcript in closing [06/17/08 RP 976-1003] and another eight pages on rebuttal [06/17/08 RP 1069-76] that the defendants were guilty. It is hardly prejudicial for the jury to see the word on a display in front of them.

There was no prosecutorial misconduct, and therefore no cumulative error.

6. California's second degree robbery statute is comparable to Washington's second degree robbery statute, and therefore Sublett's two California convictions for second degree robbery properly counted as strikes.

Sublett had prior convictions in California for second degree robbery on two occasions—one count on 1994 and two counts in 1997. [Sublett CP 173-75, 188-90] On both of those occasions he entered a guilty plea *nolo contendere* [Sublett CP 175] or in order to take advantage of a plea bargain. [Sublett CP 190] Following his conviction for first degree murder in this case, the trial court found that the California second degree robbery statute was comparable to Washington's. [07/23/08 RP 1132-33] Second degree robbery is a “strike” for purposes of imposing a life sentence pursuant to the Persistent Offender Accountability Act (POAA). RCW 9.94A.030(33).

An out of state conviction may not count as a “strike” under the POAA unless the State proves by a preponderance of the evidence that the out of state conviction would constitute a strike in Washington. To make that determination, the court must compare the two statutes. State v. Lavery, 154 Wn.2d 249, 252, 111 P.3d 837 (2005) The trial court's decision is reviewed de novo. State v. Thieffault, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

In this case, the State provided to the court the California statutes. The California Penal Code § 211 defines robbery:

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

[Sublett CP 205] California Penal Code § 212.5 identifies second degree burglary as every robbery that is not included in first degree robbery, which is defined in subsections (a) and (b) of that section.

[Sublett CP 207]

In Washington, robbery is defined in RCW 9A.56.190:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

This definition constitutes second degree robbery. RCW 9A.56.210.

When a Washington court conducts a comparability analysis, it uses a two-part test. It first determines whether the elements of the foreign offense are “substantially similar” to the elements of the

Washington offense. If so, the inquiry ceases. If the elements are broader than the Washington statute, then the court must determine if the conduct underlying the foreign conviction would have violated the Washington statute. Thiefault, 160 Wn.2d at 415. In this case only the first part of the test is applicable because it is apparent that the Washington statute is substantially similar to the California statute, and thus it passes the comparability test on the elements. The facts underlying the California convictions are part of the record only in that his attorney mentioned them at sentencing. [07/23/08 RP 1128] However, the court could consider them only if they were admitted, stipulated to, or proved beyond a reasonable doubt. Id., at 420. Since Sublett plead guilty in both instances without admitting guilt, that did not happen.

Sublett first argues that because Washington permits a defense of intoxication or diminished capacity to a crime requiring specific intent, the statutes are different enough to fail the “substantially similar” test. However, the question is whether the elements are similar, not the potential defenses. Thiefault, 160 Wn.2d at 415.

Sublett correctly notes that Washington requires the nonstatutory element of intent to steal; so does California. People v. Davis, 46 Cal. 4th 539, 608, 208 P.3d 78 (2009) (“Robbery is the taking of personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property.”); People v. Marshall, 15 Cal. 4th 1, 34, 931 P.2d 262 (1997) (“Robbery is defined as the taking of personal property of some value, however slight, from a person or in the person’s immediate presence by means of force or fear, with the intent to permanently deprive the person of the property.”)

The California statute uses the words “felonious taking.” Washington courts have found “feloniously” to mean “with intent to commit a crime.” State v. Nieblas-Duarte, 55 Wn. App. 376, 381, 777 P.2d 583 (1989).

Sublett cites to State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005), for the principle that in Washington, the force or fear must be used in the taking of the property, rather than in attempting to escape. In Johnson, the defendant was attempting to shoplift a

television set when confronted by store security. He abandoned the television and started to run away, but when grabbed by a security guard, he punched the guard and escaped. The Supreme Court found that this was not force used in taking or retaining property. Sublett implies, although does not state outright, that California law is different. In People v. Lindberg, 45 Cal. 4th 1, 25, 190 P.3d 664 (2008), the California Supreme Court said, “[T]he force or fear element of robbery is satisfied if the perpetrator uses force to retain or *escape with the property*.” (Emphasis added.) Escaping with the property is substantially similar to retaining possession of the property.

Sublett argues that Washington required an express threat of immediate force while California does not. He overstates the Washington requirement. In State v. Collinsworth, 90 Wn. App. 546, 966 P.2d 905 (1997), *rev. denied* 135 Wn.2d 1002 (1998), Collinsworth had robbed several banks by advising the tellers to give him money. He once said, “I’m serious,” and used a “serious” or “direct and demanding” tone of voice, but never displayed a weapon and never made any threats or ultimatums. Id., at 548-50. He argued on appeal that he was guilty only of theft because he had not demonstrated an intent to create fear and had not used

force. The Court of Appeals noted that this was a question of first impression and cited to several federal cases, concluding that “[a]ny force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction,” (quoting from State v. Ammlung, 31 Wn. app. 696, 704, 644 P.2d 717 (1982) (defendant’s blocking a victim’s path to car at time keys were taken was sufficient threat of force, standing alone, to support conviction for robbery)).

In his statement of the issues, Sublett maintains that his California robbery convictions are not factually comparable to the Washington statute, but he does not argue that in his brief. [Appellant’s brief 3] As noted, the facts underlying those convictions were not proven or admitted by the defendant, and cannot be used for a comparability analysis.

At sentencing, the State established by a preponderance of the evidence that the California and Washington statutes are substantially similar. [Sublett CP 166-207] There was no error in the court’s finding that Sublett is a persistent offender.

7. A reasonable jury would not have misinterpreted Instruction No. 15 to allow it to convict Olsen of felony murder for participating in burglaries that occurred after the burglary and/or robbery during which the victim was killed.

Olsen has correctly stated the law regarding jury instructions. The State disagrees that the jury would have misinterpreted Instruction No. 15 to conclude that it could convict Olsen of felony murder even if he never set foot in the victim's house until after the victim was dead. Alternative B of Instruction No. 15 reads:

To convict the defendant, Christopher Lee Olsen, of the crime of murder in the first degree as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 29, 2007, Jerry Totten was killed;
- (2) That the defendant or an accomplice was committing or attempting to commit the crime of burglary in the first degree or robbery in the first degree or robbery in the first or second degree;
- (3) That the defendant, or another participant, caused the death of Jerry Totten in the course of or in furtherance of such crime or in immediate flight from such crime;
- (4) That Jerry Totten was not a participant in the crime; and
- (5) That the acts occurred in the State of Washington.

[Olsen CP 64]

Olsen argues that the jury could find from this that because he was in the house on two or more separate occasions following the death of Totten that the jury could conclude the murder occurred in furtherance of those burglaries. The plain language of the instruction rules out any other robbery; there were no other robberies. Second degree robbery was defined for the jury. [Instruction No. 19, Olsen CP 69] First degree burglary was also defined for the jury in Instruction No. 16. [Olsen CP 66] For that crime to occur, one of the participants must be either armed with a deadly weapon or commit an assault. There was no other assault, and the only mention of a weapon apart from the time of the murder was Olsen's claim in his statement to police that Sublett threatened him with a gun when he took Olsen for a ride. [06/11/08 RP 809] Frazier said this happened during the same trip to Totten's house as the killing; [06/09/08 RP 532] Olsen claimed that during this ride he was informed that the victim was in the recliner, which, under his version of the facts, would have to be the first time he was at the house.

A common sense reading of the jury instruction would lead a reasonable person to conclude that the death and the underlying felony occurred at the same time. The terms "furtherance of" and

“in immediate flight from” clearly imply that they took place in a close time frame. Causing Totten’s death furthered only the robbery and/or burglary that was occurring at the time of the killing. Frazier and Sublett had access to Totten’s house at any time, and killing him was not necessary to enter his home.

The instruction accurately stated the law. In closing argument, the prosecutor did not suggest that the jury could find Olsen guilty because he went into Totten’s house at times after the death, but argued that Olsen participated in the killing. [06/17/98 RP 995, 998] Olsen has pointed to no evidence that the jury misunderstood the instruction, but only speculates that it is possible. The State maintains that mere speculation is insufficient to provide grounds for reversal. In State v. Watkins, 99 Wn.2d 166, 660 P.2d 1117 (1983), the trial court had submitted two new verdict forms to a deadlocked jury, along with a supplemental instruction. The jury then convicted, and Watkins appealed on the grounds that the instruction was coercive. The Supreme Court held that a defendant must produce more than mere speculation about how the jury verdict might have been influenced. Id. at 177-78. In this case, Olsen must provide some evidence of jury misunderstanding, and he has failed to do so.

8. Olsen did not produce sufficient evidence that he was guilty only of second degree manslaughter, and thus was not entitled to a jury instruction on that crime as a lesser included of first degree murder.

Olsen argues that he was entitled to a jury instruction on second degree manslaughter as a lesser included offense of first degree murder, and that the court's failure to give such an instruction violated both his state and federal constitutional rights. The State does not dispute a defendant's right to a lesser included instruction when the law and the facts of the case permit. Amendments V, VI, and XIV of the federal constitution require the trial court to give a requested instruction when the lesser included offense is supported by the evidence. Vujosevic v. Rafferty, 844 F.2d 1023 (1988). This right protects a defendant who might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because it wishes to avoid setting him free. Keeble v. United States, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 93 s. Ct. 1993 (1973).

Under current Washington law, the defendant's right to a lesser included instruction is, in addition to his federal rights, a statutory right. RCW 10.61.006 provides:

In all other cases [those not involving crimes with inferior degrees, RCW 10.61.003] the defendant may be found guilty of any offense the commission of

which is necessarily included within that with which he is charged in the indictment or information.

See also State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). This right applies when (1) each element of the lesser offense is a necessary element of the crime charged, and (2) the evidence supports an inference that only the lesser included crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997). This two-prong test reflects consideration for the specific constitutional rights of the defendant, particularly his right to know the charges against him and to present a full defense. Peterson, 133 Wn.2d at 889. An inference that only the lesser offense was committed is justified “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

The first prong of the Workman test is met. Manslaughter is a lesser included offense of premeditated murder. State v. Schaffer, 135 Wn.2d 355, 957 P.2d 214 (1998). (Neither first nor second degree manslaughter is a lesser included offense of first degree felony murder. State v. Dennison, 115 Wn.2d 609, 626-27, 801

P.2d 193 (1990).) The second prong is not, because Olsen did not establish that he was guilty only of manslaughter, or even that he was guilty of manslaughter at all.

A trial court's refusal to give a lesser included offense instruction is reviewed for abuse of discretion when the decision is based upon the facts of the case. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds*, State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). When there is evidence to support the defendant's guilt solely on the lesser charge, the trial court's refusal to instruct on the lesser charge compromises a defendant's ability to present his theory to the jury and can constitute reversible error. State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981).

In his brief, Olsen conducts a Gunwall analysis (State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)) comparing the state and federal constitutional provisions regarding rights pertaining to jury trials, and maintains that Wash. Const. Article I, sections 21 and 22 provide greater protections than does the federal constitution. He argues for an independent application of the state constitution without explaining what that application would be, or how it differs from either the federal constitution or current

Washington law, merely concluding that “[o]ur state constitution protects an accused person’s right to have the jury consider lesser-included offenses.” [Olsen’s brief at 38] The State is at a loss how to respond to that analysis. Current Washington law does protect a defendant’s right to lesser-included instructions. If the state constitution provides greater protections, what specifically are those protections? If Olsen maintains that the state constitution permits a lesser included instruction even in the absence of a factual basis, then the State disagrees that he has established that the Washington constitution requires that result.

Under current law, the party requesting the lesser included instruction must point to evidence that affirmatively supports the instruction and may not rely on the possibility that the jury will disbelieve the opposing party’s evidence. Fernandez-Medina, 141 Wn.2d at 456; State v. Leremia, 78 Wn. App. 746, 755, 899 P.2d 16 (1995). Olsen argues that he was guilty of second degree manslaughter rather than murder because he breached a statutory duty imposed by RCW 9.69.100, which provides:

- (1) A person who witnesses the actual commission of:
 - (a) A violent offense as defined in RCW 9.94A.030 or preparations for the commission of such an offense;

. . . .

shall, as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public officials.

.

(3) The duty to notify a person or agency under this section is met if the person notifies or attempts to provide such notice by telephone or any other means as soon as reasonably possible.

(4) Failure to report as required by subsection (1) of this section is a gross misdemeanor. However, a person is not required to report under this section where that person has a reasonable belief that making such a report would place that person or another family or household member in danger of immediate physical harm.

The State does not dispute that Totten's murder would fall under RCW 9.94A.030(50). However, since Olsen both told the police in his statements and testified at trial that he was terrified that Sublett and Frazier would harm both himself and his family, he would have been exempt from that statutory requirement. The State has found no cases where this statute has been held to support a charge of manslaughter. Olsen cites to State v. Morgan, 86 Wn. App. 74, 81, 936 P.2d 936 (1997) for the proposition that a manslaughter charge can be based on a failure to summon aid where there is a statutory duty to do so. In Morgan, the duty was based on RCW 26.20.035, a family law statute, and the discussion in the opinion dealt only with the duty of family members to each other.

If Olsen's story is believed, he was not there when the attack occurred and did not witness the actual commission of the murder. As he notes in his brief at page 31, fn. 17, the only on-going crime might have been kidnapping, and since he was not charged with that he could not be found guilty of it. He argues that he reasonably believed that Totten might have been alive when he entered the house for the first time, hours or days after Sublett and Frazier had beaten, restrained, and strangled Totten, but the evidence at trial shows that to have been impossible.

Totten was manually strangled. [06/05/08 RP 373-74] Pressure was applied to his neck for some time exceeding three to five minutes before death resulted. [06/05/08 RP 377, 379] There was no possibility that Totten was alive when the killer removed his or her hands from around his neck. It would have been impossible for Olsen to report the attack in time to prevent death, and thus his failure to do so did not cause death.

Nor was there any evidence that Olsen could have reasonably thought Totten was alive. He either testified in court or told the police that he never heard Totten speak or saw him move. [06/16/08 RP 855] He saw only Totten's foot at the time the body was being moved. [06/11/08 RP 802-3; 06/16/08 RP 893] He

testified that there was a bad smell, like gas odor, when the body was being moved. [06/11/08 RP 836-37; 06/16/08 RP 853] Frazier also testified that there was a smell associated with the body. [06/16/08 RP 938] There was no evidence presented that Olsen ever asked if Totten was still alive or took any action whatsoever that would be an indication that he actually thought Totten might still be alive.

The reason for the trial court's refusal to give the lesser-included instruction is not part of the record. [06/17/08 RP 956] Nevertheless, the court was correct in doing so, and an appellate court can affirm on any correct ground, even if it was not considered by the court below. State v. Fritz, 21 Wn. App. 354, 364, 585 P.2d 173 (1978)

By his own version of the events, Olsen was either guilty of murder or nothing at all. He was not guilty of manslaughter. There was no error in the court's refusal to instruct the jury on that lesser included offense.

9. Olsen did not receive ineffective assistance of counsel on the grounds that counsel either sought a “nonstandard” instruction for second degree manslaughter or failed to request instructions for second degree murder or first degree manslaughter as lesser included offenses.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel’s performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to

address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance was so deficient that he was deprived of "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The defendant is not guaranteed *successful* assistance of counsel. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Trial counsel's performance is to be judged on the entire record. State v. Jury, 19 Wn. App. 256, 262-63, 576 P.2d 1302 (1978)

a. Non-standard instruction for second degree manslaughter.

Olsen cannot carry his burden of establishing deficient performance on the part of his attorney for failing to request WPIC 28.06 rather than the "non-standard" instruction that he did submit.

[Olsen's CP 40-41] As discussed at length above, Olsen was not entitled to an instruction on second degree manslaughter as a lesser included, and therefore it is immaterial whether his attorney should have asked for WPIC 28.06. The court would have properly refused to give either one, and thus there is no prejudice.

b. Lesser included instruction for second degree murder.

A defendant cannot claim that the court's failure to give an instruction he did not offer is error unless the failure to do so violates a constitutional right. State v. Tamalini, 134 Wn.2d 725, 730-31, 953 P.2d 450 (1998). Because Olsen's trial counsel did not seek an instruction for second degree murder as a lesser included offense, he must raise the issue as one of ineffective assistance of counsel. RCW 10.61.003 provides:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

An instruction for an inferior degree offense is properly given

when:

(1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is

an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

Fernandez-Medina, 141 Wn.2d at 454. “Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” Id., at 455, emphasis in original.

To convict Olsen of second degree murder, RCW 9A.32.050, the jury would have to find that he intentionally but without premeditation caused the death of Totten, or that the death occurred during the commission of a felony other than first or second degree robbery, first or second degree rape, first degree burglary, first or second degree arson, or first or second degree kidnapping. RCW 9A.32.030(c), RCW 9A.32.050(b). There was no evidence that only second degree murder was committed. Olsen claimed he had no part in the murder at all, and there is nothing to support a jury finding that he intentionally, but without premeditation, killed Totten. If he was committing a felony, it could only have been one listed in RCW 9A.32.030, making it first degree murder. There was no evidence whatsoever of any other felony that Sublett, Frazier, or Olsen were committing. Either they planned the killing and it was premeditated, or it occurred in the

course of a first degree robbery or first degree burglary. The fact that a bat was used to beat the victim rules out second degree or residential burglary.

Once again, Olsen was either guilty as charged, or not guilty of anything. It was not ineffective assistance to fail to request an instruction to which he was not entitled and which the court would not have given.

c. Lesser included instruction for first degree manslaughter.

Olsen was not entitled to an instruction on a lesser included of first degree manslaughter for the same reason he was not entitled to an instruction for second degree manslaughter. If the State's version of the facts was believed by the jury, he was guilty of first degree murder. If the jury believed Olsen's version, he was guilty of nothing. There was no evidence to support the theory that he was guilty of manslaughter in any degree. The court would have been no more likely to allow a lesser included of first degree manslaughter than it did second degree, thus Olsen cannot show prejudice resulting from his counsel's failure to submit such an instruction.

10. The affidavit of Katrina Berchtold does not constitute newly discovered evidence such as to provide grounds for a new trial. The court did not err in denying Olsen's motion for a new trial.

Once again, the State does not dispute Olsen's statement of the law pertaining to motions for new trials.

To obtain a new trial based on newly discovered evidence, a defendant must demonstrate that the evidence: (1) will probably change the result of the trial, (2) was discovered after the trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. . . . The absence of any one of these five factors is grounds to deny a new trial.

State v. Roche, 114 Wn. App. 424, 435, 59 P.3d 682 (2002) (internal cites omitted). Denial of a motion for a new trial is reviewed for abuse of discretion. State v. Burke, 163 Wn.2d 204, 210, 181 P.3d 1 (2008).

Olsen offered the affidavit of Katrina Berchtold (also called Alexis Cox) as newly discovered evidence. [Olsen CP 79-82] In it she denies that Sublett and Olsen came to her house on January 29, 2008 (*sic*), and asserts that sometime before June 19, 2007, Frazier had discussed with her that Frazier and Sublett planned to kill Totten. Olsen claims that if the jury had heard this testimony, it would have changed the outcome of the trial because it undermined Frazier's credibility. On the contrary, Frazier was so

thoroughly impeached during her cross-examination that it is unlikely that this additional testimony would have made any difference. The closing arguments of both defense counsel were primarily an attack on Frazier and her credibility. [06/17/08 RP 1008-19, 1022-27, 1030-51, 1053-68] After all the ways they found to attack her credibility, it is unlikely that two more pieces of testimony that impeached her would make a difference.

Olsen did not demonstrate that the evidence could not have been discovered before trial. He cites to the Motion Regarding Proposed Testimony, presumably Olsen's CP 16-23, for proof that the defense tried unsuccessfully to contact Berchtold but were unable to do so. The State does not find any mention of Berchtold (or Cox) in that document. It is clear that the defense knew about Berchtold/Cox before trial. Olsen's counsel cross-examined Detective Brenna about a mention of Cox in the statement he took from Frazier; he has made no claim that he did not receive that statement as discovery. [06/11/08 RP 813] Frazier testified that Sublett and Olsen went to Cox's home after the killing. She did not say on the stand that she went there, as Olsen alleges in his brief. [06/09/08 RP 587; Olsen's brief at 54] During closing argument, counsel for Sublett argued:

Alexis Cox. Supposedly my client went to her house with Mr. Olsen after the murder. Anybody bother to go try to talk to Alexis Cox? No.

[06/17/08 RP 1025] Olsen failed to show that he was unable to obtain Cox's statement before trial, or even that he made any effort to do so.

The evidence would be of questionable materiality. The murder occurred on January 29th or 30th, 2007. Berchtold asserts that sometime prior to June 19, 2007, Frazier discussed with her the intent to kill Totten. She says she read about Totten's murder in the paper [Olsen CP 81], and therefore her inability to pin down the conversation as occurring before the end of January, 2007, tends to diminish the weight of her information. Berchtold also denied that Sublett and Olsen came to her house on January 29, 2008. If that is not a typographical error, this piece of information has no value at all. They had both been arrested by then. If she meant to say that they had not come to her house on January 29, 2007, again the evidence is suspect because she claims to have just given birth to her daughter, which she says occurred on June 19, 2007. She would have been pregnant at the time, but had not just given birth. Such "evidence" is not trustworthy enough to support the grant of a new trial.

The evidence would be cumulative impeachment, and questionable impeachment at that; it does not “devastate” Frazier’s uncorroborated testimony. The jury could hardly have missed the implication, stressed extensively in defense closing arguments, that Frazier was drastically minimizing her role in the crime. Berchtold’s affidavit does nothing to address the question of why Frazier would implicate Olsen just to exculpate herself. She could do that by blaming it all on Sublett. Minimizing her own involvement does not thereby exculpate Olsen.

The court did not err by denying the motion for a new trial.

11. The court properly admitted unedited recordings of the two telephone conversations between Olsen and Frazier. They were relevant, not unfairly prejudicial, and admissible for purposes of ER 404(b).

Olsen argues that the trial court erred when it allowed the jury to hear two recorded telephone calls between him and April Frazier; the jury was allowed to follow along by reading transcripts of the conversations. [Exhibits 178A, 178B] The transcripts were collected afterwards and not available to the jurors. [06/11/08 RP 787-88] Olsen claims that the conversations were both irrelevant and unfairly prejudicial.

Evidence Rule (ER) 401 defines relevant evidence as that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 403 provides that all relevant evidence is admissible unless it is limited by statutory, constitutional, or other considerations. ER 404(b) prohibits admitting evidence of a person’s character in order to prove that he or she acted in conformity with that character trait. However, ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

During the phone conversations at issue, there was much coarse language on the part of both Olsen and Frazier. There was a passing reference to Olsen having “accidentally” smoked dope, as well as a statement by Frazier that he might need to smoke dope to keep alert to do the job she was bailing him out to do. [Ex. 178A, p. 10] Olsen made a remark about trying to stab someone, and bragging that had circumstances been different he would have blown someone’s brains out. [Rx. 178A, p. 9] The relevancy of the

conversations, however, was that they established that Frazier and Sublett were posting bail for Olsen so that he could do a job, or jobs, for them.

The actual conversations, rather than a summary by a police officer, were helpful to the jury because they revealed the kind of relationship that existed between Frazier and Olsen, a relationship in which he claimed to love her like a sister, was grateful for being bailed out, and was willing to do what she asked of him. That relationship cannot be conveyed nearly as well by a third party summarizing the nature of the conversations. The jury was given two explanations of the "job" that he was to do; Olsen claimed it was a construction job and the State maintained it was to rob Totten. Without actually hearing the calls, the jury would not have been able to make that determination.

A trial court has "wide discretion" in balancing the probative and prejudicial values of evidence. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). Unfair prejudice is that which suggests a decision on an improper basis, often, though not necessarily, an emotional one. State v. Rupe, 101 Wn.2d 664, 686, 683 P.2d 571 (1984)

Any prejudice from the language used in the calls, or the mention of other illegal activities, was minimal, certainly not outweighing the probative value of the recordings. In his statement to Detective Brenna, Olsen admitted to extensive drug use. [06/11/08 RP 795-96, 825] On the witness stand, Olsen talked at length about his drug use. [06/16/08 RP 860-65, 867-68, 880, 882, 885, 906, 911-13, 915, 918] Any prejudice from a mention in the recorded calls about drug use was insignificant. Nor is the jury likely to have been impermissibly swayed by the bad language, which paled in importance next to the evidence of an older, disabled man being beaten, strangled, and left in the back of a pickup while Frazier and Sublett devoted full time to spending his money. If we trust a jury to decide whether a defendant is guilty or not, we should be able to trust it to filter out bad words and make its decision based on the evidence.

Olsen's reference to blowing someone's brains out, and trying to stab someone, was also relevant to the question of whether the job he was to do for Frazier and Sublett involved construction or robbery. Olsen testified that he talked about blowing someone's brains out so Frazier would bail him out of jail. [06/16/08 RP 924] It is a mystery why bragging about violence would induce

Frazier to bail him out if she wanted him to work construction, whereas if she wanted him to commit robbery, or perhaps murder, Olsen's comments would assure her that he was up to the job.

ER 404(b) permits evidence of other "bad acts" if they go to prove something besides the bad character of the actor. Here, the conversations showed motive, intent, preparation, plan, knowledge, and absence of mistake or accident. The entire gist of both conversations was that Olsen would get out of jail and perform a job for Olsen and Sublett. Any prejudice that resulted was not unfair; it was richly deserved.

The list of ER 404(b) is not exclusive. Washington courts also recognize an exception for "res gestae," or "same transaction," where "evidence of other crimes is admissible 'to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980) (internal cite omitted). The Washington Supreme Court has cited to this exception in holding that certain events and statements involving the victim or the defendant, which occurred during the last two days of the victim's life, were relevant to establish the relationship between them. State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995) "Under the res

gestae or 'same transaction' exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). That exception applies here—the recorded conversations occurred within 24 to 36 hours of the murder and allowed the jury to assess the relationship between Frazier and Olsen, hear some of the planning and preparation for robbing and/or killing Totten, and understanding the context of the ensuing crime.

The State does agree that the court should have, but did not, conduct an analysis on the record, balancing the probative against the prejudicial value of the recordings and specifying the grounds on which they were being admitted. [06/11/08 RP 760] Lillard, 122 Wn. App. at 431. However, a failure to do so does not necessarily require reversal. Any error is harmless unless "the reviewing court finds that 'within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred.'" State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (internal cite omitted). The Carleton court recognized two circumstances where a failure to weigh the prejudice on the record could be

harmless error. One occurs where there is a sufficient record for a reviewing court to determine that the trial court would have admitted the evidence if it had done such an analysis, and the other when there is sufficient untainted evidence to assure the appellate court that the outcome would be the same even if the trial court had not admitted the evidence. Id., at 686-87. Both circumstances exist in this case. The record is sufficient to allow this court to make the analysis itself, and there is sufficient other evidence to support the convictions. The court's error in failing to make an on-the-record analysis of the probative value versus the prejudicial effect was harmless.

12. The testimony of Todd Rayan, the victim's neighbor, was properly excluded because it was irrelevant as well as inadmissible hearsay.

The State has no disagreement with the law cited by Olsen regarding a defendant's right to present relevant and admissible evidence in his defense. The trial court did not err in excluding the proffered testimony of Todd Rayan because it was neither relevant nor admissible.

Olsen argues that Rayan would have testified that Totten had asked Frazier to leave his property and had spoken to Rayan, who was both a lawyer and Totten's neighbor, about obtaining a

restraining order against her. [06/12/08 p.m. RP 9-10] Olsen further argues that this was impeachment evidence, and would have contradicted Frazier's testimony that the relationship between her and Totten was a pleasant one. No time frame was offered for this evidence. Unless it was close in time to Totten's murder, it had no relevance. People change their minds and resolve their differences all the time, and if this conversation between Totten and Rayan happened weeks or months before the killing, it was irrelevant. It was Olsen's obligation to provide a time frame, and he did not do so.

Olsen argues that this evidence was relevant to show that Frazier had a motive to kill Totten. The State never argued that she didn't. The State went to great lengths to establish that Frazier and Sublett bailed Olsen out of jail for the purpose of helping them rob and/or murder Totten. Any value of this evidence to impeach Frazier would be minimal. As discussed earlier in this brief, Frazier was thoroughly impeached by both defense counsel. One more piece of evidence would be merely cumulative.

Olsen argues that the statements of the victim were not offered for their truth but to show his state of mind. Once again, the time factor is important. Totten's frame of mind, if relevant at all,

was only relevant at or near the time of the murder; if this conversation with Rayan happened months before the murder, it has no relevance whatsoever.

It is worth noting that the proffer of evidence made by Olsen before Rayan's testimony was somewhat vague and not entirely accurate. For example, Rayan was allowed to testify that he had seen Sublett in an argument with Totten shortly before the murder. Olsen told the court Rayan would testify that there was a third male present at the time, [06/12/08 p.m. RP 9] but Rayan in fact testified that there was no one else there but Sublett and Totten. [06/12/08 p.m. RP 52] Olsen told the court it was Rayan's impression that Totten had asked Frazier to leave his property. There was no indication that he actually had done so.

A defendant in a criminal case has a constitutional right to present relevant, admissible evidence in his defense. ER104; State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (citing Taylor v. Illinois, 484 U.S. 400, 404-10, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)). The admission or refusal of evidence lies largely within the sound discretion of the trial court; a reviewing court will not reverse the sound exercise of that discretion. State v. Stubsoen, 48 Wn. App. 139, 147, 738P.2d 306, review denied, 108 Wn.2d 1033

(1987) (citing State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889 (1994)).

The court did not abuse its discretion in excluding the evidence to which Olsen assigns error.

D. CONCLUSION.

No reversible error was committed during this murder trial. Based upon the foregoing authorities and argument, the State respectfully asks this court to affirm the convictions of both defendants.

Respectfully submitted this 12th day of August, 2009.



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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent and Motion to File Overlength Brief, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

STATE OF WASHINGTON
COUNTY OF CLATSOP
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of August, 2009, at Olympia, Washington.


CHONG MCAFEE