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DIVISION III
STATE OF WASHINGTON
By _____

No. 28958-3-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CORY MONAGHAN,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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A. INTRODUCTION

Following the death of his young daughter, Cory Monaghan became increasingly paranoid and experienced delusions that a business competitor was attempting to ruin his life. Following several years of suffering from Delusional Disorder, and without any motive, planning, deliberation, or explanation, Mr. Monaghan shot and killed his friend and mentee, Jeremy Karavias. The evidence presented in a motion to acquit by reason of insanity plainly established Mr. Monaghan's mental disorder was the cause of his actions and that he was insane at the time of the incident. Because of that, this Court should reverse his convictions.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Monaghan's motion to acquit under RCW 10.77.080.

2. In the absence of substantial proof to support it the court erred in entering Finding of Fact 10 regarding insanity.

3. In the absence of substantial proof to support it the court erred in entering Finding of Fact 11 regarding insanity.

4. In the absence of substantial proof to support it the court erred in entering Finding of Fact 13 regarding insanity.

5. In the absence of substantial proof to support it the court erred in entering Finding of Fact 15 regarding insanity.

6. In the absence of substantial proof to support it the court erred in entering Finding of Fact 16 regarding insanity.

7. The trial court deprived Mr. Monaghan of the due process of the law when it entered a conviction for first degree murder despite a lack of proof beyond a reasonable doubt of premeditation.

8. The trial court's failure to require a unanimous verdict violated Article I, section 21 and Article I, section 22 of the Washington Constitution.

9. The trial court erred in refusing to give the jury defense proposed instruction D-31.

10. The assistant attorney general's misconduct deprived Mr. Monaghan of a fair trial in violation of the Fourteenth Amendment Due Process Clause.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a defendant makes a motion to acquit by reason of insanity, RCW 10.77.080 requires a trial court acquit the individual if he establishes insanity by a preponderance of the evidence. Mr. Monaghan established he suffers from Delusional Disorder and that his actions were a result of that mental illness.

Did the court err in concluding Mr. Monaghan had not met his burden of establishing he was insane?

2. The State bears the burden under the Fourteenth Amendment of proving every essential element of the offense beyond a reasonable doubt. Premeditation is an essential element of first degree murder and requires the State prove a defendant deliberated prior to committing the lethal act. Where the State proved only that Mr. Monaghan's act of shooting Mr. Karavias was a spontaneous and impulsive act done without motive or preplanning, did the State prove premeditation beyond a reasonable doubt?

3. Article I, section 21 and Article I, section 22 together provide the right to a unanimous jury in all criminal trials. This right in turn requires that in cases in which the jury is presented with multiple acts which could each support the charged offense, the court must instruct the jury it must unanimously agree upon the act or acts that establish the crime. Where the trial court found the State presented evidence of three distinct potential causes of death did the court's refusal to provide a unanimity instruction deny Mr. Monaghan his right to a unanimous jury?

4. The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees an individual a fair trial. Where a prosecutor engages in misconduct by misstating the law, the defendant is denied a fair trial. Did the assistant attorney general's misstatement of the law regarding what evidence the jury could consider deny Mr. Monaghan a fair trial?

D. STATEMENT OF THE CASE

Mr. Monaghan's young daughter died in 2004. Mr. Monaghan believed his daughter died because the government did not wish to provide her with available medication. RP 2077.

In the years following the death, Mr. Monaghan's behavior became increasingly odd. RP 1076. Mr. Monaghan began complaining of regular damage to his business equipment. RP 1964. Although others did not see any indication of intentionally caused damage, Mr. Monaghan came to believe his business competitor, Mike Blakeship, was the cause. RP 1965-66, 1996-98, 2002. Despite the absence of objective evidence, Mr. Monaghan began taking extreme measures to counteract the sabotage, such as draining and burning the fuel from all his equipment, and washing an aluminum boat with baking soda to neutralize acid. RP 1997-98, 2098

Mr. Monaghan came to believe his cell phone was bugged and stopped using it. RP 1973. At times, Mr. Monaghan would overhear others describing illness and would think they were talking about him. RP 2273.

During this time, Mr. Monaghan became a mentor to Mr. Karavias, employing him in his tree cutting business and inviting him to live with his family. RP 1963-64, 2275.

On October 21, 2008, after several days of hunting, Mr. Monaghan and Mr. Karavias arrived unexpectedly at the remote Malo home of Mr. Monaghan's uncle, Ron Wessel. RP 1142. Mr. Wessel was immediately struck by Mr. Monaghan's odd behavior, so much so that immediately upon inviting the two into the house, Mr. Wessel retrieved a handgun from his bedroom and kept it in his waistband for the remainder of the day. RP 1145. Mr. Wessel's daughters subsequently arrived to visit with their cousin and were struck by his behavior which they uniformly described as markedly "off."

Kenna Ruiz, described her cousin's as "in his own world" when she arrived at her father's home later that evening. RP 1058. She was so concerned with her cousin that she asked if he was feeling all right. RP 1063. Ms. Ruiz stated Mr. Monaghan's odd

behavior was obvious to all who were present that evening, and they were all frightened by it. RP 1077, 1082.

Amanda Wessel, immediately upon greeting her cousin that day, noticed he was not normal. RP 1002. Ms. Wessel had never seen her cousin behave that way before and described his behavior as “night and day” different from how she had always known Mr. Monaghan to act. RP 1023. Ms. Wessel said her father was so scared by Mr. Monaghan’s behavior that her dad thought her cousin was there to kill him. RP 1009. Ms. Wessel did not describe any preexisting animosity between her cousin and father that might explain that perceived danger. Amanda Wessel saw no animosity between Mr. Monaghan and Mr. Karavias. RP 1008.

Jeb Olton, Amanda’s boyfriend, also testified that everyone was frightened by Mr. Monaghan’s behavior. RP 1044. Because of that, Mr. Olton and Amanda locked their bedroom door when they went to bed that night. Id.

Kathy Wessel spoke with her nephew the night of October 21 and described his voice as “empty.” RP 1227-28.

The following morning, Mr. Wessel remained anxious about Mr. Monaghan’s continued presence and just wanted him to leave. According to Mr. Wessel, Mr. Monaghan and Mr. Karavias got

ready to leave and were standing near the front door speaking softly to one another. RP 1176-79. Mr. Karavias was holding a rifle at his side. RP 1180. Sitting on his couch in his living room, Mr. Wessel could see Mr. Karavias but could not see Mr. Monaghan. RP 1178. Unable to hear what they were saying, Mr. Wessel remained fearful that he was in danger. RP 1180-81

Mr. Wessel then heard a gunshot followed by Mr. Karavias saying "Cory, Cory." RP 1182. Mr. Karavias slumped to the floor, as Mr. Wessel moved toward Mr. Monaghan who was holding a hand gun. RP 1182-83. In response to his uncle's question, "What the fuck did you do?" Mr. Monaghan said, "he pointed a gun at me." RP 1183. Mr. Wessel never saw Mr. Karavias raise the gun from his side. Id.

Mr. Wessel called 911, handed the phone to Mr. Monaghan, and took the handgun from him. RP 1184.

After Mr. Monaghan spoke briefly with the operator, Mr. Wessel took the phone back in order to give his address so emergency personnel could respond. While he was speaking on the phone Mr. Wessel heard a grunting noise. RP 1188. Mr. Wessel looked to see Mr. Monaghan cradling Mr. Karavias's head, then noticed that rather than comforting him, Mr. Monaghan

appeared to be twisting Mr. Karavias's neck. RP 1188-89. Mr. Monaghan's face was purple with veins bulging on his forehead, and Mr. Wessel heard several cracking noises. RP 1189. Mr. Wessel described Mr. Monaghan as looking "possessed." RP 1190.

Mr. Wessel ran to his bedroom to retrieve a gun and to call 911 again. RP 1191. When he returned to the front room, he saw Mr. Monaghan holding a knife over Mr. Karavias's chest, so Mr. Wessel fled the house. RP 1191-92.

Because of the open approach to the Wessel home, police did not respond directly to the house but rather to the junction of the main road and the road that led to the Wessel home. RP 1262. As officers later approached the home from a different route, they noticed smoke coming from the home. RP 1100. A helicopter hovering above the house notified the officers that Mr. Monaghan had left the house moving down the hill. RP 1101-02. Mr. Monaghan promptly complied with commands from the airborne officers to lie on the ground and was taken into custody. RP 1103, 1265-66.

Because of a stab wound in his leg, Mr. Monaghan was transported to a hospital in Republic. In the ambulance, Mr.

Monaghan was responsive, scoring the highest score of 15 on the Glasgow Coma Scale. RP 1307. However, once he arrived at the hospital Mr. Monaghan became completely unresponsive scoring a 3, the lowest possible score, on the scale. RP 1313, 1929-30. Mr. Monaghan did not respond to an anti-narcotic medication given to him as a precaution, indicating his loss of consciousness was not the result of a narcotic overdose. RP 1933. Moreover, a CT scan did not reveal any head injury. RP 1934. Medical personnel were concerned he was undergoing a psychotic event. RP 1313. Because of his inexplicably deteriorating condition and because advanced life support was not available, Mr. Monaghan was transported by helicopter to a hospital in Spokane.

Speaking with investigators after the incident, together with Ms. Ruiz, Mr. Wessel cautioned his daughter to be careful what she said to investigators lest they believe Mr. Monaghan was "psycho." RP 1216, 1683.

The home was completely destroyed by the fire. RP 1374. As a result, investigators could not determine the cause of the fire.

Id.

Because of the fire, an autopsy was unable to determine the cause of Mr. Karavias's death. RP 1528-32.

Mr. Monaghan explained he had been reluctant to visit his uncle but ultimately did so because of Mr. Karavias's persistent urging. RP 2138. When he arrived at the home he described everyone as cleaning guns, and his cousin Amanda offering to clean his. RP 2151-52. According to Mr. Monaghan, Mr. Wessel encouraged him to go up the hill behind the home noting that he had seen a white pickup up there. RP 2163. Mr. Karavias, too, wanted Mr. Monaghan to go that area. RP 2165. Mr. Monaghan noted Mike Blakenship drove a white pickup. RP 2163.

On the morning of the shooting, Mr. Monaghan was getting ready to leave with Mr. Karavias, when Mr. Wessel asked Mr. Karavias "are you going to get him?" RP 2165. As he picked up the rifle, Mr. Karavias responded "I've got this one." RP 2166. When Mr. Karavias then pointed the gun at him, Mr. Monaghan shot him. Id.

Mr. Wessel denied making any of these statements, and a host of other, odd statements Mr. Monaghan attributed to him. RP 1944-46.

The State charged Mr. Monaghan with first degree murder and first degree arson. CP 13-15

Dr. Fred Wise and Dr. Vincent Gollogly testified Mr. Monaghan suffers from Delusional Disorder and Paranoid Personality Disorder. RP 1830, 2322. Both doctors testified that based upon their review of Mr. Monaghan's history and evaluation as well as the facts surrounding the incident, Mr. Monaghan's acts were a product of the delusional disorder. RP 1843. Dr. Gollogly added that Ron Wessel's testimony of what occurred bolstered his diagnosis. RP 2334. All experts agreed that Mr. Monaghan produced valid test scores which indicted that he was not malingering. RP 1828, 2298.

A jury convicted Mr. Monaghan of both counts as charged.

CP 201-02

E. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MR. MONAGHAN'S MOTION FOR ACQUITTAL.

Prior to trial, Mr. Monaghan filed a motion to acquit based on insanity. CP 109-31. Mr. Monaghan presented the testimony of Dr. Gollogly, and the testimony of numerous other witnesses including those present at the Wessel home on the evening before and morning of the incident, and from family and associates describing his history of delusional and paranoid behavior.

The trial court denied the motion concluding (1) that Mr. Monaghan did not meet the diagnostic criteria of Delusional Disorder, and (2) that even if he did, a mental disorder cannot be the basis of an insanity defense. CP 272-73.¹

RCW 9A.12.020 provides “insanity” means

At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:

- (a) He was unable to perceive the nature and quality of the act with which he is charged; or
- (b) He was unable to tell right from wrong with reference to the particular act charged.

RCW 10.77.080 requires the court hearing a motion to acquit by reason of insanity to weigh the evidence and grant the motion if the defendant meets his burden by a preponderance of the evidence.

State v. Sommerville, 111 Wn.2d 524, 533-34, 760 P.2d 932

(1988). As set forth below, Mr. Monaghan satisfied that burden.

a. Mr. Monaghan proved he suffered from a mental disease. Following the death of his daughter, Mr. Monaghan increasingly came to believe she had become ill and had been denied a cure based upon the malfeasance of others.

¹ The original Designation of Clerk’s Papers did not include the court’s findings and conclusions regarding Mr. Monaghan’s motion to acquit. A supplemental designation has been filed, and the court’s findings are attached as an appendix.

Mr. Monaghan's persecutory delusions became focused primarily on a business competitor, Mike Blakenship, whom Mr. Monaghan believed to be sabotaging his equipment. RP 238, 346-48. Co-workers and family members, however, saw no indication of such malfeasance. RP 261.

Kenna Ruiz testified that when she saw her cousin at her father's home the night before the incident Mr. Monaghan was "out in left field." RP 130. Driving home at the end of the evening, Ms. Ruiz's son told her "Grandpa's worried and Cory's acting funny." RP 133. Ms. Ruiz's sister Amanda Wessel also described Mr. Monaghan, saying "something was just totally off with him. It was like - - 180 degrees." RP 198. Ron Wessel was so concerned with his nephew's behavior that immediately after inviting Mr. Monaghan into his home, Mr. Wessel retreated to his bedroom to retrieve a hand gun. RP 41. Mr. Wessel kept that gun in his waistband the remainder of the evening and slept with the gun under his pillow that night. Mr. Monaghan's odd behavior continued the following morning causing Mr. Wessel to simply hope his nephew would leave as soon as possible. RP 64-65

Dr. Vincent Gollogly diagnosed Mr. Monaghan with Delusional Disorder, persecutory type as well as Paranoid

Personality disorder. RP 366-67. Dr. Gollogly based his conclusion upon his examination of Mr. Monaghan as well as information provided by family and associates of Mr. Monaghan, contemporaneous records, and evidence gathered regarding the incident. Based upon that information, Dr. Gollogly described Mr. Monaghan's long standing paranoia and delusions of persecution. RP 348-55. Dr. Gollogly concluded Mr. Monaghan suffered from both delusional disorder, persecutory type, and paranoid personality disorder. RP 366-67.

The diagnostic criteria of delusional disorder are

- A. Nonbizarre delusions . . . of at least one month's duration.
- B. Criterion A for Schizophrenia has never been met . . .
- C. Apart from the impact of the delusion(s) or its ramifications, functioning is not markedly impaired and behavior is not obviously odd or bizarre.
- D. If mood episodes have occurred concurrently with delusions, their total duration has been brief relative to the duration of the delusional periods.
- E. The disturbance is not due to the direct physiological effects of a substance . . . or a general medical condition.

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, p.301, 4th ed. (1994) (Hereafter DSM-IV).

In response to the history of delusional behavior described by witnesses and Dr. Gollogly, the State questioned witnesses regarding whether they could say for certain that Mike Blakenship was not sabotaging Mr. Monaghan's equipment, implying that it was not delusional if true. RP 394-95. But by definition a "nonbizarre" delusion must be plausible, understandable, and derived from ordinary life. DSM-IV at 296. Thus, the plausibility of the imagined sabotage merely establishes that the delusion is nonbizarre. Moreover, if the State truly believed there was evidence that Mr. Blakenship was actually damaging Mr. Monaghan's property it is difficult to imagine the State would allow such criminal conduct to continue without sanction.

The court's conclusion that Mr. Monaghan did not suffer from delusional disorder hinged entirely upon the court's finding that he did not persistently adhere to his delusion when challenged. Appendix at 2 (Finding of Fact 11); RP 869-70. But that is not among the diagnostic criteria of the disorder. DSM-IV, at 301. Instead, that requirement is nothing more than a criterion which the staff at Eastern State Hospital believed necessary. RP 807. As an example, Dr. Grant opined that a person with delusional disorder would never accept an insanity defense. Id. Providing a real-life

example of the term “Catch-22,” Dr. Grant opined that by proffering such a defense, a rational act, Mr. Monaghan demonstrated he was not insane due to a delusional disorder.² RP 807. That Mr. Monaghan does not display a symptom that is not among the diagnostic criteria for the disorder cannot support the conclusion that he does not suffer from the disorder. No more so than the fact that absence of pain in one’s arm does not prevent a diagnosis of a broken leg.

Mr. Monaghan proved by a preponderance of the evidence he suffered from delusional disorder beyond a reasonable doubt. Only by relying upon a criterion which is not among the diagnostic criteria of the disorder did the court concluded otherwise. The trial court’s findings to the contrary are unsupported by the record.

b. Delusional Disorder is a mental disease. The State’s experts opined that delusional disorder is not a “mental disease.” RP 778, 806. Dr Travers testified that with very limited

² The irony of Dr. Grant’s testimony is that he is a retired Air Force psychiatrist, and it is fictional Air Force (or Army Air Corps) psychiatrists who created “Catch-22,” the policy at the heart of Joseph Heller’s novel. That policy allowed an airman who believed he was no longer mentally fit to fly missions due to fear to simply ask to be grounded. However, the policy specified that the mere recognition of such fear and the desire to avoid danger was a rational act and thus proof that any airman who made such a request was in fact fit to fly. Thus, “if he flew [the missions] he was crazy and didn’t have to; but if he didn’t want to he was sane and had to.”

exceptions, personality disorders were not “civil committable.”³ RP 778. The State repeated that claim in its argument to the court. RP 845-46. In its oral ruling the trial court stated “when I think of personality disorder I think of character - - character. Not mental illness or disease but character.” RP 872. Whatever the State, its experts, or trial court may believe with respect to mental illness, Washington courts have repeatedly found personality disorders are serious mental disorders.

For instance, in this state numerous individuals with nothing more than a personality disorder have been indefinitely confined under RCW 71.09. See e.g., In re the Detention of Sease, 149 Wn.App. 66, 201 P.3d 1078, review denied, 166 Wn.2d 1029 (2009) (affirming commitment of individual diagnosed with Antisocial Personality Disorder, Narcissistic Personality Disorder and Borderline Personality Disorder). RCW 71.09 and the Fourteenth Amendment Due Process Clause allow such confinement only where a person’s mental illness makes it “difficult, if not impossible, for the person to control his dangerous behavior.” Kansas v. Hendricks, 521 U.S. 346, 358, 117 S.Ct. 2072, 138

³ Dr. Travers explained the exceptions would be limited to instances in which the person was suicidal or otherwise posed a danger to themselves. RP 778.

L.Ed.2d 501 (1997). Due process allows involuntary commitment only for those diagnoses which “the psychiatric profession itself classifies . . . as [] serious mental disorders.” Kansas v. Crane, 534 U.S. 407, 410, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). By affirming confinement based upon personality disorders alone, this state’s courts have necessarily concluded that personality disorders are serious mental illnesses and not merely “character traits” as the trial court concluded.

c. Mr. Monaghan’s mental disease prevented him from appreciating both the nature and quality of his acts and his ability to tell right from wrong. Dr. Gollogly testified Mr. Monaghan’s mental illness prevented him appreciating the nature and quality of his acts and also made him unable to tell right from wrong. RP 371. Dr. Gollogly testified Mr. Monaghan’s reaction to the perceived threat was a product of his Delusional Disorder and Paranoid Personality Disorder. RP 376. Dr. Gollogly allowed Mr. Monaghan acted purposefully, but only in the sense that he was responding to his delusion and paranoia. RP 410.

The Eastern State Hospital staff, however, opined that so long as Mr. Monaghan knew he was shooting Mr. Karavias and that shooting someone causes death, he appreciated the nature and

quality of his acts. Moreover, they opined that so long as he knew killing a person was wrong in a broader sense, he understood right from wrong.

The State's experts claimed that even if Mr. Monaghan's belief that Mr. Karavias intended to kill him was a product of his delusion, the decision to act in self-defense, within that delusion, is nonetheless a rational act and by definition then not the product of mental illness. RP 711-12. But the ability to make a rational choice within the context of the delusion is precisely the example provided by the DSM-IV to illustrate the potential for high psychosocial functioning among people with the disorder. Specifically DSM-IV provides an example of a person who believes Mafia hit men are looking for him and thus leaves his home only in darkness and while in disguise. DSM-IV at 297. As in the example, Mr. Monaghan's choice to use self-defense is only rational in the context of his delusion.

Mr. Monaghan established by a preponderance of the evidence that because of his mental illness he was unable to appreciate the nature and quality of his actions and/or his ability to appreciate the wrongfulness of his actions.

d. This Court must reverse the trial court's ruling denying Mr. Monaghan's motion to acquit. Mr. Monaghan met his burden under RCW 10.77.080. The trial court's decision is based upon a misapplication of the relevant legal standard. This Court should reverse the trial court's ruling

2. THE STATE DID NOT OFFER SUFFICIENT EVIDENCE TO CONVICT MR. MONAGHAN OF FIRST DEGREE MURDER

a. The State was required to prove the elements of the offense beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

To convict Mr. Monaghan of first degree murder the State was required to prove he acted "with premeditated intent to cause the death of another person" RCW 9A.32.030(1)(a).

Premeditation distinguishes first from second degree murder. State v. Brooks, 97 Wn.2d 873, 651 P.2d 217 (1982).

b. The State did not prove beyond a reasonable doubt Mr. Monaghan acted with premeditation. Premeditation must involve “more than a moment in point of time,” but a mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245, cert. denied, 518 U.S. 1026 (1995). Instead, premeditation is “the deliberate formation of and reflection upon the intent to take a human life” and involves “the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” Pirtle, 127 Wn.2d at 644 (quoting State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995)); State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992).

Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial. Pirtle, 127 Wn.2d at 643; Gentry, 125 Wn.2d at 597. However, the Supreme Court has said

Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection.

State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986).

An impulsive or spontaneous act is not premeditated. State v. Luoma, 88 Wn.2d 28, 34, 558 P.2d 756 (1977). While evidence of a spontaneous act may establish intent, it does not establish premeditation. State v. Bolen, 142 Wash. 653, 666, 254 P. 445 (1927). The State did not prove Mr. Monaghan premeditated the intent to kill Jeremy Karavias.

Four characteristics “are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing.” Pirtle, 127 Wn.2d at 644. The second and third factors can be further combined as evidence of planning. Id.

Here, the State made no effort to explain what motivation Mr. Monaghan might have had to kill Mr. Karavias. By all accounts Mr. Monaghan was Mr. Karavias’s mentor, and there was no evidence of ill will between them. Yet Mr. Monaghan shot him as they stood in the doorway of his uncle’s home. Recognizing the complete inability to explain Mr. Monaghan’s actions, the assistant attorney

general in his closing argument took pains to explain to the jury the State need not provide any evidence of motive.

The complete lack of motive was a part of Dr. Gollogly's conclusion that that the act was a product of Mr. Monaghan's mental illness.

Similarly there is no evidence Mr. Monaghan procured a weapon for purposes of committing the crime. While he was wearing a holstered pistol, the State offered nothing to suggest the gun was procured for purposes of committing the crime rather than his intent to go hunting. Further, the State offered no evidence of planning or stealth. If Mr. Monaghan had been planning to kill Mr. Karavias, it is illogical to conclude the plan was to do so in his uncle's house with his uncle watching as opposed to on any of the several occasions that must have presented themselves while the pair were deer hunting alone in the woods in the days before the shooting. Mr. Wessel's testimony regarding the events preceding the murder do not suggest any deliberation by Mr. Monaghan, and at best describes a sudden impulsive act. That Mr. Monaghan committed the crime in such an open manner suggests the complete absence of planning.

A conviction of first degree murder requires proof beyond a reasonable doubt of a premeditated intent to commit the act causing death. Here, there was no evidence of which act was the cause of death. RP 1534. Acknowledging it could not prove which act was the cause of death, the State hedged its bets and argued that even if the jury didn't find Mr. Monaghan had a premeditated intent to shoot Mr. Karavias, the fact that he may have broken Mr. Karavias's neck after shooting him establishes premeditation. RP 2815, 2843. At the outset of its argument, the State claimed after Mr. Monaghan shot Mr. Karavias, "he premeditated the intent to finish the job." RP 2815.

The State's argument urging the jury to find premeditation only after the act of shooting, presupposes the shooting was not the cause of death. Further, the State's argument requires one to assume Mr. Monaghan actually did break Mr. Karavias's neck and that that act caused Mr. Karavias's death. But the medical examiner was unable to provide support for either of those facts, testifying that while twisting a person's neck could be fatal there was no physical evidence that occurred here. RP 1534. Thus even if Mr. Monaghan premeditated the act of twisting Mr. Karavias's neck, which could cause death, in the absence of proof that act

caused his death, there is insufficient evidence to support a conviction of first degree murder.

The same analysis applies with respect to Mr. Monaghan starting the fire. First there was no evidence the fire was started by anyone, as investigators could not find any indication that an accelerant was used. RP 1374. Again the medical examiner could not say the fire was the cause of Mr. Karavias's death only that if Mr. Karavias was still alive when the fire began he would not have survived. RP 1533.

The State opposed Mr. Monaghan's requests for a unanimity instruction, arguing it could not prove which act caused death and that in any event this was a continuing series of acts. RP 2763. The court agreed with the State's argument and refused the instruction. RP 2771-72. But even if the event was a continuous criminal act, the State was still required to prove Mr. Monaghan premeditated the intent to kill Mr. Karavias prior to the lethal act. RCW 9A.32.030(1)(a). If the shooting was the cause of death and it was done without premeditation, Mr. Monaghan is not guilty of first degree murder. That is so, even if the State did prove Mr. Monaghan premeditated the intent to break Mr. Karavias's neck, or to burn him by starting the fire. Because the State did not establish

what the cause of death was and did not prove Mr. Monaghan premeditated the intent to shoot Mr. Karavias, the State did not present sufficient evidence to convict Mr. Monaghan of first degree murder.

c. The Court must reverse Mr. Monaghan's conviction of first degree murder. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State failed to prove Mr. Monaghan premeditated the intent to kill Mr. Karavias, the Court must reverse the conviction of first degree murder.

Because the jury was explicitly instructed on the elements of the lesser offense of second degree murder, CP 174, the Court may reform the verdict to a conviction on the lesser offense. State v. Green, 94 Wn.2d at 234-35; State v. Argueta, 107 Wn.App. 532, 539, 27 P.3d 242 (2001).

3. MR. MONAGHAN WAS DENIED HIS RIGHT TO A UNANIMOUS JURY.

a. The Washington Constitution requires a unanimous jury in criminal cases. The Washington Constitution requires a unanimous jury verdict in criminal matters. Const. Art. I, § 21; Const. art. I, §22. When the State presents evidence of several acts which could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). By requiring a unanimous verdict on one criminal act, the court protects a criminal defendant's right to a unanimous verdict based on an act proved beyond a reasonable doubt. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007). The constitutional error resulting from the failure to either elect the incident relied upon for conviction or to properly instruct the jury is harmless only if the reviewing court is satisfied beyond a reasonable doubt that each incident established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 405-06.

b. The State presented evidence of multiple acts. Mr.

Monaghan proposed an instruction which provided:

The State alleges that the defendant committed an act of murder or manslaughter by multiple means. To convict the defendant of murder or manslaughter, one particular act of murder or manslaughter must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all acts of murder or manslaughter.

CP 153.

The State objected to the Petrich instruction, recognizing that while “there’s three ways it could have happened . . . I don’t think there’s any way for this jury to know which one.” RP 2735. The State continued that requiring it to prove “which one of those three caused the death would - - an impossible burden to reach in this case.” RP 2736. The State subsequently argued the three acts were a part of a continuing pattern of conduct and thus unanimity was not required. RP 2763

The court agreed the State’s evidence established three distinct acts, but concluded each was a part of a continuing course of conduct. RP 2771-72.

But as is clear from the foregoing discussion of the State’s proof of premeditation, the State proffered three distinct possible

causes of death: the gunshot, the possible broken neck, and the fire. The State opposed Mr. Monaghan's request for a unanimity instruction primarily because it could not prove which act was the cause of death. RP 2735. But the State's inability to prove the charge is not an exception to the unanimity requirement.

Nor could the distinct acts be deemed a single continuing act. Plainly, if the shooting was the cause of death then neither breaking Mr. Karavias's neck nor starting the fire were part of a course of lethal conduct, but merely unpleasant facts after the fact. The State's inability to prove which of these three mechanisms actually caused the death is not a basis to refuse to require unanimity, but rather precisely the reason to provide the instruction.

c. The failure to protect Mr. Monaghan's right to a unanimous jury requires reversal of his conviction. Where the prosecution fails to elect which act it wishes the jury to rely upon, and the jury is not instructed that it must unanimously agree on which act supports the charge, the resulting error "is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt." Kitchen, 110 Wn.2d at 411 (citing State v. Loehner, 42 Wn.App.

408, 411-12, 711 P.2d 377 (1985) (Scholfield concurring), review denied, 105 Wn.2d 1011 (1986)).

This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. This standard best ensures that when constitutional error occurs, a conviction will not be upheld unless the error is harmless beyond a reasonable doubt.

(Internal citations omitted.) Kitchen, 110 Wn.2d at 411-12

Here a rational jury could have had a reasonable doubt with respect to the shooting in light of the dearth of evidence that the act was premeditated. That doubt alone demonstrates the prejudice resulting from the failure to require jury unanimity. But in addition, because Mr. Monaghan was no longer “armed” when he twisted Mr. Karavias’s neck or started the fire, a rational juror could have entertained a reasonable doubt whether the firearm enhancement could apply if either of those two acts were the cause of death. Thus, the absence of a unanimity instruction requires reversal.

4. THE ASSISTANT ATTORNEY GENERAL’S
IMPROPER ARGUMENT PREJUDICED MR.
MONAGHAN.

a. A prosecutor may not misstate the law in his closing argument. A prosecuting attorney is the representative of the government and the community; therefore it is the prosecutor's

duty to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).; State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

b. The assistant attorney general misstated the law when he told the jury it could not consider as evidence the facts relied upon by experts. "Statements by the prosecution or defense to the jury upon the law, must be confined to the law as set forth in the instructions given by the court." Davenport, 100 Wn.2d at 760.

In his closing argument, the assistant attorney general told the jury:

Counsel - - made reference to a lot of the records that the experts testified to. And that's something you normally wouldn't hear in a criminal case. Normally all that stuff would be hearsay; you have to hear it, you know, directly from the horse's mouth. But when experts testify they're allowed to give opinions and they're allowed to tell you why they have the opinions, including relying on things that

they've read. But that's not really evidence; that's just things they've read to support their opinions.

RP 2912. The trial court brushed aside defense counsel's immediate objection, saying, "well this is argument. . . . I'll allow leeway. The jury will determine its - - decision." RP 2913.

It is simply not correct to say that all the evidence considered by the experts would have otherwise been inadmissible. Under ER 705, evidence which is relied on by an expert and which is otherwise admissible is substantive evidence. K. Tegland, *5B Washington Practice, Evidence*, §§705.4-705.5 (2007). Much of the evidence relied upon was testified to by other witnesses, and thus was plainly not hearsay or otherwise excludable. And even testimony that was not itself admissible as substantive evidence is admissible at least for the purpose of establishing the basis of the expert's opinion. ER 705; *State v. Lui*, 153 Wn.App. 304, 321-22, 221 P.3d 948 (2009). Thus each piece of evidence relied upon by the experts was evidence for the jury to consider.

With respect to limiting how the jury considered that evidence the State could have requested a limiting instruction on the jury's use of the evidence. Had the State requested such an instruction it would have been entitled to one as matter of right, at

least with respect to the evidence which was not otherwise admissible. ER 105; State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). But the State never requested such an instruction, and thus, the evidence was before the jury without limitation.

The State's effort to limit the jury's consideration of evidence misstated the law.

c. The prosecutor's misstatement of the law deprived Mr. Monaghan of a fair trial. Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. Davenport, 100 Wn.2d at 762. Comments made by a deputy prosecutor constitute

misconduct and require reversal where they were improper and substantially likely to affect the verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v. Fleming, 83 Wn.App. 209, 215, 921 P.2d 1018 (1996); review denied, 131 Wn.2d 1018 (1997). The prosecutor's misstatement focused upon one of the critical issues before the jury, Mr. Monaghan's sanity and the evidence to support his expert's opinions. The state's comments were an improper effort to limit the evidence the jury considered on that point. But beyond simply misstating the law, the assistant attorney general prefaced his comments by referencing defense counsel's argument, suggesting it was defense counsel that had misled the jury. RP 2912.

Further, the trial court's failure to sustain the objection and correct the misstatement of law, was exacerbated by the court's statement that "the jury will determine its - - decision." RP 2913. Thus, rather than carry out its duty to properly instruct the jury, the court left it to the jury to determine what law it wished to apply.

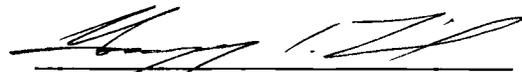
Moreover, the trial court's actions suggested to the jury that the prosecutor's argument was correct.

The prosecution's misstatements and the trial court's implicit support of them deprived Mr. Monaghan of a fair trial and require reversal.

F. CONCLUSION

Because the court erred in denying Mr. Monaghan's motion to acquit by reason of insanity, this Court must reverse Mr. Monaghan's convictions. Moreover, because the State did not prove beyond a reasonable doubt that Mr. Monaghan acted with premeditated intent and because the jury was not required to reach a unanimous verdict on that count, the Court must reverse his conviction of first degree murder. Finally, the State's misconduct requires this Court to dismiss all the convictions.

Respectfully submitted this 7th day of January, 2011.



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Washington Appellate Project - 91052
Attorney for Appellant

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**STATE OF WASHINGTON
FERRY COUNTY SUPERIOR COURT**

THE STATE OF WASHINGTON,

Plaintiff,

v.

CORY JAMES MONAGHAN,

Defendant.

NO. 08-1-00040-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
INSANITY

THIS MATTER having come before the court January 26-29, 2010, on the defendant's Motion for Judgment of Acquittal on Grounds of Insanity, and the court having heard the testimony of the witnesses presented by each party, to include Dr. Gollogly, Dr. Travers, and Dr. Grant; the arguments and memoranda of counsel, and the files herein, and the court having orally denied the motion and ruled that the defendant failed to establish by a preponderance of the evidence that he was insane at the time of the criminal acts charged, the Court hereby enters the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. On October 21, 2008, defendant Cory James Monaghan and the decedent, Jeremy Karavias, arrived at the home of Ron and Kathy Wessel at 180 Art Creek Rd., Malo, WA.

2. On the morning of October 22, 2008, the defendant shot and killed Jeremy Karavias.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
INSANITY

1 3. After shooting Jeremy Karavias, the defendant told 911 that there had been a
2 "terrible accident."

3 4. 180 Art Creek Road was on fire with Jeremy Karavias' body inside when
4 Defendant left the home. The house burned to the ground.

5 5. The defendant was apprehended by law enforcement later that day after fleeing
6 the burning house.

7 6. The defendant stated that there were two people in the burning house,
8 Jeremy Karavias and his Uncle Ron Wessel.

9 7. The defendant had a small puncture wound on his leg and told law enforcement
10 that Jeremy had stabbed him.

11 8. The defendant knew he was shooting Jeremy Karavias when he shot
12 Jeremy Karavias.

13 9. The defendant knew that shooting Jeremy Karavias would likely result in
14 killing or seriously injuring him.

15 10. Defendant did not suffer from delusional disorder at the time of the charged
16 offenses.

17 11. Defendant did not display a persistent adherence to the delusion alleged by the
18 defense. This is exemplified by the defendant's continued use of his cell phone despite his
19 claim that he thought his cell phone was being monitored by Mike Blankenship.

20 12. Defendant did not have a mental defect at the time of the alleged offenses.

21 13. Defendant was not suffering from a mental disease at the time of the alleged
22 offenses.

23 14. Defendant suffered from some level of personality disorder that included
24 paranoid personality traits.

25 15. The defendant was able to perceive the nature and quality of his acts at the time
26 of commission.

1 16. The defendant was able to tell right from wrong at the time he committed the
2 charged offenses.

3 **II. CONCLUSIONS OF LAW**

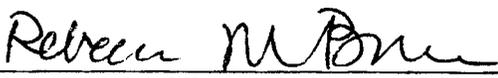
4 1. A defendant has the burden of proving by a preponderance of the evidence that
5 he was legally insane at the time of the crimes.

6 2. The court is not convinced by a preponderance of the evidence that the
7 defendant was unable to perceive the nature and quality of his acts at the time he committed
8 the charged offenses of Murder in the First Degree and Arson in the First Degree.

9 3. The court is not convinced by a preponderance of the evidence that the
10 defendant was unable to tell right from wrong with reference to the particular acts charged of
11 Murder in the First Degree and Arson in the First Degree.

12 4. Defendant's motion for acquittal on grounds of insanity is DENIED.

13 DATED this 23rd day of July, 2010.

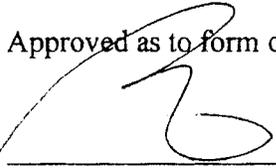
14 
15 HONORABLE REBECCA BAKER, JUDGE

16 Presented by:

17 

18 JOHN HILLMAN, WSBA #25071
19 Assistant Attorney General
20 Attorney for Plaintiff

21 Approved as to form only:

22 
23 BRETT PURTZER, WSBA # 17283
24 Attorney for Defendant