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Pierce County. No. 10-1-04055-4
COA Nos. 43039-8-II, 44780-1-II

No. 92412-1

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

Eduardo Sandoval,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

Eduardo Sandoval is currently serving a 904-month sentence, in part, because the jury found him guilty of conspiracy to commit murder by extreme indifference, a crime that (1) does not exist; (2) he was never charged with; and (3) he was never convicted of. When Mr. Sandoval's case is reviewed in its entirety, it paints a picture of a trial tainted by carelessness. Further, the erroneous instructions to the jury tainted the jury deliberations, lessened the State's burden to prove the elements of one of the charged crimes, and prejudiced Mr. Sandoval's case in its entirety.

Mr. Sandoval was charged with and convicted of the crime of conspiracy to commit premeditated murder in the first degree pursuant to RCW 9A.32.030(1)(a). But when the jury asked whether they should use the instruction as written in Instruction No. 12, which referred to extreme indifference murder under RCW 9A.32.030(1)(b), as the basis for the conspiracy conviction, the trial court incorrectly instructed the jury to do so. CP 333. This erroneous jury instruction omitted two elements that the State had the burden to prove beyond a reasonable doubt: (1) intent to cause the death of a person; and (2) premeditation.

When Mr. Sandoval's case is viewed in its entirety, including: (1) the jury finding Mr. Sandoval guilty of conspiracy to commit extreme indifference murder (a crime that he was never charged with and a crime

that does not exist); (2) the State's failure to prove all elements of conspiracy to commit premeditated murder (the crime he *was* charged with and convicted of); (3) the trial court's refusal to provide the instruction on the lesser included offense of manslaughter; (4) the trial court's refusal to give a cautionary instruction on the accomplice testimony; (5) the prosecutor's egregious, inappropriate, and inaccurate remarks regarding Mr. Sandoval's race, education, and gang status; and (6) ineffective assistance of counsel, this Court should vacate all of Mr. Sandoval's convictions and remand for a new trial.

II. ISSUE PRESENTED

Whether the trial court's jury instruction on conspiracy to commit murder by extreme indifference was given in error, thereby causing Mr. Sandoval actual and substantial prejudice, when (1) the State charged Mr. Sandoval with conspiracy to commit murder in the first degree with a premeditated intent to cause the death of another person; (2) the State failed to meet its burden of proof, offering no evidence of premeditation or intent to cause the death of another person; (3) the trial court convicted Mr. Sandoval of a crime different from the one for which the jury received instruction; and (4) the jury found Mr. Sandoval guilty of a nonexistent crime.

III. STATEMENT OF THE CASE

The full procedural posture and facts of this case are provided in the Petitioner's Personal Restraint Petition.

1. **Mr. Sandoval was charged with and convicted of conspiracy to commit murder with a premeditated intent.**

The original Information charged Mr. Sandoval with three counts: (1) first degree premeditated murder pursuant to RCW 9A.32.030(1)(a) under a theory of accomplice liability; (2) attempted murder under a theory of accomplice liability; and (3) conspiracy to commit first degree murder pursuant to RCW 9A.32.030(1)(a). *See* Information, CP 1-3.

On the first day of trial, the State filed a Second Amended Information pertaining to all defendants, including Mr. Sandoval. RP 46; *see* Second Information, CP 85-86. The State explained that it had amended Count I and Count II but it made no changes to Count III (conspiracy to commit premeditated murder). *Id.* "Count I is still Murder in the First Degree, but the manner which the State's alleging that it occurred has changed from premeditated to what's generally termed extreme indifference. It's still Murder in the First Degree, but a different prong of that statute. Count II the State's reducing from Attempted Murder in the First Degree to Assault in the First Degree. Those are the changes." *Id.* The State further recognized that "under the rules the State

can amend up unto the time of verdict.” RP 49. Mr. Sandoval’s trial counsel timely objected to the Second Amended Information. RP 47.

Following Mr. Sandoval’s conviction, the Judgment and Sentencing listed Count III as “Conspiracy to Commit Murder in the First Degree” and cited to RCW 9A.32.030(1)(a). CP 368-79.

2. Mr. Sandoval moved for a dismissal based on insufficient evidence on all three counts.

Following the State’s case in chief, Mr. Sandoval moved for a dismissal of all charges based on insufficiency of the evidence. RP 3529-3530. In denying the motion, the trial court relied on the Second Amended Information, which charged Mr. Sandoval with conspiracy to commit premeditated murder. RP 3567 (“The elements of these charges are laid out in the Second Amended Information filed against both defendants, Mr. Sandoval and Defendant Mex.”) The trial court denied Mr. Sandoval’s motion, holding, in part: “Also viewing the evidence in the light most favorable to the State, a reasonable jury could find beyond reasonable doubt that Defendant Sandoval . . . agreed with others to do a retaliatory shooting, and that several of those persons who agreed did actually take a substantial step in pursuance of that agreement.” RP 3575-76. The trial court failed to identify any evidence that demonstrated Mr. Sandoval acted with intent to commit premeditated murder. *Id.*

3. The jury was incorrectly instructed on the conspiracy charge.

The jury was not instructed on the definition of premeditated murder in the first degree pursuant to RCW 9A.32.030(1)(a). Instead, the trial court instructed the jury on first degree murder by extreme indifference (*see* Jury Instruction 12, CP-333) and conspiracy to commit murder in the first degree (*see* Jury Instruction 20, CP-341). During deliberations, the jury asked one question: whether it could rely on the definition of murder by extreme indifference to interpret the court's instruction on conspiracy. RP 3768. When the trial court answered "yes," the jury took less than an hour to end its ten-hour deliberation process and convicted Mr. Sandoval.

IV. ARGUMENT

1. Mr. Sandoval was charged with and convicted of conspiracy to commit premeditated first degree murder.

At the start of trial, the State intentionally amended the information to change its theory on Count I to murder by extreme indifference. RP 46; CP 1, 85. The State made no effort to amend Count III from a theory of premeditation to a theory of extreme indifference at the start of trial or at any point during the trial. One can assume if the State intended to adjust its theory on Count III it would have amended Count III when it amended the other two counts. Additionally, the trial court relied on the Second

Amended Information in denying Mr. Sandoval's motion to dismiss at the close of the State's case.

Thus, Mr. Sandoval was found guilty of conspiracy to commit murder by extreme indifference, without being charged with or arraigned on the crime. *See State v. Kirwin*, 166 Wn. App. 659, 271 P.3d 310 (2012) (when an information alleges only one crime, it is constitutional error to instruct the jury on a different, uncharged crime); *see also State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995) (a defendant cannot be tried for an offense which has not been charged).

The error continued beyond his conviction. Following Mr. Sandoval's conviction, the Judgment and Sentencing listed Count III as "Conspiracy to Commit Murder in the First Degree" and cited to RCW 9A.32.030(1)(a). CP 369. The trial court never instructed the jury on the elements of this crime and the only appropriate remedy is dismissing Mr. Sandoval's conspiracy conviction with prejudice.

2. The State did not prove that Mr. Sandoval committed conspiracy to commit premeditated murder

In order to meet its burden and prove Mr. Sandoval committed conspiracy to commit premeditated murder, the State was required to show that Mr. Sandoval (1) acted with the intent to cause the death of a person; and (2) the intent was premeditated. In order to properly instruct

the jury on conspiracy to commit premeditated murder, the trial court therefore should have provided the jury with the following instruction:

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

(1) That on or about (date), the defendant **acted with intent** to cause the death of (name of person);

(2) That **the intent to cause the death was premeditated;**

(3) That (name of decedent) died as a result of the defendant's acts; and

(4) 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 26.02 (emphasis added).

Here, not only did the State fail to meet its burden to prove conspiracy to commit premeditated first degree murder, the jury was improperly instructed on the State's burden. Importantly, the State now concedes: "[t]here was no evidence, argument, or even mention of premeditated intent to kill an individual." *See* State's Supp. Brief at 6.

The State charged Mr. Sandoval with conspiracy to commit premeditated first degree murder but failed to prove its case and the charge should be dismissed.

3. Mr. Sandoval raised the issue of insufficiency of the evidence for the conspiracy to commit premeditated murder.

Following the State's case in chief, Mr. Sandoval moved for a dismissal of all charges based on insufficiency of the evidence. RP 3529-3530. In denying the motion, the Court relied on the Second Amended Information, which charged Mr. Sandoval with conspiracy to commit premeditated murder and denied Mr. Sandoval's motion, holding, in part: "Also viewing the evidence in the light most favorable to the State, a reasonable jury could find beyond reasonable doubt that Defendant Sandoval . . . agreed with others to do a retaliatory shooting, and that several of those persons who agreed did actually take a substantial step in pursuance of that agreement." RP 3575-76. In denying Mr. Sandoval's motion, the trial court failed to identify any evidence that demonstrated Mr. Sandoval acted with intent to commit premeditated murder. *Id.*

Additionally, Mr. Sandoval's prior appellate counsel raised this issue under a theory of sufficiency of the evidence in Mr. Sandoval's direct appeal (Br. of Appellant at 17-21, *State v. Sandoval*, No. 43039-8-II (Wash. Ct. App. Dec. 3, 2012)). Ms. Arnold correctly identified for the

Court of Appeals that Mr. Sandoval had been charged with and convicted of conspiracy to commit premeditated first degree murder, not conspiracy to commit first degree murder by extreme indifference, and the Court of Appeals failed to address this discrepancy, reasoning: “**Sandoval** further argues that the evidence fails to show an agreement to commit *premeditated murder* because there was ‘no agreement as to what, if any, degree of injury would be inflicted by the shooting.’ But because the evidence is sufficient to prove conspiracy to commit first degree murder by extreme indifference, we do not address this argument.” *See State v. Sandoval*, 180 Wn. App. 1005, n. 3 (2014). Here, the issue of the erroneous charging and conviction was raised on appeal but the Court of Appeals declined to analyze the issue fully, resulting in further prejudice to Mr. Sandoval.

Mr. Sandoval challenged his conspiracy to commit premeditated murder charge and conviction, arguing that the State failed to present sufficient evidence to meet its burden. *See* RP 3575-75; *see also State v. Sandoval*, 180 Wn. App. 1005 (2014). The Court of Appeals found that the evidence was sufficient to prove the *nonexistent* crime of conspiracy to commit first degree murder by extreme indifference and declined to address Mr. Sandoval’s argument that the State failed to meet its burden to

prove the elements of conspiracy to commit premeditated murder. *Id.* at n. 3.

4. Mr. Sandoval is entitled to dismissal with prejudice for his conspiracy claim.

The State failed to meet its burden and trial counsel had no obligation to present a defense on Count III. Evidentiary insufficiency has the effect of showing that the government has failed to prove its case. *See State v. Vangerpen*, 125 Wn.2d 782, 794, 888 P.2d 1177 (1995). Evidentiary insufficiency, therefore, entitles Mr. Sandoval to dismissal with prejudice under the double jeopardy principle. *State v. Kirwin*, 166 Wn. App. 659, 670, 271 P.3d 310, 316 (2012).

V. THE DEFECTIVE JURY INSTRUCTIONS REQUIRE REVERSAL

The United States Supreme Court has held that it is a fundamental due process violation to convict and incarcerate a person for a crime without proof of all the elements of the crime. *Fiore v. White*, 531 U.S. 225, 228–29, 121 S. Ct. 712, 148 L.Ed.2d 629 (2001). Here, Mr. Sandoval was charged with and ultimately convicted of conspiracy to commit premeditated murder. However, the jury instructions were erroneous and prejudicial, allowing the jury to find Mr. Sandoval guilty of conspiracy (which requires actual intent) to commit murder by extreme indifference (which only requires an aggravated form of recklessness).

“An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *State v. Sibert*, 168 Wn.2d 306, 312, 230 P.3d 142, 145 (2010), as corrected (Apr. 1, 2010) (quoting *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). Had the trial court properly instructed the jury on conspiracy to commit premeditated murder, the jury would have reached a different verdict. The State now concedes it presented no evidence of premeditation and the jury was not instructed of the elements of actual intent or premeditation.

The result here is reversal because the error was not harmless. Whether an error is harmless is determined by examining: “[W]hether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Neder v. U.S.*, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)). “When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence.” *Neder*, 527 U.S. at 18, 119 S. Ct. 1827. Here, the missing elements were wholly unsupported by evidence. The State concedes this point. *See State’s Supp. Brief at 6.*

Additionally, for this Court to find that the jury instruction error was harmless, the Court must “conclude beyond a reasonable doubt that

the jury verdict would have been the same absent the error.” *Id.* at 19, 119 S. Ct. 1827. Here, the error was not harmless and requires reversal. First, the jury specifically asked whether it should use the definition of murder in the first degree (defining murder by extreme indifference, not premeditated murder) to determine the conspiracy charge. The jury realized there was a conflict yet the jury was incorrectly told to use the definition. Second, had the jury been instructed correctly, it would not have returned the same verdict as there was **no** evidence that Mr. Sandoval acted with premeditation. Because the jury would have reached a different verdict had it been given the correct instructions, Mr. Sandoval’s conspiracy conviction must be dismissed with prejudice.

**VI. THE JURY FOUND MR. SANDOVAL GUILTY OF
A CRIME THAT DOES NOT EXIST**

**1. Conspiracy to commit murder by extreme indifference
is not an actual crime.**

Although this Court has not yet determined whether an individual can commit conspiracy to commit extreme indifference murder, courts in other jurisdictions consistently hold that conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result does not exist. *People v. Swain*, 909 P.2d 994, 997-1001 (Cal. 1996) (conspiracy to commit reckless murder not a crime); *Palmer v. People*, 964 P.2d 524, 528-30 (Colo. 1998) (conspiracy to commit reckless

manslaughter not a crime); *State v. Beccia*, 505 A.2d 683, 684-85 (Conn. 1986) (conspiracy to commit reckless arson not a crime); *Conley v. State*, 247 S.E.2d 562, 565 (Ga. Ct. App. 1978) (“One cannot conspire to kill another in the heat of passion.”); *Mitchell v. State*, 767 A.2d 844, 847, 854-55 (Md. 2001) (conspiracy to commit a ‘non-premeditated’ murder not a crime); *People v. Hammond*, 466 N.W.2d 335, 336-37 (Mich. Ct. App. 1991) (conspiracy to commit second-degree murder not a crime); *State v. Baca*, 950 P.2d 776, 787-88 (N.M. 1997) (conspiracy to commit reckless murder not a crime); *see also* W. LaFave, *Substantive Criminal Law* Section 12.2(c) at 278 (2d ed. 2003).

Additionally, other jurisdictions, with similar statutes to Washington’s conspiracy statute, have specifically held that the crime of conspiracy to commit murder by extreme indifference does not exist. *See, e.g., State v. Borner*, 836 N.W.2d 383, 391 (N.D. 2013) (holding that “conspiracy to commit extreme indifference murder . . . is not a cognizable offense.”) As the *Borner* court reasoned, “conspiracy to commit unintentional murder creates a logical inconsistency because ‘one cannot agree in advance to accomplish an unintended result.’” *Id.*; *see also State v. Baca*, 950 P.2d 788 (holding that conspiracy to commit depraved-mind murder does not exist).

2. Statutory interpretation supports that conspiracy to commit extreme indifference murder does not exist in Washington.

Washington State generally follows the Model Penal Code (“MPC”). *See State v. Hayes*, 182 Wn. 2d 556, 561, 342 P.3d 1144, 1145 (2015) (the legislature adopted many provisions of the MPC in its 1975 overhaul of the state criminal code); *see also State v. Garcia*, 179 Wn. 2d 828, 839, 318 P.3d 266, 273 (2014) (the drafters in Washington looked to the MPC when crafting the 1975 revisions to the criminal code). The MPC commentary explains that to be guilty of conspiracy, a person must engage in purposeful behavior, regardless of the mens rea of the underlying offense: “[W]hen recklessness or negligence suffices for the actor’s culpability with respect to a result element of a substantive crime, as for example when homicide through negligence is made criminal, there could not be a conspiracy to commit that crime.” Model Penal Code § 5.03 comment 2(c)(i) at 408 (Official Draft and Revised Comments 1985).

The MPC Commentary recognizes that when the underlying crime has a mens rea of recklessness, one cannot conspire to accomplish an unintended result. *See id.* Here, RCW 9A.28.040 closely follows the MPC language and by extension, RCW 9A.28.040 requires intent to

commit the underlying crime. As a result, conspiracy to commit murder by extreme indifference is not a crime.

3. This Court held in *State v. Dunbar* that attempt to commit murder by extreme indifference is not a cognizable crime.

This Court should apply its analysis and holding in *Dunbar* to the instant case. As the *Dunbar* court held, “first degree murder by creation of a grave risk of death will support an attempt charge only if the underlying murder statute requires the intent to kill as an element.” *State v. Dunbar*, 117 Wn.2d 587, 592, 817 P.2d 1360 (1991). Similar to the crime of attempt, the crime of conspiracy requires that the State prove that the defendant acted with specific intent for the underlying substantive crime to be committed. *See* RCW 9A.28.040(1). Under Washington law, “a person acts with intent or intentionally when he . . . acts with the objective or purpose to accomplish *a result* which constitutes a crime.” *See* RCW 9A.08.0101(1)(a). The conspiracy statute makes use of this definition by requiring the individual act “with intent that conduct constituting a crime be performed.” RCW 9A.28.040(1).

Here, the crime of conspiracy requires two levels of intent: (1) specific intent to engage in the underlying crime; (2) intent that a particular crime will be performed. In order to support a conspiracy

murder conviction, the underlying crime must also require a specific intent to kill as an element. Murder by extreme indifference does not. *See* RCW 9A.32.030(1)(b).

“Manifesting an extreme indifference” is not consistent with a specific intent to kill. Rather, this Court has construed RCW 9A.32.030(1)(b) to “require an aggravated form of recklessness which falls below a specific intent to kill.” *Dunbar*, 117 Wn.2d at 593. “We are unwilling to imply a requirement of intent where the phrase “extreme indifference” appears to contemplate a lesser mental state.” *Id.* The analysis of conspiracy to commit extreme indifference murder is parallel. The jury was not instructed nor did it find that Mr. Sandoval acted with actual intent to cause the death of a person and his conviction must be vacated and remanded for a new trial.

4. Mr. Sandoval has shown a fundamental constitutional error that actually and substantially prejudiced him.

A judgment and sentence based on conviction of a nonexistent crime entitles one to relief on collateral review. *E.g., In re Hinton*, 152 Wn.2d 853, 860, 100 P.3d 801, 804 (2004); *Ex parte Lombardi*, 13 Wn.2d 1, 123 P.2d 764 (1942). Moreover, in *In re Personal Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980), the court held that the petitioner was entitled to relief from a sentence not authorized by law, observing that a

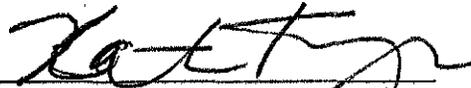
court “has the power and duty to correct [such an] erroneous sentence.” *Carle*, 93 Wn.2d at 33, 604 P.2d 1293 (emphasis omitted) (quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)). Because the jury found Mr. Sandoval guilty of the nonexistent crime of conspiracy to commit extreme indifference murder which is a nonexistent crime, he has shown a fundamental constitutional error that actually and substantially prejudiced him.

VII. CONCLUSION

Per the Court’s request, Mr. Sandoval submits this supplemental brief to address the effect of the charge and conviction for one crime: conspiracy to commit premeditated murder, when the jury was not instructed on the charge and he was ultimately convicted for a different crime: conspiracy to commit murder by extreme indifference- a crime that does not exist. While this Court limited its request to the conspiracy charge, when Mr. Sandoval’s case is viewed in its entirety, particularly on the confusing and erroneous jury instructions, Mr. Sandoval respectfully requests that the Court dismiss his conspiracy charge with prejudice, vacate his remaining convictions and remand for a new trial on the remaining counts.

RESPECTFULLY SUBMITTED this 12th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email and by First Class United States Mail, postage prepaid, one copy of this pleading on the following:

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Dear Sir/Madame:

Enclosed for filing in the Washington State Supreme Court in *In re the Personal Restraint of Eduardo Sandoval*; Supreme Court No. 92412-1, is **Petitioner's Supplemental Brief**. Thank you,

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