70418-4

70418-4

NO. 70418-4-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

TERRANCE IRBY,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON SUPREME COURT CASES

WASHINGTON COURT OF APPEALS CASES

UNITED STATES SUPREME COURT CASES

WASHINGTON STATUTES

WASHINGTON COURT RULES

I. SUMMARY OF ARGUMENT

Terrance Irby killed James Rock by beating him in the head, cutting his throat and stabbing a sharp object in his ear. Irby was caught in a neighboring county fleeing from officers when they tried to stop him. Three guns stolen from Rock's master bedroom were located in Irby's truck. Irby represented himself, discharging stand-by counsel, then did not attend trial. He was convicted of Premeditated Murder with Aggravating Circumstances, Felony Murder in the First Degree and Burglary in the First Degree.

Irby's contention that the trial court erred in failing to discharge two jurors fails because he did not challenge the jurors for cause and because the jurors were not so biased that the trial was compelled to excuse them.

Irby acknowledges his conviction for premeditated murder was proper. The State concedes it was improper to argue the burglary of the building where Rock was murdered as the basis for the aggravating circumstance of Burglary in the First Degree and the Felony Murder in the First Degree. Those must be vacated. However, the other aggravating circumstances remain and there was sufficient evidence to support them. In addition, there was sufficient evidence to support the conviction for both the means of Burglary in the First Degree.

The State also contends that Irby's prior conviction for statutory rape was factually comparable to the present crime of Rape of a Child in the

Second Degree, providing an alternative basis for Irby's sentence.

II. ISSUES

1. Where a defendant makes no challenge for cause regarding a juror, can he raise the issue for the first time on appeal?
2. Where jurors do not conclude they cannot be fair and impartial, can a defendant establish bias such that the trial court was required to discharge the jurors without a challenge for cause?
3. Where three weapons were used to inflict multiple wounds over time, was there sufficient evidence of premeditated murder?
4. Was it improper to argue that burglary of the building by causing a murder in that building could result in the aggravating circumstance that the murder was in the course of, in furtherance of or in the flight from that same building and the felony murder premised on burglary of that building?
5. Is the remedy for the improper argument vacation of the aggravating circumstance of burglary in the first degree and the felony murder?
6. Where the victim was murdered at the same date and time when his house was burglarized for the firearms and property and he was covered with a water mattress in an adjacent garage, was there sufficient evidence to support that the murder was to conceal the commission of the burglary, to protect or conceal the identity of any

person committing a crime, and in the course of, in furtherance of, or in the immediate flight from residential burglary?

7. Where the door and two locks were broken leading to the bedroom where the victim's guns had been, and the defendant ended up armed with those firearms shortly after the murder by the defendant in an adjacent building does the evidence support the conviction for burglary in the first degree in either building?

8. Was defendant's adult conviction of statutory rape in the second degree of a thirteen-year-old child factually comparable to the crime of rape of a child in the second degree?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On April 15, 2005, Terrance Irby was charged with eight felony charges, including Aggravated Murder in the First Degree, the alternative of Felony Murder in the First Degree and Burglary in the First Degree. CP 1-4.[1] Irby was convicted of Aggravated Murder in the First Degree, the alternative of Felony Murder in the First Degree and Burglary in the First Degree. CP 18. The Washington Supreme Court upheld a Court of Appeals decision reversing the convictions because of a violation of Irby's right to

[1] In proceedings prior to the first trial, venue was transferred as to counts 1, and 5 through 8. Count 4 was dismissed.

presence during communications between the Court and counsel regarding excusing certain jurors. CP 14.

Upon remand, Irby immediately requested to represent himself. 8/18/11 RP 4.[2] At a hearing on August 31, 2011, after Irby consulted with an attorney and the trial court conducted an extensive colloquy, the trial court approved Irby representing himself. 8/31/11 RP 23-33. The trial court provided for stand-by counsel. 8/31/13 PM RP 33. Irby subsequently had three separate stand-by counsel but sought discharge of each one. 3/6/13 RP 17. Irby chose not to attend his trial. 3/6/12 RP 15-7. Trial proceedings commenced and Irby did not attend any portion of the trial. 3/15/13 RP 152-3, 158-9, 3/6/13 RP 24.

On March 12, 2013, the jury returned verdicts finding Irby guilty of Premeditated Murder in the First Degree, Felony Murder in the First Degree and Burglary in the First Degree. CP 259, 263, 266. The jury also entered unanimous special verdicts separately finding the aggravating factors that Irby intended to conceal the commission of a crime, intended to protect or conceal the identity of a person committing a crime, was in the course of, in furtherance of or in immediate flight from Burglary in the First Degree and was in the course of, in furtherance of or in immediate flight from

[2] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. Attached at Appendix A, is a table of the report of proceedings.

Residential Burglary. CP 260-1. The jury also unanimously found Irby was armed with a deadly weapon at the time of the commission of Felony-Murder in the First Degree. CP 265.

On April 18, 2013, the trial court sentenced Irby to life imprisonment on the charge of Premeditated Murder in the First Degree with the Aggravating Factors. CP 339.

On April 18, 2013, Irby timely filed a Notice of Appeal. CP 347.

2. Irby's Waiver of Presence at Jury Selection and Trial

Irby chose not to attend jury selection or the trial. When the trial court encouraged Irby to participate in selecting the jury, Irby indicated "The prosecutor can pick them." 3/5/13 RP 146. He also stated the following:

> MR. IRBY: I also explained to Mr. Pedersen that I have no problem with that, Your Honor; that he could proceed. He can impanel whatever jury he wants. If they are all part of the conspiracy people of this and that, I don't care. If they have had family members murdered, I can't care. Put whoever you put on because it's immaterial. The end of this case is a conviction anyway okay.

3/5/13 RP 146-7.

> THE COURT: Okay so --
> MR. IRBY: Okay so.
> THE COURT: -- trial today. I've got a jury sitting down there, 66 members. We are about to pick a jury.
> MR. IRBY: Send him to do it. I'm out of the fucking picture. Sorry. Didn't mean to say that.

3/5/13 RP 150-1.

> THE COURT: You are doing this knowing full well that results in no defense for Mr. Irby in front of the jury and no dog in the race when it comes to selecting 12 jurors; you understand that?
> MR. IRBY: I do, Your Honor.

3/5/13 RP 171. The following morning, Irby again declined the chance to attend jury selection. 3/6/13 AM RP 14, 16.

Further facts related to the jury selection process complained of by Irby are provided in the argument section below.

3. Summary of Trial Testimony

i. Prior to March 8, 2005, James Rock's Residence and Firearms.

Candy Rock is the daughter of James T. Rock. 3/7/13 RP 35. Rock was about five feet, eight inches tall weighed about one hundred and seventy pounds, and wore size 8 shoes. 3/7/13 RP 52. In March of 2005, Candy was living in Oregon, but visited her father twice in 2004. 3/7/13 RP 35. She spoke with him two to three times per week. 3/7/13 RP 36. Candy lived at the house on Shangri-La in Hamilton from September, 1996 to April 1998. 3/7/13 RP 36. The bedrooms and bathrooms were all upstairs. 3/7/13 RP 37. Candy stayed in a bedroom upstairs with a privacy lock from the inside. 3/7/13 RP 38. Her father's bedroom had a key entry and he also always had a padlock on the door. 3/7/13 RP 38-9. The padlock was first put on for the protection of Candy's kids because her father kept his guns in his bedroom. 3/7/13 RP 39. But the locks remained after she moved out. 3/7/13 RP 39.

When Candy visited at Christmas 2004, nothing had changed. 3/7/13 RP 37.

Candy's father had been a gun collector all his life and kept the guns in a closet in his bedroom. 3/7/13 RP 39. Candy knew her father had a 12-gage shotgun which he had since he was sixteen years old, a .22 hunting rifle and a handgun. 3/7/13 RP 40. Candy identified her father's handgun which had been recovered by officers from Irby's truck. 3/7/13 RP 17, 22, 41. Candy also identified the shotgun recovered from the truck as her father's gun which her father had from age sixteen. 3/7/13 RP 42-3.

Although Rock had sold firearms, he stopped selling them when he only had a couple left, stating he wanted to keep them. 3/7/13 RP 43. Candy never knew her father to give away guns. 3/7/13 RP 43-4. The last gun he sold was about a year before his death. 3/7/13 RP 44. Rock was very careful with firearms. 3/7/13 RP 44.

Candy also described that Rock had two computers upstairs in the house. 3/7/13 RP 45. Candy said her father was on the computer every day. 3/7/13 RP 46. Candy also identified a piece of jade jewelry her father had sent her for Christmas in 2004. 3/7/13 RP 46. Candy was aware he had other jewelry like that and identified a nearly identical piece collected from Irby's property. 3/7/13 RP 47, 3/8/13 PM RP 50-1.

Candy had met Terrance Irby one time in December of 2004. 3/7/13 RP 48. Irby came over to the house about ten minutes after Candy had

arrived for Christmas. 3/7/13 RP 48. Irby remained at the house for about 20 minutes. 3/7/13 RP 48. Candy said Irby wanted a ride upriver from her father and from Candy's boyfriend, but they declined. 3/7/13 RP 49.

After Candy got the residence back after her father's death, she did a walk through. 3/7/13 RP 51. The firearms appeared to be the only thing missing and no firearms were left in the house. 3/7/13 RP 51.

Rebecca Bell was a friend of James Rock. 3/8/13 PM RP 147. She is the sister of Lorna and James Hoyle. 3/8/13 PM RP 147. Bell visited Rock's house many times and between one to three times per week in the year before Rocks' death. 3/8/13 PM RP 147, 150. Bell had seen jade jewelry that Rock sent his daughter and was aware there was more upstairs in Rock's house. 3/8/13 PM RP 149. Bell knew Rock kept firearms upstairs in his room. 3/8/13 PM RP 152. She knew Rock purchased a new .22 rifle in early 2005 a couple months before his death. 3/8/13 PM RP 152. Bell had also seen a survival backpack that Rock was making about a week before he died. 3/8/13 PM RP 154-5.

ii. March 2, 2005, to March 6, 2005, Terrance Irby's Leavenworth Arrest and Truck Impound.

On March 2nd, 2005, Chelan County Sheriff Brian Burnett was working for the State Patrol, when he made a traffic-stop on a truck driven by Terrance Irby. 3/8/13 PM RP 39-41. A few days before, Burnett

discovered Irby had an arrest warrant out of Skagit County when serving civil papers at the house of Irby's sister. 3/8/13 PM RP 41. After Burnett confirmed the warrant was still valid he tried to stop the truck. 3/8/13 PM RP 42. The truck appeared to be avoiding Burnett, as it turned into an orchard driveway and parked away from a residence. 3/8/13 PM RP 42. The driver was Terrance Irby who was taken into custody. 3/8/13 PM RP 42. Irby was transported to jail and the truck was impounded as it had been left blocking a driveway on private property. 3/8/13 PM RP 43.

The impound inventory by another deputy showed cigarettes, beer, a paint brush, pliers, diet Coke, brushes, tape, pen and papers, address book, a car light, four plastic gas cans, and two small boat motors. 3/8/13 PM RP 47-9. No firearms, shovels or boots were listed. 3/8/13 PM RP 49.

Burnett also took a report four days later on March 6th, that Irby's truck had been stolen out of the Leavenworth impound yard. 3/8/13 PM RP 44. Bolts to a gate had been taken off and the gate had been lifted off the hinges. 3/8/13 PM RP 44. The padlock was in place, the only thing missing was Irby's truck and an attempt to locate was put out. 3/8/13 PM RP 45-6.

Jayme Delvo lived in the Leavenworth area and became acquainted with Terrance Irby. 3/8/13 PM RP 161. Irby showed up in Leavenworth in March of 2005. 3/8/13 PM RP 162. Delvo was taking his roommate back to the house of Irby's sister. 3/8/13 PM RP 162. At the house was Irby, a large

man and a smaller man Irby identified as Rock. 3/8/13 PM RP 163. Irby had received a ride from Mount Vernon that day. 3/8/13 PM RP 163.

iii. March 7, 2005, James Rock's Transportation Appointment.

Robert McCracken arranged drivers for those needing assistance including Rock. 3/8/13 PM RP 142-4. McCracken spoke with Rock on March 7th to arrange transportation later in the week. 3/8/13 PM RP 145-6.

iv. March 8, 2005, Irby's Appearance at Rock's Residence.

Gerald Revell moved into a property in Hamilton in March of 2005. 3/8/13 PM RP 164. His son, Jason Johnsen and Marty Beck helped them move in. 3/8/13 PM RP 164. James Rock's house was one house away. 3/8/13 PM RP 165-6. Revell saw Irby's truck in Rock's driveway. 3/8/13 PM RP 167, 169-70. In the afternoon, Revell heard metal noises out from the back of the pickup. 3/8/13 PM RP 169. Martin Beck and Jason Johnsen both testified to moving Revell in early March, 2005 and hearing noises coming from Rock's property nearby. 3/8/13 PM RP 132-3, 136-41.

Lorna Hoyle was a friend of James Rock and visited his house on occasion. 3/8/13 PM RP 102-3. She lived about five minutes away. 3/8/13 PM RP 104. Lorna also knew Terrance Irby. 3/8/13 PM RP 104. Around March 2nd to 4th, about a week before Rock's death, Lorna saw Irby walking alongside the road. 3/8/13 PM RP 104. Lorna had not seen Irby in a while. 3/8/13 PM RP 104. Irby walked to Lorna's house and asked for a ride to

Concrete which Lorna declined. 3/8/13 PM RP 105.

On Tuesday, March 8th, at about 4:20 p.m. Irby drove up Lorna's driveway in a truck. 3/8/13 PM RP 106-7. Lorna had not seen the truck before. 3/8/13 PM RP 106. Irby was almost incoherent and had an odd purplish coloring. 3/8/13 PM RP 106-7. Lorna caught her brother's name in what Irby was saying and told Irby her brother was at work. 3/8/13 PM RP 107. Irby went to leave, but could not get his truck to start. 3/8/13 PM RP 107. Irby lifted the hood, got in and out a few times and was mumbling to himself. 3/8/13 PM RP 107. Lorna called her brother and went on about her business but looked out at Irby from time to time. 3/8/13 PM RP 108.

Lorna's brother showed up shortly after 6:00 p.m. 3/8/13 PM RP 109. Her brother helped Irby with the truck. 3/8/13 PM RP 109. Irby came into the house about 8:30 p.m. and was still incoherent. 3/8/13 PM RP 109. Irby finally got his truck going and left about 9:20 p.m. 3/8/13 PM RP 110.

James Hoyle had known Irby about ten years and knew him to be about six feet two inches and weigh one hundred and ninety pounds. 3/8/13 PM RP 111. James knew Rock was about seventy years old at the time of his death and that he was in frail health. 3/8/13 PM RP 112. James's sister called about Terrance Irby's truck broken down in the driveway. 3/8/13 PM RP 113-4. James arrived around 6:00 or 6:30 p.m. 3/8/13 PM RP 114. While working on the truck, Irby was acting different than normal. 3/8/13

PM RP 116. He was shaky and his skin was purplish. 3/8/13 PM RP 116. James and Irby found out there was a broken wire from the key to the starter. 3/8/13 PM RP 114. Irby rambled when he spoke and said something about going to see his sister in Eastern Washington. 3/8/13 PM RP 115.

v. March 8, 2005, 11:00 p.m., Irby's Eluding and Arrest in Marysville.

On March 8, 2005, Officer Derek McCleod was working for the Marysville Police Department. 3/6/13 RP 157-8. Around 11:00 p.m. he was starting to go through a green light, when a brown pickup truck ran the red light. 3/6/13 RP 160-1. The driver looked at McCleod, making eye contact, but did not acknowledge he had done anything wrong. 3/6/13 RP 164-5. McCleod activated his emergency lights and pulled the vehicle over. 3/6/13 RP 161-2. The vehicle went further than usual for a traffic stop and pulled around making it difficult to see inside. 3/6/13 RP 164. McCleod got out and could see the driver looking at him with one hand on the wheel. 3/6/13 RP 165. McCleod told him to put his other hand on the wheel, and the turn the vehicle off, but he refused, instead fiddling with something on the seat. 3/6/13 RP 166-8. McCleod put his hand on his weapon and started to go back to his vehicle for back up when the driver drove off. 3/6/13 RP 167-8.

The truck crossed the curb, sidewalk and flower bed out into the street. 3/6/13 RP 168. McCleod pursued with lights and siren. 3/6/13 RP

169. The truck made a hard left into a parking lot before flying up a ten foot embankment onto the railroad tracks. 3/6/13 RP 170. The truck went south straddling the tracks, bouncing up and down, giving off sparks and pulling out the exhaust. 3/6/13 RP 170. McCleod paralleled the tracks. 3/6/13 RP 171. The truck pulled into a parking lot and was abandoned. 3/6/13 RP 171.

A canine was called in with a handler to track the driver. 3/6/13 RP 172. The dog tracked blocks away. 3/6/13 RP 174-5. There McCleod could see hands and feet sticking out of a bush and gave commands for the person to come out. 3/6/13 RP 174-6, 3/7/13 RP 4. The man came out and questioned the officers whether they had caught the driver yet. 3/7/13 RP 5. McCleod recognized the man as the driver and sole occupant. 3/7/13 RP 5-6. The driver was Terrance Irby. 3/7/13 RP 6.

After Irby was in custody, McCleod backtracked to the truck. 3/7/13 RP 8. McCleod looked in the vehicle and saw a rifle in the bed of the truck and a shotgun and a handgun on the seat. 3/7/13 RP 8. McCleod identified the three weapons located in the vehicle. 3/7/13 RP 8-11.

Officer Wallace Forsloff assisted in the pursuit. 3/7/13 RP 12-14. Forsloff found the truck in a parking lot and stayed with the vehicle while the dog track occurred noting a lot of damage to the underside of the vehicle. 3/7/13 RP 16-7. Forsloff also saw a handgun sitting on top of the seat just to the right of the driver seat. 3/7/13 RP 17. After Irby was arrested, Forsloff

secured the handgun to make it safe. 3/7/13 RP 19. The gun was loaded with six bullets. 3/7/13 RP 19. Forsloff also identified the shotgun which he secured from the vehicle which had been loaded with five rounds. 3/7/13 RP 20-1. The rifle secured from the back of the truck was not loaded. 3/7/13 RP 21. Forsloff identified the serial numbers on the weapons. 3/7/13 RP 22.

vi. March 11, 2005, Discovery of James Rock's body

Deputy Craig Mullen of the Skagit County Sheriff's Office was dispatched to Mr. Rock's residence on March 11, 2005, on Shangri-La Lane in Skagit County for a welfare check. 3/6/13 RP 125-6, 129. Rock had not responded to an arranged pick up by a medical transportation company. 3/6/13 RP 129-30. Mullen walked around the house knocking on doors and looking in windows but could not locate anyone. 3/6/13 RP 132, 134. A door was ajar to the large metal shop or garage which is apart from the house by a breezeway. 3/6/13 RP 134-5. Mullen opened the door and tried to turn on the light but it did not work. 3/6/13 RP 135-6. Mullen used his flashlight to look around and saw a body in the middle of the shop covered by a large water bed mattress. 3/6/13 RP 136-7. There was a lot of blood around the face and a big pool of blood underneath. 3/6/13 RP 137. Mullen touched the hand to check for a pulse but the body was cold and very stiff. 3/6/13 RP 137. Mullen backed out and arranged for assistance. 3/6/13 RP 141-2.

When detectives and the coroner arrived, they moved the items on

top of the body to look for weapons and to get a better view. 3/6/13 RP 154-5. They did not locate any weapons. 3/6/13 RP 155.

vii. March 11 and 12, 2005, Death Scene Examination.

Ken Tiscornia was a detective who assisted at the crime scene. 3/7/13 RP 66, 69. Tiscornia used a flashlight and described bloodstains on the floor, as well as on the walls. 3/7/13 RP 72-3, 86, 112, 114-5. Rock's body was located in a semi-fetal position draped a over folding chair with a large pool of blood surrounding his head. 3/7/13 RP 75. Tiscornia assisted in removing the mattress off the body and removing the body. 3/7/13 RP 81, 86. At the autopsy the next day, Tiscornia collected a cell phone, pills and keys from James' pockets, but did not find a wallet. 3/7/13 RP 109. Tiscornia collected a backpack that had been seized from Irby's truck, which Rebecca Bell identified as belonging to Rock. 3/7/13 RP 132-3, 3/8/14 RP 154-5. Tiscornia located a folding knife, three .22 caliber magazines, and a first aid survival kit in the backpack. 3/7/13 RP 133.

viii. March 11 and 12, 2015, Body Examination.

Pathologist Dr. Daniel Selove was called to the crime scene. 3/8/13 PM RP 8, 13. Selove observed Rock lying on an aluminum folding chair with blood about his head obscuring his wounds. 3/8/13 PM RP 15. After feeling Rock's scalp, Selove determined there were several impacts to the head and a cutting wound to the head. 3/8/13 PM RP 16. Rock had been

beaten. 3/8/13 PM RP 16. Selove also observed droplets of blood around the garage shed showing blood had been deposited as a result of impacts with blood. 3/8/13 PM RP 16. When moving the body, Selove noted rigor mortis was still present but was noted as departing. 3/8/13 PM RP 17.

Selove performed the autopsy the next morning. 3/8/13 PM RP 19. On Rock's hands, Selove noted only two new small scrapes to the back of Rock's fingers. 3/8/13 PM RP 21. There was a stabbing injury to the back, upper right of Rock's neck resulting in a penetrating wound about three inches in depth. 3/8/13 PM RP 24. The wound was caused by a narrow object less than a half-inch in diameter and at least three inches in length, consistent with a long curved chisel. 3/8/13 PM RP 24. There was a slicing wound to the front of the neck about four inches long on the right front neck about an inch deep which cut into the jugular vein caused by a sharp, narrow object such as a knife, razor of piece of glass. 3/8/13 PM RP 25, 30. Rock's head had nine significant injuries caused by some hard, flat or rounded object. 3/8/13 PM RP 23, 27-29. The blows fractured an eye socket causing a ruptured eyeball. 3/8/13 PM RP 27-8. The impacts caused fractures in the strongest parts of the back of the skull requiring a severe amount of force with a heavy hard object such as a hammer. 3/8/13 PM RP 27-8, 33-4.

Selove determined Rock died as a result of the combined effects of the sharp injury to the neck, the stabbing would to the neck and the blunt

force injury to the head. 3/8/13 PM RP 35. Selove determined the time of death was consistent with the injuries being inflicted on March 8, 2005, three days prior to Selove's first observation of the body. 3/8/13 PM RP 36.

ix. March 12, 2005, Residence, Property Examination.

Detective Jennifer Sheahan-Lee found out Irby had been arrested in Marysville on March 8, 2005. 3/7/13 RP 139-40. Upstairs in Rock's residence were two bedrooms. 3/7/13 RP 150. The spare bedroom was used as storage with shelving holding survival type equipment. 3/7/13 RP 151. There, she located a shipping box for a folding stock for a .22 caliber firearm. 3/7/13 RP 153. A folding stock matched that located on the .22 caliber rifle found in the truck. 3/7/13 RP 153. A later check with Alcohol, Tobacco and Firearms showed that the .22 had been purchased at Wal-Mart in 2004, that the shotgun had been purchased before 1968, and the handgun had been purchased by Rock in California in 1986. 3/8/13 AM RP 134-5.

The master bedroom door had a hasp that could be used to padlock the door shut. 3/7/13 RP 154. The door was missing the doorknob. 3/7/13 RP 157. There were pieces of material from the door on the floor. 3/7/13 RP 158-9. There were shotgun shells on a bookshelf in the master bedroom as well as a storage bag for a long shotgun or rifle. 3/7/13 RP 156, 167. A speed loader for a .357 caliber firearm as well as .22 caliber ammunition was found in the spare bedroom. 3/7/13 RP 161. Sheahan-Lee located a wood

stock that would have been original to the rifle. 3/8/13 AM RP 125.

Rock's computer was last used on March 7, 2005, at 8:44 p.m. 3/8/13 AM RP 121-2. Rock's cell phone located at the autopsy was last used March 8th at 12:18 in the afternoon. 3/8/13 PM RP 117-21.

Sheahan-Lee saw a red plastic gas can, a bag of peanuts, a cooler, a shovel and a pair of boots in the back of Irby's truck. 3/8/13 AM RP 128, 130. The boots were collected and put into evidence. 3/8/13 AM RP 131-2. Sheahan-Lee obtained a DNA sample from Irby to compare with clothing obtained from Irby and the boots from the truck. 3/8/13 AM RP 138-141.

At Rock's residence, Officer Terry Esskew photographed inside including the wood splinters on the floor outside Rock's bedroom. 3/8/13 PM RP 174-5, 181. Esskew described that the door jamb had been broken and the handle removed. 3/8/13 PM RP 181-2. It appeared that someone had pried or kicked in the doorway and removed the handles. 3/8/13 PM RP 182. No doorknob or handles were located. 3/8/13 PM RP 182.

Detective Kay Walker did a sweep of the property and adjoining areas looking for any evidence of the crime. 3/8/13 AM RP 163, 169-70. She also arranged for search and rescue to do a more detailed search. 3/8/13 AM RP 186. No weapons were located. 3/8/13 AM RP 171-2, 186. Rock's mail was collected from the mailbox and newspaper from the box. 3/8/13 AM RP 187. The newspaper was dated March 9th. 3/8/13 AM RP 189.

x. Expert Examination of DNA and Blood Evidence.

Forensic Scientist Brian Smelser assisted in examining Irby's truck. 3/8/13 PM RP 57, 66. Smelser located a pair of boots in the bed of the truck. 3/8/13 PM RP 66. The boots were in fair condition and appeared to have small stains which were possibly blood that could be seen with the naked eye. 3/8/13 PM RP 66-7. The boots were collected to be examined with more scrutiny at the laboratory. 3/8/13 PM RP 67. There were twenty-four stains on the right boot, and the five spots Smelser tested showed positive for the presumptive test for blood. 3/8/13 PM RP 75. There were also small spots on the left boot and two of them also tested presumptive for blood. 3/8/13 PM RP 84. Photographs of the crime scene showed similar shaped droplets of blood. 3/8/13 PM RP 87-8. There were stains on the right side of both the right and left boot with more stains on the right boot, showing that boot was closer to the source of the blood stains. 3/8/13 PM RP 96.

Greg Frank, a forensic scientist from the Washington State Patrol Crime Laboratory, examined the boots from Irby's truck. 3/8/13 AM RP 142, 154, 3/8/13 PM RP 82. Frank was able to obtain a DNA profile from a stain on the right boot. 3/8/13 AM RP 157. A number of other small stains were also presumptive for blood. 3/8/13 AM RP 158. Comparing the DNA profile from the stain on the right boot, Frank determined the DNA profile matched that of James Rock with a probability of one in three quadrillion.

3/8/13 AM RP 161. A test of another spot on the boot came up with the same DNA profile which also matched Mr. Rock. 3/8/13 AM RP 162.

IV. ARGUMENT

1. Where there were no cause challenges to the jurors, Irby cannot establish the trial court improperly permitted jurors to remain on the case.

Irby's contention the trial court improperly permitted two biased jurors to remain on the jury is flawed as Irby was not present to make any challenges for cause and the claimed bias was inadequate to force removal.

i. The statements of the two jurors.

The first juror he contends should have been removed by the trial court without challenge was juror number 27. Juror 27 was a certified nursing assistant at the hospital. 3/6/13 AM RP 48. The juror knew two of the sheriff's deputies involved in the case. 3/5/13 AM RP 37-8. "I know a couple of them not super well, but I do know them." 3/6/13 AM RP 68.

When asked by the prosecutor if there were concerns because they could only be hearing from one side of the case, juror 27 was the first to respond. 3/5/13 AP RP 49. "Just kind of makes me think that they are guilty or maybe crazy if they don't want to have a defense for themselves." 3/6/13 AM RP 49. When asked questions about the situation, the juror indicated that it would be hard being a juror since the defendant wasn't represented at all. 3/6/13 RP 69. It was a combination of the fact she was pro police and

that Irby was not represented that caused her "some concern." 3/6/13 RP 69.

Juror 38, the other juror Irby complains was excessively biased, was a former Child Protective Service employee. 3/6/13 AM RP 40, 43. Juror 38 indicated that she was a little concerned that her prior work for the government made her "more inclined toward the prosecution I guess." 3/6/13 AM RP 43. When the court asked about the situation further, she said: "I would like to say he's guilty." 3/6/13 AM RP 43. The trial court did not ask any follow-up questions. Later in questioning, juror 38 indicated that when evaluating two expert witnesses, she would evaluate the relevancy of expert opinions. 3/6/13 AM RP 80.

At the end of the questioning of all the jurors, the prosecutor asked if all the jurors could hold the State to its burden of proof and make a finding of guilty or not guilty based upon the evidence they heard. 3/6/13 AM RP 94. Neither of the two challenged jurors responded. 3/6/13 AM RP 84.

ii. Irby did not raise the issue before the trial court.

Here there was no challenge for cause to the two jurors who were seated since the defendant was not present and chose not to put on a case. He wanted the State to seat a jury without any input.

> MR. IRBY: I also explained to Mr. Pedersen that I have no problem with that, Your Honor; that he could proceed. He can impanel whatever jury he wants. If they are all part of the conspiracy people of this and that, I don't care. If they have had family members murdered, I can't care. Put whoever you

> put on because it's immaterial. The end of this case is a conviction anyway okay.

3/5/13 RP 146-7.

Irby failed to make a challenge below and thus fails to preserve this issue for review.

> Generally, this court will not review any claim of error that was not raised in the trial court. RAP 2.5(a); see also *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal ... cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (quoting *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944))). "This rule affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984).

State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). Irby seeks the benefit of a protection that he did not seek in the trial court. For this reason alone, review of this issue should be denied.

iii. In the absence of a challenge for cause the claimed bias did not merit the jurors being excused.

On appeal, Irby essentially assumes that he would have exercised challenges against the jurors by arguing the trial court was required by statute to excuse the jurors who demonstrated bias. RCW 2.36.110 (defining a juror who is biased as unfit). His argument is based upon statute and case law deciding challenges for cause.

CrR 6.4 is the court rule providing for challenges to jurors. Here there was no challenge. CrR 6.4 refers to RCW 4.44.150 through RCW 4.44.200 in dealing with challenges for cause.

> (c) Challenges for Cause.
> (1) If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause.
> (2) RCW 4.44.150 through 4.44.200 shall govern challenges for cause.

RCW 4.44.170 defines the three types of cause challenges and Irby contends the present situation falls within the second type.

> Particular causes of challenge are of three kinds:
> ...
> (2) For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

RCW 4.44.170. RCW 4.44.190 clarifies the court's role in those challenges for actual bias.

> A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). **But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.**

RCW 4.44.190. Here, despite the earlier comments, neither of the challenged jurors responded to the prosecutor when questioned about whether they would hold the State to the burden of proof and make a decision regarding guilt based upon the evidence they heard. 3/6/13 AM RP 94. In addition, juror 27 had only indicated a concern based upon her prior knowledge of a couple of officers and the fact the defendant was not participating. 3/6/13 AM RP 69. Likewise, juror 38 had inclination toward the prosecution and would have liked to find the defendant guilty. 3/6/13 AM RP 43. She did not state that she would find him guilty even if enough evidence did not exist. And the juror's tone and demeanor do not come through on the transcript, so this Court cannot evaluate the true tenor of the juror's comments in the absence of a challenge developed on the record.

iv. In the absence of a challenge for cause, case law does not support that the judge was required to excuse the jurors.

The cases cited by Irby were challenges for cause by the other party and do not support that the trial court was required to excuse the jurors.

In *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), the defendant challenged a juror for cause who indicated the defendant did not necessarily have the presumption of innocence. The juror had difficulty in disbelieving police officers. The trial court denied the defendant's cause challenge without comment. *State v. Gonzales*, 111 Wn. App. at 280, 45

P.3d 205 (2002). The defendant used all of his peremptory challenges to remove other jurors and the challenged juror was seated. In evaluating the case, the Court of Appeals recognized that a predisposition towards a police officer did not necessarily need to result in excusing a juror.

> **A prospective juror's expression of preference in favor of police testimony does not, standing alone, conclusively demonstrate bias.** The State points to *State v. Gosser*. There, a retired state patrolman in the venire stated that if an issue could be resolved only by assessing the credibility of a police officer versus that of the defendant, he would believe the officer's testimony over the defendant's. But he also indicated he would presume the defendant innocent, and would not automatically believe everything a witness said just because the witness was an officer. In affirming the conviction, the *Gosser* court noted that although the prospective juror's answers in voir dire suggested a preference in favor of police testimony, the juror also made clear that he was able to set these notions aside because he understood the presumption of innocence and had an open mind on the issue of guilt.

State v. Gonzales, 111 Wn. App. at 281-82, 45 P.3d 205 (2002) (emphasis added). The Court in *Gonzales* decided the juror said she would have a "very difficult" time disbelieving an officer and was not sure she could afford the defendant the presumption of innocence. Because Gonzales made a cause challenge, had exercised all his peremptory challenges and the juror remained on the jury, the defendant was entitled to reversal.

In contrast here, the juror's inclination toward law enforcement did not merit their removal. And juror 38's further comment did not indicate

that she would not afford the defendant the presumption of innocence.

Furthermore, in *Gonzales*, the Court of Appeals evaluated the challenge because the defendant had exhausted his peremptory challenges referring to a prior Supreme Court decision outlining a defendant's options.

> Our Supreme Court in *Fire* recently described a defendant's options as follows:
>
> > [I]f a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

State v. Gonzales, 111 Wn. App. 276, 282, 45 P.3d 205 (2002).

Here, Irby was not present and made no effort to seek to evaluate the bias of particular jurors. He was aware he was doing so. 3/5/13 RP 146-7. Irby's lack of participation deprived the trial court of Irby's opinion about whether there was a basis for a cause challenge for any of the jurors or placed the trial court in the position of evaluating juror demeanor.

> The trial judge is in the best position to evaluate whether a particular potential juror is able to be fair and impartial based on observation of mannerisms, demeanor, and the like. We therefore review denial of a for-cause challenge for manifest abuse of discretion.

State v. Gonzales, 111 Wn. App. 276, 278, 45 P.3d 205 (2002).

Finally, contrary to Irby's claims *State v. Fire*, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001) does not provide that the absence of a challenge can

preserve an issue for review. In *Fire,* the defendant used a peremptory to remove a juror whom had been challenged for cause. Despite the defendant's exhaustion of his peremptory challenges, an improper prior determination of cause did warrant reversal since the complained of juror did not sit on the jury. *State v. Fire*, 145 Wn.2d at 168, 34 P.3d 1218 (2001). *Fire* was not a situation where the absence of a challenge preserved review.

2. Irby does not seek reversal of the jury verdict finding he killed James Rock with premeditation.[3]

On appeal, Irby challenges the sufficiency of the evidence to sustain aggravated murder in the first degree contending there was insufficient evidence of the aggravating circumstances. Brief of Appellant at page 30. The relief requested in the conclusion indicates that Irby is seeking the relief of reversal of the "aggravated portion of the conviction and sentence for Murder in the First Degree." Brief of Appellant at page 48.

From these remedies sought, Irby does not contest the sufficiency of the evidence of premeditated murder in the first degree. And, in fact there was sufficient evidence of an aggravated murder. Rock was murdered by being repeatedly beaten, having his throat slashed and neck stabbed. 3/8/13 PM RP 35. The nine blows to Rock's head were caused by a severe amount

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[3] The State arguments do not coincide to the defense assertions because the State believes the Court should evaluate the case from the most serious offense alleged and thereafter evaluate the aggravating factors and other crimes.

of force with a hard object. 3/8/13 PM RP 34. These acts, each individually having a high chance of causing death, over a period of time with three separate instruments demonstrate a premeditated intent where, after deliberation, Irby formed the intent to take a human life. CP 229.

> Premeditation may be proved by circumstantial evidence if substantial evidence supports the jury's finding and inferences from the facts are reasonable. Finch, 137 Wn.2d at 831. While the mere opportunity to deliberate is not sufficient to support a finding of premeditation, a wide range of facts can support the inference of premeditation. Id.
>
> **Motive, procurement of a weapon, stealth, and the manner of killing are all important facts that can support the finding of premeditation**. *Pirtle*, 127 Wn.2d at 644. Circumstantial evidence that the defendant brought a weapon to the scene and fired multiple shots supports the reasonable inference of premeditation. See *Hoffman*, 116 Wn.2d at 83. The defendant's statements may be considered when determining whether the defendant acted with premeditation. Id. at 83-84.

State v. Barajas, 143 Wn. App. 24, 36, 177 P.3d 106 (2007) (emphasis added) (finding the illegal alien fleeing from law enforcement and firing three shots at officers supported jury's finding of premeditation), *see also, State v. Allen*, 159 Wn.2d 1, 8, 147 P.3d 581 (2006) (finding physical struggle over a period of time and injuries inflicted by various weapons, different wounds and some injuries from behind support premeditation).

This evidence of premeditated murder by Irby is relevant in evaluating sufficiency of the evidence of the aggravating circumstances and the other crimes alleged.

3. The burglary in the first degree by murder in the garage could not be in the course of flight or furtherance of the murder therein.

The State concedes that the portion of the closing argument in which the burglary in the first degree of the garage could be used to support the aggravating circumstance that the murder was in the course of, in furtherance of or in immediate flight from burglary of the same building was inappropriate. 3/12/13 RP 32-3, 36. By logic the murder cannot be in the course of, in furtherance of or in flight from the burglary when the murder is in fact is the crime therein.

Thus, for a different reason than Irby contends, the burglary in the first degree could not support the aggravating circumstance to premeditated murder or the charge of felony murder in the first degree since both have the requirement that the murder was committed in the course of, in the furtherance of or in the flight from burglary in the first degree.

As a result, that aggravating circumstance must be vacated. The charge of felony murder was already vacated and dismissed pursuant to the conviction of the greater offense of premeditated murder. CP 339.

4. Vacating of the Burglary in the First Degree aggravating circumstance does not impact the other aggravating circumstances or the sentence.

In addition to the aggravating circumstance of burglary in the first degree, the jury unanimously found the aggravating circumstances of:

intended to conceal the commission of a crime, intended to protect or conceal the identity of a person committing a crime, and was in the course of, in furtherance of or in immediate flight from residential burglary. CP 260-1. Only one aggravating factor is required to establish the aggravated first degree murder. RCW 10.95.020. In fact, the prosecutor specifically directed that the residential burglary aggravating circumstance pertained to the burglary of Rock's residence. 3/12/13 RP 36 (lines 9-10), CP 261.

5. There was sufficient evidence of the other aggravating circumstances.

The jury unanimously found each of the aggravating circumstances other than burglary in the second degree. CP 260-1.

In challenges to the sufficiency of the evidence of an aggravating circumstance, "we review the evidence in the light most favorable to the State" to determine whether any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt. *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007) *citing*, *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004), *State v. Pirtle*, 127 Wn.2d 628, 682, 904 P.2d 245 (1995). When evidence sufficiency is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Aggravating circumstances may be properly applied if they were a consequence of the felony.

> In sum, this court in *Golladay* insisted that for a death to have occurred in the course of an enumerated felony there must be a causal connection between the two such that the death must have been a probable consequence of the felony, not the other way around. *Golladay*, 78 Wn.2d at 131.

State v. Hacheney, 160 Wn.2d 503, 519, 158 P.3d 1152 (2007).

To establish that a murder occurred in the course of or in immediate flight from a felony, there must be an "intimate connection" between the killing and the felony. *State v. Brown*, 132 Wn.2d 529, 607-08, 940 P.2d 546 (1997) (*quoting State v. Golladay*, 78 Wn.2d 121, 132, 470 P.2d 191 (1970). The murder must be in "close proximity in terms of time and distance." State v. Leech, 114 Wn.2d 700, 706, 790 P.2d 160 (1990).

The Courts have applied a res gestae analysis to felony murder and hence whether there is a causal connection between the offenses. These are the same questions posed to impose aggravating circumstances.

> A homicide is deemed committed during the perpetration of a felony, for the purpose of felony murder, if the homicide is within the "res gestae" of the felony, i.e., if there was a close proximity in terms of time and distance between the felony and the homicide.

State v. Leech, 114 Wn.2d 700, 706, 790 P.2d 160 (1990) (fire fighter's death while the arson was still engaged, was sufficiently close in time and place to the arson to be part of the res gestae of that felony) *citing State v. Dudrey*, 30

Wn. App. 447, 450, 635 P.2d 750 (1981), *rev. denied*, 96 Wn.2d 1026 (1982), *State v. Diebold*, 152 Wn. 68, 72, 277 P. 394 (1929), *see also State v. White*, 60 Wn.2d 551, 558, 374 P.2d 942 (1962) (beating the deceased in a laundry room and taking her to a closet or storage area, following which her ring was taken and the defendant had intercourse with her found the rape and robbery to be part of the res gestae). The evidence here supports the res gestae in that Irby was stealing the guns and committing the burglary of Rock as part of the same transaction.

Here there was evidence of Irby's difficult financial situation. He had to break into the tow yard in Leavenworth to retrieve his truck. 3/8/13 PM RP 44. Rock last used his cell phone two days later on March 8th at 12:18 in the afternoon. 3/8/13 AM RP 117-21. By 4:20, Irby was in his truck at the Hoyle residence. 3/8/13 PM RP 106-7. He stayed there until about 9:20 p.m. 3/8/13 PM RP 109. At 11:00 p.m. Irby started his flight from police in Marysville and attempted to point the finger at another suspect. 3/6/13 RP 160-1.

In the truck were Rock's three firearms and shoes with multiple blood spatters matching Rock's DNA. 3/7/12 RP 8-11, 22 41-3, 3/8/13 AM RP 158, 161-2, 3/8/13 PM RP 66-7. The bedroom where Rock kept his guns was broken into and all his guns were missing. 3/7/13 RP 38, 40, 51, 3/8/13 PM RP 154, 157, 181-2. The doorknob to Rock's bedroom and the three

weapons used to kill Rock were nowhere to be found. 3/7/13 RP 157, 3/7/13 AM RP 171-2, 186, 3/8/13 PM RP 182. And, Irby covered Rock with a waterbed mattress to conceal the body in the garage. 3/6/13 RP 136-7.

Furthermore, Irby committed the premeditated murder of Rock by use of three weapons over an extended period of time. See argument section 2 above. Irby's premeditated murder supports Irby's motive to take Rock's firearms. By killing Rock, he was concealing the commission of the crime, his identity, and the killing was in course of, in furtherance of or in the immediate flight from residential burglary.

Here the jury unanimously found the aggravating circumstances that the murder was committed to conceal the commission of a crime, protect or conceal the identity of a person committing a crime and committed in course of, in furtherance of or in immediate flight from residential burglary. CP 260-1. The rational inferences from the evidence support the proof of the aggravating circumstances.

The two cases cited by Irby provide examples of situations where the crimes occurred after the death, as opposed to part of the same transaction.

In *State v. Golladay*, the defendant allegedly killed the victim, a female hitchhiker, and drove away from the scene. *State v. Golladay*, 78 Wn.2d 121, 123-24, 470 P.2d 191 (1970). A short time later, the defendant ran his car into an embankment. *Id.* at 124. After the traffic accident, the

defendant threw the victim's purse and shoes into a field to conceal that the victim had been in his car. *Id.* at 125. The State based the first degree felony murder upon larceny of the purse and shoes as the predicate crime. *Id.* at 128-29. But the Court concluded there was insufficient causal connection between the murder and the larceny, since the larceny occurred after the killing. *State v. Golladay*, 78 Wn.2d 121, 130, 470 P.2d 191 (1970).

In *State v. Hacheney,* the defendant was alleged to have suffocated his wife and then set fire to the house. *State v. Hacheney*, 160 Wn.2d 503, 158 P.3d 1152 (2007). The jury found him guilty of first degree murder and with a special verdict for aggravated murder, finding the defendant had committed the murder "in the course of" first degree arson. *State v. Hacheney*, 160 Wn.2d at 516, 158 P.3d 1152, 1159 (2007). However, the lack of soot in the victim's lungs showed she was dead prior to the arson. *Id.* at 511. The State premised that the arson was committed to conceal the murder. *Id.* at 511-2. In rejecting that position the Court reaffirmed that the logic dictates that the crime must have begun before the killing. *State v. Hacheney*, 160 Wn.2d at 518, 158 P.3d 1152 (2007).

Both *Golladay* and *Hacheney* present situations where the felony was an afterthought to the murder. *Hacheney* also distinguished prior cases where the murder appeared to have part of the same transaction as the murder.

> It is true that in several pre-*Golladay* cases, this court reasoned that where there was sufficient connection between the murder and the felony, the fact finder did not have to pinpoint the exact time of death, so long as the killing was part of the res gestae of the felony. See *State v. Anderson*, 10 Wn. 2d 167, 178, 116 P.2d 346 (1941) (quoting *State v. Whitfield*, 129 Wn. 134, 138-39, 224 P. 559 (1924)). In *Anderson*, the defendant had been trying to steal the victim's eggs when the victim discovered the defendant, prompting the defendant to shoot the victim. *Id.* at 170. In *Whitfield*, it was impossible to tell whether the child victim died from blows inflicted by the defendant before or after he committed rape. *Anderson*, 10 Wn.2d at 177-78 (discussing *Whitfield*, 129 Wn. 134); see also *State v. White*, 60 Wn.2d 551, 558-59, 563, 374 P.2d 942 (1962) (defendant inflicted severe head injuries upon a woman, walked away for a moment, and then returned to rape her). Similarly, in *State v. Craig*, 82 Wn.2d 777, 514 P.2d 151 (1973), a post-*Golladay* case, the defendants killed a cab driver and then took the victim's wallet and car. But they claimed that they had killed in a drug induced rage and did not develop an intent to rob until after the killing was complete. *Id.* at 779. This court recognized that the killing was done in connection with a robbery as part of "'the same transaction.'" Id. at 782-83 (quoting *State v. Coe*, 34 Wn.2d 336, 341, 208 P.2d 863 (1949)). It was not incumbent on the State to prove that the defendant intended robbery when he committed the murder. Id. at 782; see also *State v. Temple*, 5 Wn. App. 1, 6-7, 485 P.2d 93 (1971) (death immediately preceded theft of victim's shoes, watch, and wallet). While some language in these cases suggests a broader rule than was articulated in *Golladay*, they are all distinguishable in that the deaths clearly occurred either during, in the furtherance of, or in flight from the commission of the underlying felonies.

State v. Hacheney, 160 Wn.2d 503, 515-16, 158 P.3d 1152 (2007).

Thus, the Court in *Hacheney* recognized that the Court *Golladay* did not disturb the rule that where the felony is part of the same transaction, that

it is an appropriate basis for the aggravating circumstance.

As opposed to the situation of *Hacheney* or *Golladay,* where the murders clearly preceded the crimes, no evidence supports that Irby's murder of Rock preceded the theft of the firearms or that the offenses were not part of the same res gestae. The most likely scenario is that the theft preceded the murder. But at the very least, the theft and murder are certainly part of the same transaction, having occurred in the same period, at the same relative location and that the theft provided the motive for the murder.

6. Where Rock's bedroom had been burglarized, Irby was armed with those weapons and Irby committed premeditated murder of Rock that day in an adjacent building, sufficient evidence supports guilt of Burglary in the First Degree.

i. Elements of the crime of Burglary in the First Degree.

> (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020. RCW 9A.52.010(5) defines entering or remaining unlawfully.

> A person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

The jury was instructed with both the general definition of burglary in the first degree as well as an elements instruction for that offense.

CP 240, 252. The burglary was predicted both on Irby being armed with a deadly weapon, as well as Irby assaulting someone. CP 240, 252. The jury was instructed it had to find that in entering, while in the building or in the immediate flight from the building, the defendant was so armed or assaulted someone. CP 252 (element 3).

> Depending upon the circumstances, a weapon that is obtained during the course of a burglary may be easily accessible and readily available for use regardless of whether the weapon belongs to the defendant or is a weapon stolen during a burglary. During a burglary "'[a] gun can be used ... for the purpose of frightening, intimidating or controlling people.'" *State v. Speece*, 56 Wn. App. 412, 417, 783 P.2d 1108 (1989) (quoting *State v. Faille*, 53 Wn. App. 111, 115, 766 P.2d 478 (1988)).

State v. Brown, 162 Wn.2d 422, 442, 173 P.3d 245 (2007).

> It is well established that proof of possession of recently stolen property, if accompanied by "'indicatory evidence on collateral matters,'" will support a burglary conviction. *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1982) (quoting *State v. Garske*, 74 Wn.2d 901, 903, 447 P.2d 167 (1968)).
>
> > When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction.
>
> *Mace*, at 843 (quoting *State v. Portee*, 25 Wn.2d 246, 253, 170 P.2d 326 (1946)). Flight, or presence of the accused near the scene of the crime, is sufficient corroborative evidence to support a burglary conviction. Mace, at 843; Portee, at 254.

In re Pers. Restraint of Ness, 70 Wn. App. 817, 824-25, 855 P.2d 1191, 1196 (1993), *rev. denied,* 123 Wn.2d 1009, 869 P.2d 1085 (1994).

In the context of Irby's challenge to the burglary in the first degree as an aggravating factor and felony murder, his arguments pertaining to unanimity have merit although for a different reason, as the State conceded above, in argument section 3. However a different analysis applies to whether Irby's murder of Rock in the garage and Irby's burglary of the residence supports the charges of burglary in the first degree.

"A defendant is not entitled to unanimity on an alternative charge where sufficient evidence supports each charged alternative." *State v. Wright*, 165 Wn.2d 783, 802, 203 P.3d 1027 (2009) *citing State v. Kitchen,* 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Here substantial evidence supports a burglary of each location on the same premises.

ii. Evidence establishing Burglary in the First Degree.

The prosecutor's closing was based upon the argument that Irby killed Rock to get Rock's property.

> Terrance Irby killed James Rock in Hamilton, Washington on Shangri-la Drive where he lives in James Rock's garage. The death was from multiple savage, heavy, blunt impacts to the back of the head, stabbing in the back of the neck, and slicing of Mr. Rock's neck. The purpose? Money, value, property that was taken from Rock's house.

3/12/13 RP 13. The evidence supported that Rock was murdered in his garage and in the course of that Irby was armed with a deadly weapon and that Rock took Rock's firearms from Rock's bedroom.

Rock had the shotgun since he was sixteen years old. 3/7/13 RP The handgun he purchased in California in 1986 and the rifle he had just purchased. 3/8/13 AM RP 134-5. All three, by nature, were weapons that he was unlikely to have given away or sold to Irby. More significantly there was no evidence to support that either a gift or sale occurred. Rock's daughter testified he quit selling guns about a year before. 3/7/13 RP 43-4. Instead, there was a damaged door, a missing door knob and a broken lock on the bedroom door where Rock kept his firearms. 3/7/13 RP 154. 156, 167. The case to a shotgun or long gun and ammunition were still there. 3/7/13 RP 156, 167.

Irby fled from law enforcement, driving up onto railroad tracks to attempt to get away. 3/6/13 RP 160-1, 170. And when that failed, he fled from the truck and hid in the bushes. 3/6/13 RP 174-6. Rock's firearms were located in Irby's truck. 3/7/13 RP 22, 42-3. Both the shotgun and handgun were loaded. 3/7/13 RP 19-21. The handgun was found on the seat where the officer had seen Irby fiddling with his hand. 3/6/13 RP 166-8.

Rock's death timed by the last use of his cell phone, computer and recovery of his mail, coincided with the time that Irby was seen at a neighbor's residence. 3/8/13 AM RP 117-21, 187-9, 3/8/13 RP 106-7 121-2. And blood on Irby's shoes found in the back of Irby's truck match the DNA of Rock. 3/8/13 AM RP 161-2, 3/8/13 PM RP 66-7.

This is not just significant evidence supporting the fact that Irby broke into Rock's house and stole his firearms, it is overwhelming evidence. The murder of Rock in the adjacent shop was part of the same crime.

Irby argues insufficiency of the alternative means of burglary for the burglary of the garage or shop where Rock was located. In doing so, Irby does not contend there was insufficient evidence to support the burglary in the first degree for the residence from which the firearms were taken and Irby armed himself.

But to argue in sufficiency of the alternative means of burglary of the garage, Irby relies upon an unsupported inference that Irby had permission to be in the house and garage. Brief of Appellant at pages 26-7. Irby cites to the day that Candy Rock met Irby around Christmas of 2004, when Irby arrived at the house, and "came in like he owned the place, sat down on the couch and had a beer." 3/7/13 RP 48-9. That incident occurred five months before Rock's murder. The other instance when Rock and Irby were seen together was in Leavenworth. 3/8/13 PM RP 162-3. The other references were when Irby's truck was seen at Rock's house and two of those were on the day Rock was murdered. 3/8/13 PM RP 159, 160, 169-70.

All this evidence establishes was that Irby and Rock were acquaintances. It does not establish that Irby had permission to be in the house, much less the garage, on March 8, 2005, when Rock was murdered.

Other situations can provide inferences that a person has a license to be on property. Washington law does not provide that entry or remaining in a business open to the public is rendered unlawful by the defendant's intent to commit a crime. *State v. Miller*, 90 Wn. App. 720, 725, 954 P.2d 925 (1998). In *State v. Cantu*, 156 Wn.2d 819, 824, 132 P.3d 725 (2006) the Court held a juvenile is presumed to have license to enter his parent's home. *Citing*, *State v. Steinbach*, 101 Wn.2d 460, 462, 679 P.2d 369 (1984).

Here there was no evidence that Irby had a license, invitation or was otherwise privileged to enter or remain on the property. And in evaluating evidentiary sufficiency all reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant including the premeditated murder which the jury found. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

The cases cited by Irby do not support his contention that Irby somehow was presumed to have permission to enter Rock's residence or garage. *State v. Collins*, 110 Wn.2d 253, 751 P.2d 837 (1988) was a case in which an elderly woman had given permission to a man to come into the house to use a phone. The defendant grabbed the victim and her elderly friend into another room and raped the victim. In reversing the Court of Appeals and reinstating the conviction the Supreme Court determined that the scope of the invitation was exceeded. *State v. Collins*, 110 Wn.2d at

260-1, 751 P.2d 837 (1988).

In *State v. Davis*, 90 Wn. App. 776, 954 P.2d 325 (1998), the victim initially gave permission to enter an apartment, but revoked that permission telling the defendant to leave when the defendant began yelling and pulled a firearm. The Court found this was sufficient evidence that the defendant remained unlawfully in the apartment after his license was revoked.

State v. Miller, 90 Wn. App. 720, 954 P.2d 925 (1998) involved a twenty-four hour car wash which was open to the public and breaking into an outside coin box. *Miller* is entirely distinguishable as it involved an entry onto property open to the public, whereas Rock's residence and his garage were not open to the public.

Finally in *State v. Allen*, 127 Wn. App. 125, 135, 110 P.3d 849, 854 (2005) the defendant's initial entry into a building open to the public was lawful, and the defendant then exceeded the scope of any implied or express privilege by intruding into areas of the building not open to the public. *Allen* is inapplicable for the same reason as *Davis* as both involve businesses open to the public. In fact, the *Allen* court went on to address the issue on remand concluding the defendant could be convicted for burglary for unlawfully remaining on areas not open to the public.

Contrary to Irby's assertion, there was substantial evidence supporting both the burglary in the first degree of the residence and inside

the garge.

7. Irby's prior conviction for Statutory Rape in the First Degree is sufficiently factually comparable to the present strike offense of Rape of a Child in the Second Degree.

i. Facts pertaining to prior conviction

The trial court held Irby was subject to persistent offender sentencing in the present case based upon the present conviction for Felony Murder in the First Degree and Burglary in the First Degree coupled with prior convictions for Assault in the Second Degree from 1984 and Statutory Rape in the Second Degree in Washington from 1976. CP 332-4

On appeal, Irby claims that his prior conviction for Statutory Rape in the Second Degree is not comparable to a present most serious offense of Rape of a Child in the Second Degree.

On October 15, 1976, Irby was found guilty by a jury in Chelan County case number 5029 to the charge of Statutory Rape in the Second Degree. Sentencing Exhibit 8, attached here to as Appendix B. The information charged Irby as follows:

> That the said defendant in the County of Chelan, State of Washington, on or about the 31st day of May, 1976, did then and there willfully, unlawful and feloniously then and there being over sixteen years of age, did then and there engage in sexual intercourse with Keri Fogelstrom who was thirteen years of age. contrary to the form of the Statute RCW 9.79.210 in such cases made and provided, and against the peace and dignity of the State of Washington.

The Information was filed on July 8, 1976, in Chelan County Superior Court. Irby's date of birth is June 10, 1958. Exhibit 8 at Sentencing at page 2 (eee Appendix B). Since the case was filed in Superior Court on July 8, 1976, Irby was over age eighteen at the time of filing. At the time, had Irby's case been handled under "Juvenile Court Law," he would have been subject to being found delinquent and made a ward of the State. Former RCW 13.04.010 (1961).

At the time of Irby's offense, Statutory Rape in the Second Degree, was defined as follows:

> A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

Former RCW 9.79.210.

The present offense of Rape of a Child in the Second Degree is defined as follows:

> A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.076(1). See Appendix F for graphical explanation of age ranges of statutes.

ii. Law regarding comparability of prior convictions.

A defendant is subject to a persistent offender sentencing upon either two or three qualifying offenses. RCW 9.94A.030(33). Prior convictions must be evaluated for comparability

> However, "[w]hile it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. **Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial."** *Id.*

In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (emphasis added). Although the Court in *Lavery* was comparing a foreign conviction, the same comparability analysis would apply to a conviction under a prior Washington statute. RCW 9.94A.030(33)(b)(ii), *see State v. Stockwell*, 159 Wn.2d 394, 150 P.2d 82 (2007) (applying comparability analysis of prior first degree statutory rape conviction to rape of a child statute)[4], *but see State v. Ball,* 127 Wn. App. 956, 957 n. 1, 113 P.3d 520 (2005) *rev. denied,* 156 Wn.2d 1018, 132 P.3d 734 (2006) (holding that *Lavery* is inapplicable to defendant's prior convictions because they were Washington State, not foreign, convictions). The court has devised a

[4] The Court in *State v. Stockwell*, 159 Wn.2d 394, 150 P.2d 82 (2007) applied legal comparability to find that the offense of the non-marriage element of a prior offense of first degree statutory rape was an implied element of statutory element making it legally comparable to first degree rape of a child. *State v. Stockwell*, 159 Wn.2d at 399-400. The court also noted that the legislature had added a comparability clause after the courts had declined to infer one and thus determined that the legislature intended the comparability to apply in that case. Id.

two-part test for comparability. *Lavery*, 154 Wn.2d at 255.

First, the sentencing court compares the elements of the out-of-state offense with the elements of the apparently comparable Washington crime. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the results of the comparison show that the elements of the crimes are comparable as a matter of law, or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction counts toward the defendant's offender score for the present crime. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). If the legal comparability does not resolve the issue, the ability to do factual comparability still remains.

In *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005), the court limited factual comparability test.

> Any attempt to examine the underlying facts of a foreign conviction, **facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic.** Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable

In re Personal Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005) (emphasis added). The Court provided:

> Furthermore, Lavery neither admitted nor stipulated to facts which established specific intent in the federal prosecution, and specific intent was not proved beyond a reasonable doubt in the 1991 federal robbery conviction. We conclude that Lavery's 1991 foreign robbery conviction is neither factually nor legally

> comparable to Washington's second degree robbery and therefore not a strike under the POAA.

In re Personal Restraint of Lavery, 154 Wn.2d at 258. Division II summarized this analysis following *Lavery*.

> Factual comparability requires the sentencing court to determine whether the defendant's conduct, as evidenced by the indictment or information, *Morley*, 134 Wn.2d at 606, 952 P.2d 167, or the records of the foreign conviction, *Lavery*, 154 Wn.2d at 255, 111 P.3d 837, would have violated the comparable Washington statute. The underlying facts in the foreign record must be admitted, stipulated to, or proven beyond a reasonable doubt.

State v. Farnsworth, 133 Wn. App. 1, 18, 130 P.2d 389 (2006).

iii. Irby's 1976 conviction for Statutory Rape in the Second Degree is factually comparable to Rape of a Child in the Second Degree.

Comparing the former Statutory Rape in the Second Degree statute, RCW 9.76.201, to the present Rape of a Child in the Second Degree statute, RCW 9A.44.076, reveals that they are very similar but differences exist rendering them not legally comparable. Both involve offenses based on intercourse based upon age. The only differences pertain to minor differences in age.

The present charge of Rape of a Child in the Second Degree has a more restrictive age range for the age of the victim of twelve to fourteen years of age. Statutory Rape in the Second Degree required the age range of the victim to be eleven to fourteen. Thus even though the range is less, the

present Rape of a Child in the Second Degree addresses less egregious conduct because the age range at the lower end is higher than for Statutory Rape in the Second Degree.

The other difference is that Rape of a Child in the Second Degree carries an age range of the perpetrator based upon the age of the victim of thirty-six months older than the victim. The crime of Statutory Rape in the Second Degree statute address this issue by addressing the age of the suspect to be a flat sixteen years of age, which can result in range of ages where the perpetrator is twenty-four months older than the victim.

Although there are these statutory differences in elements on their face, that is not the end of the inquiry. Factual comparability analysis is still available and in this case shows that Irby's prior conviction was comparable.

In the present case, there was no guilty plea in Irby's prior conviction for Statutory Rape in the Second Degree. He went to trial and was convicted. Thus, the only documents addressing the claim are the information and the jury verdict. The information alleges that the victim was age thirteen and thus, the State contends this was a fact that was charged and proven to the jury.

This establishes that the victim's age in the Statutory Rape in the Second Degree conviction was within the range of the present offense of Rape of a Child in the Second Degree.

Thus, the only issue remaining is the age of Irby relative to the age of the victim at the time of the offense. The information charged Irby with committing the prior offense on May 31, 1976. Irby was charged in Chelan Superior Court on July 8, 1976. Irby would not have been able to be charged in Superior Court had he not been over age eighteen at the time.[5] Had he been under age eighteen, his case would have been handled under "Juvenile Court Law." Former RCW 13.04.010 (1961). Instead, Irby was charged, tried and convicted in Superior Court and sentenced as an adult.

Since he was at least age eighteen when the case was filed, he was also at least age seventeen when the offense occurred just under a month and a half before it was filed. Thus, this Court can be certain that Irby was over age seventeen when the offense occurred which is greater than thirty-six months older than the victim. Thus, factually Irby's conviction for the Statutory Rape in the Second Degree falls squarely within the present charge of Rape of a Child in the Second Degree. See Appendix C.

The Supreme Court recently reaffirmed the SRA does not require exact comparability. *State v. Jordan*, 180 Wn.2d 456, 467, 325 P.3d 181 (2014) (holding when evaluating prior out-of-state manslaughter conviction the court need not evaluate divergent self-defense laws).

---

[5] Irby's date of birth is June 10, 1958. CP 331. He turned eighteen on June 10, 1976.

8. The trial court explicitly vacated and dismissed the lesser alternative offense of Felony-Murder in the First Degree.

Irby improperly contends the lesser offense of Felony-Murder in the First Degree remained as a conditional conviction despite the vacation and dismissal in the Judgment and Sentence. Brief of Appellant at page 37-8, *citing State v. Turner*, 169 Wn.2d 448, 238 P.3d 461 (2010).

For the reasons stated in argument section 3 above, the felony murder in the first degree charge must be vacated. This Court should direct to the trial court to enter such an order on remand.

V. CONCLUSION

For the foregoing reasons, Terrance Irby's convictions and sentence for Premeditated Murder in the First Degree with Aggravating Circumstances and Burglary in the First Degree must be affirmed. In addition, this Court should remand the case for entry of an order vacating the aggravating factor of Burglary in the First Degree and the conviction for Felony Murder in the First Degree.

DATED this 25th day of September, 2014.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Koch, addressed as Neilsen, Broman & Koch, PLLC, 1908 E. Madison Street, Seattle, WA 98122 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 26th day of September, 2014.

Karen R Wallace

KAREN R. WALLACE, DECLARANT

APPENDIX A

State v. Irby VRP List

	Title on Electronic Version	Date / AM or PM	Appellant's Volume No
1	2005 State v Irby	8/31/2011	3
2	Irby V1	12/14/2011	6
		1/12/2012	
		3/14/2012	
		4/5/2012	
		4/25/2012	
		4/26/2012	
		5/24/2012	
		6/7/2012	
		7/6/2012	
		7/20/2012	
		8/23/2012	
		9/13/2012	
		9/18/2012	
		11/1/2012	
3	Irby V2	1/3/2013	13
		1/10/2013	
		1/24/2013	
		2/6/2013	
		3/8/2013	
		3/28/2013	
4	State of Washington V Irby	2/28/2012	7
5	State of Washington v. Irby	11/27/2012	11
6	State of Washington v. Irby	12/21/2012	12
7	State of Washington v. Irby	4/12/2012	8
8	State of Washington v. Irby	4/20/2012	9
9	State of Washington v. Irby	8/18/2011	1
10	State of Washington v. Irby	8/25/2011	2
11	State v. Irby Supplemental 1.ZIP	3/6/2013 PM	16

12	State v. Irby Supplemental 2.ZIP	8/25/2011	5
		10/12/2011	
		1/5/2012	
13	State v. Irby Supplemental 3.ZIP	3/13/2013	20
		3/21/2013	
14	State v. Irby Vol 1.ZIP	9/7/2011	4
		9/15/2011	
		9/21/2011	
		11/1/2011	
		11/23/2011	
		2/23/2012	
		6/15/2012	
15	State v. Irby Vol 2.ZIP	10/2/2012	10
		10/24/2012	
		1/18/2013	
		2/28/2013	
16	State v. Irby Vol 3.ZIP	3/4/2013	14
		3/5/2013	
17	State v. Irby Vol 4.ZIP	3/6/2013 AM	15
18	State v. Irby Vol 5.ZIP	3/7/2013	17
19	State v. Irby Vol 6.ZIP	3/8/2013 PM	18
20	Stte v. Irby Vol 7.ZIP	3/12/2013	19
		3/21/2013	
		4/18/2013	

APPENDIX B

In the Superior Court of the State of Washington

FOR CHELAN COUNTY

FILED AND RECORDED ON MICRO-FILM
Roll 2-3
OCT 15 1975
MURIEL E. ROATH, Co. Clerk
By _____ Deputy

THE STATE OF WASHINGTON,
Plaintiff,

vs.

TERRANCE IRBY

Defendant.

No. 51129

VERDICT
Criminal

We, the Jury in the case of the State of Washington, Plaintiff, against Terrance Irby Defendant, find the Defendant Terrance Irby

Guilty as charged in the Information.

Dated at Wenatchee, Washington, this 10th day of October, 19 75.

Foreman.

In the Superior Court of the State of Washington

FOR CHELAN COUNTY

THE STATE OF WASHINGTON, Plaintiff,

vs.

TERRANCE IRBY, Defendant.

No. 5029

INFORMATION

Comes now E. R. Whitmore, Jr., Prosecuting Attorney for Chelan County, State of Washington, and by this his information accuses TERRANCE IRBY of the crime of STATUTORY RAPE, SECOND DEGREE committed as follows, to-wit:

That the said defendant in the County of Chelan, State of Washington, on or about the 31st day of May, 1976, did then and there wilfully, unlawfully, and feloniously then and there being over sixteen years of age, did then and there engage in sexual intercourse with Kori Fogelstrom, not being married to the said Kori Fogelstrom, who was thirteen years of age.

FILED
JUL 8 1976
MURIEL E. HOATH, Co. Clerk
By _____ Deputy

contrary to the form of the Statute R.C.W. 9.79.210 in such cases made and provided, and against the peace and dignity of the State of Washington.

Dated at Wenatchee, Washington this 8th day of July, 1976.

E. R. WHITMORE, JR.
Prosecuting Attorney in and for said County.

By _____ Deputy

STATE OF WASHINGTON }
County of Chelan } ss.

The undersigned, being first duly sworn on oath, says: He is the duly elected (appointed) Deputy Prosecuting Attorney in and for said County, that he has read the foregoing information, knows the contents thereof and believes the same to be true.

Subscribed and Sworn To before me this 8th day of July, 1976.

MURIEL E. HOATH
County Clerk and Clerk of the Superior Court

By _____ Deputy

THE CRAFTSMAN

CHELAN COUNTY DISTRICT COURT

CHELAN COUNTY, STATE OF WASHINGTON
COMMITTING MAGISTRATE

THE STATE OF WASHINGTON, Plaintiff,

vs.

TERRANCE IRBY, Defendant.

No. K76-208
COMMITTING MAGISTRATE'S
Criminal Complaint
For RAPE, SECOND DEGREE

STATE OF WASHINGTON }
County of Chelan } ss.

Comes now E. R. WHITMORE, JR. who, being first duly sworn, by this complaint accuses TERRANCE IRBY of the crime of RAPE, SECOND DEGREE, committed as follows, to-wit:

That the said defendant, in the County of Chelan, State of Washington, on or about the 31st day of May, 19 76, did then and there wilfully and unlawfully and feloniously by forcible compulsion perpetrate an act of sexual intercourse with one Kori Foculstrom, than and there a female person not the wife of said Terrance Irby;

RCW 9.79.180

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

Wherefore, said complainant prays that the said defendant may be arrested and dealt with according to law.

E. R. Whitmore

Subscribed and Sworn to before me this 7th day of June, 19 76.

Judge / Notary Public
COMMITTING MAGISTRATE

CCSO

STATE OF WASHINGTON }
County of Chelan } ss.

I, CAROLYN G. MILLER, duly appointed Clerk of Chelan County District Court, do hereby certify that the foregoing is a true and correct copy of the original on file in my office and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand this 8th day of June, 1976.

CAROLYN G. MILLER, Clerk

By _____ Clerk

CHELAN COUNTY DISTRICT JUSTICE COURT

CHELAN COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

TERRANCE ERBY,

Defendant.

No. 176/708

AFFIDAVIT OF PROBABLE CAUSE

STATE OF WASHINGTON)
) ss.
County of Chelan)

E. R. WHITMORE, JR., being first duly sworn on oath, deposes and says: That he is the duly elected Prosecuting Attorney for Chelan County and is authorized to make this affidavit on behalf of the plaintiff; that the affiant has been provided with the report of Detective Don Dahnet of the Chelan County Sheriff's Department, including the signed statement taken from Kori Fogelstrom, wherein said Kori Fogelstrom states that on the 31st day of May, 1976, Terrance Erby did force himself upon her and have sexual intercourse with her; that Dr. Ronald Wick will testify that an examination he made of slides prepared from a Tampax he removed from said Kori Fogelstrom's vagina shortly after the alleged sexual intercourse was found to contain male sperm and semen; all incidents occurring in Chelan County, Washington.

E. R. WHITMORE, JR.
Prosecuting Attorney

SUBSCRIBED AND SWORN to before me this 7th day of June, 1976.

Notary Public in and for the State of Washington, residing at Wenatchee.

AFFIDAVIT OF PROBABLE CAUSE

E.R. WHITMORE, JR.
CHELAN COUNTY
PROSECUTING ATTORNEY
Post Office Box 1612
Wenatchee, Washington 98801
509/662-5179

19 26

By

Clerk

CHELAN COUNTY DISTRICT JUSTICE COURT

CHELAN COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

TERRANCE IRBY,

Defendant.

NO. K76/208

ORDER FOR WARRANT
ON PROBABLE CAUSE

Based upon the complaint and supporting affidavit of E. R. WHITMORE, JR. the court finds probable cause for the issuance of a warrant for the arrest of the above defendant,

IT IS HEREBY ORDERED that a warrant be issued for the arrest of TERRANCE IRBY upon the charge of RAPE, SECOND DEGREE and bail is fixed in the amount of $2500.00 pending the defendant's first appearance in court. Transmission by teletype is hereby authorized.

DATED this 7th day of June, 1976.

JUDGE--COURT COMMISSIONER

ORDER FOR WARRANT
ON PROBABLE CAUSE

E. R. WHITMORE, JR.
CHELAN COUNTY
PROSECUTING ATTORNEY
Post Office Box 1612
Wenatchee, Washington 98801
(509/663-5179

STATE OF WASHINGTON)
County of Chelan)

I, CAROLYN G. ALLEN, duly appointed Clerk of Chelan County District Justice Court, do hereby certify that this document is a true and correct copy of the original on the same now appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand this ____ day of ____, 19__.

CAROLYN G. ALLEN, Clerk

By _____
Clerk

CHELAN COUNTY DISTRICT COURT

CHELAN COUNTY, STATE OF WASHINGTON

FILED
JUL 6 1976
MURIEL E. ROATH, Co. Clerk
By _____ Deputy

STATE OF WASHINGTON,
Plaintiff,

vs.

TERRANCE IRBY

No. K76-708 #5069

ORDER OF TRANSFER
TO SUPERIOR COURT

THIS MATTER having come on regularly for Preliminary Hearing on the 17th day of June, 19____, the State of Washington being represented by Grant Mueller, Deputy Prosecuting Attorney and the Defendant being represented by James Blinn, an attorney at law, and the court having heard the testimony and considered the evidence presented and it appearing to the court that there is probable cause to believe that the offense as charged in the complaint was committed and that the same was committed by the Defendant; and it further appearing that said offense is within the exclusive jurisdiction of Superior Court, NOW THEREFORE,

IT IS ORDERED that all proceedings herein be bound over to the Superior Court of the State of Washington for Chelan County;

IT IS FURTHER ORDERED that all papers in the above proceedings, including an abstract of costs, and any bail taken by this court shall forthwith be transferred to the Chelan County Clerk.

DONE IN OPEN this 18th day of June, 1976.

JUDGE

cc: Def. Atty.
Pros. Atty.
Bondsman
Chelan County Sheriffs Office
District Court File

CHELAN COUNTY DISTRICT JUSTICE COURT

CHELAN COUNTY, STATE OF WASHINGTON

COMMITTING MAGISTRATE

THE STATE OF WASHINGTON, *Plaintiff,*

vs.

TERRANCE IRBY, *Defendant.*

No. _____

COMMITTING MAGISTRATE'S *Warrant*

CHELAN COUNTY
DISTRICT JUSTICE COURT
JUN - 1 1976
ROBERT E. GRAHAM
DISTRICT COURT JUDGE

STATE OF WASHINGTON, } ss.
COUNTY OF CHELAN }

To the Sheriff or any Peace Officer of said County or any County in the State of Washington:

E. R. WHITMORE, JR. has this day complained in writing, under oath, to the undersigned, Judge of the Chelan County District Justice Court, that on or about the 31st day of May, 1976, in said County and State, TERRANCE IRBY then and there being, did then and there unlawfully and willfully and feloniously commit the crime: RAPE, SECOND DEGREE and the court finding probable cause for the issuance of a warrant herein.

THEREFORE, in the name of the State of Washington, you are commanded forthwith to apprehend the said TERRANCE IRBY and bring him before me to be dealt with according to law. Endorsed for transmission by teletype.

Given under my hand this 1st day of June, 1976

Judge - Court Commissioner
COMMITTING MAGISTRATE

Bail $ 2500

THE LEGAL BLANK CO., INC.

STATE OF WASHINGTON }
County of Chelan } ss.

I, CAROLYN G. ALLEN, Assistant Clerk of Chelan County District Justice Court, do hereby certify that this instrument is a true and correct copy of the original as the same now appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 1st day of June, 1976.

CAROLYN G. ALLEN, Clerk

By _____
Clerk

In the Superior Court of the State of Washington

FOR CHELAN COUNTY

THE STATE OF WASHINGTON, Plaintiff,

vs.

TERRANCE IRBY

Defendant.

No. 5029

WARRANT OF ARREST

ON INFORMATION

State of Washington

TO THE SHERIFF OF SAID CHELAN COUNTY, GREETING:

WHEREAS, In the Superior Court for said County, held at Wenatchee, the Prosecuting Attorney for said Chelan County, did present and file an information on the part of the State of Washington, charging the above named TERRANCE IRBY *with the crime of* STATUTORY RAPE, SECOND DEGREE

FILED
JUL 15 1976
MURIEL E. BOATH, Clerk
By _____ Deputy

NOW, THEREFORE, IN THE NAME OF THE STATE OF WASHINGTON, You are commanded forthwith to apprehend and arrest the said TERRANCE IRBY *and bring* him *before this Court to answer said charge, and abide such further order as the Court may make in the premises.*

WITNESS, the Hon. Lawrence Leahy, Judge of the said Superior Court, and the seal of said Court hereto affixed, this 8th *day of* July, 19 76

MURIEL E. BOATH,
Clerk of said Superior Court.

By _____ *Deputy.*

*Bail fixed at $*_____

THE CRAFTSMAN, INC.

FILED AND RECORDED ON MICRO-FILM
Roll 5-3
DEC 22 1976
MURIEL E. ROATH, Co. Clerk
by _____ Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON,)
)
Plaintiff,) NO. 5029
)
vs.) JUDGMENT AND SENTENCE
)
TERRANCE IRBY,)
)
Defendant.)

On the 21st day of July, 1976 this cause came on regularly for arraignment and hearing, Plaintiff, State of Washington, appearing by J. Kirk Bromley, Deputy Prosecuting Attorney for Chelan County and the defendant appearing in person and by counsel James R. Blinn, Jr. Defendant waived reading of the Information charging him with the crime of Statutory Rape, Second Degree. Defendant was advised that in the event he did not have funds of his own with which to employ legal counsel that the Court would appoint counsel for him and that said counsel would be compensated for his services from county funds. Asked if he desired the aid of counsel, defendant stated he had counsel and was advised of his rights by his said counsel to his satisfaction. Asked if he was ready to be arraigned and answer to the Information, the defendant stated that he was and entered a plea of not guilty to the Information charging him with Statutory Rape, Second Degree.

On the 14th day of October, 1976 this matter was brought on for a jury trial, plaintiff appearing by E. R. Whitmore, Jr., Prosecuting Attorney, and the defendant appearing in person and by counsel, James R. Blinn, Jr. On the 15th day of October, 1976, the jury returned a verdict of guilty.

On the 22nd day of December, 1976 the defendant was brought before the Court for sentencing, the defendant appearing in person and by counsel, James R. Blinn, Jr. The defendant was asked if he had any legal cause to show why judgment and sentence should not be pronounced against him and the defendant stated he had none. Now, Therefore, the Court being fully advised,

IT IS ORDERED AND ADJUDGED by the Court that the defendant TERRANCE IRBY is guilty of the crime of Statutory Rape, Second Degree, committed as follows, to-wit:

> That the said defendant in the County of Chelan, State of Washington, on or about the 31st day of May, 1976, did then and there wilfully, unlawfully and feloniously then and there being over sixteen years of age, did then and there engage in sexual intercourse with Kori Fogelstrom, not being married to the said Kori Fogelstrom, who was thirteen years of age; contrary to the form of the Statute R.C.W. 9.79.210 in such cases made and provided, and

E. R. WHITMORE, JR.
CHELAN COUNTY
PROSECUTING ATTORNEY
P. O. BOX 1612
Wenatchee, Washington 98801
Telephone 663-9021

against the peace and dignity of the State of Washington.

And that he be punished, therefor, by imprisonment in a Washington State penal institution and be committed to the Washington Corrections Center for classification, confinement and placement in such correctional facility under the supervision of the Department of Social and Health Services as said department shall deem appropriate for a period of not more than ten (10) years and the defendant is hereby remanded to the custody of the Sheriff of Chelan County, to be by him detained and delivered into the custody of the proper officers for transportation to the proper institution.

IT IS FURTHER ORDERED that the bond filed herein is hereby exonerated.

DONE IN OPEN COURT in the presence of the defendant this 7th day of December, 1976.

JUDGE OF THE SUPERIOR COURT
FOR CHELAN COUNTY

Presented by:

E. R. WHITMORE, JR.
Chelan County Prosecuting Attorney

Approved as to form for entry:

JAMES R. BLINN, JR.
Attorney for Defendant

E. R. WHITMORE, JR.
CHELAN COUNTY
PROSECUTING ATTORNEY
[illegible]

STATE OF WASHINGTON

BOARD OF PRISON TERMS AND PAROLES

FILED
MAY 19 1977
MARIEL E. ROATH, Dep. Clerk
By _____ Deputy

SENTENCE FIXED BY BOARD

No. SR1794 E 5239

Clemmons Troy, having been by the Superior Court of Clallam County, Washington, in cause No. 8020, convicted of the crime of Statutory Rape, Second Degree, and sentenced for a maximum term of Ten (10) years of confinement in a Washington Correctional Facility; and

The Board of Prison Terms and Paroles, having fully considered the Prosecuting Attorney's and Judge's statements of the facts surrounding said convicted person's crime and other information relative to such convicted person, and having interviewed said convicted person; NOW THEREFORE, By virtue of the authority in it vested by the laws of the State of Washington, and within six months after the admission of such convicted person to a Washington Correctional Facility, the Board of Prison Terms and Paroles fixes the duration of his confinement as follows, to wit:

That said Clemmons Troy be and he is hereby ordered to be confined in a Washington Correctional Facility, for a period of Seven (7) years, and he is hereby required to perform as many hours of faithful labor in each and every day during said term of imprisonment as shall be prescribed by the rules and regulations of said institution.

Done at Olympia, Washington, this 16th day of February, 77

BOARD OF PRISON TERMS AND PAROLES

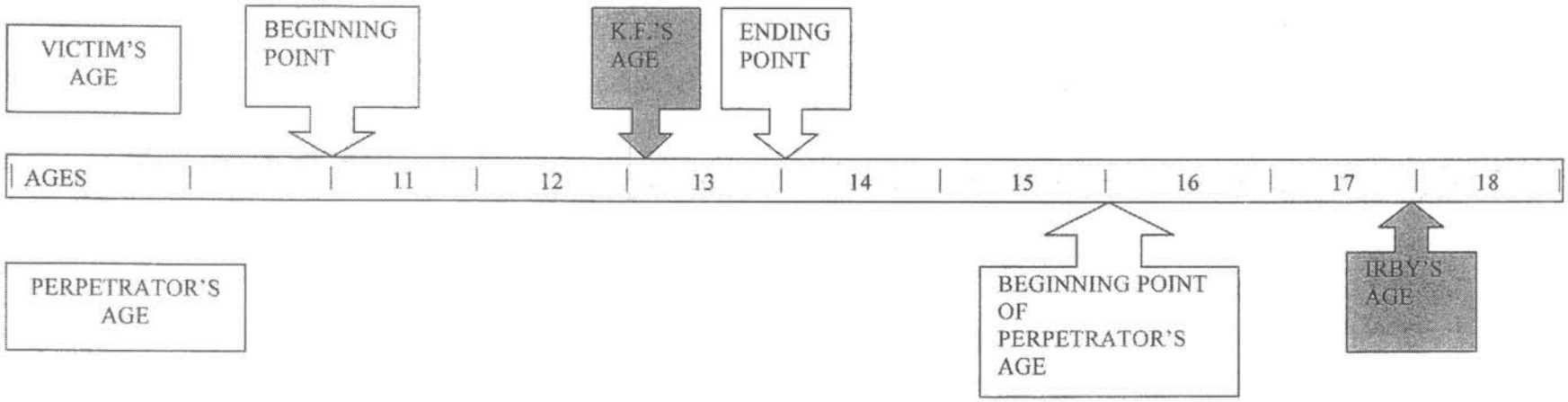
By _____

_____

APPENDIX C

COMPARISON OF FORMER STATUTORY RAPE IN THE SECOND DEGREE WITH RAPE OF A CHILD IN THE SECOND DEGREE

RCW 9.76.210: STATUTORY RAPE IN THE SECOND DEGREE



RCW 9A.44.076: RAPE OF A CHILD IN THE SECOND DEGREE