NO. 96777-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN ALAN WHITAKER,

Appellant.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

The State of Washington, respondent, responds to the defendant's petition for review of the decision of the Court of Appeals affirming his conviction for aggravated first degree murder and conspiracy to commit first degree murder.

II. STATEMENT OF RELIEF SOUGHT

The State asks the court to deny the defendant's petition for review.

III. STATEMENT OF THE CASE

The facts of the case are set out in State v. Whitaker, 133 Wn. App. 199, 135 P.3d 923 (2006) and State v. Whitaker, 429 P.3d 512 (2018). As a result of those facts the defendant was charged with aggravated first degree murder and conspiracy to commit murder. 1 CP 54. His first conviction was affirmed on appeal. He filed a personal restraint petition and was granted a new trial. The State relies on those facts and the following supplemental statement of facts for this answer.

At retrial the defendant proposed an instruction permitting jurors to consider the defense of duress as it related to the aggravating factors. 2 CP 573-74. The trial court denied the

instruction on the basis that there was insufficient evidence to support the defense. 6/24 (PM) RP 61.

During the course of deliberations Juror 2 hailed the bailiff and demanded to be released from jury duty. The juror believed that other jurors were too friendly with each other and were ganging up on him. The bailiff stopped the juror from discussing the case further and alerted the judge. 15 RP 2824-26. The defense initially asked for a mistrial. 15 RP 2827, 2853. The court decided to send the jurors home for the evening to allow time to consider a course of action. 15 RP 2873-38, 2843-46.

The next day all jurors, including juror 2, returned to the jury room and commenced deliberations. 15 P 2882-83. About one hour later the presiding juror sent a note to the court indicating a concern for the jurors' safety. 2 CP 511. At defense request the court inquired if there was a reasonable probability of the jurors reaching a verdict. The presiding juror stated there was such probability as to at least one count. Jurors were then instructed to deliberate. 15 RP 2893-98. On request of the defense, the court then deferred ruling on the defendant's mistrial motion. 15 RP 2895-2898-2904.

About two hours later the parties were notified that Juror 2 had been removed from the jury room due to a medical emergency.

The remaining jurors were excused for the day. The next day the court was informed that Juror 2 was in the hospital and it was unknown when he would be released. The court replaced juror 2 with an alternate and instructed the jurors to begin deliberations anew. 15 RP 2904--19. The reconstituted jury rendered a verdict of guilty on both counts. 15 RP 2920-21.

After the verdict entered Juror 2 stated that after the medical examiner testified one juror stated "I hope they fry the fucking bastard" while back in the jury room. 1 CP 371. After an evidentiary hearing in which all jurors testified, the court found the comment had been made. It also found that other jurors did not agree with the sentiment, during deliberations the opinions of jurors swayed back and forth, and that no juror was biased or had formed a fixed opinion as to the proper outcome of the case before deliberations began. 5 CP 1733.

IV. ARGUMENT

A. DURESS IS NOT A DEFENSE WHEN THE CHARGED OFFENSE IS MURDER. THE DEFENDANT WAS NOT CHARGED WITH KIDNAPPING, AND WAS NOT ENTITLED TO A DURESS DEFENSE.

The Court of Appeals affirmed the trial court on the basis that the defendant was charged with murder, not kidnapping, and therefore he was legally not entitled to the defense instruction.

The defendant asks this Court to review that decision, arguing that it conflicts with recent authority from this Court. RAP 13.4(b)(1). He also claims that by rejecting his proposed instruction he was denied his Sixth Amendment right to present a defense. He argues review is appropriate because the issue raises a significant question of law under the constitution of the United States RAP 13.4(b)(3). Neither of these grounds supports review.

The Court of Appeals decision was based on its interpretation of RCW 9A.16.060 setting forth the duress defense. "The defense of duress is not available if the crime charged is murder, manslaughter, or homicide by abuse." RCW 9A.16.060(3). The Court of Appeals held that the defendant was charged with first degree murder, not robbery or kidnapping. Instead those crimes were aggravating factors, not separate crimes. He was therefore not entitled to the instruction. Slip Op. at 5.

The Court relied in part on State v. Kincaid, 103 Wn.2d 304, 692 P.2d 823 (1985). There this Court considered whether the aggravating factors were required to be included in the to-convict instruction. Reasoning that the aggravating factors were not elements of the crime, but rather aggravation of penalty factors, this

Court held the aggravating factors may, but need not be included in the to-convict instruction. Id. at 312-13.

The defendant argues the Court of Appeals decision is no longer valid in light of this Court's recent decision in State v Allen, 431 P.3d 117 (2018). There the Court considered whether an acquittal on aggravating factors barred re-trial on those factors under the double jeopardy provision in the Fifth Amendment. Relying on Kincaid, this Court previously held that "double jeopardy does not apply to aggravating circumstances outside the death penalty context." Id. at 120-21, ¶12. After Kincaid was decided the United States Supreme Court found that aggravation of penalty factors were elements to be decided by a jury for purposes of the Sixth Amendment right to a jury trial. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). This court found that there was no logical reason to distinguish elements of a crime for Sixth Amendment or Fifth Amendment purposes. This Court held that the aggravating circumstances set out in RCW 10.95.020 "are elements of the offense of aggravated first degree murder for the purposes of the double jeopardy clause." Allen 431 P.3d at 121, ¶14.

Allen does not support the claim that the decision of the Court of Appeals conflicts with a decision of this Court because the issue in Allen is completely different from the issue presented here. Allen did not overrule Kincaid, nor did it overrule State v. Siers, 174 Wn.2d 269, 277, 274 P.3d 358 (2012). In Siers, the Court held that aggravating factors are not essential elements of the crime which must be charged in the information so long as some notice is provided. Both Kincaid and Siers dealt with the nature of aggravating circumstances in other contexts not at issue in Allen.

Similarly, Allen said nothing about whether a defense may apply to a single element of the crime, when that element may also be charged as a separate crime. Significantly, in finding that the aggravating circumstances set out in RCW 10.95.020 were elements of the crime of aggravated first degree murder, the Court did not find those aggravating circumstances were separately charged crimes. Since they are not separately charged crimes, the defendant was not entitled to a duress defense for either kidnap or robbery.

The plain language of RCW 9A.16.060 precludes the defense of duress if the crime charged is murder. The defendant argues that he in effect was charged with kidnapping, since the trial

court instructed the jury on kidnapping, and he was therefore tried and convicted of kidnapping as well as murder. He cites no authority for the proposition that jury instructions dictate the crimes charged, and in turn dictate what defenses are available. Furthermore, the jury was only instructed on the definition of kidnapping. Since kidnapping has a technical legal definition, the court was required to give that instruction. State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). However the court did not give a separate "to convict" instruction setting forth the elements of kidnapping. Thus the jury instructions do not support the conclusion that the defendant was separately charged with kidnapping, and was statutorily entitled to a duress defense.

The defendant also states review is justified under RAP 13.4(b)(3) because failure to give the duress instruction violated his Sixth Amendment right to fair trial. The Sixth Amendment right is satisfied when the instructions taken as a whole accurately inform the jury of the relevant law and permit each party to argue their theory of the case. State v. Henderson, 430 P.3d 637, 638, ¶8 (2018). While a criminal defendant is entitled to have a jury instructed on his theory of the case, he is not entitled to an instruction that inaccurately represents the law or for which there is

no evidentiary support. State v. Staley, 123 wn.2d 795, 803, 872 P.2d 506 (1994). Here the defendant's proposed instruction inaccurately represented the law. Thus, there is no Sixth Amendment violation.

Further, as the trial court found, there was no evidentiary support for the defense. The Court of Appeals did not address the basis for the trial court's ruling except to state that Anderson threatened to use force against the petitioner and others as the events leading to the victim's murder evolved. Slip Op. at 7. To the extent this language can be interpreted to mean that there was an evidentiary basis for a duress instruction if it had been legally available to the defendant, that is incorrect. The Court did not address other elements of the defense for which there must also be evidentiary support. Should this Court conclude that there is a basis to accept review of this issue, the Court should also consider whether the instruction was properly rejected because there was insufficient evidence to support giving it.

B. NEITHER JUROR MISCONDUCT NOR THE CIRCUMSTANCES LEADING TO THE COURT DISMISSING JUROR 2 RAISE A SIGNFICANT CONSTITUTIONAL QUESTION.

The defendant argues the sequence of events leading to Juror 2's dismissal violated his right to a unanimous and impartial

jury. He claims that Juror 2 was dismissed based on his view of the evidence. When a juror's view of the evidence differs from that of other jurors, dismissal of that juror implicates a defendant's right to a unanimous verdict and an impartial jury. State v. Elmore, 155 Wn.2d 758, 771-72, 123 P.3d 73 (2005). The Court of Appeals rejected the defendant's argument because the juror was excused for medical reasons, and not because of his views on the evidence. Slip Op. at 25-26.

The defendant's challenge to this decision rests on supposed facts that are not supported by the record. The defendant argues that Juror 2's heart attack was the result of harassment from other jurors, and that Juror 2 did not want to convict the defendant of either charge. The defendant supplied a declaration from Juror 2 that included the juror's opinion that the pain he felt occurred because of his status as a holdout juror. 1 CP 374. However there was no medical evidence supporting that opinion and the trial court made no finding that Juror 2 had been harassed by other jurors or that his medical condition stemmed from that harassment. 5 CP 1727-34. The absence of a finding of fact is presumptively a negative finding against the person with the burden of proof. Morgan v. Briney, 200 Wn. App. 380, 390-91, 403 P.3d 86 (2017).

Moreover, the reasons for the juror's medical condition, even if it is claimed to be due to pressure from other jurors, inheres in the verdict. State v. Forsyth, 13 W. App. 133, 138, 533 P.32d 847 (1975).

The defendant also argues that the bailiff's contact with Juror 2 violated CrR 6.15 and the defendant's right to a public trial. He does not even address the requirements of the rule, which relates to juror inquiries about the instructions or the evidence. Juror 2 did not ask about the instructions or evidence. His concerns related to personal matters. A bailiff may communicate with a juror about administrative matters because they are neutral and innocuous. State v. Yonker, 133 Wn. App. 627, 635-36, 137 P.3d 888 (2006). The Court did not err when it concluded that no improper communication or violation of CrR 6.15 occurred. Slip Op. at 20-21.

Finally the defendant claims that his right to be present and to a public trial were violated. The Court of Appeals found no violation, since the defendant was present when Juror 2's safety concerns were discussed in his presence in open court. Slip Op. at 22-23. The defendant does not explain how, under the circumstances of this case that the Court of Appeals erred. Review should therefore be denied. State v. Thomas, 150 Wn.2d 821, 874,

83 P.3d 970 (2004) (Failure to provide argument or authority to support it waived a claim of error.)

The defendant also argues this Court should review other juror misconduct, alleging "there is no dispute that, before deliberations, one juror prejudged the case." Petition at 15. In light of the trial court's findings that juror opinions swayed back and forth during deliberations, and that there was no evidence jurors were biased or had fixed opinions before deliberations began, there is no factual basis to support his claim that juror misconduct deprived him of a fair trial.

Should this Court accept review of the issues the defendant raises relating to the events concerning Juror 2, this Court should also consider whether the defendant waived the issues by asking the trial court to defer ruling on his mistrial motion. The Court of Appeals did not decide the waiver issue, but instead decided to address the merits of the issues. Slip Op. at 20, n. 1. This decision is inconsistent with decisions of this Court holding that a defendant may not withhold a mistrial motion, gamble on the verdict, and then seek a new trial on the same grounds he could have asserted in his mistrial motion. State v. Lord, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007); State v. Williams, 96 Wn.2d 215, 226, 634 P.2d 868 (1981).

A defendant has a right to have his trial completed by a particular tribunal. United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). When a trial irregularity occurs the defendant may either seek a mistrial, or continue with the original jury and perhaps obtain acquittal. Absent showing a manifest necessity then, the trial court has no ability to grant a mistrial for those irregularities Id. 606-09,

Here the defendant sought to take advantage of both options. He first made a motion for mistrial, but then sought to "gamble on the verdict" by asking the court to defer ruling on his motion until after the verdict. This boxed the trial court into a single course of action; continuing with the trial. But the court did not need to later consider the bases for the mistrial motion, because the defendant chose to "gamble on the verdict." When the trial court and Court of Appeals subsequently considered the issues in a motion for new trial and on appeal, each court allowed the defendant to do exactly what this Court said he could not.

It is true that the Court may exercise its discretion to consider an issue that has not been preserved for review. This Court did that in State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). The Court cited specific reasons for exercising its

discretion. The issue involved a pervasive practice that had "problematic consequences." Id. at 835-36. However the Court gave no guidance as to when it is appropriate to exercise discretion and review an otherwise unpreserved claim of error. There is a tension between the rules that require issue preservation and the rule that the court may nonetheless exercise its discretion to review an unpreserved claim of error. What factors guide that exercise of discretion is an issue of substantial public interest that should be decided by this Court. RAP 13.4(b)(4).

C. PROSECUTOR ERROR DID NOT PREJUDICE THE DEFENDANT.

The Court of Appeals found the prosecutor committed three instances of misconduct. During one officer's testimony the prosecutor elicited evidence of the defendant's post-arrest silence. In closing, the prosecutor asked jurors to imagine what Ms. Burkheimer thought and felt as the events leading to her murder unfolded. In rebuttal closing the prosecutor argued that duress is not a defense to murder. The Court found none of these instances of error, individually or cumulatively prejudiced the defendant. Slip Op. 7-17, 32-37.

The defendant argues that review of these decisions is warranted under RAP 13.4(1), (2), and (3). He argues that the Court failed to properly analyze the cumulative effect of the error by failing to analyze how each instance of error amplified the others. The Court of Appeals did consider the cumulative effect of the identified errors, stating "but even when combined, we cannot find these errors denied Whitaker a fair trial." Slip Op. at 37. The defendant cites no authority that conflicts with this decision. Rather his argument rests on a disagreement with the Court's assessment of the effect those errors had on the trial. That kind of disagreement is not a basis for review.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED LIMITED AUTOPSY PHOTOS.

The Court of Appeals held the trial court did not abuse its discretion when it admitted a limited number of autopsy photos. Slip Op. at 29-32. The defendant asks this Court to review this decision claiming that there was actual evidence in the record that the photos caused one juror to express a desire to execute the defendant. This claim does not support his request for review.

First, the juror's outburst occurred after the trial court had exercised its discretion to allow the photos. It had no bearing on the court's initial exercise of discretion.

The claim is also not factually supported by the record. The outburst came after the medical examiner testified. He was the State's last witness. 13 RP 2519-75. Before then the jury heard about how Ms. Burkheimer was kidnapped, physically and mentally brutalized, and then driven to a remote area where she was forced into a shallow grave, forced to strip naked, and then was shot multiple times, killing her. Given that testimony, the source of the juror's outburst cannot be traced solely to the autopsy photos.

Finally, the defendant's argument fails to account for the trial court's exercise of discretion. Photos may be admitted, even if gruesome, if their probative value outweighs their prejudicial effect. State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). A court does not abuse its discretion admitting autopsy photos where they are not repetitious and illustrate various injuries to a body, even if some are inflammatory. State v. Pirtle, 127 Wn.2d 829, 870, 822 P.2d 177 (1991). The defendant fails to demonstrate why the Court of Appeals determination that the trial court properly exercised its discretion warrants review.

V. CONCLUSION

For the foregoing reasons the State asks the Court to deny review.

Respectfully submitted on February 12, 2019.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, JOHN ALAN WHITAKER, Petitioner.	No. 96777-6 DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:
The undersigned certifies that on the 13th day of February, 2019, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the Petitioner; Neil M. Fox; nf@neilfoxlaw.com

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 13th day of February, 2019, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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