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 Opening Brief

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2. Deputy Police Chief Layman's recordings of Mr. Brush's statements failed to strictly comply with the requirements of the Privacy Act.

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

4. Defense counsel was ineffective for failing to object to inadmissible and prejudicial evidence.

5. Defense counsel unreasonably failed to seek suppression of Mr. Brush's recorded statements, which were made in violation of the Privacy Act.

6. The trial court violated Mr. Brush's privilege against self-incrimination under the Fifth and Fourteenth Amendments to the U.S. Constitution.

7. The trial court violated Mr. Brush's right to remain silent under Wash. Const. Article I, Section 9.

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33. The three aggravating factors cited by the court in support of its exceptional sentence do not justify a sentence above the standard range.

34. The trial judge commented on the evidence, in violation of Wash. Const. Article IV, Section 16.

35. The court's instruction defining "prolonged period of time" impermissibly relieved the state of its burden of establishing every element of the domestic violence/pattern of abuse aggravating factor.

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37. The trial court erred by giving Supplemental Instruction No. 26 over Mr. Brush's objection.

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The recording of a custodial interrogation is inadmissible at trial unless it was made in strict compliance with the Privacy Act. Here, the prosecution introduced a recording made in

violation of the Privacy Act. Did the erroneous admission of Mr. Brush's illegally recorded statements violate his rights under the Privacy Act?

2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to seek suppression of Mr. Brush's illegally recorded statements under the Privacy Act. Was Mr. Brush denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

3. An accused person's custodial statement may not be admitted at trial if it is tainted by a prior coerced statement. Here, Mr. Brush was asked at gunpoint if he'd shot a human, and he confessed that he had. Did the admission of Mr. Brush's subsequent custodial statements violate his Fifth Amendment privilege against self-incrimination because they were not sufficiently insulated from his prior coerced statement?

4. Police must scrupulously honor a suspect's invocation of his her right to remain silent. In this case, Deputy Police Chief Layman failed to scrupulously honor Mr. Brush's initial invocation of his right to remain silent. Did the trial court err by refusing to suppress statements made after Mr. Brush invoked his right to remain silent?

5. Under the federal constitution, police may not question a suspect after he invokes his right to counsel, unless the suspect himself initiates contact with police and waives his rights. Here, the prosecution failed to prove that Mr. Brush initiated contact after he'd invoked his right to counsel. Did the trial court err by refusing to suppress statements made after Mr. Brush invoked his Fifth and Fourteenth Amendment right to remain silent and his right to counsel?

6. An accused person has the constitutional right to have his case decided by the jury he helped select. Here, the trial judge removed a juror over Mr. Brush's objection after the jury had

been impaneled and sworn to try the case. Did the trial court violate Mr. Brush's rights under the Fifth, Sixth, and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?

7. Hearsay evidence is generally inadmissible. Here, the trial judge overruled Mr. Brush's hearsay objection to the testimony of Bonney's daughter, relaying her mother's out-of-court statements. Did the trial judge abuse his discretion by admitting hearsay in violation of ER 802?

8. An exceptional sentence must be reversed if the reasons for it are not supported by the record or do not justify a sentence above the standard range. Here, the court relied on three aggravating factors that are not supported by the record and do not justify a sentence above the standard range. Must Mr. Brush's exceptional sentence be reversed?

9. A trial judge is absolutely prohibited from commenting on matters of fact, and any judicial comment is presumed to be prejudicial. In this case, the judge instructed jurors that a prolonged period of time was "more than a few weeks." Did the trial judge's comment violate Mr. Brush's rights under Article IV, Section 16?

10. An exceptional sentence based on a pattern of abuse requires the prosecution to prove multiple incidents of abuse occurring over a prolonged period of time. Here, the judge instructed jurors that the phrase "prolonged period of time" was "more than a few weeks." Did the instruction relieve the prosecution of its burden to prove the elements of the domestic violence/pattern of abuse aggravating factor beyond a reasonable doubt, in violation of Mr. Brush's Fourteenth Amendment right to due process?

11. An exceptional sentence may be reversed if it is clearly excessive. The trial court in this case imposed an exceptional sentence of 1060 months, based on three aggravating factors.

If any of the aggravating factors are vacated on appeal, must the sentence be reversed as clearly excessive?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Brian Brush had a very successful boat business, up until the economy started to fail in late 2007. RP (12/5/11) 43, 45. Around that same time, his mother passed away, and his wife divorced him. RP (11/28/11) 220; RP (11/29/11) 17-18; RP (12/5/11) 46-48, 111.

Mr. Brush met Lisa Bonney online, and they fell in love. RP (11/28/11) 208, 238; RP (12/5/11) 49. They were very attached to each other; however, their relationship was volatile. At one point they became engaged; the engagement was broken off during the summer of 2009. RP (11/28/11) 230, 238; RP (12/5/11) 51, 110. By this time, Mr. Brush was estranged from his children, his business was in receivership, and he was under investigation by the Federal Bureau of Investigation for tax-related issues. RP (10/12/11) 62-63; RP (11/28/11) 199-200, 206, 220; RP (12/5/11) 49-51, 111. Mr. Brush suffered from major depression, as well as post-traumatic stress disorder stemming from his previous work as a police officer. RP (12/5/11) 103-106, 113-114, 166-167.

On September 11, 2009, the town of Long Beach put on a car show called Rod Run. The town's beach was crowded with both locals and tourists. RP (10/12/11) 3, 27; RP (12/5/11) 61, 64. That morning, Mr. Brush went hunting with his dog, did some yard work at Bonney's house,

and went to the bank to sign over a boat to his creditors. RP (11/28/11) 228, RP (11/29/11) 102, 115; RP (12/5/11) 56.

In the afternoon, he met Bonney at the beach. Their relationship was strained, and both felt they would break up permanently. They sat on a bench and spoke about issues relating to assets they shared, including a home he'd purchased for her. RP (11/28/11) 231-232, 247; RP (12/5/11) 57-61, 146, 200.

The couple argued; Bonney didn't want Mr. Brush to allow the bank to foreclose on the home; Mr. Brush saw no other options. At some point, Bonney angrily told Mr. Brush that he was not a man, and called him a "pussy". RP (11/28/11) 249; RP (12/5/11) 57-61. Mr. Brush walked to his truck, grabbed his shotgun, and shot Bonney four times in quick succession. RP (11/28/11) 81-83, 102, 112, 115, 120-122, 124, 135, 138.

Three police officers saw him do this and immediately came over and yelled commands. Mr. Brush threw down the gun, walked toward the officers, knelt on the ground, and then lay prone. RP (10/12/11) 17; RP (11/28/11) 83-85, 110-111, 137. All three officers had their weapons drawn. RP (10/12/11) 16. The shooting occurred at 4:41pm. RP (11/28/11) 104-106.

While Mr. Brush was on the ground being handcuffed, Officer Arlie Boggs asked, "Were you shooting at a human?" RP (10/12/11) 7, 8. Mr. Brush replied that he was. RP (10/12/11) 7, 19. As he was being taken into custody, Officer Boggs read Mr. Brush his rights. RP (10/12/11) 10-11, 17, 18. When asked if he wished to talk with police, Mr. Brush replied "no". RP (10/12/11) 11, 20.

Mr. Brush was secured in the back of Cosmopolis Deputy Police Chief Heath Layman's car. At 4:48 p.m. Layman read Mr. Brush his rights from a form, and again asked if he wished to talk. He was not asked to sign the rights form. RP (10/12/11) 50-54, 78. Layman checked the box labeled "no", indicating that Mr. Brush did not wish to answer questions. RP (10/12/11) 53-54, 78; Ex. I, Supp. CP.

After about forty-five minutes,[1] Mr. Brush was transported to the police station. RP (10/12/11) 59. Layman and Pacific County Undersheriff Ron Clark interviewed him. RP (10/12/11) 44. They recorded the interview, which started at 5:52pm. RP (10/12/11) 32, 58. The recording of the interview does not include any indication that Mr. Brush consented to the recording. Nor did the recording include a

[1] At some point while still at the scene, Mr. Brush reported that he was having chest pains. The police summoned paramedics, who checked and cleared Mr. Brush. RP (10/12/11) 30-31; RP (11/28/11) 198.

recitation of Mr. Brush's Miranda rights. RP (10/12/11) 32-38; Ex. H (admitted 10/12/11), Supp. CP.

Mr. Brush described his volatile relationship with Bonney, outlined abuse he'd suffered at her hands, and indicated that he had no memory of the shooting itself. RP (11/28/11) 205-239. Towards the end of his statement, he expressed surprise at discovering that he'd shot Bonney. RP (10/12/11) 73; RP (11/28/11) 239.

After about thirty minutes, Mr. Brush requested an attorney and the interview stopped. RP (10/12/11) 33-36, 66; Ex. H, Supp.CP.

Layman returned to his office. Once there, he received a phone call from Long Beach Police Chief Flint Wright, indicating that Mr. Brush wished to speak with him further. RP (10/12/11) 66-68. Layman returned and conducted a second recorded interview, starting at 7:27 pm. This time, he administered Miranda warnings as part of the recorded interview. RP (10/12/11) 67-69, 79; Ex. H, K, Supp. CP.

> LAYMAN: Alright we are recording It's uh September 11, Friday, 7:27 pm. We are at the south Pacific County Sheriff's Office in Long Beach. I was requested to come back at the request of Brian to uh provide me some additional information. This is with the understanding that he had earlier advised me that he did not want to talk to me anymore because he wanted an attorney at that point we ended it. However, he has initiated contact asking to come back and talk to him. With that in mind Brian do you still want to talk to me?
> Ex. H, Supp. CP.

Mr. Brush agreed to talk to Layman; the second recorded interview lasted until 7:39 p.m. Ex. H, Ex. K, Supp. CP. Mr. Brush described how Bonney had scratched him, hit him, and told him to "be a f*cking man." He told the officer that the last thing he remembered was Bonney telling him "Be a man, don't be a pussy." He also said he didn't remember getting the gun from the truck. He told Layman that he tried to get in the truck to get away from her, and again said he didn't remember getting the gun or shooting her. Ex. H, Ex. K, Supp. CP.

Deputy Chief Layman said he thought Mr. Brush did remember, but was trying hard to forget because it was painful, and suggested that he was "intentionally blocking that image from [his] mind." Mr. Brush told him that he remembered nothing until he was on the ground, responding to directives from the police. He also said that when he stepped on the running board to get in the truck and drive away, Bonney grabbed him and wouldn't let him leave. Layman ended the interview by confirming that Mr. Brush understood he was being charged with murder. Ex. H, Ex. K, Supp. CP. See also RP (11/28/11) 247-259.

The state charged Mr. Brush with Murder in the First Degree. The state alleged several aggravators:

> (3)(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

> (3)(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present: (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; . . . or (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.
>
> (3)(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).
>
> And furthermore, at the time of the commission of the crime, the Defendant was armed with a firearm, contrary to RCW 9.94A.533(3)(a) which adds an additional 60 months confinement. CP 11-13.

A hearing was held to determine the admissibility of Mr. Brush's statements. RP (10/12/11). At the hearing, Layman testified that while he did check the "no" box regarding whether Mr. Brush was willing to answer questions, Mr. Brush actually said that he would talk but not while still at the scene. RP (10/12/11) 50-53. He said that he did not ask Mr. Brush to sign the form when it was completed. RP (10/12/11) 54.

The prosecution also presented Layman's testimony that he'd been told Mr. Brush wished to speak to him (after concluding the first recorded interview by requesting an attorney.). RP (10/12/11) 65-66. According to Layman, he received a call from Long Beach Chief of Police Wright, who told him that "Mr. Brush had asked that I come back and talk to him." RP (10/12/11) 66-68. Layman said that no one affirmatively stated that they

had tried to get Mr. Brush to talk more. RP (10/12/11) 70. However, the state did not present the testimony of Chief Wright or anyone else who spoke with Mr. Brush after the first recorded interview; nor did the state introduce any evidence regarding who initiated the conversation between Mr. Brush and Chief Wright, what was discussed, or how Mr. Brush came to make his request to see Layman again. RP (10/12/11) 1-90.

Mr. Brush argued that all of his statements should have been suppressed, because all were tainted by his initial coerced admission that he was shooting at a human being. RP (10/12/11) 96-101. He also argued that the recorded statements were inadmissible because Mr. Brush didn't sign a rights form at the scene or before the first recorded statement. RP (10/12/11) 98-99.

The court suppressed Mr. Brush's initial statement (when he admitted shooting at a human), but found the remaining statements admissible. RP (10/12/11) 103-116; CP 30-40.

Jury selection lasted two days. A jury was selected and jurors were sworn to try the case. Clerk's Minutes filed 12/6/11, Supp. CP. On the third day of trial, the bailiff told the judge court that Juror 1 had learned that his boss had purchased him a plane ticket to go to Alaska. He'd received no advance notice, and his trip was expected to last a month. RP (11/28/11) 2-7. The court and parties questioned the juror. Juror 1 told

the court that missing the trip would create a financial hardship, but would not impact his ability to "concentrate fully on the trial." RP (11/28/11) 15-20. The court excused the juror over Mr. Brush's objection. RP (11/28/11) 21-23.

The trial was bifurcated, so that jurors would not hear any allegations of a pattern of domestic violence until a second sentencing phase. RP (11/15/11) 102-126. During the guilt phase, one state expert opined that at least one of the shots was fired from a distance of three feet or less, and that the others were fired from three to nine feet away. RP (11/29/11) 66-71.

The medical examiner who conducted the autopsy opined that the first shot was to Bonney's torso, from roughly four or five feet away. He testified that the shot would have caused pain, but would not have been fatal. RP (11/30/11) 20-24. The second shot was a fatal shot: it hit her spine and pierced many vital organs. RP (11/30/11) 25-27, 31-33. The third shot hit her buttocks, and was also fatal. RP (11/30/11) 34-37. The last shot was to her head, displacing bone and tissue from her skull; it too was a fatal shot. RP (11/30/11) 38-43.

The medical examiner told the jury that the third and fourth shots were not necessary to kill her, but that they were "to make sure she was dead". RP (11/30/11) 45-46. Over defense objection, he opined that the

damage done by the shots was "far in excess of what is required to just kill somebody." RP (11/30/11) 48-49.

Mr. Brush presented expert testimony in support of a diminished capacity defense. The prosecution countered with its own expert, who claimed that Mr. Brush acted intentionally and with premeditation. RP (12/5/11) 25-224. Both experts diagnosed Mr. Brush with major depression, post-traumatic stress disorder, and a personality disorder. RP (12/5/11) 103-106, 113-114, 166-167.

During cross-examination of the defense expert, the prosecutor brought out past incidents that the doctor considered in developing her opinion. RP (12/5/11) 130-153. These included an incident in which Mr. Brush hit Bonney's car with a hammer during an argument, and another incident in which he'd followed Bonney to a man's home and confronted both of them. RP (12/5/11) 133, 138. Mr. Brush had apparently also threatened Bonney with "financial ruin". RP (12/5/11) 139.

The jury found Mr. Brush guilty of Murder in the First Degree. Verdict Form A, Supp. CP. They also returned special verdicts finding that Mr. Brush and Bonney were members of the same family or household, that Mr. Brush was armed with a firearm, that Mr. Brush's conduct manifested deliberate cruelty, that the injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense, and

that the crime was an "aggravated domestic violence offense" (based on allegations that Mr. Brush's conduct manifested deliberate cruelty and that Bonney's injuries substantially exceeded those necessary to meet the elements of the offense). Special Verdict Forms 1, 2, 3, 4, 5, Supp. CP.

Following these verdicts, the court held the second phase of the trial to address the allegation that Mr. Brush engaged in a pattern of domestic violence. The state sought to admit evidence from Bonney's then 20-year-old daughter Elizabeth Bonney[2] regarding statements Bonney had made about prior alleged domestic violence incidents with Mr. Brush. Mr. Brush objected. RP (11/15/11) 102-128; RP (12/6/11) 137-167; Admission of Elizabeth Bonney's Statements, Supp. CP. The court ruled the evidence admissible. RP (12/6/11) 161, 167.

Elizabeth testified that she and her mother became convinced that Mr. Brush was following them as they went for a walk in August of 2009. RP (12/6/11) 174-178. During that walk, Bonney told Elizabeth that the day before, Mr. Brush had driven past the house of a male friend while she was there. RP (12/6/11) 184. In describing the incident, Bonney said that "[Mr. Brush] always stalks the house." The court overruled a defense objection. RP (12/6/11) 180.

[2] To avoid confusion, Elizabeth Bonney will be referred to as "Elizabeth."

Over defense objection, the court instructed the jury on the elements required to find an aggravated domestic violence offense based on a pattern of abuse:

> (1) That the victim and the defendant were family or household members; and
> (2) That the offense was part of an ongoing pattern of psychological abuse of the victim manifested by multiple incidents over a prolonged period of time.
>
> An "ongoing pattern of abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks. Instr. 26, Supp. CP; RP (12/6/11) 206-209.

The jury endorsed the remaining aggravating factor. RP (12/6/11) 227-230; Special Verdict Form 6, Supp. CP.

Mr. Brush moved for a new trial. Motion for New Trial, Supp. CP. He argued that the court erred by removing Juror 1 for hardship after the jury had been impaneled. The court denied the motion. RP (2/9/12) 2-5; Response to 7.5 Motions, Defentant's Reply, Supp. CP; CP 41-44.

At sentencing, the state urged the judge to impose an aggravated sentence of three times the standard range, for a total of 75 years. RP (2/9/12) 39-47. The defense countered that Mr. Brush's mental illness and failed diminished capacity defense balanced against the aggravating factors, and urged a standard range sentence. RP (2/9/12) 47-50.

The judge imposed an exceptional sentence of 1000 months, to which was added a 60-month firearm enhancement. RP (2/9/12) 67-68; CP 45-66. The court based the exceptional sentence on three aggravating factors: (1) deliberate cruelty, (2) injuries that substantially exceeded those necessary to establish the elements of the offense, and (3) that the offense was an aggravated domestic violence offense that was part of a pattern of abuse. CP 54.

Mr. Brush timely appealed. CP 45-68.

ARGUMENT

I. MR. BRUSH'S CONVICTION MUST BE REVERSED BECAUSE THE EVIDENCE USED TO CONVICT HIM INCLUDED ILLEGAL RECORDINGS MADE IN VIOLATION OF THE PRIVACY ACT.

A. Standard of Review

Questions of statutory interpretation are reviewed de novo. State v. Engel, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009). The Court of Appeals has discretion to accept review of any issue argued for the first time on appeal, including issues that do not implicate a constitutional right. RAP 2.5(a); see State v. Russell, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

A conviction based in part on a violation of the Privacy Act must be reversed unless, "within reasonable probability, the [error] did not

materially affect the outcome of the trial." State v. Porter, 98 Wash. App. 631, 638, 990 P.2d 460 (1999).

B. Privacy Act violations may be raised for the first time on review.

Under the Privacy Act, illegal recordings "shall be inadmissible in any civil or criminal case..." RCW 9.73.050 (emphasis added). Recordings of custodial interrogations made in conformity with the Act are exempt from RCW 9.73.050; however, the exemption does not apply to such recordings if they violate RCW 9.73.090(1)(b). See RCW 9.73.090(1) (listing "instances" under which "[t]he provisions of RCW 9.73.030 through 9.73.080 shall not apply to police... personnel") and RCW 9.73.090(3) (declaring that "[c]ommunications or conversations *authorized to be...recorded... by this section* shall not be inadmissible under RCW 9.73.050") (emphasis added).

The Act "puts a high value on the privacy of communications,"[3] and even requires exclusion of "conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements." State v. Williams, 94 Wash.2d 531, 548, 617 P.2d 1012 (1980). It embodies the legislature's strong desire to protect the privacy of Washington residents, including those engaged in criminal activity.

[3] State v. Christensen, 153 Wash.2d 186, 201, 102 P.3d 789 (2004).

Williams, at 548. The robust expression of this sentiment—which is consistent with the strong protections available under Wash. Const. Article I, Section 7—suggests the legislature intended to allow parties to raise Privacy Act violations on review, even absent objection in the trial court. See RCW 9.73.050.

C. The police failed to strictly comply with the requirements of the Privacy Act during the custodial interrogation of Mr. Brush.

Washington's Privacy Act "govern[s] the conditions under which police may make recordings of suspects during custodial interrogations." State v. Courtney, 137 Wash. App. 376, 382, 153 P.3d 238 (2007). Any such recording "must strictly comply with statutory provisions to ensure that consent to the interrogation is capable of proof and to avoid a 'swearing contest' regarding whether such consent actually occurred." Id. As the Supreme Court has noted, "the legislature enacted [RCW 9.73.090(1)(b)] so that police officers would comply with those provisions." Lewis v. State, Dept. of Licensing, 157 Wash.2d 446, 466-67, 139 P.3d 1078 (2006).

The Act requires that

> [S]ound recordings [of custodial interrogations] shall conform strictly to the following:
>
> (i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;

> (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
> (iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights and such statements informing him or her shall be included in the recording;
> (iv) The recordings shall only be used for valid police or court activities.

RCW 9.73.090(1)(b). Failure to strictly comply renders any recording inadmissible. State v. Mazzante, 86 Wash. App. 425, 428, 936 P.2d 1206 (1997). With regard to subsection (iii), an officer's "[m]ere reference to a prior written waiver [of constitutional rights] is insufficient." Id.

In this case, Layman conducted two recorded interviews that did not strictly comply with the statute, and were thus inadmissible at trial. Ex. H, Supp. CP. Neither of the two recorded interviews included a statement informing Mr. Brush that the recording was being made, as required under RCW 9.73.090(1)(b)(i). Ex. H, pp. 1, 25-26. In addition, the first recording did not include a recitation of Mr. Brush's constitutional rights, as required under RCW 9.73.090(1)(b)(iii). Ex. H, p. 1.

Because Layman failed to strictly comply with the Privacy Act's requirements, the two recorded statements should have been excluded from evidence. Furthermore, the error materially affected the outcome of trial: "a confession is typically 'powerful evidence.'" Sivak v. Hardison, 658 F.3d 898, 917 (9th Cir. 2011) (quoting Premo v. Moore, ___U.S. ___,

___, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011)). There can be little doubt that jurors might have reached a different verdict had Mr. Brush's statements been excluded.

Mr. Brush's conviction must be reversed. Porter, at 638. The case must be remanded for a new trial, with instructions to exclude the two recorded statements made in violation of the Privacy Act. Id.

II. MR. BRUSH WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. State v. A.N.J., 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington

Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when "there is no conceivable legitimate tactic explaining counsel's performance." Reichenbach, at 130. Any trial strategy "must be based on reasoned decision-making..." In re Hubert, 138 Wash. App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing

the alleged strategy. See, e.g., State v. Hendrickson, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

C. Defense counsel provided ineffective assistance by failing to seek suppression of Mr. Brush's statements based on violation of the Privacy Act.

Defense counsel argued that Mr. Brush's custodial statements should be suppressed because they were taken in violation of his Fifth Amendment rights. RP (10/12/11) 96-100. However, counsel neglected to argue a violation of the Privacy Act. As described in the preceding section, Mr. Brush's statements were illegally recorded in violation of RCW 9.73.090. There was no strategic reason for counsel's failure to argue the Privacy Act violation; furthermore, counsel's constitutional arguments show that he was not seeking admission of the illegal recording for tactical reasons. Accordingly, counsel's failure to argue the Privacy Act violation was unreasonable under the first prong of the Strickland test. State v. Saunders, 91 Wash. App. 575, 578, 958 P.2d 364 (1998).

The error was prejudicial, because the illegal recordings included damaging material. As noted above, confessions are always powerful evidence. Sivak at 917. There is a reasonable probability that the outcome of the trial would have been different had counsel sought to have

the recordings suppressed for violation of the Privacy Act. Accordingly, counsel's failure to seek suppression of the illegal recordings violated Mr. Brush's right to the effective assistance of counsel. Saunders, at 578.

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

A. Standard of Review

Constitutional violations are reviewed de novo. McDevitt v. Harborview Med. Ctr., ___ Wash.2d___, ___, ___ P.3d ___ (2012). The validity of an accused person's Miranda waiver presents an issue of law requiring de novo review. State v. Daniels, 160 Wash.2d 256, 261, 156 P.3d 905 (2007); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain their burden on the issue. State v. Armenta, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997); State v. Byrd, 110 Wash. App. 259, 265, 39 P.3d 1010 (2002).

B. Custodial statements are presumed to have been coerced; the state bears a heavy burden of proving that an accused person waived the right to counsel and the right to remain silent.

The Fifth Amendment to the U.S. Constitution provides that "No person shall... be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment.[4] U.S. Const. Amend. XIV; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Absent Miranda warnings, a suspect's statements during a custodial interrogation are presumed involuntary. State v. Hickman, 157 Wash. App. 767, 772, 238 P.3d 1240 (2010); Miranda, supra.

To implement the privilege against self-incrimination and to reduce the risk of coerced confessions, an accused person must be informed of her or his rights prior to custodial interrogation. Missouri v. Seibert, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004); State v. Nelson, 108 Wash. App. 918, 924, 33 P.3d 419 (2001). Failure to provide the required warnings and obtain a waiver requires exclusion of any statements obtained. Seibert, at 608. It is "clearly established" that

[4] Similarly, Article I, Section 9 of the Washington State Constitution, provides that "No person shall be compelled in any case to give evidence against himself..." Wash. Const. Article I, Section 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. State v. Easter, 130 Wash.2d 228, 235, 922 P.2d 1285 (1996).

statements taken in the absence of counsel are inadmissible unless the government meets its heavy burden of showing that the suspect made a voluntary, knowing, and intelligent waiver of her or his rights. Hart v. Attorney General of Florida, 323 F.3d 884, 891-892 (C.A.11, 2003) (citing Miranda, at 475).

C. The trial court should have suppressed statements tainted by Mr. Brush's initial coerced confession.

Statements obtained through unwarned custodial interrogation are inadmissible under Miranda. In addition, any subsequent post-Miranda statements are also inadmissible, unless the taint of the earlier statement is removed; this is so because any initial confession exerts additional pressure on the suspect:

> "After an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag."

United States v. Tyler, 164 F.3d 150, 156-57 (3d Cir. 1998) (quoting United States v. Bayer, 331 U.S. 532, 540–41, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947)).

A Miranda violation that produces an otherwise voluntary statement can generally be cured by the subsequent administration of

Miranda warnings.[5] See Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). The same is not true of involuntary statements extracted from a suspect in violation of due process. United States v. Perdue, 8 F.3d 1455, 1468 n. 7 (10th Cir. 1993).

If the prosecution hopes to introduce a statement obtained after a prior involuntary statement, it "must show intervening circumstances which indicate that the second confession was 'insulate[d] ... from the effect of all that went before.'" Id, at 1467-1468 (quoting Clewis v. Texas, 386 U.S. 707, 710, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967)). The proper administration of Miranda warnings is only one factor to be considered in making this determination. Tyler, at 157. Other insulating factors can include a significant delay between the first and second interrogations, a change of location, and a change of personnel; however, "[t]he most critical factor is a showing that the defendant knew earlier statements made prior to the Miranda warnings could not be used against him." State v. Lavaris, 99 Wash.2d 851, 858, 664 P.2d 1234 (1983).

In this case, Mr. Brush was seized at gunpoint by three officers who gave commands, and he was made to kneel and then lie prone on the ground. RP (10/12/11) 4-7, 16-19, 27. As he was being handcuffed,

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[5] Unless police deliberately engage in a two-step interrogation. Seibert, supra (plurality).

Officer Boggs asked Mr. Brush if he'd been shooting a human. RP (10/12/11) 7-8, 16-17; 19; RP (11/28/11) 83-85, 110-111, 137. Cf. Perdue, at 1468 (suspect seized at gunpoint and ordered onto the ground.) Under these circumstances, his initial statement was not merely obtained in violation of Miranda; it was also involuntary, in violation of due process. Perdue, at 1468. Accordingly, Elstad does not apply. Perdue, at 1468 n. 7.

Mr. Brush's subsequent statements are inadmissible, because they were insufficiently insulated from the taint of his initial involuntary statement. The delay between the initial involuntary statement and the post-Miranda interview was only 70 minutes,[6] which, under the circumstances, was not long enough to dissipate any taint. Cf. United States v. Swanson, 635 F.3d 995, 1004 (7th Cir. 2011) (two hour delay insufficient)

Furthermore, Officer Boggs and then Deputy Chief Layman both asked Mr. Brush to waive his Miranda rights within minutes after initial coerced statement. Furthermore, Mr. Brush was not re-advised of his Miranda rights when the recorded interrogation commenced at the police

[6] The initial coerced statement, made at gunpoint, occurred around 4:41 p.m., which is also (approximately) when Mr. Brush invoked his right to remain silent. RP (10/12/11) 4-13. Layman arrived at the scene and sought a Miranda waiver at 4:48 p.m., and started the recorded interview at 5:52 p.m. RP (10/12/11) 32, 51, 58; Ex. H, Supp.CP.

station. Finally, there is no indication Mr. Brush understood that his initial involuntary response to police questioning could not be used against him. RP (10/12/11) 64-66, 25-87; Ex. H, Supp. CP.

Under these circumstances, Mr. Brush's two recorded interviews should have been suppressed. Perdue, at 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.

D. The trial court should have suppressed statements taken from Mr. Brush because the police failed to scrupulously honor his initial invocation of his right to remain silent.

If an accused person invokes her or his right to remain silent, the police must "scrupulously honor[]" the request to cut off questioning. Michigan v. Mosley, 423 U.S. 96, 104-106, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Where the request is not "scrupulously honored," subsequent statements cannot be used at trial.[7] Id. The critical safeguard associated with the right to remain silent is the right to cut off questioning. Id, at 103.

Officers may only seek a subsequent Miranda waiver if (1) all questioning ceased, (2) a significant period elapsed between the invocation of rights and any subsequent attempt to obtain a waiver, (3) Miranda

[7] This is referred to as a Mosley violation.

warnings are readministered, and (4) the subject of the second interrogation is unrelated to the first. United States v. Rambo, 365 F.3d 906, 910-11 (10th Cir. 2004). The second requirement is critical: Mosley prohibits "the immediate cessation of questioning, and ... a resumption of interrogation after a momentary respite." Mosley, at 102.

A suspect's invocation of the right to remain silent "serves as a complete bar to any questioning related to the subject of the initial interrogation for a 'significant period of time'..." Christopher v. State of Fla., 824 F.2d 836, 844 (11th Cir. 1987). During this significant period of time, "the suspect stands in virtually the same position as he would be had he requested counsel: the police are barred from interrogating him." Id.

In this case, Mr. Brush unequivocally invoked his right to remain silent when administered Miranda warnings by Boggs shortly after the shooting. EP (10/12/11) 10-11, 17-18, 20. This invocation almost immediately after the shooting, which had occurred at approximately 4:41 p.m. RP (10/12/11) 4; RP (11/28/11) 77. The police did not scrupulously honor Mr. Brush's decision to invoke his right to remain silent. Instead, only seven minutes (or less) after Mr. Brush invoked his right to remain silent, Deputy Police Chief Layman re-administered Miranda warnings and sought a waiver; this occurred at 4:48 p.m. RP (10/12/11) 49-54; Ex. I, Supp. CP.

Furthermore, after transporting Mr. Brush to the police station, Layman did not readminister Miranda warnings or seek a waiver before he actually began the recorded interview. Ex. H, Supp. CP; RP (10/12/11) 58-59.

Because the police failed to scrupulously honor Mr. Brush's invocation of his right to remain silent, any subsequent waiver was ineffective. Mosley, at 104-106. Accordingly, Mr. Brush's statements at the jail should have been suppressed. Id; Tyler, at 157-158.

E. The trial court should have suppressed statements extracted from Mr. Brush after he unequivocally invoked his right to counsel, because the prosecution failed to meet its heavy burden of proving that Mr. Brush initiated contact with law enforcement and waived his right to counsel.

An accused person who has invoked his right to counsel may not be interrogated unless he himself initiates further communication with the police. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Necessary components of this "'rigid' prophylactic rule" are a determination that the accused person "(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." Smith v. Illinois, 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (quoting Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)).

The question of initiation and waiver "are separate, and clarity of application is not gained by melding them together." Oregon v. Bradshaw, 462 U.S. 1039, 1045, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). In other words, the prosecution must establish both that the accused person initiated another conversation about the case and that he or she knowingly, intelligently, and voluntarily waived his right to remain silent and his right to have counsel present. Id.

Not all inquiries by the accused person amount to initiation:

> there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.

Id.

In this case, the evidence established that Mr. Brush invoked his right to counsel, and that Long Beach Police Chief Wright told Layman that Mr. Brush wished to speak with him. RP (10/12/11) 66-69; Ex. H, Supp. CP. Missing from the record is any indication of what transpired between Mr. Brush and Chief Wright at the jail. RP (10/12/11) 2-87.

That interaction was just as crucial to the issue of "initiation" as Mr. Brush's subsequent contact with Layman (in which he affirmed that he wished to talk to Layman). Ex. H, Supp. CP. If Chief Wright asked

Mr. Brush about the case, or told him that invoking his right to counsel could hurt his chances of lenience from the prosecutor, then the Edwards rule was violated, even if Mr. Brush responded by asking to speak to Layman again.[8] Edwards, at 484-485.

The record shows that some interaction may have occurred between Mr. Brush and Chief Wright (or, in the alternative, between Mr. Brush and a corrections officer at the jail). RP (10/12/11) 66. It does not reveal the nature of the interaction or who initiated the conversation that resulted in the summons to Layman. RP (10/12/11) 66.

The court's findings of fact are likewise devoid of any indication of what transpired between Mr. Brush and Chief Wright; instead, the court simply summarized Layman's testimony, finding that Mr. Brush "indicated that he wanted to speak to police." CP 33. The absence of any findings on the particulars of this interaction between Mr. Brush and Chief Wright confirms that the state failed to sustain its burden to prove "initiation." Armenta, at 14; Byrd, at 265.

Furthermore, without knowing the details of Mr. Brush's interaction with Chief Wright, it is impossible to determine whether any

[8] It is not necessary to conclude that Chief Wright sought to influence Mr. Brush: she or he may have asked about the case out of simple curiosity, or provided sincere advice in an effort to help Mr. Brush.

subsequent waivers of his right to remain silent and his right to counsel were knowing, intelligent, and voluntary. Obviously, any threat, promise, or other coercive pressure applied by the corrections officer would vitiate the waiver subsequently obtained by Layman. See, e.g., Miranda, at 476 ("any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.")

The absence of proof and the lack of findings compels the conclusion that Mr. Brush did not initiate conversation within the meaning of Edwards. Accordingly, his second interview with Layman should have been suppressed. The conviction must be reversed and the case remanded for a new trial. Edwards, at 484-485.

IV. THE TRIAL COURT VIOLATED MR. BRUSH'S CONSTITUTIONAL AND STATUTORY RIGHTS TO HAVE HIS TRIAL COMPLETED BY THE JURY HE HAD HELPED TO SELECT.

A. Standard of review

Constitutional violations are reviewed de novo. McDevitt, at ___. Questions of statutory interpretation are also reviewed de novo. Engel, at 576. Although removal of a juror is ordinarily reviewed for an abuse of

discretion,[9] this discretion is subject to the requirements of the constitution: a court necessarily abuses its discretion by denying an accused person her or his constitutional rights. See, e.g., State v. Iniguez, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009); see also United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992).

B. The trial court failed to comply with RCW 2.36.110 and violated Mr. Brush's constitutional right to a jury trial by the tribunal he helped to select.

The state constitution guarantees an accused person the right to trial by an impartial jury; this "right of trial by jury shall remain inviolate." Wash. Const. Article I, Sections 21 and 22.

Similarly, the Sixth Amendment to the federal constitution guarantees an accused person the right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The Fifth Amendment's double jeopardy clause protects a related right: "the interest of an accused in retaining a chosen jury." Crist v. Bretz, 437 U.S. 28, 35-36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). That interest has been described as "a defendant's

[9] A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. State v. Depaz, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. State v. Hudson, 150 Wash. App. 646, 652, 208 P.3d 1236 (2009).

'valued right to have his trial completed by a particular tribunal.'" Id, at 36 (quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949)).

In Washington, RCW 2.36.110 governs removal of a juror after a superior court jury has been impaneled.[10] Under the statute, "[i]t shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110. The statute is supplemented by CrR 6.5 (captioned "Alternate Jurors"), which provides as follows: "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury."

In this case, Juror 1 should have remained on the jury. He did not manifest unfitness as a juror, and thus could not be removed pursuant to RCW 2.36.110. Nor was Juror 1 "unable to perform the duties" of a juror; thus, the trial court lacked the power to remove him under CrR 6.5. In fact, when asked if missing the trip would impact his "ability to

[10] RCW 4.44.290, cited by Mr. Brush in the trial court, applies in civil cases.

concentrate fully on the trial," Juror 1 replied that it would not. RP (11/28/11) 15-20.

By removing Juror 1 from the jury, the judge violated Mr. Brush's "valued right" to have the jury he'd helped select decide his case. The decision was contrary to RCW 2.36.110 and CrR 6.5, and it infringed Mr. Brush's rights under the Fifth, Sixth, and Fourteenth Amendments. It also infringed his state constitutional right to a jury trial under Wash. Const. Article I, Sections 21 and 22. Accordingly, 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. Standard of Review

Statutory construction is an issue of law, reviewed de novo. Ruvalcaba v. Kwang Ho Baek, 175 Wash.2d 1, 6, 282 P.3d 1083 (2012). A jury's finding on an aggravating factor is reviewed under the sufficiency of the evidence standard. State v. Stubbs, 170 Wash. 2d 117, 123-24, 240 P.3d 143 (2010). The legal justification for an exceptional sentence is reviewed de novo. Id.

Where no constitutional rights are infringed, evidentiary rulings are reviewed for abuse of discretion. State v. Fisher, 165 Wash.2d 727, 750, 202 P.3d 937 (2009). An erroneous evidentiary ruling requires

reversal if it is prejudicial. State v. Asaeli, 150 Wash. App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. Id., at 579.

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

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay evidence is generally inadmissible. ER 802.

A statement's proponent bears the burden of establishing an exception to the rule against hearsay. State v. Nieto, 119 Wash. App. 157, 161, 79 P.3d 473 (2003). In this case, the prosecution failed to establish an exception for a hearsay statement admitted through Bonney's daughter.

Prior to the second phase of trial, Mr. Brush sought a ruling excluding Elizabeth Bonney's testimony regarding her mother's out-of-court statements. Elizabeth was permitted to relay her mother's description of prior incidents between herself and Mr. Brush. RP (12/6/11) 174-186. Although some of these statements were made while Bonney was under stress and excitement, they were not excited utterances because they did not relate to the "startling event or condition" causing the stress and excitement. See ER 803(a)(2). In other words, Bonney's statements

to her daughter about things that had happened on other occasions were not admissible simply because Bonney was stressed or excited at the time she made the statements. Elizabeth's testimony regarding her mother's statements should have been excluded under ER 802.

Because these statements related directly to the domestic violence aggravating factor submitted to the jury, the "pattern of abuse" special verdict returned following the second phase of trial must be vacated, and the case remanded with instructions to exclude the hearsay evidence if another penalty phase hearing is held.

C. The exceptional sentence is not supported by the record, the claimed aggravating factors do not justify a sentence above the standard range, and the sentence was clearly excessive.

An exceptional sentence must be reversed if (a) "the reasons supplied by the sentencing court are not supported by the record...[or] do not justify a sentence outside the standard sentence range," or (b) "the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4). The reasons for an exceptional sentence must be substantial and compelling, and must take into account factors other than those which are necessarily considered by the legislature in computing the presumptive range for the offense. State v. Nordby, 106 Wash.2d 514, 518, 723 P.2d 1117 (1986).

Here, the exceptional sentence was based on three factors:

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The current offense involved domestic violence, and the following was present: (1) The offense was part of an ongoing pattern of psychologist, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; and (2) the offender's conduct during the commission of the current offense manifested deliberate cruelty.

(c) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.

CP 55.

None of these factors are supported by the record. Nor do they justify an exceptional sentence.

1. "Deliberate cruelty" cannot justify an exceptional sentence in this case.

Deliberate cruelty "requires a showing 'of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself.... [T]he cruelty must go beyond that normally associated with the commission of a charged offense or inherent in the elements of the offense.'" State v. Gordon, 172 Wash. 2d 671, 680-81, 260 P.3d 884 (2011) (quoting State v. Tili, 148 Wash.2d 350, 369, 60 P.3d 1192 (2003) (citation omitted)).

Two cases are illustrative. Where a murderer hits, kicks, strangles, and stabs his victim (breaking bones and cartilage in her neck and leaving

gaping wounds in her chest), rips an earring from her ear, rapes her and punctures her back, arm and thigh as she bleeds to death, a finding of deliberate cruelty is warranted. State v. Copeland, 130 Wash.2d 244, 297, 922 P.2d 1304 (1996).

On the other hand, shooting someone five times is not sufficient to impose an exceptional sentence based on deliberate cruelty: "[t]his fact itself does not suggest he gratuitously inflicted pain as an end in itself." State v. Serrano, 95 Wash. App. 700, 712-13, 977 P.2d 47 (1999).

Here, Mr. Brush shot Bonney four times with a shotgun. Although the first nonlethal shot undoubtedly caused her pain, there is no indication that her pain was greater than that of the ordinary murder victim, or that Mr. Brush deliberately sought to inflict pain as an end in itself. Indeed, the evidence is to the contrary; all the witnesses suggested that he fired the four shots in rapid succession. At most, she endured only seconds of pain before she expired. RP (11/28/11) 81-83, 102, 112, 115, 120-122, 124, 135, 138. Had Mr. Brush desired to prolong her suffering, he would not have fired so many times so quickly.

Accordingly, the finding of deliberate cruelty is not supported by the record. Serrano, at 712-713. Furthermore, his conduct was no more cruel than the conduct of others who commit premeditated murder, and

thus was necessarily considered by the legislature in computing the presumptive range. Nordby, at 518.

For these reasons, the deliberate cruelty aggravating factor cannot sustain the exceptional sentence in this case. Id. For the same reason, the deliberate cruelty prong of the aggravated domestic violence aggravating factor must also fail. Id.

2. Bonney's "substantial injuries" cannot justify an exceptional sentence in this case.

The Supreme Court has held that "no injury can 'substantially exceed' the level of bodily harm necessary to satisfy the element of 'great bodily harm.'" Stubbs at 131. It therefore follows a fortiori that no injury can substantially exceed the level of bodily harm necessary to satisfy the element of death. Accordingly, this aggravating factor cannot sustain the exceptional sentence.

3. This offense was not an "aggravated domestic violence offense."

The jury found the crime to be an aggravated domestic violence offense. Special Verdict Form 6, Supp. CP. The bases for this finding were that (1) Mr. Brush's conduct constituted deliberate cruelty,[11] (2) the

[11] The jury was instructed on an "intimidation" alternative; however, it was not provided a special verdict on that alternative. (Jurors were asked and did find both the deliberate cruelty and the excessive injury prongs). Special Verdict Form No. 5, Supp. CP.

injuries substantially exceeded the amount of bodily harm required first-degree murder,[12] and (3) the offense was part of an ongoing pattern of psychological abuse of the victim manifested by multiple incidents over a prolonged period of time.

As noted above, the deliberate cruelty and substantial injury aggravating factors cannot apply in this case. [13] Serrano, at 712-713; Stubbs, at 131. The only question, therefore, is whether or not the pattern of abuse factor applies.

Under this factor, the prosecution must prove multiple incidents occurring over a prolonged period of time. RCW 9.94A.535(3)(h)(i). The Court of Appeals has held that two weeks is too short to constitute a prolonged period of time, and noted that "[c]ases from this state suggest that years are required." State v. Barnett, 104 Wash. App. 191, 203, 16 P.3d 74 (2001). However, the court subsequently held that a 5-6 week period presented a question for the jury. State v. Epefanio, 156 Wash.

The sentencing court did not mention the intimidation prong in its findings relating to the exceptional sentence. CP 45-66.

[12] The sentencing court did not include this prong in its findings relating to the exceptional sentence. CP 55.

[13] Likewise, the intimidation prong cannot justify an exceptional sentence; presumably most murder victims feel intimidated just before they are murdered, and thus the legislature must have considered this factor in setting the standard range. Nordby, at 518.

App. 378, 392, 234 P.3d 253 (2010); see also State v. Harris, 123 Wash. App. 906, 99 P.3d 902 (2004) review granted in part, cause remanded on other grounds, 154 Wash.2d 1032, 119 P.3d 852 (2005) (finding six months sufficient to constitute a "prolonged" period of time).

To establish the pattern of abuse factor, the state relied on two incidents. In one, Mr. Brush damaged Bonney's car with a hammer during an argument. RP (12/5/11) 133. In another, over the weekend of a local jazz festival, Mr. Brush confronted Bonney at the home of another man, revved his engine while Bonney and her daughter were walking (causing Bonney to fear he might run her over), and left answering machine messages threatening to humiliate Bonney[14] by publicizing naked photos of her.[15] RP (12/6/11) 174-190. In closing arguments, the prosecution specifically referred jurors to the hammer incident and past problems in general. RP (12/6/11) 56-66, 91-97, 215-216.

The first incident occurred in July of 2009, and resulted in the temporary protection order admitted into evidence. RP (12/6/11) 161,

[14] The messages also threatened to turn her in for fraudulently receiving unemployment benefits while she was working. RP (12/6/11) 190.

[15] The state also introduced evidence that Mr. Brush changed the locks on his house after he had Bonney and her daughter move out. RP (12/6/11) 196. Since he had a legal right to do so, this cannot constitute abuse.

193; Exhibit 42, Supp. CP. The second series of incidents occurred in August of 2009. RP (12/5/11) 138-141.

These two incidents cannot be described as a "pattern" of abuse. First, the short period of time during which they occurred is not substantial enough to be considered "prolonged." Barnett, supra. Second, the evidence was insufficient to show "multiple" incidents, where the prosecution presented proof of only two different episodes. Cf. State v. Hyder, 159 Wash. App. 234, 259, 244 P.3d 454, review denied, 171 Wash.2d 1024, 257 P.3d 665 (2011) (defendant molested victim 2-5 times per week over the course of six years).

For all these reasons, the crime was not an aggravated domestic violence offense. Accordingly, the exceptional sentence must be vacated and the case remanded for sentencing within the standard range. Nordby, at 518.

D. 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.

Under Article IV, Section 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. Article IV, Section 16. A comment on the evidence "invades a fundamental right" and may be challenged for the first time on review under RAP 2.5(a)(3).

State v. Becker, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997). A judicial comment is presumed prejudicial and is only harmless if the record affirmatively shows no prejudice could have resulted. State v. Levy, 156 Wash.2d 709, 725, 132 P.3d 1076 (2006). This is a higher standard than that normally applied to constitutional errors. Id.

Jury instructions are reviewed de novo. Anfinson v. FedEx Ground Package Sys., Inc., 174 Wash.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. Kyllo at 864. A trial court may not instruct the jury in a way that relieves the state of its burden to prove each element of an aggravating factor. U.S. Const. Amend. XIV; State v. Aumick, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995) (addressing elements of the substantive crime).

Before an exceptional sentence can be imposed under RCW 9.94A.535(3)(h)(i), the prosecution must establish beyond a reasonable doubt that the offense was part of a pattern of abuse, consisting of multiple incidents occurring "over a prolonged period of time." Above some minimal threshold, the phrase "prolonged period of time" is a jury question; it is not defined by statute. Epefanio, at 392. Here, however, the court defined the phrase to mean "more than a few weeks." Instr. No.

26, Supp. CP. This phrase conveyed to jurors that any time period greater than a few weeks necessarily qualified as a "prolonged period of time."

By defining "prolonged period of time" as more than a few weeks, the judge commented on the evidence and relieved the prosecution of its burden to establish the aggravating factor beyond a reasonable doubt. Levy, at 725; Aumick, at 429. Accordingly, the domestic violence aggravating factor must be vacated and the case remanded for a new sentencing hearing. Levy, at 725.

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

A sentencing court has broad discretion in setting the length of an exceptional sentence; however, such discretion is not unbounded. State v. Bluehorse, 159 Wash. App. 410, 434, 248 P.3d 537 (2011). A sentence is clearly excessive if it is clearly unreasonable—i.e. imposed on untenable grounds or for untenable reasons, or if it is a sentence that no reasonable person would have imposed. Id. Such a sentence is one whose length shocks the conscience. State v. Knutz, 161 Wash. App. 395, 410-11, 253 P.3d 437 (2011).

In this case, the sentencing court more than tripled the standard range (apparently following the prosecutor's suggestion that each aggravating factor should add a multiplier). CP 45-60; RP (2/9/12) 44.

The sentence was significantly longer than sentences imposed on parents who kill their own children. See State v. Sao, 156 Wash. App. 67, 80 n. 12, 230 P.3d 277 (2010). It was also longer than sentences imposed in cases where the murderers tortured their victims prior to killing them. See, e.g., State v. Scott, 72 Wash. App. 207, 217, 866 P.2d 1258 (1993) aff'd sub nom. State v. Ritchie, 126 Wash.2d 388, 894 P.2d 1308 (1995); State v. Drummer, 54 Wash. App. 751, 759, 775 P.2d 981 (1989).

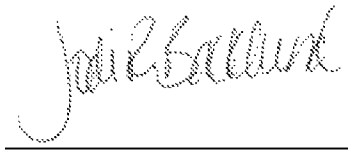
Here, Mr. Brush's standard range was only 240-320 months. This range reflects the legislature's judgment that premeditated first-degree murder should be punished by imprisonment for 20-27 years. The court imposed a base sentence of 1000 months, to which was added the 60 month mandatory firearm enhancement. CP 45-60. Even if all three aggravating factors are upheld, the 1060-month sentence is clearly excessive. Bluehorse, supra. Furthermore, if any of the aggravating factors are found to be invalid, the sentence is even more excessive. Accordingly, the sentence must be vacated and the case must be remanded for a new sentencing hearing. Id.

CONCLUSION

For the foregoing reasons, Mr. Brush's conviction must be reversed, his statements suppressed, and the case remanded for a new trial. In the alternative, the exceptional sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on January 24, 2013,

BACKLUND AND MISTRY



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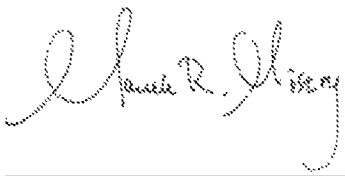

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

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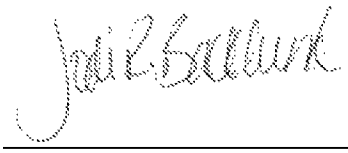
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 January 24, 2013.



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