

NO. 40692-6-II

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

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES WALTER NETTLEBECK, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John A. McCarthy

No. 09-1-01418-5

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**BRIEF OF RESPONDENT**

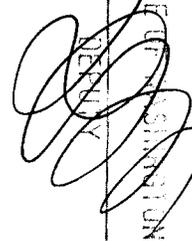
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MARK LINDQUIST  
Prosecuting Attorney

By  
BRIAN WASANKARI  
Deputy Prosecuting Attorney  
WSBA No. 28945

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY



COURT OF APPEALS  
DIVISION II

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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

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B. STATEMENT OF THE CASE.

1. Procedure

On March 16, 2009, Charles Walter Nettlebeck, hereinafter referred to as the “defendant,” was charged by information with aggravated first-degree murder of his wife, Barbara Jo Nettlebeck, in count I and aggravated first-degree murder of Bretta Joan Hawkins in count II. CP 1-2. In both counts the State alleged that the aggravating circumstance was “that there was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant.” CP 1-2. *See* RCW 10.95.020(10). With respect to count I, the State alleged that “at the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order.” CP 1-2. *See* RCW 10.95.020(13). Both counts also included a deadly weapon sentence enhancement. CP 1-2.

The State filed an amended information on November 20, 2009, which added an additional aggravating circumstance to count II, “the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing the crime, to

wit: the murder of Barbara Jo Nettlebeck.” CP 9-10; RP 73- *See* RCW 10.95.020(9). *See* RP 73-74.

On February 4, 2010, a status conference was conducted and the parties took preservation testimony of Detective Sergeant Denny Wood, RP 3-67.

On March 15, 2010, the parties discussed motions in limine RP 74-81, 130-41, the court distributed jury questionnaires, RP 68-70, 81, *see* RP 177-78, and conducted a Criminal Rule (CrR) 3.5 hearing, at which Detective Ben Benson, Deputy John Heacock, and Detective Darrin Rayner testified. RP 81-120. The court found that the defendant’s statements to Deputy Heacock and Detectives Benson and Rayner were admissible at trial. RP 120-26.

The parties selected a jury on March 16, 2010, RP 148, and gave opening statements. RP 152.

The State moved to admit a March 20, 1984 letter to the superior court, authored by Western State Hospital, regarding the defendant’s mental status in a prior case in which he was found not guilty by reason of insanity. RP 690-98. That letter stated that the defendant was not able to distinguish right from wrong and that he had a psychotic break with reality at the time of the crime then at issue. RP 693. The State moved to admit the letter so that the jury could evaluate the credibility of statements the

defendant made to police in this case, that he did not know right from wrong and had a break with reality. RP 693. That motion was denied. RP 698.

The State then called Joan Stubblefield, RP 152-69, Denise Severson, RP 170-75, Jerry Hawkins, RP 179-206, Deputy Lucas Baker, RP 206-40, Deputy Peter Turner, RP 240-49, Deputy Michael Phipps, RP 249-55, Deputy John Heacock, RP 256-72, Firefighter/Paramedic Shawn Prather, RP 272-84, Stephen Mell, RP 285-353, 357-82, Rosie Narayan Nirmala, RP 383-91, Thomas Wilkinson, RP 391-431, Sergeant Ronald Schaub, RP 431-442, Randy Wurl, RP 443-55, Nicole Thurston, RP 456-77, Brian McQuay, RP 478-84, Dr. Brian Cashin, Jr., RP 484-98, Dr. Sigmund Menchel, RP 499-544, Detective Sergeant Ben Benson, RP 545-54, 558-74, Adam Anderson, RP 574-80, Detective Darrin Rayner, RP 580-89, Wallace Bagley, RP 589-600, Marion Clark, RP 600-16, Janel Ostrem, RP 616-60, Shirley Harold, RP 661-70, Cindy Mullins, RP 670-83, and Ralph Coleman, RP 710-55.

The State also published the video deposition of Detective Sergeant Wood, RP 684, a taped telephone call from the defendant, and a recording of the 911 call. RP 755-56.

The State rested on March 23, 2010.

The defendant called Clayton Daneker, RP 758-75, Stanley Shkuratoff, RP 776-85, Ronald Graham, RP 788-811, Gary Grendahl, RP 811-21, Dr. Barry Ward, RP 822-936, and Dr. Craig Beaver, RP 940-1073. The defense rested on March 24, 2010.

The parties discussed jury instructions, RP 1075-83, 1088-1121. The court devised its instructions to the jury and the parties took formal exceptions thereto. RP 1121-22. The court then instructed the jury. RP 1124-25.

The parties gave closing arguments. RP 1126-40 (State's closing); RP 1141-82 (defense closing); RP 1182-94 (State's rebuttal).

On March 29, 2010, the jury returned verdicts of guilty to both counts, and answered special verdict forms pertaining to both counts in the affirmative, indicating that the State had "proven the existence of the following aggravating circumstance beyond a reasonable doubt: There was more than one person murdered, and the murders were part of a common scheme or plan or the result of a single act of the person." RP 1202-03; CP 45, 47, 49, 50. The jury also returned special verdict forms indicating that the defendant was armed with a deadly weapon at the time he committed both counts. RP 1203-04; CP 51-52.

On May 7, 2010, the defendant was sentenced to life in prison without the possibility of release or parole, plus the 24-month sentence enhancement on both counts. RP 1214-16; CP 58-70.

The defendant filed a timely notice of appeal the same day. CP 71.

## 2. Facts

Jerry Hawkins considered his sister, Barbara Nettlebeck, the best friend he ever had. RP 179-84. He was also close to Barbara's daughter, his niece, Bretta Hawkins. RP 181. On, March 14, 2009, when he got up to start his 6:00 a.m. work shift, Jerry got a call from a Pierce County Sheriff's detective telling him that Barbara had been killed and Bretta attacked.

Bretta was subsequently transported to Harborview Medical Center. RP 200-02. Jerry gathered at the hospital with other family members and was told that Bretta had no chance of recovery. RP 204. Bretta Hawkins died about 7:00 that evening. RP 205.

Pierce County Sheriff's Deputy Lucas Baker was working patrol in the Pierce County Sheriff's Department mountain detachment on March 13, 2009 at about 9:30 p.m., when he responded to a 911 call from 168<sup>th</sup> and Orville Road. RP 206-08. Four deputies were dispatched in all, but Baker was the first to arrive. RP 209-10. When he arrived, he saw a man, standing in a field or pasture, who was talking on a cell phone and flagging him down in a field or pasture. RP 210. Deputy Baker stopped

his patrol vehicle and placed the man in handcuffs. RP 213. He then handed him over to Deputy Heacock, and entered the property with Deputies Turner and Phipps. RP 214; RP 259.

The deputies went to the front door of the residence and found it locked. RP 214. They went around the house and entered through a back door, where they found Bretta lying. RP 216-18. She had a puddle of blood around her head and there was blood coming from her mouth. RP 237, 244-45, 252. She was pale and initially appeared to be deceased, however, her eyes reacted to light. RP 237-39, 244-45. Deputy Baker radioed that she was still breathing. RP 218, 245. Bretta, moaning, then sat up and reached out for the deputy. RP 219. Deputy Baker stayed with her until medical aid arrived. RP 219-20.

Deputies Turner and Phipps went into the residence where Deputy Turner found a second victim in the living room area who was “obviously deceased,” with a “big gash on her neck” and “blood everywhere.” RP 245-47, 254.

Deputy Phipps then returned to Bretta and found her “moaning and groaning,” and “not coherent at all.” RP 254. Deputy Phipps took photos of Bretta and the scene around her, while Deputy Baker waited with her until medical personnel arrived. RP 219-202, 255.

Graham Fire and Rescue Firefighter / Paramedic Shawn Prather responded to the scene with his partner Derek Guenther. RP 273-75. A total of four paramedics ultimately responded, along with an unknown

number of EMTs. RP 276. Prather encountered Bretta on a patio with a significant amount of blood on the ground and around the top of her head. RP 277. She was unresponsive and Prather bandaged her, immobilized her spine, and because she was not breathing adequately, installed an oropharyngeal airway and a bag valve mask to assist in ventilation. RP 277-80. Once she was moved to the ambulance, she was intubated and taken to Kapowsin Elementary from which she was airlifted to Harborview Medical Center. RP 282-83; RP 488.

Dr. Brian Cashin testified that Bretta Hawkins was admitted to Harborview Medical Center on the evening of March 14, 2009, given “some basic resuscitation and then taken to the ICU.” RP 488. A CAT scan confirmed that Hawkins had multiple skull fractures. RP 490-91. Dr. Cashin testified that there was nothing medically that could be done for her. RP 492. Doctors completed a brain death exam, which is a series of basic tests to see if a patient has intact cranial nerves, and determined that Hawkins was, in fact, brain dead. RP 492-95. Dr. Cashin testified that if a patient who had suffered an injury of the type suffered by Hawkins, received immediate treatment, his or her probability of survival would increase. RP 497. Cashin testified that if doctors had gotten to Hawkins hours sooner, her outcome may have been different. RP 498.

Deputy John Heacock read the defendant the *Miranda* warnings, and the defendant seemed to understand those warnings. RP 260-62. The defendant thereafter told Heacock, “I hurt my wife with an ax. I think she

is dead.” RP 263. The deputy then placed the defendant into a patrol car and asked him “What is going on here?” RP 263. The defendant reported that he and his wife were going through a divorce and that he had been staying at a motel in Puyallup. RP 264. He said that he had been at the residence to help with a garage sale, but that they had an argument about a court date, during which he “just lost it” and assaulted her. RP 264. The defendant identified his wife as “Barbara” and said that he also assaulted “Bretta.” RP 264. He stated that, after the assaults, he planned on hanging himself with a red rope in a barn or garage, but that he could not do it. RP 265.

The defendant went on to tell the deputy that he needed help, and that he tried to get medication at Good Samaritan Hospital, but that “they couldn’t help him for three months.” RP 265. The defendant also indicated that he had been at Western State Hospital in 1984, and that his “mom was there, too.” RP 266-68. The defendant said, he had a break with reality, but that he “didn’t blackout,” and could not explain why he killed his wife and step-daughter. RP 266-67. According to Deputy Heacock, the defendant spoke calmly and coherently. RP 269. He was, however, concerned about what was going to happen to his dogs and horses, and indeed, appeared more concerned about them than his wife or step-daughter. RP 269.

Detective Sergeant Ben Benson was called to the scene and, assisted Detective Sergeant Wood in interviewing the defendant after

Deputy Heacock had read him the *Miranda* warnings and spoken to him briefly. RP 545-49. The defendant told detectives, “It’s been a bad month.” RP 549. The defendant went on to say that he and his wife were going through a divorce and that, “tonight something happened.” RP 549. The defendant told detectives, “I didn’t know the difference between right and wrong,” RP 549, and said that he had been seeing a doctor for mental problems. RP 551.

The defendant indicated that he had been staying at the Crossland motel in Puyallup, but that he was at the residence to help his wife with a garage sale that day. RP 550. The defendant said, “[t]he wife and I started talking. I can’t tell you what started it. I hit her with an ax.” RP 551. He stated that his stepdaughter then came in and that he hit her, too. RP 551. The defendant indicated that he then wrote some things on the house and finally called 911. RP 551. He also told detectives that he did not know right from wrong when he killed Barbara and Bretta. RP 573-74. Benson testified that the defendant was coherent and articulate at the time of the interview. RP 552, 558-59.

Det. Sgt. Wood, who was assigned to the death investigations and missing persons unit of the Pierce County Sheriff’s Department, was also called to the scene, and made contact with the defendant after the defendant had been read the *Miranda* warnings by Deputy Heacock. RP 13-14. Wood described the defendant as “pretty calm.” RP 17. The defendant indicated that he was in the process of divorce from his wife

and that he had been “served a protection order, restraining order, and had moved out of the home as a result of that.” RP 18. The defendant indicated that they had had a garage sale that day to try to raise money, which was why he was on the property that day. RP 18. The defendant told Wood that after the sale, he was splitting up the revenue with his wife when “he lost it and struck his wife with an ax in the head.” RP 19-20. The defendant stated that he then struck his stepdaughter in the head with the same ax. RP 20-21. He then painted some things on the side of the house before walking around and trying to figure out what to do. RP 21.

After the interview was completed, Detective Rayner was left alone with the defendant. RP 582. During that time, the defendant made several unsolicited statements to Rayner. RP 582-83. Specifically, he said,

Be better off locked up at Western State. I'd be better off there for the rest of my life. Maybe I could get help there. What happened tonight was really, really bad, just terrible. My mother was there for five years.

RP 583.

Detective Mark Merod obtained a search warrant for the residence at which the homicides occurred, RP 26, and Detectives Rayner and Johnson served a search warrant on the defendant's hotel room. RP 584.

Forensic Specialists Steve Mell and Adam Anderson began processing the scene. RP 26. Mell documented the scene by taking photographs and preparing a scale diagram. RP 285-300. He also found

elliptical blood stains on the living room wall adjacent to Barbara Nettlebeck's body. RP 333, 377. Mell testified that the elliptical shape of the blood stain indicated that the object which caused the injury struck the surface of the skin at an angle. RP 333-34. He took a sample of this suspected blood stain, as well as others found in the house. RP 337-39. He also took samples of suspected blood found on the defendant's hands and clothing and of that found on the ax. RP 340-48.

Forensics Investigator Adam Anderson assisted in obtaining a DNA reference sample from the defendant, in the form of two buccal swaps, which were admitted into evidence. RP 576-79.

Det. Sgt. Wood entered the residence, and found a King County corrections uniform belonging to Barbara Nettlebeck and a Renton Police Specialist uniform belonging to Bretta. RP 25-26. 48-49. He also found Barbara Nettlebeck's purse, which contained cash, another small purse, and a .38-caliber Rossi revolver. RP 27-28. When Wood entered the barn located on the property he found a rope hanging from one of the rafters. RP 30.

Marion Clark, a forensic scientist employed by the Washington State patrol, developed DNA profiles of the defendant, Barbara Nettlebeck, and Bretta Hawkins. RP 600-11. Clark testified that the DNA profile of the samples of suspected blood taken from the defendant's pants and boots matched that of Barbara Nettlebeck. RP 612. The samples of suspected blood taken from the head of the ax also had a DNA

profile that matched that of Barbara Nettlebeck. RP 612-13. The samples of suspected blood taken from the blunt end of that ax had a mixture of DNA from at least two people. RP 615. One was Bretta Hawkins and the other may have been Barbara Nettlebeck. RP 615.

Nicole Thurston, who worked at the front desk of Crossland Economy Studios in Puyallup, testified that the defendant checked into that hotel on February 4, 2009. RP 457-59. The defendant told Thurston that he was staying at the hotel because he was going through a divorce and having problems with his wife. RP 462. The defendant indicated that he missed his horses and being on the farm that he owned with his wife in Orting. RP 462. The defendant told Thurston that his stepdaughter, Bretta, never liked him and that she was the reason why he and his wife were having problems. RP 463. Thurston indicated that the defendant got angry when he was not notified of a package that was delivered. RP 464, but that even when angry, he was coherent and articulate. RP 464-65. She described the defendant as just a normal guy going through a hard time. RP 474.

Brian McQuay, the Crossland Hotel manager interacted with the defendant during his stay at the hotel and described the defendant as “very well-kempt, sound of mind.” RP 478-84.

Randy Wurl, who worked as a maintenance engineer at Crosslands Hotel in Puyallup, also met the defendant. RP 443-44. The defendant told Wurl that he was “in the middle of a nasty divorce.” RP 444. Wurl

indicated that the defendant spoke coherently, that he never had any difficulty understanding him, that the defendant responded appropriately to his questions, and that the defendant “was very, very normal.” RP 445-46.

Clayton Daneker attended the garage sale hosted by the defendant on March 13, 2009, and described the defendant as frustrated and overwhelmed by the number of customers, but testified that the defendant was coherent, in control of himself, set reasonable prices, and “[s]eemed normal.” RP 758-74.

Stanley Shkuratoff, who had known the defendant for about twenty years, testified that the defendant was gullible, and, after his wife filed for divorce, subdued, but that he otherwise behaved exactly as he always had in the twenty years before. RP 776-783. The defendant was not acting as though he was suffering hallucinations, RP 783, and had, in fact, told Shkuratoff that he was fine and that he was not going to seek additional help with his mental health. RP 783.

Dr. Barry Ward, a psychologist who worked at Western State Hospital as a forensic evaluator, completed an evaluation of the defendant in conjunction with Dr. Dean, a psychiatrist. RP 822-28. Ward noted that the defendant was involuntarily committed to a hospital from March 8 through 9, 1984, and while there, was diagnosed with schizophrenia acute paranoia. RP 831-36. He was prescribed psychotropic medication, which he stopped taking in February, 1985. RP 835. The defendant apparently

attended once monthly counseling sessions and had a “near complete remission of symptoms.” RP 835.

After their evaluations of the defendant for this case, doctors at Western State diagnosed him as currently suffering from “an alcohol-related disorder” and “a personality disorder not otherwise specified with dependent, borderline and paranoid features.” RP 850. The latter was defined as a collection of maladaptive behaviors and attitudes. RP 850. Dr. Ward testified that he could not diagnose the defendant with schizophrenia because the defendant did not meet the requisite diagnostic criteria. RP 860. He suffered from paranoia only. RP 861. The defendant denied hallucinations and doctors saw no evidence thereof. RP 861. Nor could Dr. Ward find any other factor which would warrant a diagnosis of schizophrenia. RP 861.

Dr. Ward opined that the defendant was not legally insane at the time of the murders and testified that there was no clinical data which would make him doubt the defendant’s capacity to premeditate at the time of the homicides in question. RP 857-58, 893. In fact, Dr. Ward concluded that the defendant did have the capacity to premeditate and act intentionally, and specifically, that he had the capacity to form the premeditated intent to kill when he committed the homicides of his wife and step-daughter. RP 912-13. Dr. Ward noted that “even people with severe mental illness are capable of forming intents and acting on those intents most of the time.” RP 858, 918. Ward testified that the capacity

for premeditation and the capacity for intent can differ, but that he undertakes the same basic analysis in determining whether either exists. RP 912.

Dr. Ward also reviewed exhibit 304, which was a “forensic court letter” written in 1984 by Western State Hospital staff, which stated that, at the time of the 1984 crime, the defendant was unable to distinguish right from wrong and that the defendant, at the time of that crime, had a psychotic break with reality. RP 874-76. That letter recommended that the defendant be found not guilty by reason of insanity in the 1984 matter, and the defendant was ultimately released, medicated for about ten months, and underwent some counseling. RP 888. Ward indicated that this language used in the 1984 letter was similar to that used by the defendant when speaking to the police regarding the murders at issue here. RP 877-79. Dr. Beaver also agreed that the defendant used standard language regarding insanity and the “key phrases that everybody talks about,” when he spoke with police, but did not find this surprising. RP 1021.

Dr. Craig Beaver, a psychologist called by the defendant, testified that the defendant did “have schizophrenia, paranoid type,” an “adjustment disorder,” and that he has “episodically had alcohol abuse problems.” RP 963-65, 1009-10. Dr. Beaver testified that these things would have a “significant impact” on the defendant’s ability to deliberate, but that the defendant was not insane at the time of the homicides in

question. RP 978. Dr. Beaver opined that the defendant had the capacity to act intentionally, but that his mental illness diminished his capacity to form premeditated intent at the time of the homicides. RP 1024-25. He indicated, however, that the defendant had the capacity to premeditate just before and after the homicides. RP 1029-41, 1054-63.

Dr. Sigmund Menchel, who was the acting chief Pierce County medical examiner, testified that an autopsy was performed on Barbara Jo Nettlebeck on March 16, 2009, during which it was found that she had suffered two separate lacerations to her scalp, a fractured skull, “a chop wound on the left side of the neck,” “a transection or a complete separation of the cervical spine and spinal cord,” and a cutting of the carotid arteries on both sides and the left jugular vein. RP 504-11. The nature of the “chop wound” suggested that it was caused by something like an ax and that the injury occurred while Barbara was lying with her head supported by the floor. RP 509-10. Dr. Menchel agreed that it was likely that Barbara was struck in the head by an instrument that caused the lacerations and which caused her to fall to the floor, and that she was then struck by an ax in her neck. RP 510. He concluded that the cause of death was “a chopping wound of the neck” and the “manner of death was homicide.” RP 515.

An autopsy of Bretta Hawkins’ body indicated that she suffered a laceration to the left side of the scalp, large areas of bruising involving the back of her neck on both sides, and a basilar skull fracture, as well as

diffuse brain swelling and brain injury caused thereby. RP 528. Dr. Menchel testified that the cause of Bretta's death was blunt force trauma of the head and that the manner of her death was homicide. RP 530.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED DR. WARD'S TESTIMONY REGARDING THE SIMILARITY BETWEEN THE LANGUAGE USED BY THE DEFENDANT IN INTERVIEWS WITH POLICE AND THAT USED IN THE 1984 WESTERN STATE LETTER BECAUSE SUCH TESTIMONY WAS RELEVANT AND NOT OTHERWISE INADMISSIBLE.

If properly preserved for appeal, a trial court's decision regarding the admissibility of testimonial evidence, including expert testimony, will only be reversed for a manifest abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 359-61, 229 P.3d 669 (2010); *State v. Young*, 158 Wn. App. 707, 243 P.3d, 172, 179 (2010); *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). The trial court abuses its discretion "if no reasonable person would have decided the matter as the trial court did." *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *review granted in part*, 163 Wn.2d 1033, 187 P.3d 269 (2008). "That is, such judgments merit reversal only if the trial court acts on unreasonable or untenable grounds." *Aguirre*, 168 Wn.2d at 359. However, such a decision may be affirmed on any ground the record adequately supports

even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

In the present case, the defense called psychologist Dr. Barry Ward, who had evaluated the defendant for purposes of determining his mental state at the time of the homicides at issue. RP 822-936. Ward testified that there was no clinical data which made him doubt the defendant's capacity to premeditate those homicides. RP 857-58. During his direct examination of Ward, defense counsel asked a significant number of questions regarding the defendant's 1984 commitment at Western State Hospital and its diagnosis at the time. RP 830-32, 834-36, 844. Ward also indicated on direct that, as one of the bases for his opinion, his team "reviewed the interviews from the State's discovery." RP 849.

On cross examination, the deputy prosecutor inquired of Ward's qualifications, which defense had failed to do, RP 862-63, asked about the report prepared by his team in this case. RP 864, and then inquired as to the bases for Ward's opinion. RP 865-79. It was in asking about the bases of his ultimate opinion on capacity that the deputy prosecutor asked about a 1984 forensic court letter authored by Western State Hospital about the defendant. RP 874. The following exchange then occurred:

Q Does the letter express the opinion that the defendant, at the time of the alleged crime, had a psychotic break with reality?

A Yes, it does.

Q Is it your understanding that as a result of the Court and parties receiving that letter, that the defendant was actually found not guilty by—

[DEFENSE COUNSEL]: Objection, Your honor. I don't know that this has been made relevant. I don't know that the doctors opined that this was something that he used to form his opinion, and this was taken up, this very same document was taken up by the Court earlier.

THE COURT: Part of the diagnosis and evaluation is information that was considered. Overruled.

Q [BY Deputy Prosecutor]: Do you know, Dr. Ward, as a result of the Court and the parties receiving this letter, whether the defendant was actually found not guilty by reason of insanity in 1984?

A There was an order from the Court in our files, also—

Q Okay

A --expressing that opinion --or that order, reflecting that order.

....

Q Is it your recollection in preparing for the interviews with the defendant and your evaluation in December and January, December '09 and January '10, that he told deputies at the scene that he had a break from reality?

A My recall was that that was in quotes, yes.

Q And that he told deputies and detectives maybe more than once that he didn't know the difference between right and wrong?

A I recall him reading that specifically, yes.

**Q Did that strike you as similar to the language you've described in the letter that's before you?**

[DEFENSE COUNSEL]: Objection, Your Honor. Your Honor, can we have a sidebar, please?

THE COURT: Okay.

(sidebar conference held.)

THE COURT: Okay. Ms. [deputy prosecutor], you may proceed.

**Q (By [Deputy Prosecutor]) I am trying to remember the question, but I think the question was, did it strike you as – did it strike you that the statements that you recall reading, given to the police or the deputy sheriffs and detectives were strikingly similar to the –**

[DEFENSE COUNSEL]: Objection, Your honor. Calls for speculation and relevance.

THE COURT: Got to let her finish her question first, and I think I understand the question, and I will overrule your objection. Go ahead. Do you want her to repeat?

RP 875-79(emphasis added). The original question was then read back by the court reporter, and Dr. Ward answered, “Yes, it does.” RP 879.

Although the defendant argues that “the language used in the 1984 letter, concluding that [he] was legally insane was similar to the language [he] used when he spoke to the police was irrelevant,” Brief of Appellant, p. 11-16, he is mistaken. Such testimony was relevant, not otherwise inadmissible, and therefore, properly admitted by the trial court.

Generally, relevant evidence is admissible. ER 402. “The threshold to admit relevant evidence is very low. Even minimally relevant

evidence is admissible.” *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

ER 401 provides that

“Relevant evidence” means evidence having 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 401. “To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). “Relevant evidence encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense.” *Rice*, 48 Wn. App. at 12. “Facts tending to establish a party’s theory of the case will generally be found to be relevant.” *Id.* (citing *State v. Mak*, 105 Wn. 2d 692, 703, 718 P.2d 407 (1986)).

In the present case, the evidence in question is Ward’s testimony that he, as the psychologist evaluating the defendant for diminished capacity, found that the defendant’s words to law enforcement were similar to those of the Western State evaluation that resulted in his acquittal in a previous criminal case. The fact that the words used by the

defendant when confronted by police investigating the homicides were almost the same as the terms of art employed by doctors at Western State Hospital could suggest that the defendant was not being truthful in his evaluation of his mental state at the time of the homicides, but simply parroting the language that resulted in his acquittal of past criminal charges. This, in turn, would support Dr. Ward's conclusion that the defendant did not suffer from a diminished capacity at the time of these homicides. *See* RP 857-58, 893; ER 705. Indeed, the fact that the defendant could successfully parrot these terms of art in the appropriate context twenty five years later, could suggest a capacity to premeditate around the time of the homicides, which would undercut the defense of diminished capacity.

Because this fact had a tendency to disprove the claim that defendant's capacity to premeditate was diminished at the time of the homicides, it had probative value. Moreover, because the defense at issue was diminished capacity, it was a fact of consequence in the context of the applicable substantive law. *See Rice*, 48 Wn. App. at 12. Thus, this testimony (1) had a tendency to disprove a fact that (2) was of consequence in the context of the other facts and the applicable substantive law. As a result, this testimony was relevant, *see Rice*, 48 Wn. App. at 12, and therefore, admissible. *See* ER 402.

Although the defendant presents two reasons why Ward's answer was irrelevant, Brief of Appellant, p. 11-15, neither are persuasive.

The defendant first argues that the testimony is irrelevant because neither expert testified that the defendant was legally insane at the time of the homicides in question and "no insanity defense was presented at trial." Brief of Appellant, p. 13. While this is true, it is immaterial. The defense at issue was diminished capacity and Ward's testimony regarding the similarity in language between the 1984 letter and the defendant's statements to police was relevant for two reasons.

First, it supported the State's theory that the defendant was fabricating a mental health defense by parroting the language of the Western State letter. Although the defendant argues that there was no evidence that he ever saw the letter, Brief of Appellant, p. 13, he is mistaken. There may be no direct evidence that he saw the letter, but the fact that the letter concerned him, was vital to winning his acquittal in a prior criminal case, and contained terms of art which were virtually identical to those he used in speaking to police in the present case, are all circumstances from which a jury could properly infer that he saw the letter.

Second, it was relevant because, if the defendant was indeed parroting the terms of art used by Western State in an attempt to avoid

criminal responsibility, he was demonstrating a clear capacity to premeditate near the time of the acts in question. Hence, Ward's testimony that the defendant's language was similar to that employed by Western State Hospital could show that the defendant had the capacity to premeditate. It could, therefore, both undercut the defense of diminished capacity and help explain the basis of Ward's opinion on that topic. Such testimony was therefore, relevant and admissible, and the trial court did not abuse its discretion in admitting it.

Although the defendant also argues that "Ward's opinion was irrelevant and should have been excluded because it did not meet the criteria for admission of expert opinion," Brief of Appellant, p. 13-15, he is mistaken.

While the testimony at issue was that of an expert in the field of psychology, it was not expert opinion. Rather, it was testimony regarding the basis of and reasons for that expert's ultimate opinion that the defendant had the capacity to premeditate at the time of the homicides in question.

ER 705 provides that

[t]he expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the judge requires

otherwise. *The expert may in any event be required to disclose the underlying facts or data on cross-examination.*

(emphasis added). Thus, “ER 705 provides that an expert may testify in terms of an opinion and give the reasons for that opinion.” *Young*, 243 P.3d at 179. Division I has held that this rule “gives the trial court discretion to permit an expert to relate hearsay or otherwise inadmissible evidence to the jury for the limited purpose of explaining the reasons for his or her opinion.” *State v. Lui*, 153 Wn. App. 304, 321-22, 221 P.3d 948 (2009), *review granted*, 168 Wn.2d 1018, 228 P.3d 17 (2010). This Court, however, has cautioned that ER 705 does not provide “a mechanism to avoid the rules for admissibility of evidence.” *State v. Anderson*, 44 Wn. App. 644, 652, 723 P.2d 464 (1986).

In this case, the testimony at issue was elicited during cross-examination about the basis and reasons for Ward’s opinion regarding diminished capacity. RP 875-59. This testimony was relevant, and indeed, necessary for the jury to properly evaluate the credibility of Ward’s ultimate opinion on diminished capacity. Because it was not otherwise inadmissible, it was properly admitted. *See* ER 402.

This is particularly true given that the defendant himself opened the door to testimony on this topic. *See State v. Gallagher*, 112 Wn. App. 601, 610, 51 P.3d 100 (2002) (“Fairness dictates that the rules of evidence

will allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness”).

Because Ward’s testimony regarding the similarity between the 1984 Western State letter and the language used by the defendant here had a tendency to disprove the claim that defendant’s capacity to premeditate was diminished at the time of the homicides, and because the defense at issue was diminished capacity, such testimony was relevant, *see Rice*, 48 Wn. App. at 12, and therefore, admissible. *See* ER 402. Because such testimony was not otherwise inadmissible, the trial court did not abuse its discretion in admitting such testimony.

Therefore, the admission of such testimony and the defendant’s convictions should be affirmed.

2. THE TRIAL COURT PROPERLY REFUSED TO GIVE THE DEFENDANT’S PROPOSED JURY INSTRUCTION DEFINING “DELIBERATION” BECAUSE “DELIBERATION” IS A WORD OF ORDINARY MEANING AND THE COURT’S INSTRUCTIONS WERE OTHERWISE PROPER STATEMENTS OF THE LAW, NOT MISLEADING, AND ALLOWED THE PARTIES TO ARGUE THEIR THEORIES OF THE CASE.

“Parties are entitled to [jury] instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case.”

*State v. Marchi*, 158 Wn. App. 823, 243 P.3d 556, 561 (2010) (quoting

*State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003)). This Court will “review a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole.” *Id.* (quoting *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

“When a defendant presents substantial evidence of a mental illness or disorder and the evidence logically and reasonably connects the defendant’s alleged mental condition with the inability to form the mental state necessary to commit the charged crime, a trial court must give a diminished capacity instruction.” *Marchi*, 243 P.3d at 561 (citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003)). This instruction “allows a jury to take evidence of diminished capacity into account when determining whether the defendant could form the requisite mental state.” *Marchi*, 243 P.3d at 561 (*State v. Stumpf*, 64 Wn. App. 522, 524-25, 827 P.2d 294 (1992); *State v. James*, 47 Wn. App. 605, 608, 736 P.2d 700 (1987)).

In the present case, the trial court instructed the jury that, to convict the defendant of first-degree murder, as charged in counts I and II, it must find, among other things, that the defendant’s intent to cause the victim’s death was “premeditated.” CP 17-44 (instruction 12, 17); *see* Appendix A.

The court also defined the term “premeditated”:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the

formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is *deliberately* formed.

CP 17-44 (court's instruction to the jury 10)(emphasis added). See Appendix A.

The defendant proposed an instruction which defined "deliberation" as "to weigh in the mind, to consider the reasons for and against and consider maturely, to reflect upon." RP 1091, 1098-1104; Brief of Appellant, p. 16-21. This definition was taken from *obiter dictum* in the 1895 case of *State v. Rutten*, 13 Wn. 203, 212, 43 P. 30, 32 (1895), which was quoted in *State v. Shirley*, 60 Wn.2d 277, 278-79, 373 P.2d 777 (1962). See RP 1101-04.

The trial court declined to give this instruction, noting that the instruction defining premeditation was sufficient and that "deliberation" appeared to only be an element of the first-degree murder statute in effect at the time of the *Rutten* decision. See RP 1103-04. The defendant took exception to the court's ruling. RP 1121-22.

The defendant admits that "[t]here is no question" that the trial court's instruction number 10 "is an accurate statement of the law." Brief of Appellant, p. 18, and the defendant is correct in this regard. The Washington State Supreme Court has repeatedly held that WPIC 26.01.01, which was given as instruction 10, see RP 1098-99, compare CP 17-44

with WPIC 26.01.01, “adequately state[s] the rule regarding premeditation. *State v. Benn*, 120 Wn. 2d 631, 658-59, 845 P.2d 289 (1993). See *State v. Clark*, 143 Wn.2d 731, 770, 24 P.3d 1006 (2001).

However, the defendant argues that in refusing to give his proposed instruction, “the court did not define a crucial term,” because “[t]he difference between murder in the first degree and murder in the second degree is the presence or absence of deliberate and premeditated intent.” Brief of Appellant, p. 19, 16-21. The defendant is mistaken.

While trial courts must define technical words used in jury instructions, they need not define words of ordinary understanding. *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997) (citing *State v. Scott*, 110 Wn.2d 682, 689, 757 P.2d 492 (1988); *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984)). A term is ‘technical’ only if it has a meaning that differs from common usage. *Id.* at 611. If a term is not defined by statute, addressed by a pattern jury instruction, or defined by an appellate court, it is likely a term of common understanding and its meaning comes from common usage. *Id.* Trial courts have discretion to determine whether they should define words of common understanding. *Id.* (citing *Scott*, 110 Wn.2d at 692).

Neither the term “deliberately,” used in WPIC 26.01.01 which was given here as instruction number 10, nor the term “deliberation” are defined by statute or addressed by pattern jury instructions. See, e.g., RCW 9A.04.110, RCW 9A.32, WPIC 26.01-06. While it is true that the

Court in *Rutten* defined “deliberation” in the context of a first-degree murder statute, it did so in *obiter dictum* in reference to an 1895 statute, which made “deliberate and premeditated malice” an element of the offense. *Rutten*, 13 Wn. 203, 211-12, 43 P. 30, 32 (1895); Laws of 1854, Wn. Terr., Sec. 12. That statute is no longer in effect and the defense has cited no appellate decisions defining deliberation in the context of the current first-degree murder statute. *See* Brief of Appellant, p. 27. In fact, that statute does not so much as mention the word “deliberation” or “deliberately.” RCW 9A.32.030. Because “deliberation” is not defined by statute, addressed by a pattern jury instruction, or defined by known appellate court decisions, it is likely a term of common understanding. *See Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984).

This fact is confirmed by a comparison of the defendant’s proposed definition of “deliberation” with its common definition. The defendant’s proposed instruction defined deliberation as “to weigh in the mind, to *consider the reasons for and against* and consider maturely, to reflect upon.” RP 1091, 1098-1104(emphasis added); Brief of Appellant, p. 16-21. Webster’s Dictionary defines deliberation as “the act of *weighing and examining the reasons for and against* a choice or measure.” Webster’s Third New International Dictionary 596 (1993) (emphasis added). *See* GR 14. Thus, the defendant’s proposed definition and the common definition are nearly identical and certainly logically equivalent. Because a term is “technical” only if it has a meaning that

differs from common usage, the term “deliberation” is not technical.

*Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). *Id.* at 611.

Therefore, the trial court had no duty to give the proposed instruction defining it, *State v. Brown*, 132 Wn.2d 529, and did not error in refusing to do so.

In fact, appellate courts have consistently approved jury instructions in first-degree murder cases where, as here, the trial court only defined “premeditation” and “intent.” See *State v. Clark*, 143 Wn.2d 731, 770-71, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001); *State v. Brown*, 132 Wn.2d 529, 604-07, 940 P.2d 546 (1997); *Matter of Personal Restraint of Lord*, 123 Wn.2d 296, 317, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994); *State v. Benn*, 120 Wn.2d 631, 657-58, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). See 11 Washington Pattern Jury Instructions: Criminal, 26.02 (3<sup>rd</sup> ed. 2008). The defendant acknowledges that the premeditation instruction was “an accurate statement of the law,” and has assigned no error to any of the court’s other instructions. Brief of Appellant, p. 18. See *Id.* at 1-27. Compare RAP 2.5(a). Therefore, the court’s instructions properly instructed the jury on the applicable law and were not misleading.

Although the defendant seems to argue that the court’s refusal to give his proposed instruction rendered him unable to argue his theory of the case that he did not premeditate the murders due to diminished capacity, Brief of Appellant, p.16-21, this is inaccurate. Indeed, as the

defendant acknowledges in his brief, he argued just this theory to the jury in his closing argument. *See* RP 1173-74; Brief of Appellant, p. 19-20. No definition of “deliberation” was necessary to make this argument.

Therefore, the court’s instructions in this case, “taken as a whole, properly instruct[ed] the jury on the applicable law, [were] not misleading, and allow[ed] each party the opportunity to argue their theory of the case.” *See State v. Marchi*, 243 P.3d 556, 561 (2010) (quoting *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003)). As a result, the trial court did not abuse its discretion by refusing to give the defendant’s proposed instruction defining “deliberation.”

Therefore, the defendant’s convictions should be affirmed.

3. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT BECAUSE THE DEPUTY PROSECUTOR SIMPLY ARGUED REASONABLE INFERENCES FROM THE EVIDENCE AND THAT THE EVIDENCE DID NOT SUPPORT THE DEFENSE THEORY OF DIMINISHED CAPACITY.

Where there was a proper objection, an appellant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d

529, 561, 940 P.2d 546 (1997)); *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962) (before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.”). Hence, a reviewing court must first evaluate whether the prosecutor’s comments were improper. *Anderson*, 153 Wn. App. at 427.

“The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Anderson*, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009). “It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

“A prosecutor’s improper comments are prejudicial ‘only where ‘there is a substantial likelihood the misconduct affected the jury’s verdict.’” *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546); *Fisher*, 165 Wn.2d at 747. “A reviewing court does not assess ‘[t]he prejudicial effect of a prosecutor’s improper comments... by looking at the comments in

isolation but by placing the remarks ‘in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *Id.* (quoting *Brown*, 132 Wn.2d at 561). “[R]emarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

In the present case, the defendant argues that the deputy prosecutor committed prosecutorial misconduct when she stated the following in closing argument:

[D]id he [i.e., the defendant] find pleasure knowing that she [i.e., Bretta Hawkins] was laying there on the ground alive and suffering and dying? Did he find joy when—

[DEFENSE COUNSEL]: You Honor, I object. We are allowing latitude, but this continuation is improper.

THE COURT: This is closing argument. Overruled.

[DEPUTY PROSECUTOR]: Did he find joy when he knew she was dying and he could have called for help, picked up that phone? One phone call would have brought them there. And as minutes turned to hours and her body was dying, what was he thinking? He is guilty of everything he did, no excuses. Guilty, Aggravated Murder in the First Degree, against the woman who married him, Barbara Nettlebeck; guilty, Murder in the First Degree for Barbara – for Bretta Hawkins, stepdaughter in name only. Thank you.

RP 1139-40.

However, the deputy prosecutor here did no more than draw reasonable inferences from the evidence, *see State v. Anderson*, 153 Wn.

App. 417, 427-28, 220 P.3d 1273 (2009), and argue that such evidence did not support the defense theory that the defendant lacked premeditated intent. See *Russell*, 125 Wn.2d at 87.

The evidence here included testimony of Dr. Ward that the defendant told him that after the murder of Barbara Nettlebeck “happened, I felt real bad about that, and I wished I could have controlled myself, and that wouldn’t have happened.” RP 910. However, the defendant had also told Ward that, after striking Barbara with the ax, he walked over to Bretta and hit her with the same ax. RP 906-08.

Based on this testimony, just prior to the challenged argument, the deputy prosecutor stated,

[r]ight after he killed Barbara, he felt remorse and wished he could have controlled himself. This is what he said to Dr. Ward. How did he feel right after he killed Barbara, and this was his answer. But you know what, he walked over and killed Bretta anyway. That’s why Dr. Beaver’s testimony [that the defendant lacked capacity] is unreasonable.

RP 1138.

If it is unreasonable, as the deputy prosecutor properly inferred from the testimony, that the defendant felt remorse after the murder, then it would be reasonable to infer from that testimony that he might have felt something else. The deputy prosecutor addressed this in the challenged

argument by asking if the defendant found “pleasure” knowing that Bretta Hawkins was “on the ground alive and suffering and dying,” or if he found “joy” knowing that “she was dying and he could have called for help.” If the defendant did experience these emotions, then it is more likely that he premeditated the assault that brought Bretta to that point.

The deputy prosecutor emphasized this by noting that the defendant knew Bretta was dying and that he could have called for help, but did not until hours later. *See* RP 560-64. When the prosecutor asked “what was he thinking?” in not calling for help, she asked the jury to consider the defendant’s mental state and whether he had acted with premeditated intent in conducting the assault. If he had *not* acted with the premeditated intent to kill Bretta, he would have called for help rather than waiting for hours while she “suffered and d[ied]” on the ground before him. Indeed, the jury could have inferred from the fact that the defendant did not call for help, that he acted with the premeditated intent to kill Bretta.

Therefore, rather than seeking to inflame the “emotions and animosity” of the jury, *see* Brief of Appellant, p. 21-24, the prosecutor was simply arguing that the evidence did not support the defense theory that the defendant lacked premeditated intent.

Because “[i]t is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory” and the “prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel,” *State v. Russell*, 125 Wn.2d at 87, the argument at issue was proper. Therefore, the defendant has failed to meet his burden of showing prosecutorial misconduct and his convictions should be affirmed.

The defendant relies on *State v. Reed*, 120 Wn.2d 140, 684 P.2d 699 (1984) for the proposition that the argument in question was “geared toward inciting the jury to render an improper verdict based on emotions and animosity toward Nettlebeck, rather than the evidence.” Brief of Appellant, p. 23-24. The defendant is incorrect and his reliance on *Reed* is misplaced.

*Reed* found the comments of a deputy prosecutor to be improper where that prosecutor “assert[ed] his personal opinion of the credibility of the witness and the guilt or innocence of the accused” by calling the defendant “a liar no less than four times,” and implying that defense experts “should not be believed because they were from out of town and drove fancy cars.” *Reed*, 102 Wn.2d at 145-46. None of these things happened here. The deputy prosecutor did not assert her personal opinion of anything, and certainly not her opinion of the credibility of defense witnesses or the guilt of the accused. *See* RP 1126-40. Although she did

question the credibility of the defense expert's claim that the defendant lacked the capacity to form premeditated intent, she did so by drawing reasonable inferences from properly admitted evidence. *See* RP 136-40. Therefore, this case is entirely distinguishable from *Reed*.

Indeed, because “[t]he State is... allowed to draw reasonable inferences from the evidence,” *State v. Anderson*, 153 Wn. App. at 427-28, and “[i]t is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory,” *State v. Russell*, 125 Wn.2d at 87, the argument at issue here was entirely proper.

Therefore, the defendant has failed to meet his burden of showing prosecutorial misconduct and his convictions should be affirmed.

4. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A JURY COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT THE MURDERS AT ISSUE WERE PART OF A COMMON SCHEME OR PLAN OR THE RESULT OF A SINGLE ACT OF THE DEFENDANT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). “In a claim of insufficient evidence, a reviewing court examines whether ‘any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt." *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992). "Determinations of credibility are for the fact finder and are not reviewable on appeal." *Brockob*, 159 Wn.2d at 336.

In the present case, in its instructions 16 and 20, the trial court instructed the jury that

If you find the defendant guilty of premeditated murder in the first degree, Count I [or Count II], you must then determine whether any of the following aggravating circumstance exists:

**There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person.**

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

CP 17-44 (instruction 16, 20) (emphasis added); RP 1124-25. *See*

Appendix A. These instructions comport with RCW 10.95.020(10), which provides that

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

**(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person.**

RCW 10.95.020(10) (emphasis added).

Moreover, the defendant did not object to these instructions, RP 1093-94, 1121-22, and therefore, under the law of the case doctrine, they became the law of the case. *See State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

A “common scheme or plan” is “an overarching criminal purpose which connects both murders. *State v. Pirtle*, 127 Wn.2d 628, 662-63, 904 P.2d 245 (1995). Thus, there must be a “nexus,” such that “an overarching criminal plan connects both murders.” *State v. Finch*, 137 Wn.2d 792, 835-36, 975 P.2d 967 (1999). A finding of a “[c]ommon

scheme or plan does not require both murders be committed for precisely the same reasons, but only that the murders are connected by a larger criminal purpose.” *Id.* at 663. Moreover, “[a] finding of ‘common scheme or plan’ does not require a preconceived plan to commit multiple murders or that both victims be killed for the same reason.” *State v. Baruso*, 72 Wn. App. 603, 618, 865 P.2d 512, *review denied*, 124 Wn.2d 1008, 879 P.2d 292 (1994).

The phrase, “a single act of the person” in RCW 10.95.020(10), has been interpreted to include “multiple murders committed by one person pursuant to [a] plan to kill more than one person, even though not linked by time, and multiple murders committed in the course of [a] very short period of time involving one continuous act, even though there is no plan involved,” *State v. Guloy*, 104 Wn.2d 412, 419, 705 P.2d 1182, *cert. denied*, 106 S. Ct. 1208, 475 U.S. 1020, 89 L. Ed. 2d 321 (1985).

In the present case, the defendant’s counselor, Ralph Coleman, testified that, before the murders at issue, the defendant told him, that his wife drew money out of his account and left him nearly “penniless.” RP 734. The defendant told Coleman, “I need help for thoughts and feelings because my wife separated from me and left me homeless.” RP 733.

The defendant told Nicole Thurston, who worked at the front desk of the hotel at which he was staying during the separation, that he was

staying at the hotel because he was going through a divorce and having problems with his wife. RP 462. The defendant indicated that he missed his horses and being on the farm that he owned with his wife in Orting. RP 462. He told her that his stepdaughter, Bretta, never liked him and that she was the reason why he and his wife were having problems. RP 463.

According to Pierce County Sheriff's Deputy Heacock, the defendant told him that he and his wife were going through a divorce and that he had been staying at a motel in Puyallup. RP 264. The defendant reported that he had been at the residence to help with a garage sale, but that they had an argument about a court date, during which he "just lost it" and assaulted her. RP 264. The defendant identified his wife as "Barbara" and said that he also assaulted "Bretta." RP 264.

According to Detective Sergeant Benson, the defendant told him, "I can't tell you what started it. I hit her with an ax," referring to his wife Barbara. RP 551. The defendant stated that his stepdaughter, Bretta, then came in and that he hit her, too. RP 551. The defendant indicated that he then wrote some things on the house, apparently pertaining to the divorce, and finally called 911. RP 551.

Both Barbara and Bretta died of injuries consistent with being struck by an ax, and an ax was found at the scene and admitted into evidence. RP 509-10, 530.

Given that there was testimony that the defendant felt as his though his wife left him homeless and nearly penniless when she filed for divorce, and given that he was sufficiently upset over the divorce that he saw a counselor for professional help with the “thoughts and feelings” he was having, RP 733-34, a jury could infer that the defendant murdered his wife, Barbara, as revenge for her filing for divorce and taking all of his property. Similarly, the jury could infer that the defendant killed Bretta for the same reason from the fact that the defendant felt that Bretta was the underlying cause of the divorce. RP 463. Because all reasonable inferences from the evidence must be drawn in favor of the State, *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), these inferences must be made. When they are, it becomes clear that revenge for the divorce and its consequences was the “overarching criminal purpose which connects both murders,” and hence, that the murders were part of a common scheme or plan. See *Pirtle*, 127 Wn.2d 628, 662-63, 904 P.2d 245 (1995). Therefore, viewing the evidence in the light most favorable to the State, a rational fact finder could find beyond a reasonable doubt that the murders at issue were part of a common scheme or plan.

Although the defendant argues that “there was no evidence that [he] was interested in revenge,” he is mistaken. The defendant told Deputy Heacock that he murdered Barbara and Bretta during an argument

about a court date. RP 264. He told Dr. Ward that he and Barbara Nettlebeck “were talking about the divorce, and it got to be too much for me to take, and I just went insane, went crazy.” RP 904. The defendant went on to tell Ward that the murders occurred because “[t]he stress I was getting from Barb and her attorney was overwhelming me.” RP 906-07. The jury could infer from these facts that the defendant was indeed interested in revenge for the divorce, and that the murders which occurred during the argument concerning that divorce were motivated by revenge for that divorce. Again, because all reasonable inferences from the evidence must be drawn in favor of the State, *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), this inference must be drawn.

Because “[a] finding of ‘common scheme or plan’ does not require a preconceived plan to commit multiple murders or that both victims be killed for the same reason,” *Baruso*, 72 Wn. App. at 618, it does not matter whether the defendant formed a plan to kill Barbara and Bretta before the argument concerning the court hearing.

All that matters is that the evidence shows that revenge for the divorce and its consequences was the “overarching criminal purpose which connects both murders.” See *Pirtle*, 127 Wn.2d at 662-63. Because it does, there was sufficient evidence from which the jury could have

found beyond a reasonable doubt that the murders at issue were part of a common scheme or plan.

Though not an issue raised by the defendant, *see* RAP 10.3(a)(4), *State v. Ross*, 141 Wn.2d 304, 311, 4 P.3d 130 (2000), *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995), there was also sufficient evidence that the murders in question were the result of “a single act” of the defendant.

Specifically, the defendant told Dr. Ward that when he killed Barbara Nettlebeck with the ax, Bretta Hawkins was just outside “in a little patio area,” and that he “hit her with the wood handle part” of the same ax. RP 906-08. The jury could reasonably infer from this evidence that the defendant went from one victim to the next killing both with the same ax, as part of one continuous act. Because “a single act of the person” as used in RCW 10.95.020(10), has been interpreted to include “multiple murders committed in the course of [a] very short period of time involving one continuous act, even though there is no plan involved,” *State v. Guloy*, 104 Wn.2d 412, 419, there was sufficient evidence from which a jury could have found beyond a reasonable doubt that these murders were part of a single act of the defendant.

Therefore, the defendant’s convictions for aggravated first-degree murder should be affirmed.

D. CONCLUSION.

The trial court properly admitted Dr. Ward's testimony regarding the similarity between the language used by the defendant in interviews with police and that used in the 1984 Western State letter because such testimony was relevant and not otherwise inadmissible.

The trial court properly refused to give defendant's proposed jury instruction defining "deliberation" because "deliberation" is a word of ordinary meaning and the court's instructions were otherwise proper statements of the law, not misleading, and allowed the parties to argue their theories of the case.

The defendant has failed to prove prosecutorial misconduct because the deputy prosecutor simply argued reasonable inferences from the evidence and that the evidence did not support the defense theory of diminished capacity.

Finally, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which the jury could have found

beyond a reasonable doubt that the murders at issue were part of a common scheme or plan or the result of a single act of the defendant.

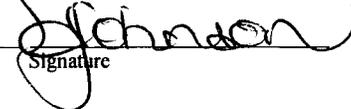
Therefore, the defendant's convictions should be affirmed.

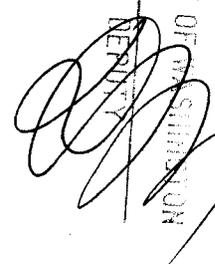
DATED: March 4, 2011

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

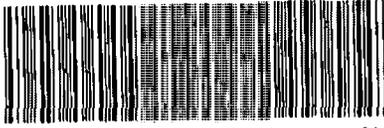
  
BRIAN WASANKARI  
Deputy Prosecuting Attorney  
WSB # 28945

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

3/11/11   
Date Signature

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STATE OF WASHINGTON  
BY  LEMMY  
COURT OF APPEALS  
DIVISION II

**APPENDIX A:  
COURT'S INSTRUCTIONS TO THE JURY,  
FILED MARCH 29, 2010**



09-1-01418-5 34034502 CTINJY 03-31-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,  
Plaintiff,

CAUSE NO. 09-1-01418-5

vs.

CHARLES WALTER NETTLEBECK

Defendant.

**COURT'S INSTRUCTIONS TO THE JURY**

DATED this 25 day of March, 2010

*John A. McCarthy*  
JUDGE  
John A. McCarthy

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value

of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.

INSTRUCTION NO. 6

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

INSTRUCTION NO. 7

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 8

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

INSTRUCTION NO. 10

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. 11

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form premeditated intent.

INSTRUCTION NO. 12

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

- (1) That on or about March 13, 2009, the defendant acted with intent to cause the death of Barbara Jo Nettlebeck;
- (2) That the intent to cause the death was premeditated;
- (3) That Barbara Jo Nettlebeck died as a result of defendant's acts; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

The defendant is charged in count I with Murder in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, or if you cannot agree on this charge, then you will consider whether the defendant is guilty of the lesser crime of Murder in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 14

A person commits the crime of murder in the second degree when with 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.

INSTRUCTION NO. 15

To convict the defendant of the lesser included crime of murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 13, 2009, the defendant acted with intent to cause the death of Barbara Jo Nettlebeck;

(2) That Barbara Jo Nettlebeck died as a result of defendant's acts; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

If you find the defendant guilty of premeditated murder in the first degree, Count I, you must then determine whether any of the following aggravating circumstance exists:

There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

INSTRUCTION NO. 17

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

- (1) That on or about March 13, 2009, the defendant acted with intent to cause the death of Bretta Joan Hawkins;
- (2) That the intent to cause the death was premeditated;
- (3) That Bretta Joan Hawkins died as a result of defendant's acts; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

The defendant is charged in count II with Murder in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, or if you cannot agree on this charge, then you will consider whether the defendant is guilty of the lesser crime of Murder in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 19

To convict the defendant of the lesser included crime of murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 13, 2009, the defendant acted with intent to cause the death of Bretta Joan Hawkins;

(2) That Bretta Joan Hawkins died as a result of defendant's acts; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

If you find the defendant guilty of premeditated murder in the first degree, Count II, you must then determine whether any of the following aggravating circumstances exist:

There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

INSTRUCTION NO. 20A.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 21

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and eight verdict forms, A, A1, B, B1 and four special verdict forms. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of murder in the first degree as charged in count I. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the

decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form A1. If you find the defendant not guilty of the crime of murder in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of murder in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A1 the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A1.

You will next consider the crime of murder in the first degree as charged in count II. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

If you find the defendant guilty on verdict form B, do not use verdict form B1. If you find the defendant not guilty of the crime of murder in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of murder in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B1 the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B1.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision.

The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 72

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Counts I & II.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime the type of weapon.

A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas. An axe is a deadly weapon.