IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID FRANCIS GAUL, Appellant.	No. 39610-6-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — David F. Gaul appeals his convictions of premeditated first degree murder, second degree felony murder, and attempting to tamper with physical evidence. Gaul charges that error occurred when the trial court informed the jury during voir dire that his was not a death penalty case and questioned the jury about the effect of that information on its deliberations in a post-trial proceeding; that prosecutorial misconduct occurred during the cross-examination of one of his expert witnesses; that the jury instructions on lesser included offenses were erroneous; that the evidence was insufficient to prove premeditation; that the jury instruction on the attempted tampering charge was improper; that the trial court violated his double jeopardy rights by sentencing him for both murder convictions; and that cumulative error deprived him of a fair trial. In addition, Gaul argues in a pro se statement of additional grounds that the trial court erred in denying his motions to sever the murder and tampering charges. We affirm Gaul's

convictions of premeditated first degree murder and attempting to tamper with physical evidence but remand for vacation of his conviction and sentence for second degree felony murder.

FACTS

While Gaul was in jail for driving under the influence of alcohol, he gave a power of attorney to his niece, Rosille Smith. Rosille[1] agreed to help sell Gaul's home and, when he told her he wanted to be debt-free upon his release, she assumed that he wanted her to use the proceeds to pay off any monies he owed. When the house sold, Rosille paid off a debt of $18,000 to Junette Gaul, Gaul's mother, and a debt of $2,500 to Sue Smith, Gaul's sister.

Gaul was released from jail on December 27, 2007. He enjoyed dinner that evening with his mother and his daughters, Katie and Jennifer Gaul. Gaul stayed with his mother after his release.

On December 28, Gaul wanted to go to the bank and check out his financial situation. He had learned that Rosille had paid monies to Junette and Sue and was not happy about it. Katie's boyfriend, Gary Wallesen, drove him to the bank along with Katie and Junette. Gaul had an angry conversation with Junette about his finances on the way to the bank. When the group drove to a restaurant for lunch, Gaul had another heated conversation with Junette. Sue came over to Junette's house later, and Gaul angrily confronted her about his money. Katie and Wallesen took Gaul out for a drive so that he could calm down.

On December 29, Junette left her home to stay with her daughters because she was uncomfortable staying with Gaul. After she left, Gaul spoke with his friend, Colleen Puderbaugh,

[1] We use the first names of Rosille Smith, Sue Smith, Junette Gaul, Katie Gaul, and Jennifer Gaul for clarity of the reader.

about his financial situation. He thought his family had robbed him and felt betrayed.

Junette's family sought advice from the sheriff's office on how to deal with Gaul and was advised to get a restraining order against him. On January 2, Junette went to the Clark County courthouse to obtain an order that would require Gaul to leave her home. She arrived too late to have the order processed that day and returned to her home in the early afternoon. Puderbaugh was on the phone with Gaul at 1:50 pm when she heard Junette call out a greeting. Gaul's voice sounded flat when he heard his mother, and the call ended. When Gaul called Puderbaugh back at 3:25 pm, she asked to speak to Junette because she was worried about her. Gaul told Puderbaugh that Junette was in the bathroom, and Puderbaugh replied that she would talk with Gaul until Junette could come to the phone. Puderbaugh then heard Gaul make "very exaggerated" sounds of going down the hall, knocking, and calling out to Junette. 8-A Report of Proceedings (RP) at 300. When Puderbaugh did not hear an answer, she became concerned and told Gaul that she would come over and speak to Junette in person. Gaul became "really angry" and asked, "Do you think I would do anything to hurt my mother?" 8-A RP at 301.

When Puderbaugh got to the house an hour later, no one answered her knock or phone call. The doors were locked, so Puderbaugh called Rosille, who told her where to find a key. Still on the phone, Puderbaugh entered the house, walked through several rooms, and told Rosille to call 911. Gaul was on a hallway floor holding Junette in an embrace and there was blood on them as well as the wall. When the officers arrived, Junette was dead. There was no sign of forced entry nor was anyone else in the home.

The officers arrested Gaul, who was intoxicated, and took him to the hospital for observation. Gaul attempted to choke himself three times while he was in the hospital. He later

told the police that he had not seen his mother since December 27.

Gaul remained in custody after being charged with two counts of second degree murder. On January 13, he wrote a letter to his daughters that a corrections officer seized and turned over to the police. Among other instructions, the letter suggested that his daughters should buy two bottles of alcohol, empty out most of their contents, wipe any fingerprints from the bottles, place them below a window and near a ladder at Junette's house, and take photographs of the scene. The State amended Gaul's charges to include two counts of tampering with a witness and one count of attempted tampering with physical evidence in addition to second degree felony murder, second degree intentional murder, and premeditated first degree murder.

During voir dire, a prospective juror asked if this was a death penalty case. The trial court replied, "You would [know] if it was." 16 RP at 2096.[2]

At Gaul's trial, several witnesses testified about his anger concerning his finances and his belief that his family had stolen from him. Puderbaugh also testified that Gaul sounded fine the first few times he talked to her on January 2, but that he was depressed and intoxicated when he called later in the afternoon. Puderbaugh added that when she entered the home, she saw a lamp knocked over. A deputy sheriff who responded to the 911 call testified that he saw a table in the kitchen that was turned over and that there was blood on the wall and floor of the hallway where Gaul and his mother were found. Others who responded saw signs of a struggle, including a pulled-out drawer, a vase and flowers on the floor by Junette, and clumps of her hair around her feet.

[2] The trial court listened to the audio recording of the proceedings but was unable to hear clearly due to the poor quality. Therefore, it augmented the recording with its recollection of what the attorneys and the trial court had heard and said.

A medical examiner testified that Junette died as a result of blunt force injuries to her head and chest, and strangulation. Her chest compression injuries were inconsistent with a cardiopulmonary resuscitation (CPR)-related injury and instead showed that she had been forcefully pushed into the floor.

Gaul's main defense at trial was diminished capacity due to alcoholism, brain atrophy, and the post-traumatic stress disorder resulting from his years of service as a firefighter. The psychologist who testified for the defense acknowledged, however, that Gaul was angry with his family about taking his money and had said Junette received a "felonious amount" of money from Rosille. 12-B RP at 1494.

On cross-examination, the State asked the psychologist about other cases in which he had made a finding of diminished capacity, and the following exchange occurred:

> Q. All right. So—all right. When you evaluated this case for diminished capacity, when you were being asked to look at whether this defendant was able to act intentionally—I mean, if he couldn't act intentionally, he's not guilty; right? Walks out—
> A. I—I can't say—
> Q. —right?
> A. —that. I don't know that.
> Q. That's the finding.
> A. Well, I can't—I don't—
>
> [DEFENSE COUNSEL]: Objection, relevance.
> THE COURT: Sustained.
> [PROSECUTING ATTORNEY]: All right.
> [DEFENSE COUNSEL]: Move—move to strike, instruct the jury.
> THE COURT: Disregard that last question.

12-B RP at 1577-78. The psychologist added on cross-examination that Gaul's actions immediately before and after his mother's death showed his ability to form premeditated intent. After he testified, the trial court denied defense counsel's motion for a mistrial based on the

State's cross-examination about the possibility of acquittal.

Gaul testified that although he was disturbed about his money after his release from jail, he was not angry at his mother. He admitted, though, that she acted as if something was wrong when she left the house; "she wanted to slip away." 13-B RP at 1805. He insisted that after Junette left the house on December 29, he never saw her again. He remembered parts of January 2, including a morning phone conversation with Puderbaugh and being in the hospital, but he remembered nothing about his mother's death.

The trial court instructed the jury on first and second degree manslaughter in addition to the charges filed. The court also instructed the jury, without objection, that second degree intentional murder and both manslaughters were lesser included offenses. During closing argument, the State argued that Gaul's mid-afternoon phone call to Puderbaugh occurred after he killed his mother and was a ruse that showed his ability and thought process. The State also emphasized that Gaul beat his mother about the face and head, strangled her, and crushed her ribs. Defense counsel suggested that Gaul had been trying to perform CPR on Junette after she fell.

The jury found Gaul guilty of premeditated first degree murder, second degree felony murder, both witness tampering counts, and attempted tampering with physical evidence. The jury also found by special verdict that Junette was particularly vulnerable. The court later granted Gaul a new trial on both witness tampering convictions because of instructional error.

Defense counsel argued that Gaul also was entitled to a new trial on the murder charges because the trial court erred in informing the jury that this was not a death penalty case. The court decided to summon the jurors for a hearing to determine whether they heard the comment and whether it had any effect on their deliberations. Neither party objected and both participated

in the questioning of the jurors. Six of the twelve had heard the court's comment about the death penalty, but they denied that it had any impact on their deliberations. The trial court determined that any error was harmless. The trial court also denied Gaul a new trial based on his claims of prosecutorial misconduct and insufficient evidence of premeditation.

The trial court entered judgment on both murder convictions and ran the sentences concurrently. Gaul received a concurrent 90-day sentence on the attempted tampering conviction.

DISCUSSION

Death Penalty Reference

A. Trial Court Error

During the post-trial hearing on the motion for a new trial, the trial court played the voir dire recording. Although the court reporter could not hear what was said, the judge stated that defense counsel was talking to people in the back, outside the range of the microphone, and described what followed:

> [Defense counsel] is saying:
> "It's something to keep in mind, but we're not actually supposed to be considering what may happen."
> I said:
> "I wasn't able to quite hear. Was she talking about capital punishment?"
> [Defense counsel] says:
> "No."
> [Prosecuting attorney] says:
> "I think she might have been talking about it."
> I ask the juror:
> "Do you have a concern that this might be a capital case?"
> Can't hear what the juror said, but then I said:
> "You would if it was."

16 RP at 2095-96. The trial court acknowledged that by telling the juror she would know if it was a death penalty case, the court implied that Gaul's case was not.

It is error to inform the jury during the voir dire in a noncapital case that the death penalty is not involved. *State v. Townsend*, 142 Wn.2d 838, 840, 15 P.3d 145 (2001). Where the jury has no sentencing function, it should not be informed on matters that relate only to sentencing. *Townsend*, 142 Wn.2d at 846. Such instructions increase the likelihood of a conviction, and jurors may be less attentive and less deliberative if they know that execution is not a possibility. *Townsend*, 142 Wn.2d at 847. The Supreme Court has adhered to *Townsend* in subsequent cases. *See, e.g.*, *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831, *cert. denied*, 129 S. Ct. 278 (2008); *State v. Mason*, 160 Wn.2d 910, 929, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035 (2008).[3]

In addressing this case law during its ruling on Gaul's motion for a new trial, the trial court noted that although some jurors said they had heard the court's comment about the death penalty, none said it affected them. Each juror testified that the penalty or lack thereof had no impact on their deliberations, and most of them attributed the absence of such an impact to the instruction stating that the jury was not to consider punishment in its deliberations. Although one juror said that the possibility of the death penalty might have led to more discussion, she also said that she took the case as seriously as a death penalty case and that the jury deliberated fully and carefully. As a result, the trial court also concluded that any error resulting from its comment was harmless: "[Any error] had no effect on the jurors as proven by their testimony, their unanimous testimony, that the comment was not a formal instruction as in all of the other cases, but rather a short sound bite in an otherwise lengthy selection process." 18 RP at 2204-05.

[3] In *Mason*, however, the court noted that if its reasoning in *Townsend* was flawed, and there were legitimate reasons why informing a jury about issues of punishment would advance the interest of justice and provide a more fair trial, counsel should advance them. 160 Wn.2d at 930. In ruling on Gaul's motion for a new trial, the trial court accepted this invitation and asserted forcefully that it was error to deceive jurors about the potential for the death penalty in any case.

We agree that the comment at issue differs from those found to be error in *Townsend*, *Mason*, and *Hicks.* In each of those cases, the trial court expressly informed the jury that the death penalty was not at issue. *Hicks*, 163 Wn.2d at 483; *Mason*, 160 Wn.2d at 929; *Townsend*, 142 Wn.2d at 842. Despite that express instruction, reversal was not required in *Mason* because defense counsel's objection to the death penalty instruction was "lukewarm" and no objection was advanced to the selection of any juror or to the panel. "On this record, we find the error harmless." *Mason*, 160 Wn.2d at 931.

Moreover, here, there was *no* objection to the court's comment, and there is no record of an objection to the selection of any juror. (The juror who objected to the death penalty was not selected.) Furthermore, the court instructed the jury not to consider the potential punishment "except insofar as it may tend to make you careful," and we must presume that the jury followed this instruction. Clerk's Papers (CP) at 39; *State v. Pastrana*, 94 Wn. App. 463, 480, 972 P.2d 557, *review denied*, 138 Wn.2d 1007 (1999). The trial court's indirect reference to the death penalty was harmless.

B. Ineffective Assistance of Counsel

Gaul also argues that his attorney's failure to object to the court's death penalty reference and move to strike the jury panel constituted ineffective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). A defendant shows prejudice if he demonstrates a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant can also establish

prejudice by showing that if counsel had made the objections or arguments at issue, they likely would have succeeded. *McFarland*, 127 Wn.2d at 337 n.4.

In *Hicks*, the court held that although counsel's failure to object when the trial court informed the jury that the case was noncapital was deficient performance, the deficiency was not prejudicial. 163 Wn.2d at 488. There was no showing that the defendants were deprived of a fair trial or that the trial outcome likely would have differed; the jurors took their duty seriously, and abundant evidence supported the convictions. *Hicks*, 163 Wn.2d at 488. Similarly, the court found deficient performance but no prejudice in *Townsend* because the evidence overwhelmingly supported the finding of premeditation and a conviction of first degree murder rather than second degree murder. 142 Wn.2d at 848-49.

Gaul argues that without the reference to the death penalty, he would not have been convicted of premeditated first degree murder. In a related argument, he challenges the sufficiency of the evidence showing premeditation.

Premeditation is "'the deliberate formation of and reflection upon the intent to take a human life'" and involves "'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (quoting *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284 (1982); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987)), *cert. denied*, 516 U.S. 843 (1995). Premeditation can be inferred from circumstantial evidence, including evidence of motive and the method of killing. *State v. Elmi*, 138 Wn. App. 306, 314, 156 P.3d 281 (2007), *aff'd*, 166 Wn.2d 209, 207 P.3d 439 (2009). Sufficient evidence of premeditation may be found where multiple wounds are inflicted by various means over a period of time. *State v. Allen*, 159 Wn.2d 1, 8, 147

P.3d 581 (2006); *see also State v. Scott*, 72 Wn. App. 207, 216, 866 P.2d 1258 (1993) (first strangulation and/or blows to the head established premeditation before victim's death by final strangulation), *aff'd on other grounds*, *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995); *State v. Harmon*, 50 Wn. App. 755, 760, 750 P.2d 664 (1988) (infliction of multiple stab wounds established premeditation), *review denied*, 110 Wn.2d 1033 (1988); *State v. Sargent*, 40 Wn. App. 340, 353, 698 P.2d 598 (1985) (two blows to victim's head, with interval passing between them, were sufficient to establish premeditation); *but see State v. Millante*, 80 Wn. App. 237, 248, 908 P.2d 374 (1995) (multiple wounds and sustained violence, by themselves, cannot support an inference of premeditation; other evidence of premeditation includes, but is not limited to, prior threats or quarrels and a possible motive for the killing), *review denied*, 129 Wn.2d 1012 (1996).

Here, there was abundant evidence of prior quarrels and motive, as Gaul was extremely angry with his mother over her receipt of some of his money. He made her so uncomfortable that she left her home, and she attempted to obtain a restraining order against him on the day she died. The evidence also shows that Gaul was cogent when his mother came home around 1:50 pm that day, and that he was intoxicated but able to communicate 90 minutes later. Although he did not initially acknowledge those who responded to the 911 call, he moved when confronted with a taser and was alert and oriented upon his hospital arrival. He told detectives that he had not seen his mother since December 27, but later testified that he spent the day with her on December 28, and that she left the house on December 29. Although he testified that he could not remember anything about her death, he did remember parts of the day she died. Eleven days later, Gaul wrote a letter to his daughters in which he attempted to get them to alter the evidence so as to implicate someone else.

Junette was beaten severely in the face and strangled, and she suffered multiple chest fractures. Her house showed signs of a struggle; household items in the kitchen, living room, and hallway were in disarray, and tufts of her hair were found by her legs. There was ample evidence of premeditation, as the trial court recognized in denying Gaul's motion for a new trial. The court first referred to Gaul's anger toward his mother for stealing his money. "The jury could . . . determine that this animosity rather than being the product of diminished capacity was the product of diminished inhibitions." 18 RP at 2196. The court then referred to Junette's injuries.

> [T]here was evidence of strangulation. . . . There was evidence of a beating of the victim's head and face severely. There was evidence of crushing the victim's chest. Three separate, although related, types or mechanisms of injury. A jury could conclude that this went far, far beyond just a momentary loss of inhibition or a striking out at someone because you're mad at them. . . . [T]he jury could believe that it was systematic, although drunken, and from that, given the other factors, including the anger and the monetary belief of theft, a jury could reasonably believe beyond a reasonable doubt that some degree of premeditation, even for a moment in time, had occurred.

18 RP at 2196-97.

In addition to the abundant evidence supporting Gaul's first degree murder conviction, the record shows that the jurors took their duty seriously. There is no reasonable likelihood that counsel's failure to object to the death penalty reference during voir dire altered the trial's outcome, and we reject Gaul's challenge to the sufficiency of the evidence.

Inquiry into Jury Deliberations

Gaul argues that the trial court erred in asking jurors during the post-trial hearing about the effect of the death penalty reference on their deliberations.

Public policy forbids inquiries into the privacy of the jury's deliberations. *State v. Hoff*, 31 Wn. App. 809, 813, 644 P.2d 763, *review denied*, 97 Wn.2d 1031 (1982). In a motion to set

aside a verdict and grant a new trial, the verdict cannot be affected by the fact that a juror assented because of importunities. *Hoff*, 31 Wn. App. at 813. In other words, considerations that inhere in the verdict are beyond inquiry. *State v. Marks*, 90 Wn. App. 980, 986, 955 P.2d 406, *review denied*, 136 Wn.2d 1024 (1998).

Gaul admitted below that questions into whether jurors heard the court's reference were permissible; his objection is to questions about whether that reference affected their deliberations. The purpose of the hearing was to determine whether the death penalty reference affected the jury's deliberations, and that purpose would not have been served by the limited inquiry Gaul now recommends. If error occurred, however, it was either invited or harmless. Both parties fully participated in the post-trial hearing, and the jurors' answers revealed nothing that undermined or impeached their verdict. Having held that the trial court's death penalty reference was harmless error, we find no reason to remand for a more limited post-trial proceeding, as Gaul now requests. Given this conclusion, we need not consider Gaul's alternative argument that his attorney was ineffective in failing to object to the post-trial questioning of the jury.

Prosecutorial Misconduct

Gaul contends that the prosecuting attorney's reference to the possibility of acquittal if the diminished capacity defense succeeded constituted misconduct. This reference came during the cross-examination of one of Gaul's psychologists, and Gaul argues that it improperly invited the jury to consider the consequences of its verdict. *See Shannon v. United States*, 512 U.S. 573, 579, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994) (when a jury has no sentencing function, it should be told to reach its verdict without regard to what sentence might be imposed); *State v. Murphy*, 86 Wn. App. 667, 670, 937 P.2d 1173 (1997) (punishment is irrelevant to the jury's

task), *review denied*, 134 Wn.2d 1002 (1998).

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Prejudice occurs if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). We review misconduct claims in the context of the entire record. *State v. Miles*, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007).

The trial court sustained the defense objection to the State's question and instructed the jury to disregard it. Although this question subsequently prompted a motion for a mistrial and also supported Gaul's motion for a new trial, the trial court found that by sustaining the objection to the "short, very limited inquiry" and directing the jury to disregard it, the prejudicial effect of the unanswered question was eliminated. 13-A RP at 1697. The court also observed that it formally instructed the jury not to consider evidence that was stricken or that it had been told to disregard. We presume that the jury followed the court's instructions and hold that there is no substantial likelihood that the improper question affected the verdict.

Lesser Included Offense Instructions

Gaul objects to instruction 13 and the special verdict forms on the basis that they referred to second degree intentional murder and to first and second degree manslaughter as "lesser included" crimes.[4] He argues that use of the phrase "lesser included" led jurors to reason that a lesser crime equaled a lesser penalty and improperly informed them that they could influence the punishment by finding guilt on the greater crime.

[4] He does not assign error to the other instructions referring to these "lesser included" offenses.

Gaul did not object to the instructions at issue on any basis below and does not now cite authority demonstrating that they deprived him of a fair trial. The only case he discusses concerns the Supreme Court's disapproval of an instruction describing the minimum sentence a defendant might receive if not given the death penalty. *State v. Todd*, 78 Wn.2d 362, 474 P.2d 542 (1970). Although it was error to give the instruction at issue in *Todd* over the defendant's objection, the error did not affect the guilty verdict, and the Supreme Court remanded for a new trial on the issue of punishment only. 78 Wn.2d at 377. The holding in *Todd* has little relevance here, and we find this claim of error without merit. Consequently, we do not address Gaul's alternative ineffective assistance argument.

Attempted Tampering with Physical Evidence Instructions

Gaul argues here that the jury instructions allowed the jury to convict him of a means of committing attempted tampering with physical evidence that the information did not include. He did not raise this objection at trial, but the claim that a defendant was improperly convicted of an uncharged alternative implicates the constitutional right to notice and may be raised for the first time on appeal. RAP 2.5(a)(3); *see State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) (accused cannot be tried for offense not charged).

When a statute provides that a crime may be committed in alternative ways, the information may charge one or all of the alternatives as long as they are not repugnant to each other. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). When the information charges only one alternative, however, it is error to instruct the jury that it may consider other ways by which the crime could have been committed, regardless of the range of evidence admitted. *Bray*, 52 Wn. App. at 34. Nonetheless, instructing the jury on an uncharged alternative may be harmless

if there is no possibility that the jury convicted the defendant on the uncharged alternative. *State v. Nicholas*, 55 Wn. App. 261, 273, 776 P.2d 1385, *review denied*, 113 Wn.2d 1030 (1989); *see also State v. Spiers*, 119 Wn. App. 85, 94, 79 P.3d 30 (2003) (finding instructional error harmless where no evidence was presented on alternative means).

A person is guilty of tampering with physical evidence if, believing an official proceeding is pending or about to be instituted and acting without legal right, he "(a) [d]estroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its appearance, character, or availability" in the official proceeding or "(b) [k]nowingly presents or offers any false physical evidence." RCW 9A.72.150(1). Separate subsections within a statute proscribing an offense represent alternative ways to commit that offense. *State v. Smith*, 159 Wn.2d 778, 784-85, 154 P.2d 873 (2007).

In charging Gaul with attempted tampering with physical evidence, the information stated that he did an act that was a substantial step toward the commission of that crime, to wit:

> [H]aving reason to believe that an official proceeding is pending or about to be instituted and acting without legal right or authority, did attempt to alter physical evidence, with intent to impair its appearance, character, or availability in such pending or prospective official proceeding.

CP at 10.

The "to convict" instruction stated that the jury had to find, in part, that "the defendant did an act which was a substantial step toward the commission of Tampering with Physical Evidence" and that the act was "with the intent to commit Tampering with Physical Evidence." CP at 64. After defining "substantial step," the court defined the crime in a separate instruction as follows:

> A person commits the crime of Tampering with Physical Evidence when, having reason to believe that an official proceeding is pending or about to be instituted, he alters physical evidence with intent to impair its appearance or

knowingly presents or offers any false physical evidence.

CP at 66. Gaul alleges that this definitional instruction informed the jury that it could convict if it found that he knowingly presented or offered false evidence and thus improperly allowed the jury to convict based on an uncharged alternative.

We recognize that the "to convict" instruction did not distinguish between the two means of committing the crime of tampering with physical evidence and simply referred to the need to find that the crime had been attempted. The jury thus was compelled to consider the definitional instruction, which offered two ways of committing the crime.

But even if the court instructed the jury on an uncharged alternative, the error was harmless. Gaul's letter instructed his daughters to alter the crime scene and photograph the result without reference to presenting or offering false evidence during a resulting proceeding. Although there was evidence of an attempt to alter evidence, there was none regarding an attempt to offer that evidence. Moreover, counsel conceded Gaul's guilt of this offense during closing argument.

Double Jeopardy

Gaul did not object when the trial court entered judgment and sentenced him on both premeditated first degree murder and second degree felony murder, but he may raise this double jeopardy claim for the first time on appeal. *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000), *review denied*, 143 Wn.2d 1009 (2001). We review double jeopardy claims de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010).

A defendant may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple punishments for the same offense imposed in the same

proceeding. *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). The State concedes that Gaul's dual convictions and sentences for murder violated this principle. Accordingly, we remand this case to the trial court for vacation of the second degree murder conviction and sentence. *See State v. Hughes*, 166 Wn.2d 675, 686 n.13, 212 P.3d 558 (2009) (usual remedy for double jeopardy violations is to vacate lesser offense).

Severance

Gaul raises an additional issue concerning the trial court's refusal to sever the murder and tampering charges in his pro se statement of additional grounds. RAP 10.10. We review a trial court's decision to deny a motion to sever charges for abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). A defendant seeking severance has the burden of demonstrating prejudice that outweighs the concern for judicial economy. *Bythrow*, 114 Wn.2d at 718.

Prejudice may result if a defendant is embarrassed in the presentation of separate defenses or if joinder of multiple counts in a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition. *State v. Sanders*, 66 Wn. App. 878, 885, 833 P.2d 452 (1992), *review denied*, 120 Wn.2d 1027 (1993). Factors that offset the prejudicial effect of joinder include (1) the strength of the evidence on each count, (2) the clarity of defenses to each count, (3) whether the court properly instructs the jury to consider the evidence of each crime separately, and (4) the admissibility of the evidence of one crime in the trial of the other if they had been tried separately. *Sanders*, 66 Wn. App. at 885.

Gaul moved for severance before trial and at the end of trial, and he argued in his motion for a new trial that the court's denial of severance was prejudicial error. In denying severance, the

trial court reasoned that Gaul's letter, which supported the tampering charges, was relevant to his diminished capacity defense and thus also relevant to the murder charges. In denying Gaul's motion for a new trial, the court found that the letter would have been cross admissible in the murder trial had severance been granted because of its probative value: "[T]he man who testified, the man who wrote the letter was totally inconsistent with the defense experts as to his mental capacities even absent the intoxication." 17 RP at 2121. In addition, the evidence on the murder and tampering counts was strong and the court instructed the jury to decide each count separately. The trial court did not abuse its discretion in denying Gaul's motions to sever. Nor was defense counsel ineffective due to his lack of success in obtaining severance. *See State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (competency of counsel is not measured by the result).

Cumulative Error

Errors that do not individually require reversal may still require reversal if together they deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The cumulative error doctrine does not apply where the errors are few and have little or no effect on a trial's outcome. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007).

Gaul argues that the combined effect of the individual errors cited above demonstrates cumulative error that requires reversal. In addition, he claims that the trial court's death penalty comment, coupled with the prosecutorial misconduct and the erroneous lesser included instructions, gave the jury too much information about potential penalties and deprived him of a fair trial.

Having concluded that none of the individual trial errors discussed above was prejudicial, we also conclude that together they do not reveal an improper emphasis on penalty and constitute cumulative error. We affirm Gaul's convictions of premeditated first degree murder and attempted tampering with physical evidence but remand for vacation of his second degree murder conviction and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

JOHANSON, J.