

COURT OF APPEALS
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STATE OF WASHINGTON
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Court of Appeals No. 38704-2-II
Thurston County No. 07-1-01359-1

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN MULLINS

Appellant.

BRIEF OF APPELLANT

ANNE CRUSER/WSBA #27944
Attorney for Appellant

P. O. Box 1670
Kalama, WA 98625
360 - 673-4941

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A. ASSIGNMENTS OF ERROR

I. MR. MULLINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

II. THE TRIAL COURT ERRED IN FINDING THAT MR. MULLINS' CrR 3.1 RIGHT TO COUNSEL WAS NOT VIOLATED AND IN FAILING TO SUPPRESS HIS CONFESSION.

III. THE TRIAL COURT ERRED IN ENTERING FINDINGS OF FACT (TERMED "CONCLUSIONS AS TO DISPUTED FACTS") NUMBERS 4 AND 5 ON THE CrR 3.5 HEARING AND THE MOTION TO SUPPRESS.

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C. STATEMENT OF THE CASE

Steven Mullins and Amy Mullins were married for eight years.

Trial RP 804. On or about July 10th, 2007 Amy moved out of the house

she shared with Steve and into a rental house about a mile and half away. Trial RP 59, 102. On the evening of July 20th Amy and Steve had dinner together, along with their grandchildren and Amy's daughter Kailyce at Amy's rental house. Trial RP 64-68. Steve and Amy had an argument and Steve left to return to his house, taking the grandchildren with him. Trial RP 69-70. When he arrived home, Steve told his brother Jim Mullins (who lived at the Mullins home as well) that Amy had told him that the marriage was over. Trial RP 250. Steve also told Jim that he had made a few comments that could "get him in trouble," and that the Sheriff would likely be looking for him because of what he said. Trial RP 250. The next morning, according to Jim, Steve left the house alone between 7:30 and 8:00 a.m., saying he was going to a lumber store to pick up paint. Trial RP 259. That morning at around 8:00 a.m., Amy came to Kailyce's room to wake her and her friend Brittanie and tell them to get up. Trial RP 64. Amy and Brittanie ignored Amy's request and went back to sleep. Trial RP 75. That was the last time Kailyce saw Amy. Trial RP 75.

At around 9:30 a.m., Kailyce was looking out her bedroom window and saw Steve. Trial RP 76. She went outside and spoke with him, and he asked where her mother was. Trial RP 78. As far as Kailyce knew, her mother was planning to do laundry that morning at a friend's house. Trial RP 74. At around 10:00 a.m. Kailyce and Brittanie went

outside to wait for Brittanie's boyfriend and Kailyce found Amy's Jeep parked near the garage, which was unusual. Trial RP 81-82. Kailyce found the driver's side door open and Amy's dog Fred alone in the front passenger seat. Trial RP 82. There was a cup of coffee in the cup holder that was still warm, Amy's purse was sitting on the center console and the keys to the car were in the ignition. Trial RP 81-82. Kailyce began searching for her mother but was unable to find her. Trial RP 82-83. Kailyce called the police to report her mother missing. Trial RP 83.

Amy's body was found two days later in an abandoned refrigerator on public property behind Mr. Mullins' property. Trial RP 159. Amy was found by her grief-stricken father rather than the Sheriff's detectives because the Sheriff's detectives evidently believed that the constitution prohibits them from searching for a missing person on public property, and because they ignored the results of a dog track which established, a full two days before her body was found, that Amy lay on public property behind Mr. Mullins' property. Trial RP 157-159, 521, 571-72, 643-44, 650-51. Amy died from manual strangulation. Trial RP 389. No physical evidence implicating Mr. Mullins was found on Amy's body. Trial RP 485-496. Two types of DNA were found on Amy's belt, one male and one female. Trial RP 496. Neither Amy nor Steve Mullins was the source of this DNA. Trial RP 496. Two tracking dogs tracked Amy's scent

along the path from her rental home to Steve Mullins' home on Carper Road. Trial RP 518-19.

The jury heard impeachment evidence from Wilma Snyder and Dorothy Due, two sisters of Steve Mullins, that he told each of them, after Amy's disappearance, that Amy called Steve "half a man" and that he "just snapped." Trial RP 452-55, 605-07, 635. Although this was not substantive evidence, the jury was never instructed as such because defense counsel specifically declined the trial court's offer to instruct them on the legal limitations of this evidence. Trial RP 631.

On July 23rd at around 3:30 p.m. Mr. Mullins walked into the Grays Harbor County jail and submitted himself for arrest. RP (10-2-08), p. 22. Accounts differed as to what Mr. Mullins said when he submitted himself, but the deputy who received him said that Mr. Mullins stated: "My wife is dead and I'm the reason why." RP (10-2-08), p. 22. Frank Johnson, the person who accompanied Mr. Mullins to the jail, testified that Mr. Mullins stated he was submitting himself because his wife had been found and he was a suspect. Trial RP 232.

After being transported to the Thurston County jail, Sgt. Dehan and Deputy Duprey of the Thurston County Sheriff's department met Mr. Mullins at the jail. RP (10-2-08), p. 64. Dehan and Duprey met with Mr. Mullins to execute a warrant on him for the collection of evidence from

his person and to take photographs. RP (10-2-08), p. 65. Duprey advised Mr. Mullins of his constitutional rights and Mr. Mullins requested an attorney be provided to him. RP (10-2-08), p. 67, Trial RP 697. No attorney was provided to Mr. Mullins, and no effort was made to place him in contact with the public defender or the person in charge of assigning attorneys. RP (10-2-08), p. 89, 92, 100, Trial RP 697, 701-02. Dehan conceded that Thurston County has assigned counsel on duty 24 hours a day and that he was aware of that fact. RP (10-2-08), p. 93.

At the CrR 3.5 hearing, Sgt. Dehan claimed that no investigative questions were asked of Mr. Mullins. RP (10-2-08), p. 67, 91, 94. Dehan claimed the only question he asked of Mr. Mullins was if he knew why he was there. RP (10-2-08), p. 70, 91. This question was asked after Mr. Mullins requested a lawyer, and after Mr. Mullins had already been advised why he was there. RP (10-2-08), p. 91, Trial RP 697-98, 791. At this point Mr. Mullins, according to Dehan, began rambling and made numerous incriminating statements. Trial RP 786-87. At the 3.5 hearing Dehan was asked: "And just so we're clear, for an hour and a half that you're there with Mr. Mullins or hour to hour and a half, your testimony to the judge is that *not one time* did you ask Mr. Mullins any questions about what it was he was saying. He just simply was rambling during this whole period of time?" Dehan answered: "Yes." RP (10-2-08), p. 93-94.

At trial, however, Dehan's story changed and he revealed that he and Duprey asked numerous questions about the facts of the case. Dehan testified that while they waited for a deputy coroner to come and assist with the evidence collection Mr. Mullins began talking spontaneously and said that he dream in which he might have done something bad. Trial RP 681. He also said that when he was a child, his brother used to lock him in a refrigerator for 15 to 20 minutes at a time. Trial RP 687. He went on to say that he had to get something off of his chest, and that a man needs to own up for what he did. Trial RP 689. In response, Dehan asked Mr. Mullins what he meant by this, and Mr. Mullins replied that he had a vision of him dragging Amy Mullins. Trial RP 700. Dehan also asked him to clarify what he said about the dream, and conceded that this was the third question he asked Mr. Mullins after he requested a lawyer. Trial RP 700-01. Next, Dehan asked Mr. Mullins if he had had sex with Amy. Trial RP 701. According to Dehan, such questions were not investigative but were "clarification" questions. Trial RP 699-700. When confronted with the fact that he had, in fact, asked questions of Mr. Mullins, Dehan became defensive and said "I have conducted hundreds of interviews, and that was not an interview. That was simply listening to a person who was talking." Trial RP 700. Dehan was forced to concede that in his written

report, he characterized this conversation with Mr. Mullins as an “interview.” Trial RP 703.

Duprey went even further, revealing at trial that Dehan also asked Mr. Mullins if he knew what Amy Mullins had been wearing when she disappeared. Trial RP 773. Duprey also characterized these questions “clarification” questions. Trial RP 775. Mr. Mullins also stated, after being asked what it was he wanted to get off his chest, that Amy had put his (Steve’s) hands around her throat. Trial RP 786.

Mr. Mullins was charged with Murder in the First Degree. CP 3. Defense counsel did not seek an instruction on the lesser included offense of murder in the second degree. Report of Proceedings. Prior to trial, defense counsel moved to suppress the statements made by Mr. Mullins to Deputies Dehan and Duprey at the Thurston County jail on the ground that they were obtained in violation of his constitutional rights and in violation of CrR 3.1. RP (10-7-08), p. 213.

The trial court entered the following “Conclusions As To Disputed Facts”¹ to which Mr. Mullins assigns error:

4. The defendant’s rights under CrR 3.1 were not violated. The time spent processing the defendant (execution of the warrant and pre-

¹ Normally these are called “findings of fact.” Here, the court bifurcated its findings into three parts: Undisputed facts, disputed facts, and “conclusions as to disputed facts.” CP 3-8.

booking) took about one and three quarters of an hour. This process was not even completed when the defendant made the statements to Duprey and Dehan about his “dream.”

5. Moreover, during this period, the defendant was not restrained in close custody. After the evidence collection the defendant was allowed to remain in the “waiting area” of the booking area where he had access to telephones with signs posted as to their availability. It was from this area that the defendant moved to the BAC room to talk to the officers.

CP 9.

The court made the following “Conclusions As To Admissibility” to which Mr. Mullins assigns error:

1. The defendant was given his Miranda warnings on three different occasions on July 23, 2007: by Det. Hamilton in Centralia, Sgt. Clark in Montesano, and Det. Duprey at the Thurston County jail. The defendant was in custody when his rights were given to him by Sgt. Clark and by Det. Duprey. Under the facts and circumstances in this case, however, the question “Do you know why you are here,” by Det. Dehan, was not a question designed to elicit an incriminating response. It was therefore not “interrogation.”

3. The defendant also invoked his rights when he made the response to the effect “I will talk to you after I have an attorney

appointed.” No interrogation occurred thereafter, as was appropriate. Interrogation must stop (as it did here) unless the defendant himself initiates further communications or exchanges or conversations with police. This is what the defendant did, in spite of being reminded (by Duprey) that he had previously invoked. By insisting that he “get something off his chest” the defendant initiated the communication, and his ensuing statements were voluntarily made.

6. In this instance, the defendant did waive his CrR 3.1 rights. The detectives were executing a court order and otherwise engaged in the booking process. Defendant was in the waiting area and, upon overhearing Duprey’s question to Dehan, the defendant initiated the contact with the detectives. He insisted on engaging the detectives to “get something off his chest.” His statements were voluntary and his conducted [sic] constituted a waiver of his rights under CrR 3.1. CP 9-10.

Mr. Mullins was convicted of Murder in the First Degree and given a sentence at the top end of the standard range. CP 12, 31.

D. ARGUMENT

I. MR. MULLINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO PROPOSE AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF MURDER IN THE SECOND DEGREE.

Under RCW 10.61.006, “the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.” An accused person is entitled to an instruction on a lesser-included offense if (1) each element of the lesser offense is a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed. *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008). In evaluating whether a lesser-included instruction is appropriate, the trial judge takes the evidence in a light most favorable to the defendant. *State v. Pittman*, 134 Wn. App. 376, 385, 166 P.3d 720 (2006) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000)).

First-degree murder statute does not preclude consideration of lesser included offenses. *State v. Pirtle*, 127 Wash.2d 628, 904 P.2d 245 (1995). Proving aggravated first-degree murder necessarily includes proving all of elements of second-degree murder for purposes of determining whether defendant is entitled to instruction on lesser included offense of second-degree murder. *State v. Bowerman*, 115 Wash.2d 794, 802 P.2d 116 (1990). Second-degree murder is intentional murder without premeditation. *Id.* Premeditation is the element that distinguishes first-degree murder from intentional second-degree murder. *State v. Feeser*,

138 Wash.App. 737, 158 P.3d 616 (2007), *review denied* 163 Wash.2d 1007, 180 P.3d 784. Second degree murder is an inferior degree offense of murder in the first degree as well.

A defendant is entitled to an instruction on an inferior degree offense if (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.² *State v. Fernandez-Medina*, at 455. To satisfy the third requirement, the defendant must show that the evidence, viewed in the light most favorable to him, would allow the jury to find the defendant not guilty of the charged offense but guilty of the inferior degree offense. *Pittman*, at 386; *State v. McDonald*, 123 Wn. App. 85, 89, 96 P.3d 468 (2004).

Under RCW 9A.32.050, a person is guilty of second-degree intentional murder when “[w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.” RCW 9A.32.050. Second-degree intentional murder is an inferior degree offense of first-degree intentional murder,

² This is different from the test for lesser included offenses, which requires that the lesser offense meet both a legal and a factual prong. *Fernandez-Medina II*, at 455.

because RCW 9A.32.030 and RCW 9A.32.050 “proscribe but one offense... that is divided into degrees, and the proposed offense is an inferior degree of the charged offense.” *State v. Winings*, 126 Wn.App. 75, 86, 107 P.3d 141 (2005).

Here, counsel’s failure to request instructions on the inferior degree offense of Murder in the Second Degree denied Mr. Mullins the effective assistance of counsel. When taken in a light most favorable to the defense, the evidence suggested that he was guilty only of second-degree intentional murder in that he acted without premeditation and “just snapped.”

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104

S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); *see also Pittman*, at 383.

Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). The reasonable competence standard requires defense counsel to be familiar with the relevant legal standards and instructions applicable to the

representation. *See, e.g., State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused person's own testimony. *Fernandez-Medina, supra*. For example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to an inferior degree instruction under appropriate circumstances:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.

Fernandez-Medina, at 460-461. Defense counsel's failure to seek instructions on an inferior degree offense or a lesser-included offense can deprive an accused of the effective assistance of counsel. *Pittman, supra*; *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004). Counsel's failure to request appropriate instructions constitutes ineffective assistance if (1) there is a significant difference in the penalty between the greater and the inferior degree, (2) the defense strategy would be the same for both crimes, and (3) sole reliance on the defense strategy in hopes of an

outright acquittal is risky, i.e. because of credibility problems if the defendant testifies. *Pittman, supra; Ward, supra.*

In *Pittman, supra*, the defendant was charged with attempted residential burglary. At trial, his attorney failed to request the lesser-included instruction of attempted trespass. The Court of Appeals reversed his conviction, finding that defense counsel's failure to request the instruction constituted ineffective assistance:

[C]ounsel's failure to request a lesser included offense instruction left Pittman in [a] tenuous position... One of the elements of the offense charged was in doubt... but he was plainly guilty of some offense. Under those circumstances, the jury likely resolved its doubts in favor of conviction.... [H]e clearly committed a crime similar to the one charged but the jury had no option other than to convict or acquit.

Pittman, at 387-389.

Similarly, in *Ward*, the defendant was charged with two counts of second-degree assault, with firearm enhancements. His attorney failed to offer the lesser-included offense instruction for unlawful display of a weapon. The Court of Appeals reversed for ineffective assistance:

First, the potential jeopardy for Ward was considerable. He faced 89 months in prison... Unlawful display of a weapon, by contrast, is a gross misdemeanor carrying a maximum penalty of one year in jail...

Second, Ward's defenses were the same on both the greater and lesser offenses... An instruction on the lesser included offense was therefore at little or no cost to Ward...

Finally, self-defense as an all or nothing approach was very risky in these circumstances, because it relied for its success chiefly on the credibility of the accused... Given the developments at trial and the starkly different potential penalties, it was objectively unreasonable to rely on such a strategy.

In these circumstances, we can see no legitimate reason to fail to request a lesser included offense instruction. The all or nothing strategy exposed Ward to a substantial risk that the jury would convict on the only option presented...

Ward, supra, at 249-250 (citations and footnotes omitted).

Pursuing an “all or nothing” defense in this case was objectively unreasonable. The evidence pointing to Mr. Mullins’ guilt was very strong, due in large part to the confession he gave at the Thurston County jail after his request for counsel was ignored. Had Mr. Mullins been convicted of second degree murder, his standard range would have been 123 to 220 months, as opposed to 240 to 320 months for murder in the first degree. The defense strategy would have remained the same as well; Mr. Mullins’ denial that he caused the death of Amy Mullins did not preclude his counsel arguing that even if they disbelieved Mr. Mullins, he did not act with premeditation and, in fact, just snapped. The jury heard testimony that Mr. Mullins admitted to having “just snapped,” and was not instructed that it could not consider those statements as substantive evidence (due to the further ineffectiveness of defense counsel). Last, sole reliance on a strategy of acquittal was wholly unreasonable. It was likely that the jury, “with no option other than to convict or acquit,” would

choose conviction, even if they had doubts that Mr. Mullins acted with premeditation. *Pittman*, at 389. In addition, an acquittal would rest entirely on Mr. Mullins' own testimony, whose self-interest in denying the crime inherently damaged his credibility.

Had Mr. Mullins requested an instruction on murder in the second degree the trial court would have been required to give this instruction for the following reasons: Mr. Mullins has a right under the due process clause of the Fourteenth Amendment and under Article 1, section 21 and 22 of the Washington State constitution to have the court instruct the jury on lesser included offenses.³

1. Fourteenth Amendment right to due process.

Refusal to instruct on a lesser-included offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). The constitutional right to such an instruction stems from “the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free.” *Vujosevic*, at 1027. *See also Beck v. Alabama*, 447

³ The following two subsections are included because although defense counsel did not request an instruction on murder in the second degree, appellate counsel feels it is necessary to preserve his claim that had such an instruction been requested, the trial court would have been compelled to give it. These two subsections have been adopted verbatim from the brief in *State v. Olsen*, No. 38104-4-II, authored by Jodi Backlund and Manek Mistry, with their permission.

U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, “providing the jury with the ‘third option’ of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...”).⁴

Had the trial court refused to instruct the jury on the lesser-included and inferior degree offense of murder in the second degree, Mr. Mullins would have been denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic*.

2. State constitutional right to lesser-included instruction.

Under the Washington Constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Furthermore, “[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury...” Wash. Const. Article I, Section 22. As with many other constitutional provisions, the right to a jury trial under the Washington State Constitution is broader than the federal right. *State v. Hobble*, 126 Wn.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

⁴ The Court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck*, at 638, n.14. Some federal courts only review a state court’s failure to give a lesser-included instruction in noncapital cases when the failure “threatens a fundamental miscarriage of justice...” *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990)

Washington State Constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). In this case, analysis under *Gunwall* supports an independent application of the state constitution. These two provisions establish an accused person's state constitutional right to have the jury instructed on applicable lesser-included offenses.

1. The language of Wash. Const. Article I, Sections 21 and 22 supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The first *Gunwall* factor requires examination of the text of the state constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” *emphasis added*. “The term ‘inviolate’ connotes deserving of the highest protection... For [the right to a jury trial] to remain inviolate, it must not diminish over time.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury...” The direct and mandatory language (“shall have the right”) implies a high level of protection.

Thus an accused person's right to have the jury consider a lesser-included offense remains the same as it existed in 1889, and “must not

diminish over time,” *Sofie v. Fibreboard Corp.*, at 656. *Gunwall* factor one favors an independent application of these provisions.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Wash. Const. Article I, Section 21, which declares “[t]he right of trial by jury shall remain inviolate....,” has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace*, *supra*, found the difference between the two constitutions significant, and determined that the state constitution provides broader protection. This difference in language also favors an independent application of the state constitution.

3. State constitutional and common law history supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *Hobble*, *supra*; *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (“Smith I”). In 1889, when our state constitution

was adopted, the lesser-included offense doctrine was well-established under the common law. *Beck v. Alabama, supra*, at 635 n. 9 (citing 2 M. Hale, *Pleas of the Crown* 301-302 (1736); 2 W. Hawkins, *Pleas of the Crown* 623 (6th ed. 1787); 1 J. Chitty, *Criminal Law* 250 (5th Am. ed. 1847); T. Starkie, *Treatise on Criminal Pleading* 351-352 (2d ed. 1822)).

Thirty years prior to the adoption of the state constitution in 1889, the Court for Washington Territory addressed a parallel doctrine (relating to inferior degree offenses), and declared that “There is no better settled principle of criminal jurisprudence than that under an indictment for a crime of a high degree, a crime of the same character, of an inferior degree, necessarily involved in the commission of the higher offense charged, may be found.” *Clarke v. Washington Territory*, 1 Wash. Terr. 68, 69 (1859).

It was against this backdrop that the framers decided that “[i]n criminal prosecutions the accused shall have the right” to a jury trial, and that the jury trial right “shall remain inviolate.” Wash. Const. Article I, Sections 21 and 22. Accordingly, *Gunwall* factor 3 supports an independent application of Article I, Sections 21 and 22 in this case, and establishes a state constitutional right to instructions on applicable lesser-included offenses.

4. Pre-existing state law supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62). Just one year prior to adoption of the state constitution, the Court noted that a jury had the power to convict an accused person “‘of any offense, the commission of which is necessarily included within that with which he is charged in the indictment.’” *Timmerman v. Territory*, 3 Wash. Terr. 445, 449 (1888) (quoting Territorial Code of 1881, Section 1098.) This language endures in the current provision. *See* RCW 10.61.006. Accordingly, *Gunwall* factor four supports a state constitutional right to applicable instructions on a lesser-included offense.

5. Differences in structure between the federal and state constitutions supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

In *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), the Supreme Court noted that “[t]he fifth *Gunwall* factor... will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state

constitution represents a limitation of the State's power.” *Young*, at 180.

Thus factor five favors Mr. Olsen’s position.

6. The right to a jury trial is a matter of particular state interest or local concern, and supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The right to a jury trial is a matter of state concern; there is no need for national uniformity on the issue. *Smith I*, at 152. *Gunwall* factor number six thus also points to an independent application of the state constitution, and supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

All six *Gunwall* factors favor an independent application of Article I, Section 21 and 22 of the Washington Constitution. Our state constitution protects an accused person’s right to have the jury consider lesser-included offenses. Had the trial court refused to instruct on the lesser-included and inferior degree offense of Murder in the Second Degree Mr. Mullins’ rights under Wash. Const. Article I, Sections 21 and 22 would have been violated.

Mr. Mullins was prejudiced by defense counsel’s deficient performance. Had counsel proposed an instruction on murder in the

second degree the judge would have been compelled to so instruct the jury, and the jury would not have been faced with the choice of conviction or acquittal. Further, the top-end of the sentencing range for murder in the second degree is a whopping 100 months shorter than for murder in the first degree. Because Mr. Mullins was prejudiced by his attorney's failure to propose an instruction on murder in the second degree he was denied the effective assistance of counsel. The conviction must be reversed and the case remanded for a new trial.

II. THE TRIAL COURT ERRED IN HOLDING THAT CrR 3.1 WAS NOT VIOLATED AND IN FAILING TO SUPPRESS THE STATEMENTS MR. MULLINS MADE TO DEPUTIES DEHAN AND DUPREY.

The right of an accused held in custody to speedy access to counsel is of such importance in Washington that it is expressly protected by court rule. See CrR 3.1. CrR 3.1 creates a separate and distinct right to counsel, which attaches "as soon as feasible after the defendant is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest." CrR 3.1 (b) (1).

CrR 3.1 (c) provides as follows:

Explaining the Availability of a Lawyer.

(1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

One purpose of the rule is to “ensure that arrested persons are aware of their right to counsel before they provide evidence which might tend to incriminate them.” *State v. Templeton*, 148 Wn.2d 193, 217, 59 P.3d 632 (2002). The rule was designed to “provide a meaningful opportunity to contact a lawyer.” *State v. Kirkpatrick*, 89 Wn.App. 407, 413, 948 P.2d 882 (1997), *review denied* 135 Wn.2d 1012 (1998) (citation omitted); *State v. Jaquez*, 105 Wn.App. 699, 715, 20 P.3d 1035 (2001) (internal citation omitted).

The rule goes beyond the requirements of the constitution, in that police must not only advise the arrestee of his right to counsel, but also must formally offer the assistance of counsel. *Heinemann v. Whitman County*, 105 Wn.2d 796, 802, 718 P.2d 789 (1986); *Kirkpatrick* at 414. Under the Sixth Amendment, the right to an attorney attaches only after charges are formally filed. *Kirby v. Illinois*, 406 U.S. 682, 689-90, 92 S.Ct. 1877 (1972). CrR 3.1 does not require initiation of formal criminal proceedings before the right to counsel arises. Rather, being taken into custody creates that right. *State v. Schulze*, 116 Wn.2d 154, 162, 804 P.2d

566 (1991). “Although the rule does not require the officers to actually connect the accused with an attorney, it does require *reasonable efforts* to do so.” *Id.* “[T]he fact that a warning valid within the meaning of *Miranda* has been made should not in itself be considered to fulfill the requirement of a formal offer [of counsel pursuant to CrR 3.1 (c) (2)].” *Jacquez* at 715. The rule requires police to make reasonable efforts to contact an attorney for a suspect who has invoked his right to counsel *at the earliest opportunity*. *Jacquez* at 715-16 (reversing conviction where police delayed provision of counsel for 45 minutes after defendant’s request for attorney); *Kirkpatrick* at 415-16.

An accused may waive his rights under CrR 3.1, but because of the mandatory language of the rule, a waiver requires knowing, intelligent, and voluntary conduct. *Kirkpatrick* at 415. Here, Mr. Mullins did not initiate conversation with Dehan and Duprey until after his CrR 3.1 rights had already been violated. Mr. Mullins was being detained, under arrest, in Thurston County. He requested a lawyer immediately after he was read his constitutional rights, which occurred upon his initial contact with Dehan and Duprey. The evidence established that Thurston County has assigned counsel who are on call 24 hours a day, and the deputies were aware of this. Further, this was a Monday before the close of business, according to the testimony.

The trial court's finding of fact that Mr. Mullins was not in "close custody" makes little sense or difference. It is undisputed that Mr. Mullins was under arrest for murder and awaiting the execution of a search warrant on his body. The events of this case demonstrate precisely why CrR 3.1 was codified: Mr. Mullins, having slept very little in the preceding three days and under obvious duress made highly incriminating statements to two manipulative police officers who provoked him by asking him if he knew why he was there, despite the fact that they already knew Mr. Mullins had been advised why he was there. Although the deputies claim they readvised Mr. Mullins of his right to counsel, they did not do what CrR 3.1 requires and advise him on how to contact the on-call public defender. The trial court erred in concluding that CrR 3.1 was not violated.

A police officer's failure to comply with the rule requires suppression of evidence subsequently gathered by police if tainted by the violation. *State v. Kruger*, 116 Wn.2d 135, 146, 803 P.2d 305 (1991); *State v. Schulze*, 116 Wn.2d 154, 804 P.2d 566 (1991). In *Schulze*, the Supreme Court held that suppression of a blood sample taken from a defendant under arrest for vehicular homicide after a violation of his CrR 3.1 right to counsel was not required because the evidence was not tainted

an attorney the deputies had a duty to provide—at the earliest opportunity—“access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.” Had Mr. Mullins been able to contact an attorney he would certainly have been advised to keep his mouth shut, and most likely would have been accompanied by the attorney throughout the execution of the warrant on his person. The confession was tainted by the violation of CrR 3.1 and should have been suppressed.

If this Court were to conclude that the confession itself was not tainted by the violation of CrR 3.1, but merely a product of the violation, a harmless error analysis controls. “When an error is a violation of a court rule (rather than a constitutional violation), it is governed by the harmless error test.” *State v. Kronich*, 131 Wn.App. 537, 128 P.3d 119, review granted 157 Wn.2d 1008, 139 P.3d 349 (2006), quoting *State v. Robinson*, 153 Wn.2d 689, 697, 107 P.3d 90 (2005), citing *Templeton* at 220. When a court rule is involved, this Court determines whether the error was prejudicial in that “within reasonable probabilities, [i]f the error [had] not occurred, the outcome... would have been materially affected.” *Kronich*

at 544, quoting *Robinson* at 697 and *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255(2001).

The error in admitting this evidence was not harmless. The State relied heavily on the statements made by Mr. Mullins to Duprey and Dehan to prove that he committed premeditated murder. In particular, the State relied on Mr. Mullins' admission to knowing what Amy was wearing when her body was found, as it wholly undercut Mr. Mullins' contention that he did not see Amy at all after leaving her house on July 20th.

Although Amy's body was found on public property that abutted Mr. Mullins' property, Amy's rental house was also located very close to this area. The testimony established that Amy's rental house on James Road was merely down the road from Mr. Mullins' residence on Carper Road. Although the jury heard testimony that Mr. Mullins claimed to be responsible for Amy's death when he turned himself in at the Grays Harbor County jail, Frank Johnson, who accompanied Mr. Mullins to the jail, disputed that account of what Mr. Mullins said. Mr. Johnson, the jury heard, had no particular bias in favor of Mr. Mullins in that Mr. Mullins was responsible for him losing the \$30,000 he invested in their joint business venture. Trial RP 219. Last, there were two separate DNA samples found on Amy's belt, one male and one female, yet neither Amy

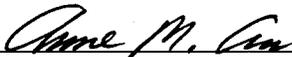
nor Steve was the source. Absent the confession obtained by Duprey and Dehan at the Thurston County jail, there is a reasonable probability that the outcome of the trial would have been different.

The trial court erred in admitting Mr. Mullins' statements to Duprey and Dehan, which were obtained in violation of CrR 3.1, and his case should be remanded for a new trial with an order suppressing those statements which were made after the violation.

E. CONCLUSION

Mr. Mullins' conviction for murder in the first degree should be reversed and he should be granted a new trial.

RESPECTFULLY SUBMITTED this 7th day of August, 2009.


ANNE M. CRUSER, WSBA No. 27944
Attorney for Mr. Mullins

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,)
) Court of Appeals No. 38704-2-II
) Thurston County No. 07-1-01359-1
)
 Respondent,)
)
 vs.) AFFIDAVIT OF MAILING
)
 STEVEN MULLINS,)
)
)
 Appellant.)
 _____)

ANNE M. CRUSER, being sworn on oath, states that on the 7th day of August 2009, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Carol La Verne
Thurston County Deputy Prosecuting Attorney
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Mr. Steven Mullins

AFFIDAVIT OF MAILING - 1 -

Anne M. Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
anne-cruser@kalama.com

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Walla Walla, WA 99362

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10
- (3) AFFIDAVIT OF MAILING

Dated this 7th day of August, 2009.


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

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

Date and Place: August 7, 2009, Kalama, WA

Signature: Anne M. Cruser