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Consol. No. 38034-0-II
No. 38104-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Christopher Olsen,
Appellant.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

COURT OF APPEALS
DIVISION II

Thurston County Superior Court Cause No. 07-1-01363-0
The Honorable Judge Christine A. Pomeroy

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The court's instructions violated Mr. Olsen's Fourteenth Amendment right to due process by allowing conviction without proof of each element beyond a reasonable doubt.
2. The court's instructions allowed the jury to convict Mr. Olsen of felony murder even if Frazier and Sublett killed Mr. Totten before recruiting Mr. Olsen to help them.
3. The court's instructions allowed the jury to convict Mr. Olsen of felony murder even if Frazier and Sublett completed the acts causing Mr. Totten's death before recruiting Mr. Olsen.
4. The trial judge erred by refusing to instruct the jury on the lesser-included offense of Manslaughter in the Second Degree.
5. The trial judge violated Mr. Olsen's Fourteenth Amendment right to due process by refusing to instruct on manslaughter.
6. The trial judge violated Mr. Olsen's state constitutional right to a jury trial by refusing to allow the jury to consider the lesser-included offense of Manslaughter in the Second Degree.
7. If the trial judge's refusal to instruct on manslaughter is not preserved for review or is attributable to defense counsel, then Mr. Olsen was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
8. Mr. Olsen was denied the effective assistance of counsel by his attorney's failure to request instructions on the inferior degree offense of Murder in the Second Degree.

9. Mr. Olsen was denied the effective assistance of counsel by his attorney's failure to request instructions on the lesser-included offense of Manslaughter in the First Degree.
10. The trial judge abused her discretion by denying Mr. Olsen's motion for a new trial based on newly discovered evidence.
11. The trial judge abused her discretion by admitting unedited recordings and transcripts of telephone calls between Mr. Olsen and Frazier in violation of ER 401, ER 403 and ER 404(b).
12. The trial judge violated Mr. Olsen's Sixth and Fourteenth Amendment right to present a defense by excluding evidence that was relevant and admissible.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the state to prove every essential element of the offense beyond a reasonable doubt. The court's instructions relieved the state of its burden to prove that Mr. Olsen participated in or was an accomplice to the specific burglary and/or robbery that resulted in Mr. Totten's death. Did the court's instructions violate Mr. Olsen's Fourteenth Amendment right to due process by relieving the state of its burden to prove all the elements first-degree felony murder?
2. A criminal defendant is entitled to have the jury instructed on applicable lesser-included offenses. Here, the trial judge refused to instruct on the lesser-included offense of Manslaughter in the Second Degree. Did the trial judge's refusal to instruct on manslaughter violate Mr. Olsen's Fourteenth Amendment right to due process and his state constitutional right to a jury trial?

3. The Sixth and Fourteenth Amendments guarantee the right to the effective assistance of counsel. Mr. Olsen's attorney submitted a nonstandard instruction on the lesser-included offense of second-degree manslaughter. If the trial judge denied the request for a lesser-included instruction because of counsel's nonstandard instruction, was Mr. Olsen denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. An accused person is denied the effective assistance of counsel when her or his attorney unreasonably fails to propose applicable instructions for lesser-included or inferior-degree offenses. In this case, defense counsel unreasonably failed to propose instructions on the inferior-degree offense of Murder in the Second Degree and the lesser-included offense of Manslaughter in the First Degree. Was Mr. Olsen denied his constitutional right to the effective assistance of counsel?
5. A motion for a new trial based on newly discovered evidence should be granted when material evidence discovered after trial would probably change the outcome, could not have been discovered before trial by the exercise of due diligence, and is not merely impeaching because it devastates an important witness's uncorroborated testimony. Mr. Olsen's motion for a new trial was based on evidence that met these requirements. Did the trial judge abuse her discretion by refusing to grant a new trial?
6. Relevant evidence must be excluded whenever the trial court concludes that the probative value is substantially outweighed by the danger of unfair prejudice. Here, the judge admitted irrelevant evidence of Mr. Olsen's prior bad acts without balancing probative value and prejudicial effect. Did the trial judge abuse her discretion by admitting the improper evidence?
7. An accused person has a constitutional right to present relevant, admissible evidence. Here, the trial judge refused to allow Mr. Olsen to present evidence that the decedent had

sought advice about obtaining a restraining order against Frazier shortly before being killed. Did the trial judge violate Mr. Olsen's Sixth and Fourteenth Amendment right to present a defense by excluding relevant, admissible evidence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. STATEMENT OF FACTS

- A. April Frazier is expelled from a clean-and-sober house and moves to a trailer on Jerry Totten's property.

In January of 2006, methamphetamine addict and convicted felon April Frazier was expelled from her clean-and-sober living house. RP (6/9/08) 567, 572; RP (6/10/08) 614. Though she'd only been there two months, and the house had rules against it, she used certain prescription drugs and behaved inappropriately while there. RP (6/9/08) 572; RP (6/12/08 am) 18-26.

Frazier had met Jerry Totten at an Alcoholics Anonymous meeting toward the end of 2005. RP (6/9/08) 497. Mr. Totten was a 69-year-old disabled veteran who was a recovered alcoholic himself. RP (6/3/08) 32, 40. He offered to let Frazier stay in a trailer on his property. RP (6/9/08) 497-498. Mr. Totten trusted her, giving her the only key to the trailer. RP (6/9/08) 498-499; RP (6/12/08 pm) 40. He also gave Frazier a key to his home, allowing her to come and go freely. RP (6/9/08) 499-503, 573. Frazier had a boyfriend, Michael Sublett, and Mr. Totten allowed him to come and go freely as well. RP (6/4/08) 126; RP (6/9/08) 501, 503, 578.

B. Frazier and her boyfriend, Michael Sublett, steal from Mr. Totten, and Mr. Totten seeks advice about obtaining a restraining order against Frazier.

In November of 2006, Frazier stole coins from Mr. Totten and had a friend pawn them for \$200. RP (6/10/08) 616; RP (6/12/08 pm) 33-35, 47-48. Frazier and Sublett made money two ways during this time period: selling drugs and selling items Sublett had stolen. RP (6/10/08) 615.

On January 10, 2007, Sublett pawned more coins that had been Mr. Totten's for \$115. RP (6/3/08) 85-87; RP (6/10/08) 616. Sublett sold a generator that had been Mr. Totten's to a different pawnshop on January 16, 2007 for \$150. RP (6/3/08) 94-100, 102-106. He pawned another generator to a third pawnshop on January 27, 2007, for \$234. RP (6/3/08) 89-93, 102-106.

Mr. Totten told Frazier and Sublett that the latter was no longer welcome in his house, following an argument that Mr. Totten feared would become physical.¹ RP (6/9/08) 503-505. Frazier also said that Sublett was jealous of Mr. Totten, because Mr. Totten was much more generous with Frazier than Sublett could be. RP (6/9/08) 564, 575.

¹ According to Frazier, after a couple of months, things returned to normal. RP (6/9/08) 504.

In mid-to-late January of 2006, Mr. Totten told his neighbor, an attorney named Todd Rayan, that he wanted Frazier to move out and asked Mr. Rayan's advice about obtaining a restraining order against her. RP (6/12/08 pm) 9-10, 49-52. He told Mr. Rayan that Frazier had overstayed her welcome, and that he'd asked her to leave. RP (6/12/08 pm) 9-10. Mr. Rayan later overheard Mr. Totten and Sublett arguing in the carport. RP (6/12/08 pm) 52.

Frazier and Sublett went to Reno together. While in Reno, Frazier called Mr. Totten and persuaded him to wire them \$500 for non-existent car repairs. RP (6/9/08) 512. She gave him the false impression that Sublett had a job and they would pay him back. RP (6/9/08) 513. When they returned to Thurston County at the end of January, they "visited" Mr. Totten and stole his wallet, cell phone, and checkbook. RP (6/9/08) 509, 513-516.

C. Frazier and Sublett bail Christopher Olsen out of jail with \$1000 belonging to Mr. Totten.

While in Reno, Frazier spoke on the phone with Christopher Olsen, whom she'd met two months prior. Mr. Olsen called her from the Thurston County Jail. RP (6/9/08) 580. After returning to Thurston

County, Frazier and Sublett bailed Mr. Olsen out of jail, using \$1000 that belonged to Mr. Totten.² RP (6/9/08) 508-509.

Frazier, Sublett, and Mr. Olsen went to Little Creek Casino Hotel, where Frazier and Sublett had been staying, and used methamphetamine. RP (6/9/08) 446, 521; RP (6/11/08) 794-795. According to Mr. Olsen, Frazier and Sublett left for some time. RP (6/11/08) 796. Later that same day (or possibly the next day), all three went to Mr. Totten's home. RP (6/11/08) 796-797.

D. Following a domestic violence incident, Sublett and Frazier drive to Las Vegas and spend over \$51,000 of Mr. Totten's money.

Police were called to a hotel in Tumwater on February 4, 2007 to investigate domestic violence. RP (6/4/08) 217-218; RP (6/5/08) 414-417. Frazier told the officer that Sublett had physically abused her over the last few days, but she was otherwise uncooperative and declined medical attention. RP (6/4/08) 218-221. At the scene, the officer observed methamphetamine and a butane torch (often used to ingest methamphetamine), but made no arrest. RP (6/5/08) 416-417.

Using Mr. Totten's access cards, Frazier and Sublett withdrew cash at ATM machines and made purchases at Target totaling over

² Mr. Olsen's mother signed the bond. RP (6/9/08) 506-510; RP (6/11/08) 792.

\$51,000. RP (6/10/08) 686-699, 703-709, 712-741. They drove to Las Vegas in a friend's Suburban,³ and gambled with money stolen from Mr. Totten. RP (6/9/08) 439-442, 450-461, 464-472.

E. The police learn that Mr. Totten is missing, and find his body in a truck that had been impounded on January 30, 2007.

Responding to a call from Mr. Totten's sister, police officers entered his home on February 8, 2007 and found it in disarray. RP (6/3/08) 41, 46. Officers went in again on February 10, 2008, after additional contact from Mr. Totten's family. They found that the house was still messy, that a chair was in front of a door, and that a safe was open. RP (6/3/08) 36, 47-50.

Elsie Pray, a friend of Sublett's, contacted police on February 10, 2007. She relayed statements Frazier had made to her on January 30 regarding an incident that occurred the preceding day. RP (6/3/08) 56, 65; RP (6/4/08) 124, 127, 139, 150-151. Pray said Frazier told her she'd taken part in a homicide, committed because Mr. Totten was involved in child pornography. RP (6/3/09) 57. According to Pray, Frazier said she and two males used a ruse to get into the house, beat Mr. Totten with a baseball bat, and used her gun. RP (6/3/08) 57-58; RP (6/4/08) 141, 160. Frazier

³ They later offered to buy the vehicle and wire the friend money. RP (6/5/08) 390-395.

told Pray that while she was in the house with Mr. Totten after he'd been beaten, she didn't help him, but instead ransacked the house for items of value. RP (6/4/08) 160-161. Frazier claimed the men left her alone with the dead body for 8 hours. RP (6/3/08) 58. Frazier told Pray that Mr. Totten had to die because he had raped children and made tapes of it. RP (6/4/08) 169. Pray said Frazier told her they put Mr. Totten's body into a pickup and drove it over an embankment. RP (6/3/08) 59.⁴ Pray said she suspected that Frazier and Sublett were both using drugs again. RP (6/4/09) 129-30.

The deputy confirmed that Summit Towing had towed a truck matching the description given by Pray, and obtained a search warrant. RP (6/3/08) 60-61. On February 10, 2007, the police found Mr. Totten's body, bound and gagged in the back of the truck.⁵ RP (6/3/08) 63; RP (6/4/08) 119, 241. It was later established that Mr. Totten had been bound and beaten prior to his death. RP (6/5/08) 353, 363, 370-372.

⁴ An area resident noticed the vehicle on January 30, 2008. RP (6/3/08) 68. It was towed soon after. RP (6/3/08) 80.

⁵ The police had impounded the truck, which was registered to Mr. Totten, on January 30, 2007, after finding it in a ditch. The truck was towed by Summit Towing. RP (6/9/08) 432-437.

The police searched Mr. Totten's home on February 11, 2007. RP (6/4/08) 196. Among other items, they found a rubber glove in the utility room. RP (6/4/08) 211, 213. From this glove, the police obtained the only physical evidence tying Mr. Olsen to the crime scene.^{6,7}

F. Frazier and Sublett are arrested in Las Vegas, and are found to be in possession of items belonging to Mr. Totten.

Las Vegas police arrested Frazier and Sublett, and Tumwater police went to interview them on February 14, 2007. RP (6/5/08) 409. Frazier was hostile and placed on a suicide watch. RP (6/5/08) 412. In the couple's Suburban, police found Mr. Totten's disabled parking placard, a loaded gun, and various items from Mr. Totten, including his wallet, checkbook and social security card. RP (6/9/08) 479-487.

G. Mr. Olsen is arrested in Thurston County and admits to being in Mr. Totten's house after his death, but denies being involved in the homicide.

Christopher Olsen was arrested on February 22, 2007, and he ultimately gave two statements. RP (6/11/08) 788, 791, 807. The statements were transcribed and admitted into evidence at trial.

⁶ DNA analysis later identified Mr. Olsen's DNA in the glove. RP (6/5/08) 337-338.

⁷ According to one officer, Mr. Olsen's name had come up in the investigation on February 12, 2007. RP (6/11/08) 773. No clarification was provided.

Exhibit 179; Exhibits 179A and B, Supp. CP. Mr. Olsen told the police that Sublett had pointed a gun at him and told him, "You work for me," and had threatened him and his family.⁸ RP (6/11/08) 809, 836-837; RP (6/16/08) 854-857. He admitted that he had been inside Mr. Totten's house. RP (6/11/08) 796-798. He said that Frazier and Sublett told him that Mr. Totten was a child molester who had a jar of his victims' teeth. RP (6/11/08) 830.

Mr. Olsen explained to the police that he had planned to help Sublett and Frazier steal from Mr. Totten, but that he didn't participate in the murder, and that Mr. Totten was already dead or fatally injured when he arrived. RP (6/11/08) 792-810. He acknowledged that he helped steal items from the house, and helped move Mr. Totten's body.⁹ RP (6/11/08) 801-804.

H. In return for her testimony, Frazier's first-degree murder charge is reduced to second-degree manslaughter.

Sublett and Frazier were both charged with Murder in the First Degree and Burglary in the First Degree. Mr. Olsen was charged with

⁸ Mr. Olsen's mother said that Frazier had threatened her as well as Mr. Olsen. RP (6/12/08 pm) 20-22.

⁹ Mr. Olsen did not keep any items from Mr. Totten's home for himself. RP (6/10/08) 644-646.

premeditated first-degree murder and (in the alternative) with felony first-degree murder. CP 2.

Frazier made a deal with the state to testify against Sublett and Olsen. In exchange, her charges were reduced to Manslaughter in the Second Degree, Burglary in the First Degree, and Rendering Criminal Assistance. RP (6/9/08) 564. The state agreed to recommend a total of 54 months in prison.¹⁰ RP (6/9/08) 564-565.

I. At trial, Frazier testifies that Sublett and Mr. Olsen planned a robbery and killed Mr. Totten without her involvement.

At trial, Frazier claimed that she and Sublett bailed out Mr. Olsen so that he could help them rob Mr. Totten. RP (6/9/08) 519. Although Frazier acknowledged that she was the one who spoke on the phone with Mr. Olsen, she claimed that Sublett made specific plans for the robbery with Mr. Olsen outside of her hearing. RP (6/9/08) 522, 583; RP (6/10/08) 662. She maintained that all three went to Mr. Totten's house, but claimed that she stayed in the utility room and turned up her music so she couldn't hear what happened in the main part of the house. RP (6/9/08) 526-529. She also testified that she saw Mr. Olsen grab an aluminum bat on the way into the house; however, evidence later established that the bat was not

¹⁰ Ultimately, the sentencing court did not follow this agreed recommendation, but gave Frazier a longer sentence.

moved from the utility room, and was not used in the assault. RP (6/4/08) 211; RP (6/9/08) 528, 585; RP (6/10/08) 666.

Frazier said that Sublett told her to get blankets, and at that point she saw Mr. Totten's dead body when she walked through the living room. RP (6/9/08) 530-531. According to Frazier, Mr. Olsen was upset, and crouched under a table, crying. RP (6/10/08) 628. Sublett took him for a ride to help him calm down, and Frazier asserted that they went to Alexis Cox's home. RP (6/9/08) 532, 587. While they were gone, Frazier went through the house and put items of value in the spare bedroom. She did nothing to help Mr. Totten. RP (6/9/08) 533, 586. When she left the house, she and Sublett took bags of stolen items, including credit cards, a laptop computer, and documents from Mr. Totten's desk. RP (6/9/08) 537. She testified that Sublett pointed his gun at Mr. Olsen, both in the house, and later in the hotel room. RP (6/10/08) 629, 642.

According to Frazier, she never asked Sublett or Mr. Olsen what had happened while she was in the laundry room—either immediately after the killing, or while she and Sublett drove to Las Vegas. RP (6/9/08) 530, 538. Although she had given statements to the police and the attorneys prior to trial, she asserted for the first time at trial that Mr. Olsen had told her (after Mr. Totten's death) that he had enjoyed the killing and would do it again. RP (6/9/08) 543, 591; RP (6/10/08) 626-631.

Frazier acknowledged several lies she had told others during this time period: that Mr. Totten was a child molester with a jar of his victims' teeth, that she needed to borrow her friend's Suburban because she was moving, that she needed money to repair a broken down car, that her sister was coming so Mr. Olsen needed to leave the hotel room, that she knew Sublett hadn't killed Mr. Totten, and that they weren't guilty. RP (6/9/08) 559, 574, 579, 592; RP (6/10/08) 612, 676-679.

J. Over Mr. Olsen's objection, the court allows the jury to hear recordings of two telephone conversations between Mr. Olsen and Frazier.

The state proposed to play for the jury two recordings of calls that Mr. Olsen made to Frazier before she and Sublett bailed him out. RP

(6/11/08) 751-760, 785-787. The first was made January 28, 2007.

Exhibit 178A, Supp. CP, Appendix A. On the recording, Frazier can be heard at the beginning of the call telling Mr. Olsen that if they bailed him out, he would need to lay low in order to work with them. Exhibit 178A, p. 1. They discussed Mr. Olsen's bail, and she asked Mr. Olsen if he had a car they could use, and if he would ride with them for "a quick minute" to get cash. Exhibit 178A, p. 2-4, 6. They also discussed drug use at some length, and referred to people using foul and inappropriate language such as 'nigger,' 'bitch,' 'mother-fucker,' 'retarded,' and 'son-of-a-bitch.'

Exhibit 178A, p. 7- 10, Supp CP.

The state also sought to admit the recording of a second call between Mr. Olsen and Sublett and Frazier, made the next day (January 29, 2007). Exhibit 178B, Supp. CP, Appendix A. On this recording, the three of them conferred about the bail and Mr. Olsen expressed great enthusiasm about his pending release from jail. Exhibit 178B, Supp. CP.

Mr. Olsen objected to the admission of unedited recordings of both conversations. He argued that the evidence should be excluded under ER 404(b), since the recordings served no purpose other than to make him look bad. RP (6/11/08) 751-759, 787; Motion in Limine, Supp. CP. The recordings contained no evidence of planning, and had already been described by Frazier in her testimony. RP (6/11/08) 751-753; Motion in Limine, Supp. CP. The prosecutor argued that Frazier's credibility would likely be attacked, and that the recordings corroborated her testimony and provided evidence relevant to the issues for the jury. RP (6/11/08) 756-758.

The court admitted the recordings, rejecting Mr. Olsen's request to redact portions or to have the detective describe the content of the conversation. According to the trial judge, the recordings related to whether or not Frazier and Mr. Olsen acted in concert. RP (6/11/08) 754-760, 787.

K. The court excludes evidence offered through attorney and neighbor Todd Rayan that Mr. Totten had sought advice about getting a restraining order against Frazier.

Mr. Olsen wanted to call Todd Rayan (an attorney who lived across from Mr. Totten) to testify that Mr. Totten had sought advice about getting a restraining order against Frazier. Motion Regarding Proposed Testimony, Supp. CP. The trial judge ruled that Mr. Olsen could establish that Mr. Totten had asked about a restraining order, but could not show that he specifically asked about getting an order against Frazier. RP (6/12/08 pm) 16.

L. Mr. Olsen testifies that he was not present when Mr. Totten was killed or fatally wounded.

Mr. Olsen testified at trial. He said that while in jail, he was willing to say anything to get bailed out, but that he didn't agree to hurt anyone or commit a robbery. RP (6/16/08) 855, 872, 875, 878. He acknowledged going to Mr. Totten's house, which he described as having a terrible smell. RP (6/16/08) 853, 855. When he got there, he didn't know if Mr. Totten was dead or alive. RP (6/16/08) 855. While at the house, he never heard Mr. Totten say anything. RP (6/16/08) 855. He admitted helping to move Mr. Totten's body. RP (6/16/08) 853. He did not take or receive any money or property from the incident. RP (6/16/08) 857. Mr. Olsen's testimony was generally consistent with his prior

statements to the police. RP (6/16/08) 852-927; Exhibit 179; Exhibits 179A and B, Supp CP.

M. After the court refuses to instruct on the lesser-included offense of Manslaughter in the Second Degree, Mr. Olsen is convicted of Felony Murder in the First Degree.

Mr. Olsen's counsel proposed a lesser-included instruction on Manslaughter in the Second Degree.

To Convict the defendant of the crime of manslaughter in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 19th day of January, 2007, the defendant failed to summon aid after illegally entering Jerry Totten's residence;
- (2) That the defendant's conduct was criminal negligence;
- (3) That Jerry Totten died as a result of the 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 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.
Defendant's Jury Instructions, Supp. CP.

The trial court refused to give the instruction. RP (6/17/08) 956-957. Defense counsel did not offer any other lesser-included instructions, and none were given to the jury. Defendant's Jury Instructions, Supp. CP.

The trial court gave two instructions defining first-degree murder:

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.

A person also commits the crime of murder in the first degree when he or she attempts to commit burglary in the first degree or robbery in the first or second degree, and in the course of and in furtherance of such crime or in immediate flight from such crime or in immediate flight from such crime he or another participant causes the death of a person other than one of the participants.

Instruction No. 11, Court's Instructions to the Jury, Supp. CP, Appendix B.

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

(ALTERNATIVE A)

- (1) That on or about January 29, 2007, the defendant and/or an accomplice caused the death of Jerry Totten;
- (2) That the defendant or an accomplice acted with intent to cause the death of Jerry Totten;
- (3) That the intent to cause death was premeditated;
- (4) That Jerry Totten died as a result of the defendant's and/or an accomplice's acts; and
- (5) That the acts occurred in the State of Washington.

- OR -

(ALTERNATIVE B)

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

If you find from the evidence that each of the elements in the Alternative A or each of the elements in the Alternative B has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. All of the elements of only one alternative need be proved. You must unanimously agree as to

which one or more of the alternatives, A or B, has been proved beyond a reasonable doubt.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of the elements in Alternative A, or as to any one of the elements in Alternative B, then it will be your duty to return a verdict of not guilty on that alternative.

Instruction No. 14, Court's Instructions to the Jury, Supp. CP.

The court also gave an instruction outlining accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. Instruction No. 21, Court's Instructions to the Jury, Supp. CP.

Mr. Olsen's attorney did not object to any of these instructions.

Nor did defense counsel ask the court to instruct the jury that Mr. Olsen could be convicted of felony murder only if he were involved with a

burglary or robbery that was in progress at the time Mr. Totten was killed or fatally wounded. Defendant's Jury Instructions, Supp. CP.

The jury acquitted Mr. Olsen of premeditated first-degree murder, and found him guilty of felony first-degree murder. Verdict Form B, Supp. CP.

N. The court denies Mr. Olsen's motion for a new trial and sentences him to 500 months in prison.

Mr. Olsen filed a motion for a new trial based on newly discovered evidence. Motion for New Trial, Supp. CP. Katrina Berchtold (aka Alexis Cox) said that Frazier called her in the winter of 2007 and asked if she knew how to kill someone and get away with it.¹¹ Affidavit of Katrina Berchtold, Supp. CP, Appendix C. Frazier told Berthold that she and Sublett planned to kill Mr. Totten because he was involved with kiddie porn, and emphasized that she was serious. Affidavit, p. 2, Supp. CP. Frazier repeated her plans several times, stating that they planned to put Mr. Totten out of his misery. Affidavit, p. 2-3, Supp. CP. Berchtold also wrote that Mr. Olsen and Sublett had not come to her house to use

¹¹ The statement indicated this happened in June of 2007, but in court counsel indicated the month had been a typo by his staff and the correct date was January of 2007. RP (7/23/08) 1117-1122.

methamphetamine (as Frazier had testified), and explained that at the time, she had been clean for three years. Affidavit, p.4, Supp. CP.

Berchtold wrote that she was afraid to come forward with the information, but that after trial started, she attempted to speak with the prosecutor. Affidavit, p. 3, Supp. CP. The prosecutor told her he was not interested in her information, and she left the courthouse. Affidavit, p. 3, Supp. CP. The next week, she contacted defense counsel and gave him her information. Affidavit, p. 3, Supp. CP.

Mr. Olsen argued that this information was crucial to the defense case because it directly contradicted Frazier's testimony on several points (including her claim that she'd had no part in planning the murder), and would have eliminated the need for Mr. Olsen's testimony. Motion for New Trial, Supp. CP.

The court denied the motion. RP (7/23/08) 1123. Mr. Olsen was sentenced to 500 months, and he appealed. CP 7, 13.

II. PRIOR PROCEEDINGS

The state charged Christopher Olsen with Murder in the First Degree. CP 3. His case was joined with Michael Sublett's by court order on May 8, 2008 (over Sublett's objection). RP (5/8/08) 12-13. Jury trial for both codefendants began on June 2, 2008. RP (6/2/08) 3-4.

The jury returned a verdict of guilty on the felony murder prong of Murder 1. Verdict Form B, Supp. CP. Olsen moved for a new trial on July 11, 2008, and the court denied the motion. Motion for New Trial, Supp. CP; RP (7/23/08) 1123. Olsen was sentenced to 500 months imprisonment, and he timely appealed.¹² CP 7, 13.

ARGUMENT

I. THE COURT'S INSTRUCTIONS VIOLATED MR. OLSEN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING CONVICTION EVEN IF FRAZIER AND SUBLETT RECRUITED MR. OLSEN AFTER THEY HAD ALREADY KILLED OR FATALLY WOUNDED MR. TOTTEN.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions that relieve the state of its burden to prove every element of an offense violate due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). Such instructions also create a manifest error affecting a constitutional right, and thus can be raised for the first time on

¹² Olsen's appeal was consolidated with Sublett's by order of the Court of Appeals.

appeal. RAP 2.5(a); *State v. Chino*, 117 Wn.App. 531, 538, 72 P.3d 256 (2003)

Juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004). Accordingly, a court's instructions to the jury "must more than adequately convey the law. They must make the relevant legal standard 'manifestly apparent to the average juror.'" *State v. Watkins*, 136 Wn.App. 240, 240-241, 148 P.3d 1112 (2006) (quoting *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

Jury instructions that misstate an element are not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) ("Brown I"). The state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Woods*, 138 Wn.App. 191, 202, 156 P.3d 309 (2007).

The elements of an offense are determined with reference to the language of the statute. *See State v. Leyda*, 157 Wn.2d 335, 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269, 274, 110 P.3d 1179 (2005). Questions of statutory construction are addressed *de novo*. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005) ("Smith II"); *State*

Owned Forests v. Sutherland, 124 Wn.App. 400, 409, 101 P.3d 880 (2004). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789, (2004). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

RCW 9A.32.030 declares that a person is guilty of first-degree felony murder when:

He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree... [or] (3) burglary in the first degree... and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants...

RCW 9A.32.030(c).¹³ Our Supreme Court has made clear that in order to establish

that a killing occurred in the course of, in furtherance of, or in the immediate flight from a felony "there must be an intimate connection between the killing and the felony. The killing must be part of the *res gestae* of the felony, that is, in close proximity in terms of time and distance."

State v. Hacheney, 160 Wn.2d 503, 513, 158 P.3d 1152 (2007) (quoting *State v. Brown*, 132 Wn.2d 529, 608, 940 P.2d 546 (1997) ("Brown II"), *death sentence rev'd on other grounds, Brown v. Lambert*, 451 F.3d 946

¹³ The statute also creates an affirmative defense for unarmed participants who had no reasonable grounds to believe that a coparticipant was armed or might engage in conduct likely to result in death or serious injury. RCW 9A.32.030(c).

(9th Cir. 2006)). *See also State v. Armstrong*, 143 Wn. App. 333, 339, 178 P.3d 1048 (2008) (noting that the legislature had reaffirmed that felony murder requires “the death to be sufficiently close in time and proximity to the predicate felony,” quoting Laws of 2003, Chapter 3, Section 1).

The phrases “the crime” and “such crime” (rather than “a” or “any” crime) in RCW 9A.32.030(c) indicate the legislature’s intent to punish those who are involved in the specific underlying crime causally connected to the death. *See, e.g., State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000) (legislature’s choice of the phrase “the crime” over the phrase “a crime” is significant), *and State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) (same). In other words, a killing that occurs in the course of, in furtherance of, or in immediate flight from one crime does not make co-participants in a subsequent crime guilty of felony murder, if they were not also participants in or accomplices to the first crime. RCW 9A.32.030(c).

The defense theory was that Sublett and Frazier committed the acts that caused Mr. Totten’s death while engaged in a burglary/robbery that was completed and had terminated before Mr. Olsen was recruited.¹⁴

¹⁴ For the purpose of the felony murder statute, a burglary (and presumably a robbery) is considered to be in progress until after the burglar (or robber) flees the scene. *Dennison*, at 616.

Under the statute, this should have resulted in acquittal, whether Mr. Totten died during the initial burglary/robbery or at a later time. RCW 9A.32.030(c). However, under the court's instructions, a reasonable jury could have convicted Mr. Olsen even if it believed Sublett and Frazier killed or fatally wounded Mr. Totten during the course of earlier felonies, no longer in progress when they recruited Mr. Olsen to help them.

The problem stems from the court's failure to explain that Mr. Olsen was guilty of felony murder only if he was an accomplice to the specific burglary or robbery in progress when Mr. Totten was killed or fatally wounded.¹⁵ Without an instruction explaining this limitation (and a supplemental instruction outlining when a burglary or robbery terminates), jurors could have concluded that Mr. Olsen was an accomplice to a single burglary/robbery that started when Frazier and Sublett first attacked Totten (without Mr. Olsen's help), and concluded when Frazier and Sublett left the residence for the last time (after Mr. Olsen became involved).

The jurors were given no guidance on these points.

¹⁵ In addition, the court should have clarified to the jury that (for purposes of the felony murder rule) a burglary or robbery is no longer in progress after the perpetrators flee the scene. *See, e.g., Dennison*, at 616.

Instead, the court's "to convict" instruction allowed the jury to convict if it found, *inter alia*, "[t]hat the defendant or an accomplice was committing or attempting to commit the crime of burglary in the first degree or robbery in the first or second degree," and "[t]hat the defendant, or another participant, caused the death of Jerry Totten in the course of or in furtherance of such crime or in immediate flight from such crime..." Instruction No. 15, Supp. CP. Under Instruction No. 21, Mr. Olsen could be considered an accomplice "in the commission of a crime if, with knowledge that it [would] promote or facilitate the commission of the crime, he... aid[ed] or agree[d] to aid another person in planning or committing the crime." Instruction No. 21, Supp. CP.

A reasonable juror could have interpreted the court's instructions to require a guilty verdict if Mr. Olsen participated in any burglary or robbery at Mr. Totten's house, even if Mr. Totten had already been killed or fatally wounded during an earlier burglary or robbery, completed before Mr. Olsen's participation commenced. Under these instructions, the jury may have considered Sublett and Frazier's multiple burglaries, thefts, and robberies to be a single ongoing crime for purposes of Instruction No. 21. This interpretation would make Mr. Olsen an accomplice to the entire criminal enterprise, including the murder, even if he agreed to join Sublett and Frazier after they'd already killed or fatally wounded Mr. Totten.

The court's instructions were not manifestly clear, and allowed conviction even if the state failed to prove the elements of felony murder. Because of this, the conviction must be reversed and the case remanded to the trial court for a new trial. *Winship, supra*.

II. MR. OLSEN'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL JUDGE ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF MANSLAUGHTER IN THE SECOND DEGREE.

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

Manslaughter is a lesser-included offense to a charge of premeditated murder. *State v. Schaffer*, 135 Wn.2d 355, 357-358, 957 P.2d 214 (1998). A person has committed Manslaughter in the Second Degree

“when, with criminal negligence, he causes the death of another person.”

RCW 9A.32.070. A manslaughter charge can be based on the defendant’s failure to summon aid, where the defendant has a legal duty to do so. *See State v. Morgan*, 86 Wn. App. 74, 81, 936 P.2d 20 (1997).

Although there is no general duty to summon aid for a stranger under Washington law, RCW 9.69.100 imposes such a duty on people who are witness to violent offenses. Under the statute, anyone “who witnesses the actual commission of...[a] violent offense as defined in RCW 9.94A.030... shall as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public officials.” RCW 9.69.100.

In this case, Mr. Olsen was entitled to an instruction on the lesser-included offense of manslaughter, and the trial judge erred by refusing to give one. As noted above, manslaughter is a lesser-included offense to intentional murder under the legal prong of the test. *Schaffer, supra*. Accordingly, the sole issue is whether or not Mr. Olsen was factually entitled to a manslaughter instruction. *Nguyen, supra*.

The evidence, when taken in a light most favorable to Mr. Olsen, established that he was guilty of the lesser offense of manslaughter and not guilty of the greater offense of intentional murder. According to Mr. Olsen, he accompanied Frazier and Sublett to Mr. Totten’s residence after

Frazier and Sublett had already killed or fatally wounded Totten. RP (6/11/08) 792-810; Exhibit 179A, Supp CP. When he arrived at the house, the earlier robbery and burglary—committed without Mr. Olsen’s involvement—were complete. *See, e.g., State v. Dennison*, 115 Wn.2d 609, 616, 801 P.2d 193 (1990) (for the purpose of the felony murder statute, a burglary is considered to be in progress until after the burglar flees the scene.) Thus, under his version of events, Mr. Olsen was not guilty of Felony Murder in the First Degree.

Mr. Olsen also testified that Mr. Totten—who was tied up in a chair, with only a foot protruding—may still have been alive when he got to the house. RP (6/16/08) 855; Exhibit 179A, p. 11, 18, Supp. CP. Under these circumstances, Mr. Olsen was a witness to an ongoing violent offense: a kidnapping in the first or second degree.¹⁶ RCW 9.94A.030. As a witness to the ongoing kidnapping offense, Mr. Olsen had a duty to summon medical aid under RCW 9.69.100.¹⁷ His breach of this statutory

¹⁶ Kidnapping in the First Degree occurs when a person “intentionally abducts another person with intent: ... (b) To facilitate commission of any felony or flight thereafter; or (c) To inflict bodily injury on him...” RCW 9A.40.020. Kidnapping in the Second Degree occurs when a person “intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.” RCW 9A.40.030.

¹⁷ Even if Mr. Olsen were an accomplice to the kidnapping, he could not be found guilty of felony murder based on kidnapping, because the State failed to charge him with that offense.

duty was reckless or criminally negligent, and was a cause of Totten's death. *Morgan, supra*. A rational jury could have accepted Mr. Olsen's version of events and found him guilty of manslaughter instead of intentional murder.

- A. The trial judge's refusal to instruct on Manslaughter in the Second Degree denied Mr. Olsen his constitutional right to due process under the Fourteenth Amendment.

Refusal to instruct on a lesser-included offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). The constitutional right to such an instruction stems from "the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." *Vujosevic*, at 1027. *See also Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...").¹⁸

¹⁸ The Court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck*, at 638, n.14. Some federal courts only review a state court's failure to give a lesser-included instruction in noncapital cases when the failure "threatens a fundamental miscarriage of justice..." *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990)

Because the trial judge refused to instruct the jury on the lesser-included offense of manslaughter, Mr. Olsen was denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic*. The conviction must be reversed and the case remanded to the superior court.¹⁹ *Schaffer, supra*.

B. The trial judge's refusal to instruct on Manslaughter in the Second Degree violated Mr. Olsen's state constitutional right (under Wash. Const. Article I, Sections 21 and 22) to have the jury consider applicable lesser included offenses.

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

Washington State Constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). In this case, analysis under *Gunwall*

¹⁹ On retrial, Mr. Olsen is entitled to an instruction on manslaughter, even though the jury found him not guilty of intentional murder. *Schaffer*, at 358-359.

supports an independent application of the state constitution. These two provisions establish an accused person's state constitutional right to have the jury instructed on applicable lesser-included offenses.

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

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

Thus an accused person's right to have the jury consider a lesser-included offense remains the same as it existed in 1889, and “must not diminish over time,” *Sofie v. Fibreboard Corp.*, at 656. *Gunwall* factor one favors an independent application of these provisions.

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

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

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

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *Hobble*, *supra*; *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (“Smith I”). In 1889, when our state constitution was adopted, the lesser-included offense doctrine was well-established under the common law. *Beck v. Alabama*, *supra*, at 635 n. 9 (citing 2 M.

Hale, Pleas of the Crown 301-302 (1736); 2 W. Hawkins, Pleas of the Crown 623 (6th ed. 1787); 1 J. Chitty, Criminal Law 250 (5th Am. ed. 1847); T. Starkie, Treatise on Criminal Pleading 351-352 (2d ed. 1822)).

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

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

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

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

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

In *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), the Supreme Court noted that “[t]he fifth *Gunwall* factor... will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power.” *Young*, at 180. Thus factor five favors Mr. Olsen’s position.

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

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

All six *Gunwall* factors favor an independent application of Article I, Section 21 and 22 of the Washington Constitution. Our state constitution protects an accused person's right to have the jury consider lesser-included offenses. The trial judge's failure to instruct on the lesser-included offense of Manslaughter in the Second Degree violates Wash. Const. Article I, Sections 21 and 22. Accordingly, Mr. Olsen's conviction must be reversed and the case remanded to the trial court for a new trial.

III. MR. OLSEN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of

Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

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

Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*);
see also Pittman, at 383.

- A. If the trial judge's refusal to instruct on Manslaughter in the Second Degree is not preserved for review, then Mr. Olsen was denied the effective assistance of counsel.

Any trial strategy "must be based on reasoned decision-making..."

In re Hubert, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). The reasonable competence standard requires defense counsel to be familiar with the relevant legal standards and instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

In this case, defense counsel proposed a nonstandard "to convict" instruction for the lesser-included offense of Manslaughter in the Second Degree. Defendant's Jury Instructions, No. 11, Supp. CP. If the trial court's failure to instruct the jury on manslaughter is attributable to defense counsel, then Mr. Olsen was denied the effective assistance of counsel.

The standard "to convict" pattern instruction for Manslaughter in the Second Degree is WPIC 28.06.²⁰ The instruction reads as follows:

²⁰ Defense counsel provided an instruction defining second-degree manslaughter consistent with WPIC 28.05 (which he erroneously cited as WPIC 28.00). Defendant's Jury Instructions, No. 8, Supp. CP.

WPIC 28.06 Manslaughter—Second Degree—Criminal Negligence—Elements

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

- (1) That on or about _____, the defendant engaged in conduct of criminal negligence;
- (2) That _____ died as a result of defendant's negligent 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.

WPIC 28.06.

Defense counsel submitted a nonstandard “to convict” instruction that included language beyond that contained in WPIC 28.06. Defendant’s Jury Instructions, Supp. CP. The instruction proposed by defense counsel modified the numbered paragraphs of WPIC 28.06; the modified portion of defense counsel’s proposed instruction reads as follows:

- (1) That on or about the 19th [sic] day of January, 2007, *the defendant failed to summon aid after illegally entering Jerry Totten’s residence;*
- (2) That the defendant’s conduct was criminal negligence;
- (3) That Jerry Totten died as a result of defendant’s acts; and
- (4) That the acts occurred in the State of Washington.

Defendant’s Jury Instructions, No. 11, Supp. CP (emphasis added).

Paragraphs (2), (3), and (4) are substantially the same as the three numbered paragraphs of WPIC 28.06; however, the first numbered

paragraph of defense counsel's proposed instruction contains a typographical error (19th instead of 29th) and surplusage that may misstate the law and may constitute a comment on the evidence.

Paragraph one is surplusage because the "to convict" instruction ordinarily does not outline the defendant's negligent conduct. *See* WPIC 28.06. Furthermore, the paragraph may misstate the law because no Washington court has upheld a finding of criminal negligence based on a failure to summon aid for a previously injured party following illegal entry into a residence.²¹ Finally, the paragraph may constitute a comment on the evidence because the paragraph could be read to indicate the judge's belief that Mr. Olsen illegally entered the residence.

A proper manslaughter instruction would have tracked the language of WPIC 28.06. If necessary, additional instructions could have outlined the duty created by RCW 9.69.100, and the effect of Mr. Olsen's breach of that duty. If the judge's refusal to instruct the jury on Manslaughter in the Second Degree is the result of defense counsel's

²¹ It is possible that illegal entry into a residence by itself creates a duty to summon aid for any injured person found therein, and that breach of that duty supports a finding of criminal negligence. However, in the absence of a published opinion supporting such a theory, defense counsel should have been prepared with a standard instruction on Manslaughter in the Second Degree, and offered that instruction and any necessary supporting instructions when the trial judge rejected his nonstandard instruction.

failure to propose proper instructions, then Mr. Olsen was denied the effective assistance of counsel. *Reichenbach, supra*.

By proposing a nonstandard instruction (without also proposing the standard instruction in the alternative), defense counsel's performance fell below an objective standard of reasonableness. *Reichenbach, supra*.

Defense counsel should have been familiar with the standard instruction, and should have submitted it when the trial judge refused his nonstandard instruction. *See Tilton, supra*. There was no strategic reason to offer only a nonstandard instruction, and the trial judge might have considered the standard instruction even though she rejected the instruction actually proposed.

Defense counsel's deficient performance prejudiced Mr. Olsen. Had counsel proposed a proper instruction, the judge would have instructed the jury on the lesser-included offense, and the jury would not have been faced with the choice of conviction or acquittal. By acquitting Mr. Olsen of intentional murder, the jury made clear that it did not believe Frazier's testimony that Mr. Olsen had personally killed Mr. Totten and then talked about enjoying it. Verdict Form B, Supp. CP; RP (6/9/08) 543. But after rejecting her story and the allegation that he premeditated killing Mr. Totten, they had no choice but to convict or acquit on the felony murder charge, even if they believed Mr. Olsen was recruited after the

actions that caused Mr. Totten's death. Furthermore, Manslaughter in the Second Degree is a Class B felony (rather than a Class A felony, like first-degree murder). Instead of being sentenced within the standard range for first-degree felony murder (411-548 months), Mr. Olsen would have faced a standard range of only 108-120 months.

Because Mr. Olsen was prejudiced by his attorney's failure to propose a standard instruction on Manslaughter in the Second Degree, he was denied the effective assistance of counsel. *Reichenbach, supra*. The conviction must be reversed and the case remanded for a new trial.

Reichenbach, supra.

B. Mr. Olsen's attorney unreasonably failed to request instructions on the inferior degree offense of Murder in the Second Degree and the lesser-included offense of Manslaughter in the First Degree

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

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

evidence that is presented at trial when it is deciding whether or not an instruction should be given.

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

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

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

Pittman, at 387-389.

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

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

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

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

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

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

In this case, as in *Ward* and *Pittman*, defense counsel's failure to propose instructions on second-degree murder and first-degree manslaughter was unreasonable, and constituted deficient performance. Furthermore, Mr. Olsen was prejudiced by the deficient performance.

1. Mr. Olsen was entitled to an instruction on the inferior degree offense of Murder in the Second Degree.

A defendant is entitled to an instruction on an inferior degree offense if (1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.²² *State v. Fernandez-Medina*, at 455. To satisfy the third requirement, the defendant must show that the evidence, viewed in the light most favorable to him, would allow the jury to find the defendant not guilty of the charged offense but guilty of the inferior degree offense. *Pittman*, at 386; *State v. McDonald*, 123 Wn. App. 85, 89, 96 P.3d 468 (2004).

Under RCW 9A.32.050, a person is guilty of second-degree intentional murder when “[w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.” RCW 9A.32.050. Second-degree intentional murder is an inferior degree offense of first-degree intentional murder, because RCW 9A.32.030 and RCW 9A.32.050 “proscribe but one offense... that is divided into degrees, and the proposed offense is an

²² This is different from the test for lesser included offenses, which requires that the lesser offense meet both a legal and a factual prong. *Fernandez-Medina II*, at 455.

inferior degree of the charged offense.” *State v. Winings*, 126 Wn.App. 75, 86, 107 P.3d 141 (2005).

Here, counsel’s failure to request instructions on the inferior degree offense of Murder in the Second Degree denied Mr. Olsen the effective assistance of counsel. When taken in a light most favorable to the defense, the evidence suggested that he was guilty only of second-degree intentional murder. The jury acquitted Mr. Olsen of premeditated intentional murder. Verdict Form B, Supp. CP. Furthermore, there was some evidence in Frazier’s testimony that Mr. Olsen intended to kill Mr. Totten. RP(6/9/07) 519, 528, 530-31. Under these circumstances, Mr. Olsen was entitled to an inferior degree instruction on second-degree intentional murder, and his attorney should have requested such an instruction.

2. Mr. Olsen was entitled to an instruction on the lesser-included offense of Manslaughter in the First Degree.

As noted above, manslaughter is a lesser-included offense of premeditated murder. *Schaffer*, at 357-358. A person is guilty of Manslaughter in the First Degree when “[h]e recklessly causes the death of another person.” RCW 9A.32.060. Mr. Olsen was entitled to an instruction on Manslaughter in the First Degree because the facts, when

taken in a light most favorable to him, suggest that he was guilty of that crime and not of the charged offense.

Mr. Olsen testified that Mr. Totten was under a blanket and had been beaten and tied in a chair, and that he may have been alive when Mr. Olsen arrived at the residence. RP (6/16/08) 855. Had Mr. Olsen summoned medical care, Mr. Totten might have survived. As outlined earlier in this brief, Mr. Olsen's failure to summon aid breached the duty imposed by RCW 9.69.100, and thus recklessly caused Mr. Totten's death. *Morgan, supra*.

A rational jury could have accepted Mr. Olsen's testimony, and found him guilty of Manslaughter in the First Degree instead of intentional murder. Accordingly, Mr. Olsen was entitled to an instruction on Manslaughter in the First Degree.

3. Defense counsel's failure to propose instructions on second-degree murder and first-degree manslaughter was objectively unreasonable.

In this case, as in *Ward* and *Pittman, supra*, an all-or-nothing strategy exposed Mr. Olsen to enormous potential jeopardy. As charged, he faced a standard range of 411-548 months. CP 4. A conviction for second-degree murder would have resulted in a standard range of 298-397

months incarceration, while a conviction for first-degree manslaughter carried a standard range of 210-280 months.²³

Second, Mr. Olsen's defense—that he arrived at the house after Mr. Totten had been fatally assaulted (and possibly after his death)—would have been the same, regardless of the combination of inferior degree and/or lesser-included charges he proposed. Accordingly, proposing the instructions would not have led to inconsistent strategies, and would not have cost Mr. Olsen anything. In fact, by proposing the lesser-included offense of Manslaughter in the Second Degree, defense counsel signaled his initial intent to rely on a strategy of offering a third way for the jury.

Third, defense counsel's strategy of seeking an acquittal was extremely risky. Mr. Olsen was plainly guilty of some offense. Even under his own testimony, he was likely guilty of residential burglary, theft, and being an accessory (after the fact) to murder. Thus it is likely that the jury, "with no option other than to convict or acquit," would choose conviction, even if they had doubts about Mr. Olsen's guilt of first-degree murder. *Pittman*, at 389. In addition, an acquittal would rest entirely on Mr.

²³ In other words, the difference in the high end of his standard range would have been 250 months (for second-degree murder) and 338 months (for first-degree manslaughter). The difference in the low end would have been 113 months (for second-degree murder), and 201 months (for first-degree manslaughter).

Olsen's own testimony, but (as in *Ward, supra*) his credibility was damaged. He admitted to lying in his recorded telephone conversations with Frazier, admitted to drug use and other illegal behavior, and was biased by his interest in avoiding conviction.

Given all these facts, an "all or nothing" strategy was unreasonable. Counsel apparently recognized this when he proposed instructions on Manslaughter in the Second Degree. When that instruction was denied, counsel should have proposed instructions on Murder in the Second Degree and Manslaughter in the First Degree, and his failure to do so constituted deficient performance.

4. Mr. Olsen was prejudiced by his attorney's failure to request instructions on these lesser-included and inferior degree offenses.

Mr. Olsen was prejudiced by his lawyer's failure to request instructions on the inferior degree offense of Murder in the Second Degree and on the lesser-included offense of Manslaughter in the First Degree. There is a reasonable probability that the jury would have convicted Mr. Olsen of only of a lower charge had the appropriate instructions been given.

The jury did not believe Mr. Olsen was guilty of premeditated murder, and thus may have been inclined to convict him of second-degree intentional murder (without premeditation), had they been given that

option. In addition, the jury might well have accepted Mr. Olsen's testimony over Frazier's, given her credibility problems. Had they done so Mr. Olsen would not have been convicted of first-degree felony murder, but would instead have been found guilty only of manslaughter. As previously noted, either of these crimes would have resulted in significantly lower sentences for Mr. Olsen.

Because defense counsel's deficient performance prejudiced Mr. Olsen, both prongs of the *Strickland* test are met. Mr. Olsen was denied the effective assistance of counsel. *Pittman, supra; Ward, supra*. His conviction must be reversed and the case remanded for a new trial.

IV. THE TRIAL JUDGE ERRONEOUSLY DENIED MR. OLSEN'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

Under CrR 7.5, the court may grant a new trial based on "[n]ewly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial..." CrR 7.5(a)(3). Denial of a motion for a new trial is reviewed for an abuse of discretion. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008). To obtain a new trial, the accused person must demonstrate that newly discovered evidence "(1) [would] probably change the result of the trial, (2) was discovered after the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not

merely cumulative or impeaching.” *State v. Roche*, 114 Wn. App. 424, 435, 59 P.3d 682 (2002).

Impeaching evidence “is more than ‘merely’ impeaching” and thus “can warrant a new trial if it devastates a witness’s uncorroborated testimony establishing an element of the offense.” *Roche*, at 438 (quoting *State v. Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996), *overruled on other grounds by State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003)). Under such circumstances “the new evidence is not merely impeaching, but critical.” *Savaria*, at 838.

Mr. Olsen’s motion for a new trial met the five requirements for newly discovered evidence outlined in *Roche*. First, the evidence would probably change the result of the trial, because Frazier’s testimony was critical to the prosecution’s case. Mr. Olsen never denied entering the residence or helping to move the body, but he maintained that his involvement commenced after the fatal assault on Totten. RP (6/16/08) 852-927; Exhibits 179A and B, 182, Supp CP. Frazier’s uncorroborated testimony was the only evidence implicating Mr. Olsen in the murder itself. The newly discovered evidence—Katrina Berchtold’s testimony—established that Frazier and Sublett planned the murder long before Frazier even met Mr. Olsen. Affidavit of Katrina Berchtold, Supp. CP; RP (6/9/08) 580. It also undermined Frazier’s credibility by directly

contradicting her sworn testimony that she had no part in planning the murder and her sworn testimony that she went with Sublett and Mr. Olsen to Ms. Berchtold's to use methamphetamine after the killing. Had the jurors heard this evidence, they could have disregarded Frazier's testimony and acquitted Mr. Olsen of first-degree felony murder.

Second, the evidence was discovered after the trial. Affidavit, p. 3, Supp. CP. The prosecuting attorney ignored Ms. Berchtold's attempt to contact him during trial, and did not notify defense counsel that she had pertinent information. Affidavit, p. 3, Supp. CP. Ms. Berchtold did not telephone defense counsel until June 20, after Mr. Olsen had been convicted. Affidavit, p. 3, Supp. CP; RP (7/23/08) 1117-1121.

Third, the evidence could not have been discovered before trial by the exercise of due diligence. Prior to trial, defense counsel and his investigator interviewed a number of witnesses. *See, e.g.*, Motion Regarding Proposed Testimony, Supp. CP. They tried unsuccessfully to contact Ms. Berchtold (whom they knew only as Alexis Cox). Motion for New Trial, Supp. CP. This shows that they diligently investigated the case prior to trial, but were unable to discover the evidence.

Fourth, the evidence was material. Ms. Berchtold would have testified that Frazier and Sublett discussed killing Mr. Totten before Mr. Olsen became involved. This directly implicates Frazier in the

premeditated murder of Mr. Totten, and contradicts her sworn testimony that she did not help plan the murder. Ms. Berchtold would also have contradicted Frazier's sworn testimony about smoking methamphetamine with Mr. Olsen at Ms. Berchtold's house after the murder. Affidavit, p. 3, Supp. CP; RP (6/9/08) 587.

Fifth, the evidence is not cumulative, and it is "critical" rather than "merely impeaching." *Roche, supra*. Ms. Berchtold's testimony was substantive "other suspect" evidence, relevant to establish Frazier's guilt of a premeditated homicide. In addition, the evidence demonstrated Frazier's bias and directly contradicted her uncorroborated testimony on two key points: her involvement in planning the murder and her account of what happened immediately following the murder. Ms. Berchtold's testimony, like the evidence in *Roche* and *Savaria*, "devastates a witness's uncorroborated testimony establishing an element of the offense." *Roche*, at 438.

For all these reasons, the trial judge abused her discretion by denying Mr. Olsen's motion for a new trial under CrR 7.5. Ms. Berchtold's testimony would have changed the outcome of the case, because it undermined the very foundation of Frazier's testimony—that she had no part in planning the murder. Frazier's testimony was at the very heart of the state's case for a homicide conviction against Mr. Olsen;

accordingly, the conviction must be reversed and the case remanded for a new trial. *Roche, supra; Savaria, supra.*

V. THE TRIAL COURT ERRONEOUSLY ADMITTED UNEDITED RECORDINGS AND TRANSCRIPTS OF TELEPHONE CALLS BETWEEN MR. OLSEN AND FRAZIER IN VIOLATION OF ER 401, ER 403 AND ER 404(B).

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “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.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” A trial court’s decision under ER 403 is reviewed for an abuse of discretion. *Subia v. Riveland*, 104 Wn. App. 105, 113-114, 15 P.3d 658 (2001). The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence. *State v. Johnson*, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

Under ER 404(b), “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” A trial court “must always begin with the

presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). Where the state seeks to introduce evidence of prior bad acts, it bears a “substantial burden” of showing admission is appropriate. *DeVincentis*, at 18-19.

An erroneous ruling requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Wilson*, 144 Wn.App. 166, 177-178, 181 P.3d 887 (2008).

Here, Mr. Olsen objected to the state’s use of unedited recordings and transcripts of his telephone conversations with Frazier. Motion in Limine, Supp. CP. The limited amount of relevant evidence contained in the recordings was cumulative, at least in part, since Frazier had already testified that she spoke with Mr. Olsen, and told him she planned to get him out of jail so he could “go to work” for her and Sublett. RP (6/9/08) 510-511, 520-522, 582. Furthermore, part of the evidence related to planned criminal activity unrelated to the charged crime. Exhibits 178 A and B, Supp. CP. Finally, the conversations included foul language that presented Mr. Olsen in a negative light and was calculated to inflame the passions and prejudices of the jury against him. Exhibits 178A and B, Supp. CP.

The trial judge abused her discretion by admitting the unedited recordings and transcripts. First, portions of the conversations were not

relevant under ER 401, and thus should have been excluded under ER 402. Specifically, Mr. Olsen and Frazier discussed past and future drug use, violations of the law and probation rules, and grudges they held against various people; they also spun yarns of toughness and revenge. Exhibits 178A and B, Supp. CP.

Second, parts of the recordings and transcripts were highly prejudicial, with little or no probative value, and should have been excluded under ER 403. Specifically, they called people hateful names, like 'nigger,' 'motherfucker,' 'bitch,' 'son-of-a-bitch,' and 'retarded.' Exhibits 178A and B, Supp. CP.

Third, the conversations included discussions of unrelated criminal activity, and should have been excluded under ER 404(b). Frazier and Mr. Olsen discussed past law violations, including drug use and probation violations. Exhibits 178A and B, Supp. CP.

Fourth, the trial judge failed to balance the evidence on the record, as required under ER 403 and ER 404(b). The judge did not presume the evidence inadmissible (as required under *DeVincentis*). RP (6/11/08) 754. Nor did she identify any probative value for the objectionable portions of the recorded conversations, as required under ER 403. RP (6/11/08) 754-755, 760. She did not consider alternatives to admitting the entire, unedited recordings (as required under *Johnson*), even when specifically

requested to exclude portions of the recordings. RP (6/11/08) 754-760. Rather than explicitly concluding that the probative value of the objectionable portions outweighed any prejudicial effect, the judge characterized at least one part of one recording as “questionable,” but admitted the entire recording anyway. RP (6/11/08) 755.

For all these reasons, the trial judge abused her discretion by admitting the unedited recordings and transcripts. The error was not harmless because it materially affected the outcome of the trial. *Wilson*, 177-178. The recordings included irrelevant material that painted Mr. Olsen as a disrespectful, self-absorbed, jerk, extensively involved in criminal activity. This extraneous material did nothing to advance the state’s case, but unfairly prejudiced Mr. Olsen. Without it, the jury could have seen more clearly that he was a pawn in Frazier’s nefarious machinations. Accordingly, Mr. Olsen’s conviction must be reversed and the case remanded for a new trial, with instructions to exclude the unedited recordings and transcripts. *DeVincentis, supra; Johnson, supra*.

VI. THE TRIAL JUDGE VIOLATED MR. OLSEN’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO PRESENT A DEFENSE BY EXCLUDING EVIDENCE THAT WAS RELEVANT AND ADMISSIBLE.

The Sixth and Fourteenth Amendments guarantee criminal defendants a meaningful opportunity to present a complete defense at trial. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164

L.Ed.2d 503 (2006); U.S. Const. Amend. VI; U.S. Const. Amend. XIV. An accused person must be allowed to present her or his version of the facts to the jury so that it may decide “where the truth lies.” *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has described this right as “a fundamental element of due process of law.” *Washington v. Texas*, at 19.

An accused person thus has a constitutional right to present a defense consisting of relevant, admissible evidence. *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993); *State v. Rice*, 48 Wn.App. 7, 12, 737 P.2d 726 (1987) (“Due process demands that a defendant be entitled to present evidence that is relevant and of consequence to his or her theory of the case.”).

Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Flores*, 164 Wn.2d 1, 25, 186 P.3d 1038 (2008) (citing *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007)). The state must show that the error was trivial, formal, or merely academic, and was not prejudicial to the

substantial rights of the defendant, and in no way affected the outcome of the case. *Flores*, at 25, (citing *State v. Britton*, 27 Wash.2d 336, 341, 178 P.2d 341 (1947)). An appellate court will not “tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt.” *State v. Fisher*, ___ Wn.App. ___, 202 P.3d 937, 951 (2009).

Here, the trial judge violated Mr. Olsen’s constitutional right to present relevant and admissible evidence. Mr. Olsen’s theory at trial was that Frazier and Sublett attacked Mr. Totten before Mr. Olsen joined them at Mr. Totten’s house. RP (6/17/08) 1030-1068. The strategy also required impeachment of Frazier’s testimony, since she alone claimed that Mr. Olsen was present for (and involved in) the killing.

The excluded evidence would have shown that Mr. Totten had asked Frazier to leave his property, and was considering seeking a restraining order against her. RP (6/12/08 pm) 9-10, 49-52. Mr. Olsen also wanted to show that Sublett had argued with Mr. Totten shortly before bludgeoning him to death. RP (6/12/08 pm) 9-10, 49-52.

The evidence was relevant to show that Frazier had a motive to kill Mr. Totten, and that Sublett’s argument with Mr. Totten had been loud enough to reach a neighbor’s ears. The evidence also directly contradicted Frazier’s sworn testimony that she and Mr. Totten got along well, and that

he had never asked her to leave. RP (6/9/08) 499, 503, 571, 573, 575; RP (6/10/08) 637-38. Mr. Rayan's testimony was critical to Mr. Olsen's theory of the case.

The evidence was relevant, admissible, and unlikely to cause unfair prejudice; accordingly, it should not have been excluded. To the extent Mr. Totten's statements were offered for their truth, they were admissible under the state-of-mind hearsay exception (set forth in ER 803(3)) for two reasons. First, they showed Mr. Totten's state of mind, including his plan to evict Frazier and seek a restraining order (both of which were relevant in light of the state's theory that the accused parties committed a burglary by entering or remaining unlawfully on the premises, despite Frazier's access to the property). ER 803(3). Second, they were admissible to show both Sublett's and Frazier's mental states during the days just prior to Mr. Totten's death. ER 803(3).

The erroneous exclusion of this evidence violated Mr. Olsen's constitutional right to present a defense, and is presumed prejudicial. *Flores, supra*. The prosecution's case against Mr. Olsen was based entirely on Frazier's testimony. Mr. Rayan's testimony (that Mr. Totten had sought advice about getting a restraining order against her) contradicted her claims that any problems had been smoothed over and that she hadn't been asked to leave. It also provided a motive for her and

Sublett to kill Mr. Totten, since an eviction and restraining order would have interfered with their habit of coming and stealing Mr. Totten's property. Thus the evidence was relevant to impeach Frazier's testimony (by contradiction, and by showing bias), and strengthened Mr. Olsen's theory that Frazier and Sublett planned to kill Mr. Totten even before Mr. Olsen was released from jail.

The trial judge violated Mr. Olsen's constitutional right to present a defense by prohibiting him from presenting Mr. Totten's statements through the testimony of Mr. Rayan. This violated his right to due process, his right to compulsory process, and his right to confrontation. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Holmes, supra*; *Maupin, supra*.

CONCLUSION

For the foregoing reasons, Mr. Olsen's conviction of Murder in the First Degree must be reversed. The case must be remanded for a new trial, with instructions directing the trial judge to inform the jury that a robbery or burglary is complete when the participants leave the scene, and that a conviction for felony murder is only appropriate if Mr. Olsen participated in the felony that was in progress at the time of the acts that caused Mr. Totten's death.

On retrial, the judge should also submit to the jury any applicable lesser-included or inferior-degree offenses requested by the defense. The court should also exclude the unedited recordings of telephone calls between Frazier and Mr. Olsen, and admit Mr. Rayan's testimony (if offered by the defense) that Mr. Totten sought advice about getting a restraining order against Frazier.

Respectfully submitted on April 15, 2009.

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APPENDIX A:

Exhibits 178 A and B

db

178A

**TUMWATER POLICE DEPARTMENT
Tumwater, Washington**

Case number: 07-0322-01
Date of Call: January 28, 2007
Time of Call: 1227 Hours
Location: Thurston County Jail

For English, press 1. For a collect (number entered) Please state your name at the beep "Christopher". This call is from a correctional facility, and is subject to monitoring and recording. After the beep, press 1 to accept this policy, or press 2, to refuse and hang up. Please wait while your call is being processed. (Phone rings)

1 Male: Hello?

2 Recording: This is a free call from "Christopher" an inmate at the Thurston County
3 Jail. To accept this free call press 0, to refuse this free call... This call is
4 from a correctional facility, and is subject to monitoring and recording.
5 After the beep, press 1 to accept this policy, or press 2, to refuse and
6 hang up. Thank you for using AGM Telecom.

7 Christopher: Hold on. Hold on a second, okay?

8 Male: Hello? Hello?

9 Christopher: (inaudible)

10 Female: Hold on. (inaudible) Handicapped. (inaudible)

11 Christopher: Yeah?

12 Female: My husband (inaudible). This his phone and I told him that I trust and
13 respect you, and I choose for him to not know the bullshit people because
14 that was just my—I told you, I had (indistinguishable) besides my fucking
15 dumb shit, right? Couple grand a day is nothing. My, you know,
16 (indistinguishable) nothing, uh, so if we get you out, do you need a spot
17 to fucking lay low because if you want to work with us...

18 Christopher: (inaudible)

19 Female: ... I would like you to stay at our spot.

20 Christopher: Yeah.

21 Female: But (indistinguishable) you're, you're out yet because it's better that way.

1 Christopher: Okay.

2 Female: Because you're (inaudible) and quiet. You're very quiet.

3 Christopher: Yeah.

4 Female: I'm a little bit loud when I go in (inaudible) Hey, hold on.

5 Christopher: (inaudible) February. Yeah. Take him to trial. Yeah. (inaudible)

6 Female: English you freaking Mexican. (inaudible)

7 Christopher: Yeah. Same place, yeah. We're working together. He's the baker. Yeah,

8 I will for sure. Yeah, I got your stuff (inaudible)

9 Female: What?

10 Christopher: 5960? 508? Okay, cool. Okay, 508-5960? Cool-cool. Right on. Right

11 on. (inaudible) I'll talk to you later. Mm-hmm, bye. Okay, I'm back.

12 Female: Who the fuck are you putting me on hold for?!

13 Christopher: No, I wasn't. It was a long distance phone call.

14 Female: Trippin'. Don't put me on hold...

15 Christopher: No, hey. I just, I just got us something. Don't even trip. Hey? Sis?

16 Female: Yes?

17 Christopher: We are hooked up.

18 Female: Okay.

19 Christopher: Soon as I get out.

20 Female: Uh, okay. You want (inaudible)?

21 Christopher: Huh?

22 Female: Come home tomorrow?

23 Christopher: Yes.

24 Female: Six hundred bucks, baby. It's nothing. Got, I got that in my... (person in

25 background inaudible) No, he has no hearing. You can come straight out

26 and you don't have to wait for a release, do you?

27 Christopher: No. Oh, no, not at all. All I gotta do is, we gotta have somebody get a

28 hold of mom, right?

29 Female: Mom?

30 Christopher: Yeah, so she can bring uh, Michelle, her roommate.

1 Female: Yeah.

2 Christopher: To sign me out.

3 Female: Yeah.

4 Christopher: And the six hundred bucks.

5 Female: So, do you have a way of speaking with her today to let her know that
6 your sister needs to call her?

7 Christopher: Yeah.

8 Female: I'm just going to say, Hi, Debbie. I am uh, your daughter by another
9 father. It's all good. It's a complicated, but I need my brother, so I, he
10 needs your signature and my smiles and pennies.

11 Christopher: Yeah, affordable.

12 Female: Always?

13 Christopher: Affordable.

14 Female: Do you use them?

15 Christopher: Yeah.

16 Female: (inaudible)?

17 Christopher: Yeah, the affordable, affordable is the only place they'll do it for a
18 signature and 600 bucks.

19 Female: Okay, so you'll be out on bond?

20 Christopher: Yeah.

21 Female: And do I have his last name? I got his fucking everything. It's my
22 brother.

23 Christopher: Tell her you got my height and weight too.

24 Female: Skinny and short.

25 Christopher: (laughs) Pistol Pete.

26 Female: Because I'm a girl.

27 Christopher: Yeah-yeah. But, yeah, um, mom's number, the 4, the 412 number, right?

28 Female: Yeah.

29 Christopher: Here's the number we'll need to call, alright?

30 Female: Yeah, I got her number.

1 Christopher: Okay, cool. I'll call her after we get done talking then, and tell her to
2 get...

3 Female: Where, where, where were you posted up before you were staying in
4 Tumwater?

5 Christopher: Where was I posted before I stayed in Tumwater? I was posted up on
6 the Westside over by uh, 4th Avenue.

7 Female: (inaudible)

8 Christopher: Remember the house you drop me off at? Remember?

9 Female: Oh, yeah-yeah.

10 Christopher: You remember where my Cutlass's are?

11 Female: Yeah.

12 Christopher: Yeah.

13 Female: Hey. Do you have a disposable car?

14 Christopher: Do I have a disposable?

15 Female: Do you got El's or what?

16 Christopher: I got, I got both.

17 Female: Okay.

18 Christopher: I got my...

19 Female: That is uh, everybody knows it or no?

20 Christopher: No. That card? No. That car will not, wouldn't be good for that, but I've
21 got another ride out, out in like Littlerock area.

22 Female: Okay. Well, I've done bought like ten cars since that fucking bullshit
23 Suburban. Everyone knew that car.

24 Christopher: Fuck yeah. You see the white Suburban you know what's up.

25 Female: Move out the way or fucking empty your pockets.

26 Christopher: Oh yeah. I just got my insurance back too.

27 Female: Well we don't need that.

28 Christopher: I'm just saying I got, I got the license and insured now.

29 Female: Are you allowed to leave the state?

30 Christopher: Yes, I am.

1 Female: Says who? Your sister?
2 Christopher: Exactly.
3 Female: Well, then, let's talk business.
4 Christopher: Let's talk fucking... (indistinguishable). Let's talk fruit salad and coleslaw.
5 Female: Are, do you have some bitch hanging on your nuts right now, or what?
6 Christopher: No. You know better than that.
7 Female: Gotta report to anyone?
8 Christopher: Uh, not other than you.
9 Female: On the block or what?
10 Christopher: Other than you, no. You're the only person I got to report to.
11 Female: Soon to forget all them little girls. They make me mad. (male in
12 background says "I'm serious" twice)
13 Christopher: Hey, they make me mad. What do you think? Hey, I'm sitting in here.
14 You know what I'm saying? I called up... Hold on one second, okay?
15 (covers phone while speaking to someone in background) So we are good.
16 Hello? Hello? Hello?
17 Female: Hey.
18 Christopher: Oh, what happened?
19 Female: Who is that?
20 Christopher: That was the other line. We're, we're good. You know what I'm talking
21 about? Hey? Hello?
22 Female: Did you hear me?
23 Christopher: What?
24 Female: Have you seen Mortensen?
25 Christopher: What?
26 Female: (inaudible)
27 Christopher: You're breaking up. (pause) Check this.
28 Female: Can you hear me?
29 Christopher: Yeah, now I can.
30 Female: Sorry. Have you seen Officer Mortensen?

1 Christopher: Have I seen him? No. (laughs)
2 Female: Since when?
3 Christopher: Since uh, last time I saw him was oh, what, yesterday morning, actually.
4 Female: How old are you brother?
5 Christopher: 26
6 Female: Old enough to know better, young enough to do it again.
7 Male: (in background) How the fuck did all this happen?
8 Female: Who is that with the terrible manners?
9 Christopher: What?
10 Female: I...
11 Christopher: Huh?
12 Female: Is he listening?
13 Christopher: Yeah.
14 Male: (in background) Yeah. Yeah, I called her. I just called and she...
15 Christopher: I'm listening.
16 Male: (in background - inaudible)
17 Female: So can I come get you and can you ride with us for, for a quick minute
18 and make some cash to get yourself (indistinguishable)?
19 Christopher: Yeah.
20 Female: Okay, like how much cash are you trying to make?
21 Christopher: How much do we need to make?
22 Female: (inaudible)
23 Christopher: I mean, because I got a spot I can close up at.
24 Female: Well, you're going to close up with your sister.
25 Christopher: Exactly. That's what I'm saying. That, that's the plan, I mean...
26 Female: (inaudible) because I got a big mouth.
27 Christopher: Well how much money do we need to make?
28 Female: I'm going to make infinity, sweetheart. That's what I do.
29 Christopher: Well, then let's get to the grind.
30 Female: (inaudible) just don't want to break a nail, and um, I am...

1 Christopher: Well I got short nails. I ain't worried about breaking them. You can just
2 kick back. (inaudible)

3 Female: (inaudible) come get you (inaudible)

4 Christopher: Huh?

5 Female: (laughs) Oh, when you get out can you take your property?

6 Christopher: Yeah.

7 Female: And all that, plus—I can't believe you asked me about that jewelry. I'm
8 not going to fucking let you walk around with some stolen (inaudible).

9 Christopher: No, it wasn't that. It was, it came from him. You know what I'm saying?
10 And I don't, I don't trust Lamar as far as I can throw his scandalous little
11 ass.

12 Female: Nothing. He doesn't own a mother fucking thing.

13 Christopher: Because he's a real bitch.

14 Female: Duh. Why do you think I was having him fucking work for a bowl a day?

15 Christopher: Hey, check this out. I still got my cell phone in my property right now.
16 It's still hooked up.

17 Female: Well, I got like 20 phones. You know the fucking funny phone game.

18 Christopher: Hey, you know what, you know what I got though? Remember that little
19 camera phone Lamar just bought? Remember the itty-bitty one?

20 Female: Uhhh, no. Because I don't, I wasn't playing on those fucking phones. I
21 was on...

22 Christopher: (inaudible) Yeah. No, I got the uh, the Pentex flip phone, right? It's the
23 smallest camera phone they got.

24 Female: Yeah.

25 Christopher: And I got that Motorola Razor.

26 Female: Yeah.

27 Christopher: Hey, you know what, you know what he gave it to me for? A ride from
28 Tumwater to Lacey. (laughs) Mother fucker say, hey, can you come get
me? I said, what do you got? He said there's, remember that Cadillac I
30 was (indistinguishable) in? Emily's Cadillac?

1 Female: Oh, you can't, we can't be (inaudible) that fucking obvious.

2 Christopher: No, I'm not going to be riding in that at all ever again. But you remember
3 that Cadillac?

4 Female: (inaudible)

5 Christopher: That blue one?

6 Female: (inaudible)

7 Christopher: Yeah. Hey, check it out. Emily's a fool man. That girl is crazy. She try to
8 run a mother fucker over.

9 Female: Well (inaudible)

10 Christopher: Huh?

11 Female: He shouldn't have been in the way.

12 Christopher: Exactly. Hey, but, no. That's the night that she told me she wanted to be
13 with me and shit, right?

14 Female: Who?

15 Christopher: Emily.

16 Female: That bitch is retarded. You need to fucking get a real woman.

17 Christopher: Hey, yeah. But, no, you know what I told her, right? Hey, she, because
18 she was the one smashing around, I mean, like every time I told her she
19 needed to do something she did it, right? So, I told her I said, check this
20 out, right? I said, if you can show me that you can hit six three pointers
21 in a row, I'll hook up with you. She said I don't even play basketball. I
22 said, well, then you better learn. (laughs)

23 Female: Oh, well this number that you called is my man's phone, and um... so bro,
24 can I see you tomorrow?

25 Christopher: Yeah. All we gotta do is get me outta here.

26 Female: Okay, and where is your shit?

27 Christopher: It's here in the jail.

28 Female: Everything you own is in the jail?

29 Christopher: Everything that, if it's important.

1 Female: Uhhh, so when you and her were kicking it, you were just rolling around
2 with your (indistinguishable)?

3 Christopher: I was just rolling around with my outfit, my brand new hat, my watch, my
4 cell phones, my ring, my tongue ring.

5 Female: Your pimp jacket.

6 Christopher: Yes, the blue one.

7 Female: Go it?

8 Christopher: Yes, I got that blue one.

9 Female: (inaudible)

10 Christopher: That blaze jacket? Yeah, I keep jacket. The jean one? I still got that
11 mother fucker.

12 Female: (inaudible) Huh, brother? You do what I say because you love me, and
13 you've always stuck up for me.

14 Christopher: Exactly. I mean, if you tell me to do it, it obviously needs to be done, sis,
15 so I'm gonna handle it.

16 Female: I, about anything and I like that. But I am kind of uh, disappointed that
17 you believe that a nigger was about to get a piece of ass. Sometimes a
18 girl has to lie, you know?

19 Christopher: Oh, I didn't believe he was getting her, but I thought for real, that I
20 mean, the way he was acting was a little bit on the questionable side.

21 Female: Do something (inaudible)

22 Christopher: If I'd a done something to that boy that night, I'd a blown that mother
23 fucker's brains out all over that motel room.

24 Female: I had the fucking bullets. Hello?

25 Christopher: Check this out. I try, I tried to stab that son-of-a-bitch in the Super 8
26 Motel room the night before I got arrested.

27 Female: Where is that (indistinguishable)

28 Christopher: That one? I do not know right now. (laughs) I have no clue where that
29 mother fucker's at.

30 Female: (inaudible)

1 Christopher: What?
2 Female: Don't have my name on it.
3 Christopher: Don't have mine on it either.
4 Female: Don't have any name on it at all, actually.
5 Christopher: No?
6 Female: No. But I need another one because those are fucking loud. Oh my god.
7 Christopher: Beautiful, huh? That mother fucker is sweet. It's like a hand cannon,
8 don't even trip. Anything, anything you aim at, if you get within ten feet
9 of it, it's done. Toasty. (laughs)
10 Female: I'm gonna, we're gonna have to fucking hustle and just—I got a whole
11 bunch of jobs planned that are going to have to be done back-to-back, so.
12 Christopher: Okay, so you figure Monday morning I'll be out. Tuesday, Wednesday,
13 Thursday, Friday, Saturday, Sunday, Monday, Tuesday, Wednesday,
14 Thursday, Friday 'til it's done.
15 Female: (inaudible) Hello?
16 Christopher: Huh?
17 Female: Um... oh, you gotta pee?
18 Christopher: What?
19 Female: (inaudible)
20 Christopher: Do I gotta pee?
21 Female: Get out and pee for them?
22 Christopher: Uh, not the first day, no.
23 Female: Listen to me. You remember when you had to pee before and then we
24 accidentally smoked a whole buncha dope?
25 Christopher: Yeah.
26 Female: (inaudible) and I'm going to need you to stay awake and alert so you
27 might have to smoke some dope.
28 Christopher: I'm not really tripping.
Female: Well breakfast is good for everyone.

1 Christopher: Well, you see, on top of that, okay, I can stay awake without anything,
2 okay?
3 Female: My ass. You can't fucking hang with me. You'd be like, bitch, you...
4 Recording: You have one minute remaining.
5 Christopher: Baby girl, check this out. I'm like the terminator, okay? The only thing I
6 need is a little bit of oil and water, I'll be all right.
7 Female: You need a ham sandwich and a Gatorade.
8 Christopher: Hey, give, hey, give me a bottle of SoBe and a chicken wing.
9 Female: Eat today. Fill your skinny ass up with some energy because I'm coming
10 to get you tomorrow.
11 Christopher: Okay.
12 Female: Who-hoo, I'm coming to get you.
13 Christopher: Good stuff.
14 Female: Just miss you and I need you, and I just miss you, actually.
15 Christopher: I miss you hella. We can go to Chuck E. Cheese, too, and just kick it.
16 (laughs)
17 Female: Well, this is going to be about business, and once I feel like I have
18 enough change in my pocket to, to break, then we'll talk about a, you
19 know, like Disneyland, or something like that.
20 Christopher: That sounds like a plan.
21 Female: You like rides?
22 Christopher: What? Do I what?
23 Female: Like Disneyland?
24 Christopher: Fuck yeah. Six Flags.
25 Female: Hey, you been to Long Beach?
26 Christopher: California?
27 Female: Yeah.
28 Christopher: I stay...

Transcribed:
BEB:jp

TUMWATER POLICE DEPARTMENT
Tumwater, Washington

178B

Case number: 07-0322-01
Date of Call: January 29, 2007
Time of Call: 1829 Hours
Location: Thurston County Jail

For English, press 1. For a collect call... please enter the... (number entered) Please state your name at the beep "Chris". This call is from a correctional facility, and is subject to monitoring and recording. After the beep, press 1 to accept this policy, or press 2, to refuse and hang up. Please wait while your call is being processed. (Phone rings)

1 Male: Hello?

2 Recording: Hello. This is a free call from "Chris" an inmate at the Thurston County
3 Jail. To accept this free call press 0, to refuse this free call hang up or
4 press 1.

5 Male: Do you have any change? Do you have any change?

6 Recording: Hello. This is a free call from "Chris" an inmate at the Thurston County
7 Jail. To accept this free call press 0, to refuse this free... This call is from
8 a correctional facility, and is subject to monitoring and recording. After
9 the beep, press 1 to accept this policy, or press 2, to refuse and hang up.
10 Thank you for using AGM Telecom.

11 Chris: Hello?

12 Male: Yeah, what's up?

13 Chris: What's up man?

14 Male: Who is this?

15 Chris: Chris.

16 Male: Okay, Chris.

17 Chris: What's cracking?

18 Male: What's happening with you?

19 Chris: Shit, just sitting here chilling.

20 Male: Uh-huh. So uh, yeah, you, you probably getting a little excited and uh,
21 chest swelling up.

22 Chris: Hey, man. I'll tell you like this. I'll tell you like this homey. I really, I fell
23 like I'm like, in the Third Grade again and it's Christmas time. My

1 homeboys is all sitting there saying goodbye to me and shit, and I'm like
2 man, hey, I'm out. Peace.

3 Male: Oh, you know what they told me, brother? You step through the doors uh,
4 don't count on nothing.

5 Chris: Yeah. Oh, yeah. I feel that totally.

6 Male: Um, I need to know something that the uh, the, the dude um, that's
7 supposed to be meeting us down there, uh, the bondsman.

8 Chris: Yeah?

9 Male: Uh, Roy, I think his name is.

10 Chris: Yeah.

11 Male: Did you talk to him yesterday?

12 Chris: No.

13 Male: No?

14 Chris: No, I haven't talked to nobody.

15 Male: Okay, because uh, there was some discrepancy on, on 600 or a thousand,
16 or some shit. I say, you know, baby girl must really, really think awfully
17 highly of you for me to go in my pocket for this much money.

18 Chris: Yeah-yeah.

19 Male: You know what I'm saying? So uh, and I told her, I say, hey, you know,
20 I'm going on your judgment because I don't know dude from Adam.

21 Chris: Yeah-yeah, I feel you.

22 Male: So uh, but I do trust her judgment. I'm trying to get her to come up uh-
23 uh, come up out of here so we can get on the road.

24 Chris: Yeah.

25 Male: Got a little travel time. But uh, yeah, I guess she uh, laced you up on
26 uh...

27 Chris: Yeah.

28 Male: ... that we will be there to uh, to, to uh, pick you up, so.

29 Chris: Definitely, and I mean, please believe, I mean, out of everyone in this
30 mother fucking world that has talked to me since I've been in here...

31 Male: Uh-huh.

1 Chris: 'Ya all's the only ones, that, you know what I'm saying, have actually
2 shown me any kinda love, man.

3 Male: (indistinguishable) Only love we showed you so far is answering your
4 phone call.

5 Chris: Yeah, but I mean, that, that alone in itself, you know what I'm saying?

6 Male: The proof, the proof is in the pudding brother.

7 Chris: Oh, yeah. But I mean, with me her word is good as gold. You know what
8 I'm saying? That's my, that's my sister right there.

9 Male: Well, yeah, you know where I come from all you got is your word. Your
10 word is your bond.

11 Chris: Yep, and if she, if she told me it was raining blue frogs outside I believe
12 her.

13 Male: (asking April in background) Is it raining blue frogs outside? Is it raining
14 blue frogs outside? You ready? (laughs) (inaudible) Alright, we uh, hitting
15 the road right now. Hold on a second. (inaudible) Uh, yeah, we getting,
16 we, we headed that way.

17 Chris: Cool-cool.

18 Male: Yeah, because I'm gonna, I'm gonna try to work these fools, these
19 bondsmen. You know, I, I've dealt with them once or twice.

20 Chris: Yeah.

21 Male: (speaking to April - inaudible) Yeah, your Chris. (laughs) She said, like
22 who you talking to?

23 Chris: (laughs) Yeah.

24 April: (in background) Sorry, I take forever. (inaudible)

25 Male: So uh, oh yeah, Debbie that's your uh, that's mom?

26 Chris: Yeah, that's moms.

27 Male: She's waiting up there now.

28 April: (in background) Out other mother.

29 Chris: Yeah.

30 Male: (inaudible conversation with April) I don't know. Hey, hold on a minute.
31 Let me get on this road. Here, talk to, talk to her.

1 Chris: Yeah-yeah, for sure, bro.
2 April: Hi.
3 Chris: Hey Sissy.
4 April: How you doing?
5 Chris: Loving you so much it's crazy.
6 April: I know.
7 Chris: Oh my god, he sounds real cool, too, Sis.
8 April: I'm telling you. I'm professional and I'm a lady and I'm (inaudible) so you
9 don't (inaudible)?
10 Chris: My Sissy's a perfect Angel.
11 April: I know I'm a perfect Angel.
12 Chris: Just my loving Sissy.
13 April: I just miss you and I just want it to, I want to be selfish, alright? And have
14 uh... do you smoke brother?
15 Chris: Cigarettes?
16 April: Well, what do you smoke?
17 Male: (in background) Does he smoke cigarettes?
18 April: Yeah, what do you want? What do you smoke? What do you want?
19 Chris: Um, Marlboro's.
20 April: No way. You two are the same.
21 Male: (in background) Marlboro red box?
22 Chris: Yep.
23 April: (inaudible)
24 Chris: Hey.
25 April: Yes.
26 Chris: He knows my brand and everything. That's crazy.
27 April: What?
28 Chris: Marlboro red box?
29 April: Yeah.
30 Chris: (laughs)
31 April: We actually have some in the house, but um...

1 Chris: That's cool.
2 April: But I didn't grab any. I was gonna grab you a pack (inaudible)
3 Chris: Hey, don't even trip.
4 April: ... pack of mine.
5 Chris: Don't even trip because you know what? You know what? I'll tell you
6 right now.
7 April: What?
8 Chris: All I really want is be able to get out and give you the biggest hug in the
9 world.
10 April: You do?
11 Chris: Yes. Everything else is just secondary.
12 April: So what's he saying so far?
13 Chris: Basically that, you know, everything's cool.
14 April: Yeah, it is.
15 Chris: You know, I mean, he, he seems real good for you, Sis.
16 April: He could be really good for everybody. Actually, a very crafty, very, just
17 like me kind of man.
18 Chris: Well that's what you need, you know, and as long as he makes you happy
19 like I told you, you know what I'm saying? That's all that matters to me.
20 April: Yes.
21 Chris: You know? I mean, for real you know? Out of everyone out there, you're
22 ss.. you're the only one, you know what I'm saying? The only one that
23 has given even enough of a care to accept my calls and talk to me for as
24 long as you do, you know what I'm saying? I mean, a lot of people talk to
25 me, but it doesn't mean nothing, you know what I'm saying?
26 April: I was excited when you called. I was like, oh my god. Thank god he can
27 call me.
28 Chris: Yeah, I had your number memorized.
29 April: Of course.
30 Chris: I mean, how many times did I call you a day when I was out there, you
31 know what I'm saying?

1 April: So we're not going to say the name Lamar too many times.
2 Chris: No, we're not going to say that name at all.
3 April: Because uh, somebody else called and tried to say that Lamar and I were
4 together, but it was one of the people who didn't understand that April is
5 professional.
6 Chris: Yeah.
7 April: It was one of the little people.
8 Chris: One of, one of the totems, one of the little frogs on the totem pole?
9 April: Hey, let's cut that out. He's on his way. But listen, um, guess what I still
10 have on, on right now?
11 Chris: Huh?
12 April: Do you remember when you gave me that ring?
13 Chris: Yes.
14 April: You do?
15 Chris: Yes.
16 April: I still have it on.
17 Chris: Oh yes! I love you Sissy.
18 April: Well, we got you a couple packs of cigarettes.
19 Chris: Oh, I love you guys so much.
20 April: One.
21 Chris: That's cute.
22 April: (indistinguishable) the other one.
23 Chris: I'll probably get beat. My hands are weak. I got girly hands.
24 April: Duh, you're a boy.
25 Chris: (laughs) God, this is great Sis.
26 April: Your call is, I just missed you and if what, what uh, what's a small little
27 fucking debt to pay to see my brother? Nothing.
28 Chris: I love you so much Sis. You know, I, I really want to cry right now. I
29 mean, this is so...
30 April: I told you, knock that shit off. I'll fuck, I'll fuck you up if you...
31 Male: (in background - inaudible) ... crying in there brother.

1 April: Brother, you can't cry. You have to be happy. What the hell is...

2 Chris: Oh, that, that's exactly it though. I am happy, and I mean, I, I'm one of

3 the people, I'm not afraid of crying in front of anybody, Sis. You should

4 know that by now.

5 April: Brother, listen. Gangsters don't dance, we groove.

6 Chris: That was cute. That was cute. (Inaudible)

7 April: I am cute.

8 Chris: I love you to death Sis.

9 April: I know.

10 Chris: Oh my god, this is beautiful.

11 April: We're on our way to you right this moment.

12 Chris: That's amazing, Sis.

13 April: Are you excited?

14 Chris: I'm hella excited. I'm like about to pee on myself.

15 April: Alright, pop a color. What color are you wearing?

16 Chris: Right now? Gray.

17 April: What?

18 Chris: Gray.

19 April: Oh, yeah. You're in gray now because you're a worker.

20 Chris: Yeah, but uh, I got my tan pants and my white T-shirt and my uh, blue

21 jean jacket and my white hat in uh, my property right now. I got me a

22 new Nike, a new uh, New York hat. My new one, it's white, right? With

23 gold pin stripes on it, Sis.

24 April: You know me I do it in suits and shit, right?

25 Chris: Yeah-yeah.

26 April: I don't know why everybody wants to trip on uh, April is professional.

27 Chris: Because nobody's used to that. You know what I'm saying? I mean...

28 April: Well nobody knew what the fuck to think of me when they met me, right?

29 Chris: I remember when I first met you I didn't know what to think. I was like,

30 wow, she's cool.

31 April: I am cool. I'm the coolest.

1 Chris: You are major cool, Sis. You have no clue. Like...

2 April: Get your nose out of my ass, brother. Listen, we're going to have a good
3 time tonight. We're just gonna go back to my house and have a drink or
4 something, right?

5 Chris: That sounds like a plan. Oh my god, that sounds like a beautiful plan. I
6 mean, spending time with family and...

7 April: I mean, we might, we might do something fun. I told you.

8 Chris: Yeah, well, whatever we do check it out, as long as I'm with my Sissy, it's
9 great.

10 April: I know.

11 Chris: You know what I'm saying? I mean, like when I found out you were in jail
12 and fag boy wasn't trying to do nothing to get you out really, I quit kicking
13 it with him.

14 April: I told you I'd get you out. Did I not tell you I'd come and see you with
15 some money or something?

16 Chris: I know you did. Hey, when we was sitting in jail you said you would.

17 April: How many people told you they were going to pay your (indistinguishable)
18 and get you out?

19 Chris: A whole bunch of people and none of them did it, but you.

20 April: Thank you.

21 Chris: You are wonderful, Sis.

22 April: I know.

23 Chris: I love you.

24 April: But you're gonna have to help, I told you, look.

25 Chris: I'm working my ass off.

26 April: (inaudible) but you gotta (inaudible - cutting out)

27 Chris: Hello? Hello? Hello? Hello? Sis? Hello? Hello? (busy signal) Hello?
28 Hello? (busy signal continues)

APPENDIX B:

Court's Instructions to the Jury

32

FILED
SUPERIOR COURT
THURSTON

'08 JUN 18 P4 57

BY _____ DEPU

**SUPERIOR COURT OF WASHINGTON
THURSTON COUNTY**

STATE OF WASHINGTON,)

Plaintiff,)

vs.)

MICHAEL LYNN SUBLETT and
CHRISTOPHER LEE OLSEN,)

Defendant.)

Nos. 07-1-00312-0 and
07-1-01363-0

Court's Instructions To Jury

Dated this 17th day of June, 2008.

Christine Pomeroy
Christine A. Pomeroy, Judge

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 is also your duty to accept the law from the court's instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from the court's 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 the court has 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.

One of the court's duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for the court's rulings on the evidence. If the court has ruled that any evidence is inadmissible, or if the court has asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that the court has admitted that related 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 the court's instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in the court's 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 the court to express, by words or conduct, the court's personal opinion about the value of testimony or other

evidence. The court has not intentionally done this. If it appeared to you that the court has indicated it's 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__

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 reexamine 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. 3

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.

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. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

You must separately decide the count charged against each defendant.
Your verdict on one count as to one defendant should not control your
verdict on the other count or as to the other defendant.

INSTRUCTION NO. 7

A defendant is not compelled to testify, and the fact that a defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 8

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. 9

You may not consider an admission or incriminating statement made out of court by one defendant as evidence against a co-defendant.

INSTRUCTION NO. 10

Evidence that a witness has been convicted of a crime may be considered by you in deciding what weight or credibility should be given to the testimony of the witness and for no other purpose.

INSTRUCTION NO. 11

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.

A person also commits the crime of murder in the first degree when he or she attempts to commit burglary in the first degree or robbery in the first or second degree, and in the course of and in furtherance of such crime or in immediate flight from such crime he or another participant causes the death of a person other than one of the participants.

INSTRUCTION NO. 12

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. 13

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

INSTRUCTION NO. 14

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

(ALTERNATIVE A)

- (1) That on or about January 29, 2007, the defendant and/or an accomplice caused the death of Jerry Totten;
- (2) That the defendant or an accomplice acted with intent to cause the death of Jerry Totten;
- (3) That the intent to cause the death was premeditated;
- (4) That Jerry Totten died as a result of the defendant's acts and/or an accomplice's; and
- (5) That the acts occurred in the State of Washington.

- OR -

(ALTERNATIVE B)

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

If you find from the evidence that each of the elements in Alternative A or each of the elements in Alternative B has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. All of the elements of only one alternative need be proved. You must unanimously agree as to which one or more of the alternatives, A or B, has been proved beyond a reasonable doubt.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of the elements in Alternative A, or as to any one of the elements in Alternative B, then it will be your duty to return a verdict of not guilty on that alternative.

INSTRUCTION NO. 15

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

(ALTERNATIVE A)

- (1) That on or about January 29, 2007, the defendant and/or an accomplice caused the death of Jerry Totten;
- (2) That the defendant or an accomplice acted with intent to cause the death of Jerry Totten;
- (3) That the intent to cause the death was premeditated;
- (4) That Jerry Totten died as a result of the defendant's and/or an accomplice's acts; and
- (5) That the acts occurred in the State of Washington.

- OR -

(ALTERNATIVE B)

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

If you find from the evidence that each of the elements in Alternative A or each of the elements in Alternative B has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. All of the elements of only one alternative need be proved. You must unanimously agree as to which one or more of the alternatives, A or B, has been proved beyond a reasonable doubt.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of the elements in Alternative A, or as to any one of the elements in Alternative B, then it will be your duty to return a verdict of not guilty on that alternative.

INSTRUCTION NO. 16

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon or assaults any person.

INSTRUCTION NO. 17

Deadly weapon means any weapon, device, instrument, substance, or article [including a vehicle], which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

INSTRUCTION NO. ____18____

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 19

A person commits the crime of robbery in the second degree when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

INSTRUCTION NO. 20

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon or inflicts bodily injury.

INSTRUCTION NO. 21

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 22

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 23

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

INSTRUCTION NO. 24

In a prosecution for a crime, it may be a defense that the defendant acted under duress. Duress means that the actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and that such apprehension was reasonable upon the part of the actor; and that the actor would not have participated in the crime except for the duress involved.

However, the defense of duress is not available if the crime charged is murder, manslaughter, or homicide by abuse.

The defense of duress is not available if the actor intentionally or recklessly places himself or herself in a situation in which it is probable that he or she will be subject to duress.

INSTRUCTION NO. 25

It is a defense to a charge of murder in the first degree based upon committing Burglary or Robbery that the defendant:

- (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
- (2) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury; and
- (3) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article or substance; and
- (4) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

This defense must be established by a preponderance of the evidence.

Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 26

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 a verdict form for each defendant for recording your verdict. 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.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", and answer the questions as to the alternatives, according to the decision you reach.

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 verdict form(s) 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.

APPENDIX C:

Affidavit of Katrina Berchtold

4

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

08 JUL -8 PM 12:48

BETTY J. GOULD, CLERK

BY _____
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON
Plaintiff,
vs.
CHRISTOPHER OLSEN,
Defendant.

NO. 07-1-1363-0

AFFIDAVIT OF KATRINA
BERCHTOLD

AFFIDAVIT

STATE OF WASHINGTON }
Thurston County }

ss

1. I, KATRINA BERCHTOLD, being over the age of 18 and competent do swear to the following information.
2. I have known April Frazier for 3years or so. I met her through Mike at AA

Richard Woodrow
3732 Pacific Ave SE
Olympia, WA 98501
360 352 9911
Fax 360 352 9955

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meetings in Olympia,

3. Before June 19, 2007 I was talking with a friend in an AA meeting. I explained to a friend in front of April that my father had molested me when I was a child. I became pregnant and had an abortion at 14 years of age. I told a friend that I wanted to kill my father. I said I knew how to kill someone and get away with it. I was joking. This conversation occurred about a week before I gave birth to my child.

4. On June 19, 2007 I gave birth to my first child. Before the birth of my child but after my conversation with my friend about being able to kill someone and get away with it, April Frazier called me up and told me that she remembered me saying that I knew how to kill someone and get away with it. I told her that I was only joking when I said that. April asked me if I really knew how kill someone and get away with it

3. April said that she and Mike were going to kill Jerry Totten. I asked her why. She said that she was sick and tired of the kiddy porn Jerry was involved with. I was in disbelief so I said something like you can't be serious. April said, "We are going to fucking kill Jerry."

4. April said Mike had a gun and we are going to shoot Jerry. She said they were going to pistol-whip Jerry before they killed him.

5. I felt that April was back using meth so I told her to calm down and she needed to get clean again.

6. April became angry with me and said she wasn't using again. She repeated her assertion that she was going to kill Jerry 3 or 4 times. She said Jerry was a child molester and she was sick and tired of him. They were going to put him out of his

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misery. Finally I hung up on her.

7. Later on I heard that April had been arrested for killing Jerry. I did not contact the police. I was afraid. I have never been in trouble before.

8. Jerry was very good to me. He would give me money and told me to buy my child a present. Sometimes he would give me some money and say don't spend this on your kid spend it on your self.

9. After I read about Jerry's murder in the paper I was afraid that I would get into trouble for not reporting what April had told me. I thought CPS would come take my child from me.

10. When I read in the paper after trial started that April was only going to get 4 and a half years I was shocked. I told my mom about what happened and she told me to go to the courthouse and tell someone about what happened.

11. I rode the bus to the courthouse on June 12, 2008. I listen to the Letinent from Tumwater testify and then I listen to the tape recording of the co-defendant. During the break I went to the prosecutor's office and told the guy at the window that I needed to talk with the prosecutor on the Frazier case. I told him that April had told me that she was going to kill Jerry before Jerry was killed.

12. The receptionist called over to the prosecutor with the bow tie , who was standing in the hallway and said to him that I had a "dialogue with April that involved murder". The prosecutor said no thank you. I didn't go back into the courtroom. I went home.

13. The following week I was given the card of Mr. Woodrow at an AA meeting place. I called him on June 20, 2008. I told him about April and her threat. I came to his office the following week and his investigator interviewed me.

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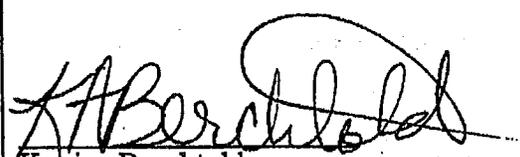
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14. I know that when I spoke to the receptionist other people saw me do this. I believe these people have been in contact with Mr. Woodrow.

15. My real name is on this affidavit. Everybody calls my Alexis. That is my middle name. April has referred to me in the past as Cox. I am not too sure why she does this but I think she knows my real name.

16. While I was speaking to the investigator I was asked if Chris and Mike came to my house on 1-29-08 and smoked meth. They did not come to my house. I had just given birth to my daughter and I have been clean for 3 years. I can provided medical reports if necessary to prove I did not use meth during this time period. I never spoke with April again.

I swear that the above foregoing information is true and accurate and I signed under penalty of perjury under the laws of the state of Washington at Olympia, Washington on June 30th 2008.


Karina Berchtold

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of Appellant's Opening Brief to:

Christopher Olsen, DOC #831898
Washington Corrections Center
P. O. Box 900
Shelton, WA 98584

and to:

Jeffrey Erwin Ellis
Ellis Holmes & Witchley PLLC
705 2nd Ave Ste 401
Seattle, WA 98104-1718

and that I personally delivered a copy to:

Thurston County Prosecuting Attorney
2000 Lakeridge Dr. S.W., Building 2
Olympia, WA 98502

I further certify that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All mailed postage prepaid, on April 15, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 15, 2009.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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