No. 43056-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Brian Brush,

Appellant.

Pacific County Superior Court Cause No. 09-1-00143-8

The Honorable Judge Michael J. Sullivan

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. Respondent's concession requires reversal of Mr. Brush's conviction and suppression of his recorded statements. 1

A. Respondent's failure to address the merits of Mr. Brush's Privacy Act claim may be taken as a concession. . 1

B. Mr. Brush's Privacy Act claim may be raised for the first time on appeal.. 1

C. The improper admission of Mr. Brush's illegally recorded statements prejudiced him.................................. 4

II. Mr. Brush was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. 6

III. Mr. Brush's conviction was obtained in violation of his privilege against self-incrimination under the Fifth and Fourteenth Amendments and Wash. Const. art. I, § 9.. 8

A. Mr. Brush's initial involuntary statement tainted his recorded confessions.. 8

B. The police failed to scrupulously honor Mr. Brush's initial invocation of his right to remain silent.................. 12

C. The record does not establish that Mr. Brush initiated a conversation about the investigation after invoking his right to counsel.. 13

IV. The trial court should not have dismissed Juror 1 after the jury was impaneled.. 16

V. Mr. Brush's exceptional sentence must be reversed.... 17

A. The trial judge abused his discretion by admitting hearsay during the sentencing phase of Mr. Brush's trial. 17

B. The aggravators are unsupported and do not justify an exceptional sentence. 18

C. The trial court's instructions included a comment on the evidence and relieved the prosecution of its burden to prove that multiple incidents of abuse occurred over a prolonged period of time.. 19

D. If any of the aggravating factors are vacated, Mr. Brush's 1060-month sentence must be overturned as clearly excessive. 20

CONCLUSION 21

TABLE OF AUTHORITIES

FEDERAL CASES

Christopher v. State of Fla., 824 F.2d 836 (11th Cir. 1987) 12

Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978) 17

Dickerson v. United States, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) 10

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) 16

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) 13, 14, 15

Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) 12, 13

Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) 10, 11

New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) 9, 10

Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) 14

Premo v. Moore, ___U.S. ___, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011) 5, 6

United States v. Perdue, 8 F.3d 1455 (10th Cir. 1993) 8, 9, 11

United States v. Rambo, 365 F.3d 906 (10th Cir. 2004) 12

WASHINGTON STATE CASES

In re Pullman, 167 Wn.2d 205, 218 P.3d 913 (2009) 1

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997) 15

State v. Barnett, 104 Wn. App. 191, 16 P.3d 74 (2001) 19

State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997) 20

State v. Byrd, 110 Wn. App. 259, 39 P.3d 1010 (2002) 15

State v. Courtney, 137 Wn. App. 376, 153 P.3d 238 (2007) 4

State v. Edwards, 131 Wn. App. 611, 128 P.3d 631 (2006) 17

State v. Garcia-Trujillo, 89 Wn. App. 203, 948 P.2d 390 (1997) 17

State v. Gordon, 172 Wn.2d 671, 260 P.3d 884 (2011) 18

State v. Hendrickson, 138 Wn. App. 827, 158 P.3d 1257 (2007) 6, 7

State v. Hickman, 157 Wn. App. 767, 238 P.3d 1240 (2010) 8

State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006) 19

State v. Lavaris, 99 Wn.2d 851, 664 P.2d 1234 (1983) 8

State v. Porter, 98 Wn. App. 631, 990 P.2d 460 (1999) 5

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2005) 6, 7

State v. Russell, 171 Wn.2d 118, 249 P.3d 604 (2011) 1, 4

State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998) 6

State v. Sengxay, 80 Wn. App. 11, 906 P.2d 368 (1995) 3

State v. Spotted Elk, 109 Wn. App. 253, 34 P.3d 906 (2001) 10

State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 (2010) 18

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V 16

U.S. Const. Amend. VI 16

U.S. Const. Amend. XIV 16

Wash. Const. art. I, § 21 16

Wash. Const. art. I, § 22 16

Wash. Const. art. I, § 9 8

Wash. Const. art. IV, § 16 19

WASHINGTON STATUTES

RCW 2.36.110 16

RCW 9.73.050 .... 1, 4

RCW 9.73.090 4

RCW 9.94A.535 19

OTHER AUTHORITIES

CrR 6.5 16

ER 803 17

RAP 2.5 1

ARGUMENT

I. RESPONDENT'S CONCESSION REQUIRES REVERSAL OF MR. BRUSH'S CONVICTION AND SUPPRESSION OF HIS RECORDED STATEMENTS.

A. Respondent's failure to address the merits of Mr. Brush's Privacy Act claim may be taken as a concession.

The police violated the Privacy Act when they recorded Mr. Brush's interviews. Appellant's Opening Brief, pp. 18-22. Respondent does not address this claim on its merits. *See* Brief of Respondent, *generally.* Respondent's silence on this point may be treated as a concession. *See In re Pullman,* 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

B. Mr. Brush's Privacy Act claim may be raised for the first time on appeal.

Recordings obtained in violation of the Privacy Act are categorically inadmissible at trial. RCW 9.73.050. The strict requirements of the Act suggest that the legislature intended to authorize litigants to raise Privacy Act violations at any time, including for the first time on review. *See* Appellant's Opening Brief, pp. 18-22. Furthermore, the Court of Appeals has discretion to review any issue, regardless of whether or not it is preserved for review. *State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011) (citing RAP 2.5(a)(3)).

Respondent alleges that the error was waived by defense counsel's failure to object. Brief of Respondent, p. 16. Given Respondent's reading of the record, a stronger argument would be that Mr. Brush invited any error. *See* Brief of Respondent, p. 18 ("Defense counsel agreed to the admission of the audio tape recordings as a tactical measure, and the State made certain that their decision was part of the record")[1] (citing RP (11/28/11) 37-41, 147-49, 247).

In fact, the record shows an *unsuccessful* attempt by the prosecutor to obtain (1) an explicit waiver of any Privacy Act violation and (2) an agreement from defense counsel that such a waiver was based on trial strategy. *See* RP (11/28/11) 37. Although the prosecutor referenced the Act's requirements, the officers' failure to comply, and even a case requiring suppression under the Privacy Act,[2] defense counsel responded by agreeing only that any reference to *Miranda* warnings should be redacted from the recording before it was played for the jury:

> [Defense Counsel:] Your Honor, that's correct, Defense has no objection to the admission of the audio recording of the first interview with the redaction of the Constitutional warnings that

[1] This assertion is part of Respondent's argument on the ineffective assistance issue.

[2] *See* RP (11/28/11) 37.

> were read by the officers involved to Mr. Brush.[3] We agree that that material should not go before the jury. It's a 3.5 issue that's already been resolved.
> THE COURT: And has that been redacted?
> [Defense Counsel:] It's been redacted…
> RP (11/28/11) 37-41.

When the issue was raised again, the prosecutor's attempt to obtain an explicit waiver of any Privacy Act violation was less articulate, and defense counsel again responded, in essence, that Mr. Brush had no objection to the redaction. RP (11/28/11) 147-149. In the end, there is no indication that defense counsel ever understood the prosecutor's request for an explicit waiver of the Privacy Act violation.[4]

Respondent argues that the failure to object waives the issue because violations of the Privacy Act are not constitutional. Brief of Respondent, p. 15 (citing *State v. Sengxay*, 80 Wn. App. 11, 15, 906 P.2d 368 (1995)). But the *Sengxay* court was not asked to address the argument raised by Mr. Brush: that the legislature implicitly authorized Privacy Act violations to be raised at any time, including for the first time on appeal. *See* Appellant's Opening Brief, pp. 18-22. Furthermore, the *Sengxay* court

---

[3] This passage suggests that defense counsel was unaware that the recording contained less than a full administration of *Miranda* warnings, and apparently failed to grasp the significance of this lack.

[4] Defense counsel's statements suggest that the defense team was unaware of the violation, despite the prosecutor's explicit statements on the subject. RP (11/28/11) 37-41; 147-149.

did not consider exercising its discretion to consider the issue despite the absence of an objection in the lower court. *Russell,* 171 Wn.2d *at* 122.

The violation is clear in the record. In light of the strong protections afforded by the legislature, Mr. Brush's failure to object should not bar review of the failure to comply with the Privacy Act. In the alternative, if the failure to object did waive the issue, then Mr. Brush was denied the effective assistance of counsel, as argued elsewhere in this brief.

C. The improper admission of Mr. Brush's illegally recorded statements prejudiced him.

Where police record a custodial interrogation in violation of the Privacy Act, the recording itself is inadmissible at trial. RCW 9.73.050; *State v. Courtney*, 137 Wn. App. 376, 382, 153 P.3d 238 (2007). The police recorded two interviews that did not strictly comply with the statute. Ex. H; RCW 9.73.090(1). These two recordings should not have been introduced into evidence. *Courtney*, 137 Wn. App. at 382. As noted above, Respondent does not dispute this. *See* Brief of Respondent, pp. 15-17.

Respondent suggests that any error was harmless because only the recording would have been suppressed, while the substance of Mr. Brush's

statements would have been admitted along with a recorded telephone conversation. Brief of Respondent, pp. 15-17.

In many cases, erroneous admission of a recording made in violation of section .090 will be harmless, since derivative evidence remains admissible. *See, e.g., Courtney,* at 383. In this case, however, the error prejudiced Mr. Brush. A confession is powerful evidence. *Premo v. Moore,* ___U.S. ___, ___, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011). The jury heard Mr. Brush's "confession" in his own words, emanating from his own mouth. This undoubtedly influenced the jury in a way that could not have been duplicated by an officer's summary of the information obtained. The impact was especially strong in light of Mr. Brush's defense: jurors likely considered such things as Mr. Brush's tone of voice and demeanor in rejecting his diminished capacity defense.

Mr. Brush's conviction must be reversed because there is a reasonable probability the error materially affected the verdict. *State v. Porter*, 98 Wn. App. 631, 638, 990 P.2d 460 (1999). The case must be remanded for a new trial, with instructions to exclude the two recordings. *Id.*

II. Mr. Brush was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

Defense counsel's failure to seek exclusion of Mr. Brush's recorded statements under the Privacy Act prejudiced Mr. Brush. *See State v. Hendrickson,* 138 Wn. App. 827, 833, 158 P.3d 1257 (2007); *State v. Reichenbach,* 153 Wn.2d 126, 131-32, 101 P.3d 80 (2005); *see also State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Contrary to Respondent's assertion,[5] counsel's failure to raise the Privacy Act issue was not a strategic choice, as argued above. Furthermore, counsel's actual strategy involved suppression of the recordings. RP (10/12/11) 96-100.

The prosecutor's unsuccessful attempts to obtain an explicit waiver and statement of trial strategy does not alter this. Brief of Respondent, p. 18. In fact, as noted above, the passages cited by Respondent suggest that defense counsel was unaware that the recording violated the Privacy Act.

The illegal recordings contained damaging material, including multiple inculpatory statements in Mr. Brush's own words and from his own mouth. Ex. H. As noted above, confessions are always powerful evidence. *Premo,* ___ U.S. *at* ___. Absent the recorded confessions, there is a reasonable probability that jurors would not have voted to convict Mr.

[5] Brief of Respondent, pp. 18.

Brush of first-degree murder. This is especially true in light of Mr. Brush's diminished capacity defense. Jurors might well have been swayed by their perceptions of such subtle cues as his tone of voice and demeanor during the hours following the shooting. Second hand information introduced through the interviewing officers would not have been as persuasive.

There was no dispute at trial regarding Mr. Brush's actions. The trial focused on his state of mind. Because of this, Respondent's argument that "no less [sic] than five witnesses observed Mr. Brush shoot Ms. Bonney" is misplaced.[6] Brief of Respondent, p. 19. The question for the jury was not whether Mr. Brush shot Bonney; the question to be answered was whether or not he premeditated an intentional murder. CP 172-199.

Counsel's failure to seek suppression of the illegal recordings deprived Mr. Brush of his Sixth Amendment right to the effective assistance of counsel. *Hendrickson*, 138 Wn. App. at 833; *Reichenbach*, 153 Wn.2d at 131-32.

[6] The same is true regarding Mr. Brush's recorded phone conversation with his ex wife. Brief of Respondent, pp. 19-20.

III. MR. BRUSH'S CONVICTION WAS OBTAINED IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, § 9.

A. Mr. Brush's initial involuntary statement tainted his recorded confessions.

In the absence of *Miranda* warnings, statements obtained through custodial interrogation must be excluded from trial. *State v. Hickman,* 157 Wn. App. 767, 772, 238 P.3d 1240 (2010). If such statements are involuntary, any subsequent confession must also be excluded unless intervening circumstances insulate it from the effect of all that went before. *United States v. Perdue*, 8 F.3d 1455, 1467-1468 (10th Cir. 1993); *see also United States v. Lopez*, 437 F.3d 1059, 1066 (10th Cir. 2006). Relevant factors include administration of *Miranda* warnings, the passage of a significant amount of time, a change of personnel, and proof that the defendant knew earlier statements could not be used in court. *State v. Lavaris*, 99 Wn.2d 851, 858, 664 P.2d 1234 (1983).

1. The initial statement was involuntary.

Mr. Brush's initial unwarned statement was involuntary. This is so because the question was posed after he'd been seized at gunpoint by three officers who forced him to kneel, to lie face down on the ground, and to submit to handcuffs. RP (10/12/11) 4-7, 16-19, 27. Such circumstances necessarily overwhelm a person's ability to freely resist questioning.

Perdue, 8 F.3d at 1466-67. Respondent concedes that Mr. Brush was in custody, but faults Mr. Brush for providing "little or no analysis" establishing coercion. Brief of Respondent, pp. 24, 25.

But the circumstances themselves establish coercion. As in *Perdue,* Mr. Brush's initial statement was obtained at gunpoint. *Perdue*, 8 F.3d at 1466-67. He had been forced to his knees and then ordered to lie face down on the ground. RP (10/12/11) 7-8, 16, 19.

In assessing coercion, Respondent ignores the drawn guns, the presence of multiple officers, and the orders to kneel and lie face down on the ground. *See* Brief of Respondent, pp. 25-26. In light of these coercive measures, it is irrelevant that Boggs didn't verbalize any promises or additional threats, that Mr. Brush had no mental infirmity, and that he apparently understood what was happening. Brief of Respondent, p. 26. His statements were coerced. *Perdue*, 8 F.3d at 1466-67.

2. The public safety exception does not apply.

In certain limited circumstances, custodial statements obtained without benefit of *Miranda* warnings may be admitted into evidence under an exception for public safety. *See* New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). The public safety exception does not apply here.

The *Quarles* court addressed only the admission of statements obtained in violation of what were then referred to as *Miranda's* "prophylactic rules;"[7] the *Quarles* court did not sanction the admission of *involuntary* statements. *Id.,* at 654 ("In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist.") The Supreme Court has made clear that "*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law." *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (emphasis in original).

Furthermore, *Quarles* did not address the requirement that *subsequent* statements be insulated from the initial statement. When the emergency justifying application of the public safety exception fades, the justification for admitting unwarned statements under *Quarles* disappears as well. *Id.; see also State v. Spotted Elk*, 109 Wn. App. 253, 260, 34 P.3d 906 (2001) (noting that public safety exception applies only "if (1) the question is solely for the purpose of officer or public safety, and (2) the circumstances are sufficiently urgent to warrant an immediate question.")

---

[7] *Id., at* 653. The Supreme Court has since made clear that *Miranda's* requirements are no mere prophylaxis; they are requirements imposed by the constitution. *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). It is unclear whether this conclusion would affect the holding in *Quarles.*

Because Mr. Brush's initial statement was involuntary, it was inadmissible for any purpose—even if Boggs' question fell within the public safety exception. *Mincey,* 437 U.S. *at* 398. In addition, the prosecution was required to prove that any subsequent confession was insulated from the initial involuntary statement. *Perdue*, 8 F.3d *at* 1467-1468; *Lopez,* 437 F.3d at 1066. The state failed to do so.

First, the delay between the involuntary statement and Mr. Brush's subsequent statements was too short to insulate his later confession.[8] Second, Mr. Brush was twice asked to waive *Miranda* within minutes after his involuntary statement. Third, the police did not re-advise Mr. Brush of his rights when he was subjected to custodial interrogation at the police station. Fourth, nothing in the record shows that Mr. Brush understood that his initial involuntary statement would be excluded from any criminal trial. RP (10/12/11) 64-66, 25-87; Ex. H.

Under these circumstances, Mr. Brush's two recorded interviews should have been suppressed. *Perdue*, 8 F.3d at 1467-1468. His conviction must be reversed and the case remanded to the trial court for a new trial, with instructions to exclude his statements from evidence. *Id.*

---

[8] *See* Appellant's Opening Brief, pp. 18-22.

B. The police failed to scrupulously honor Mr. Brush's initial invocation of his right to remain silent.

The police must "scrupulously honor[]" an accused person's request to cut off questioning; otherwise, subsequent statements are inadmissible. *Michigan v. Mosley,* 423 U.S. 96, 104-106, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). All questioning must cease, and a significant period of time must elapse before waiver is sought again.[9] *Id.; United States v. Rambo*, 365 F.3d 906, 910-11 (10th Cir. 2004); *Christopher v. State of Fla.*, 824 F.2d 836, 844 (11th Cir. 1987).

Here, when administered *Miranda* warnings, Mr. Brush unequivocally told officer Boggs that he did not wish to speak:

> A. "Having these rights in mind, do you wish to talk to us now?"
> Q. What was Mr. Brush's response?
> A. "No."
> Q. Did he indicate in any way that he understood the rights or he had confusion about the rights?
> A. He didn't show any confusion. He—as soon as I read them, he said, "No."
> RP (10/12/11) 12-13.

Despite this clear and unequivocal assertion of his right to remain silent, police sought a waiver from Mr. Brush only minutes later, as Respondent concedes. RP (10/12/11) 49-54; Ex. I; Brief of Respondent, p. 28. Respondent's focus on Layman's state of mind—his apparent

[9] In addition, questioning must relate to a different subject. *Rambo*, 365 F.3d at 911.

ignorance of the prior invocation—is misplaced. *See* Brief of Respondent, pp. 28, 29. Under *Mosley,* the officer's subjective motivation is irrelevant. *Rambo,* 365 F.3d at 911 (listing the relevant considerations, which don't include the officers' state of mind.) A suspect does not care why the police ignore an assertion of the right to remain silent; from the suspect's point of view, all that matters is the failure to scrupulously honor that assertion. *Id.*

Because the police failed to scrupulously honor Mr. Brush's invocation of his right to remain silent, any subsequent waiver was ineffective.[10] *Mosley,* 423 U.S. at 104-106. Accordingly, Mr. Brush's statements at the jail should have been suppressed. *Id; Rambo*, 375 F.3d at 910.

C. The record does not establish that Mr. Brush initiated a conversation about the investigation after invoking his right to counsel.

Invocation of the right to counsel bars any subsequent interrogation unless initiated by the accused person. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The

[10] Respondent erroneously contends that Layman "went over Mr. Brush's advisement of rights a second time before the first interview…" Brief of Respondent, p. 29 (citing RP (10/12/11) 66). This is incorrect. Layman referred to the prior advice of rights, but did not re-administer a full set of warnings until the second recorded interview. RP (10/12/11) 66; Ex. H.

prosecution must prove both initiation and waiver; these are separate inquiries. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983).

In this case, Long Beach Police Chief Flint Wright had contact with Mr. Brush after Mr. Brush invoked his right to counsel. This contact resulted in Mr. Brush asking to speak to Deputy Police Chief Heath Layman about the case. RP (10/12/11) 66-69; Ex. H. Nothing in the record shows what happened between Mr. Brush and Chief Wright. RP (10/12/11) 2-87. The prosecution did not show who initiated the conversation that resulted in Mr. Brush's request to speak to Layman. RP (10/12/11) 66-69; Ex. H. In other words, the prosecution failed to establish compliance with the *Edwards* rule. *Edwards,* 451 U.S. at 484-485.

Respondent asserts that "Layman testified that no one talked to Mr. Brush to convince him to be reinterviewed." Brief of Respondent, p. 31 (citing RP (10/12/11) 67-68, 71). This overstates Layman's testimony. The cited passage reads as follows:

> Q. *To the best of your knowledge,* did anyone talk to Mr. Brush to try to get him to change his mind after he wanted to talk to a lawyer?
> A. No. I wasn't present with him after I left the room and I didn't see him again until I walked in with him and *nobody indicated anything to me about trying to get him to talk to me again.*
> RP (10/12/11) 71 (emphasis added).

This testimony does not further the analysis. Layman's testimony to the best of his knowledge is hardly conclusive. Furthermore, an *Edwards* violation occurs whenever police initiate conversation about a case following invocation of the right to counsel. Any discussion about the investigation is sufficient, it need not be an attempt "to try to get him to change his mind," or "to get him to talk to [an officer] again." RP (10/12/11) 71. Layman provides no information about what actually transpired between Mr. Brush and Chief Wright. RP (10/12/11) 44-84.

Given the absence of evidence on this point, the trial court understandably failed to find facts relating to the interaction between Mr. Brush and Chief Wright. CP 33. The lack of evidence and the absence of findings must be held against the state. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn. App. 259, 265, 39 P.3d 1010 (2002).

In light of this, the state failed to prove "initiation" within the meaning of *Edwards*. Mr. Brush's second interview with Layman should have been suppressed. The conviction must be reversed and the case remanded for a new trial. *Edwards,* 451 U.S. at 484-485.

IV. THE TRIAL COURT SHOULD NOT HAVE DISMISSED JUROR 1 AFTER THE JURY WAS IMPANELED.

The trial judge removed a juror who had neither "manifested unfitness" nor been found "unable to perform the [required] duties." RCW 2.36.110; CrR 6.5. Even in the face of impending hardship, Juror 1 maintained that he'd be able to "concentrate fully on the trial." RP (11/28/11) 15-20. Under these circumstances, removal of Juror 1 was error.

As constituted before Juror 1's dismissal, the jury reflected the decisions Mr. Brush and his attorney made during jury selection. Although an alternate might be called to deliberate in any trial, no litigant assumes that a properly selected juror will be improperly dismissed. If dismissal of a sitting juror is easy, parties will have the incentive to continue jury selection even after the trial commences, so that the best combination of jurors and alternates can be achieved.

The court's decision violated RCW 2.36.110 and CrR 6.5 and infringed Mr. Brush's state and federal constitutional jury trial rights. Wash. Const. art. I, §§ 21 and 22; U.S. Const. Amend. V, VI, XIV; *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Crist v. Bretz*, 437 U.S. 28, 35-36, 98 S.Ct. 2156, 57 L.Ed.2d 24

(1978). Mr. Brush's conviction must be reversed and the case remanded for a new trial. *Crist, at* 35-36.

V. MR. BRUSH'S EXCEPTIONAL SENTENCE MUST BE REVERSED.

A. The trial judge abused his discretion by admitting hearsay during the sentencing phase of Mr. Brush's trial.

A hearsay statement does not qualify as an excited utterance unless it relates to the "startling event or condition" that causes the declarant's stress and excitement. *See* ER 803(a)(2). Here, Elizabeth was permitted to relay to the jury statements her mother had made while stressed or excited, even though the statements did not relate to the startling event or condition causing her stress or excitement. The testimony should have been excluded under ER 802.

The improper admission of this hearsay testimony prejudiced Mr. Brush, because it related directly to the domestic violence/pattern of abuse aggravating factor. *See, e.g., State v. Garcia-Trujillo*, 89 Wn. App. 203, 211, 948 P.2d 390 (1997) (reversal required where improperly admitted hearsay relates to critical issue at trial). Because of this, the aggravator must be stricken and the exceptional sentence vacated. *Id; see also State v. Edwards*, 131 Wn. App. 611, 615, 128 P.3d 631 (2006) (improper admission of hearsay testimony is not harmless unless the untainted evidence is overwhelming).

B. The aggravators are unsupported and do not justify an exceptional sentence.

The evidence does not support a finding of deliberate cruelty. Mr. Brush's conduct—killing with a shotgun fired four times in rapid succession—did not manifest deliberate cruelty beyond the cruelty inherent in the crime of first-degree murder. RP (11/28/11) 81-83, 102, 112, 115, 120-122, 124, 135, 138. The prosecution did not make a showing of any conduct that went beyond that normally associated with murder, as required to sustain a finding of "deliberate cruelty." *State v. Gordon*, 172 Wn.2d 671, 680-81, 260 P.3d 884 (2011).

Likewise, Bonney's injuries did not substantially exceed those necessary to establish murder. *See State v. Stubbs*, 170 Wn.2d 117, 123-24, 240 P.3d 143 (2010). Although *Stubbs* dealt with the definition of "great bodily harm," its reasoning applies with even greater force to the level of harm inherent in murder. *Stubbs at* 131. Some murders are undoubtedly grislier than others; however, all result in the victim's death. The same is true of Mr. Brush's crime. The injuries here could not and did not substantially exceed those required to establish murder.

Finally, the record did not support the jury's aggravated domestic violence finding. As noted above, the deliberate cruelty and substantial injury factors are generally inapplicable; they also cannot be applied in the

context of the domestic violence aggravating factor. The viability of the jury's finding thus depends on proof of multiple incidents of abuse occurring over a prolonged period of time. RCW 9.94A.535(3)(h)(i). Here, the prosecution presented evidence of two episodes of abuse occurring within one month of each other. RP (12/5/11) 138-141; RP (12/6/11) 161, 193; Ex. 42. The two episodes cannot be described as "multiple" incidents over a "prolonged" period of time. *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001). The evidence was thus insufficient to prove an aggravated domestic violence offense. *Id.*

None of the aggravating factors are supported by the record. The exceptional sentence must be vacated and the case remanded for resentencing within the standard range.

C. The trial court's instructions included a comment on the evidence and relieved the prosecution of its burden to prove that multiple incidents of abuse occurred over a prolonged period of time.

The trial judge defined a "prolonged period of time" as more than a few weeks. This erroneous definition amounted to a comment on the evidence. Wash. Const. art. IV, § 16. It is unsupported by any published court decisions, and relieved the prosecution of its burden to establish the aggravating factor set forth in RCW 9.94A.535(3)(h)(i). *State v. Jackman*, 156 Wn.2d 736, 744-45, 132 P.3d 136 (2006). The domestic violence aggravating factor must be vacated and the case remanded for a new

sentencing hearing. *State v. Becker*, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997).

D. If any of the aggravating factors are vacated, Mr. Brush's 1060-month sentence must be overturned as clearly excessive.

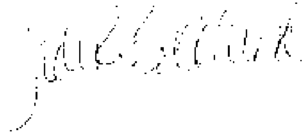
Mr. Brush rests on the argument set forth in Appellant's Opening Brief.

CONCLUSION

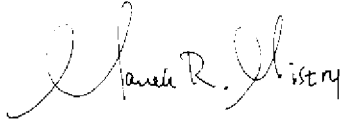
Mr. Brush's conviction must be reversed and the case remanded for a new trial, with instructions to exclude his custodial statements. If the conviction is not reversed, his exceptional sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on May 24, 2013,

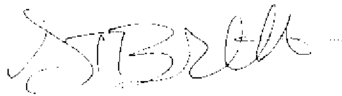
BACKLUND AND MISTRY



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



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Brian Brush, DOC #337561
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

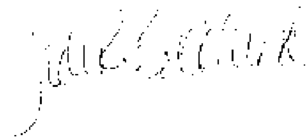
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pacific County Prosecuting Attorney
dburke@co.pacific.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on May 24, 2013.



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

BACKLUND & MISTRY

May 24, 2013 - 12:25 PM

Transmittal Letter

Document Uploaded: 430568-Reply Brief.pdf

Case Name: State v. Brian Brush
Court of Appeals Case Number: 43056-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers   Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): ________

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ________

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: **backlundmistry@gmail.com**

A copy of this document has been emailed to the following addresses:
dburke@co.pacific.wa.us