NO. 45041-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

DENNIS LEE WOLTER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00862-2

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

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B. STATEMENT OF THE CASE

I. SUMMARY OF FACTS

On May 17, 2011, Dennis Wolter was arrested for assaulting his girlfriend, Kori Fredericksen. He was charged with assault in the fourth degree (domestic violence) and malicious mischief in the third degree (domestic violence). A judge of the Clark County District Court imposed a no contact order on Wolter, protecting Kori Fredericksen and restraining

Wolter from contacting Kori. The order was still in effect when, on May 25, 2011, Wolter savagely murdered Kori by stabbing her between 70 and 75 times. He dumped her body on the side of Old Evergreen Highway in Vancouver. Approximately 2 minutes or less after dumping Kori on the side of the road as though she were nothing, Wolter was stopped for speeding by Camas Police officer Stefan Hausinger. Noticing almost immediately that Wolter was drenched in blood, Hausinger asked Wolter if he was alright and Wolter volunteered a manufactured, detailed story about his dog having been hit by a car and taking the bleeding animal to an animal hospital where the dog was declared dead and disposed of. Following his arrest for murder, Wolter told friends and family on recorded jail phone calls that he murdered Kori because she "pushed" him too far and that he wasn't sorry for having murdered her. His only regret, he said, was that he would lose his freedom for what he did. Although Wolter claimed, through his hired expert at trial, that he couldn't recall the murder, and that his capacity was diminished when he murdered Kori, the jury rejected this claim. The jury returned a verdict of guilty to the charge of murder in the first degree, and found that the murder was aggravated. Wolter was given a mandatory sentence of life in prison without the possibility of release.

II. EVIDENCE AT TRIAL

Kori Fredericksen was a mother of a young son. RP 1867-74, 1975. She had the misfortune of knowing Dennis Wolter and began a dating relationship with him a few months prior to her murder. RP 1977. The relationship became strained within a month of its beginning. Id. On May 17, 2011, Wolter was arrested for assaulting Kori and damaging her property. RP 1575. Wolter told the arresting officer, Donald Magarian of the Vancouver Police Department, that he and Kori had argued because Kori was planning to leave him. RP 1606. A no-contact order was imposed on Wolter, restraining him from contacting Kori Frederickson. RP 1994-2008, Ex. 307. The order was still in effect on May 25, 2011. RP 1994-95, 2007. On that day, Kori tried to leave to leave Vancouver on a bus to South Dakota with her eight year-old son, Kyle. RP 2114-15. She was unable to get on the bus, however, because her bags exceeded the weight limit for luggage. RP 2114-15. Her friend Dustin Sparks picked her and Kyle up from the bus station and brought them back to the apartment he shared with his mother, Shari Manor. 2076, 2114. That night, Kori decided she wanted to go to the house she previously shared with Wolter to retrieve some end tables and an air conditioner. RP 2086. Dustin Sparks and Shari Manor didn't want her to go. RP 2085-86, 2088. Mr. Sparks didn't understand why these items were so important to her, but Kori

explained that she wanted him (Mr. Sparks) to have her air conditioner, and she wanted to put her end tables into storage before leaving for South Dakota because she'd had them "forever." RP 2094, 2115. While having this discussion with Mr. Sparks and Ms. Manor, Kori kept receiving phone calls and hanging up on them. RP 2082. Mr. Sparks reluctantly drove Kori to Wolter's home and dropped her off at approximately 11:00 p.m. or midnight, according to his recollection. RP 2070, 2085-86. She had no other bags but her purse. RP 2072. Kori was supposed to call Mr. Sparks when she was done at Wolter's house and he would pick her up. RP 2072. She never called, although he waited up for a long time. RP 2072, 2110. Wolter called Kori's cellphone at 11:05 p.m. and 11:35 p.m. that night. RP 2354. The 11:05 phone call lasted four minutes, and the 11:35 phone call wasn't received by Kori. Id.

At around midnight[1] on May 26, 2011 Officer Stefan Hausinger of the Camas Police Department stopped Wolter on Southeast Evergreen Highway for speeding. RP 1302-03. Wolter was traveling 51 mph in a 40 mph zone. RP 1303. Wolter was heading from east from Vancouver, toward Camas. RP 1304. Hausinger made a U-turn after passing Wolter and stopped him for the violation. Id. Hausinger planned to identify the driver, notify him of the reason for the stop, get his required information

[1] At the CrR 3.5 hearing, outlined below, the time of the stop was fixed at 12:20 a.m.

and run his license. RP 1305. Wolter rolled down his window when Hausinger reached the car and Hausinger asked for his information and whether he knew what the speed limit was. Id. Wolter said he didn't and apologized for speeding. RP 1306. As Wolter was reaching into his wallet to retrieve documents Hausinger noticed that he smelled of alcohol. Id. As his eyes adjusted to the darkness, Hausinger also began to notice that Wolter was covered with blood. Id. Wolter had blood on his hands, cheek, and clothing. Id. Hausinger asked Wolter if he was okay, suspecting that he was injured. Id. Wolter took a deep breath, looked down, and told Hausinger that his dog was just run over, and that the blood came from his dog. RP 1307. Hausinger asked if the dog was okay and Wolter said the dog hadn't survived. Id. Hausinger asked where the dog was and Wolter said he had taken the dog to a veterinary clinic in southeast Portland, and that it was disposed of by the clinic. RP 1308. Wolter could not provide the name of the clinic. Id. Wolter told Hausinger that the dog was "shredded," which was why he had so much blood on him. Id. He provided more detail, such as that he was having a few beers at a friend's house in southeast Portland, that he had thrown a ball for the dog to fetch, and that the dog ran into the street and was run over by a lady. Id. He said his dog was a four year-old black lab named Charlie. RP 1309. Wolter had no difficulty relaying this story and was very believable. Id. Indeed,

Hausinger believed the story at that point. Id. After Hausinger returned to his patrol car and was walking back to Wolter's truck, he saw blood covering the tailgate and saw a pool of blood in the bed of the truck. Id. He also, notably, saw no dog hair or evidence that a dog had been there. RP 1310.

Hausinger called for backup as he decided at that point he needed to investigate Wolter for driving under the influence. RP 1310. Following field sobriety tests and a portable breath test showing a result of .065, Hausinger felt he needed to ask some more questions about the blood all over Wolter. RP 1311-18. It is unusual to come across someone who is covered in that much blood. RP 1318. Hausinger wondered if he'd actually been in a fight or a traffic accident. Id. Hausinger asked Wolter what he did with his dog after taking him to the vet clinic and Wolter said he paid $35 to have the dog disposed of. RP 1319. He said he had a receipt for the disposal in his truck, and allowed Hausinger to search his truck. Id. Three backup officers were on scene at this point. RP 1321. Wolter said the receipt was written on a white and blue piece of paper. Id. Hausinger found no receipt in the car. RP 1321-22. Hausinger did, however, find a no-contact order on the front seat prohibiting Wolter from having contact with Kori Fredericksen. RP 1322. When asked about the no-contact order,

Wolter lied and said that Kori had recanted her allegation of domestic violence in court that morning and the order had been dropped. RP 1323.

Hausinger asked if anyone could verify his story about the dog and he said that he was with his friend, Richard Gardner, who lived on Foster Road in Portland. RP 1323-24. He couldn't provide a phone number or address for Gardner. RP 1324. At that point Hausinger arrested Wolter for negligent driving and read him his constitutional rights. RP 1325. Wolter understood and agreed to waive his rights. RP 1326. He told Hausinger that he was going to Kori's house when he was stopped. RP 1327. Officer Gonzalez, who was also on the scene, tried calling the phone number for Kori that Wolter gave him and got no answer. RP 1348. Wolter explained to Gonzalez how to find Kori's apartment and Gonzalez, being familiar with that apartment complex, went there. RP 1349. There was no record of Kori living at that apartment complex. RP 1349-50. Sergeant Norcross, one of the officers at the scene, suspected that Wolter had poached a deer and dumped it and was trying to cover it up. RP 1395. Being familiar with Evergreen Highway, Norcross was aware that there is a dark patch of the road where people often dump things. Id. It is an area of the road that is isolated, and you cannot see this stretch of Evergreen Highway from SR 14. RP 1395. There's an embankment and train tracks below the embankment. Id. You can see long ways in both directions at night if any

cars are coming. Id. Deer carcasses have been dumped here in the past. RP 1395. Norcross drove to that stretch of the highway and didn't find anything, then he returned to the traffic stop. RP 1396.

Hausinger told Sergeant Norcross that he felt someone should go to Wolter's house and do a welfare check to see if anyone there needed aid. RP 1328. Hausinger then took Wolter to the Camas police station to finish his investigation for negligent driving (breath testing, etc). Id. Wolter had a breath alcohol level of .04. RP 1330. During this time Sergeant Norcross called Hausinger and told him that the Vancouver police had discovered a crime scene at Wolter's house in Vancouver. RP 1330. VPD asked the Camas police to ask Wolter if he would provide a written statement about what occurred with his dog earlier in the evening and he said he would. RP 1330-31. The statement was admitted as exhibit 296. RP 1332. The statement said "On or about 10:45, I, Dennis Wolter, was in southeast Portland throwing a ball for my dog, Charlie. He ran out into the street and got hit by a car. I picked him up off the street, put him in the back of my truck, and went to find a vet." RP 1333. Wolter did not object to the admission of his written statement at trial. RP 1332. Both Officer Hausinger and Officer Packer, another responding officer, described Wolter as calm as he told his story about his dog. RP 1335, 1367.

Officer Packer did a search for veterinarians in southeast Portland who are open 24-hours and came across one. RP 1369. It was near Foster Road, where Wolter said he'd been. Id. The hospital had no record of a dog being brought into the hospital that night. RP 1369-70.

When he took Wolter to the booking area of the Camas Police Department to conduct the remainder of the negligent driving investigation, Hausinger asked Officer Katie Brock to wait with Wolter while he attended to other matters of the investigation. RP 1424. Wolter was not detained in a cell, which is why an officer had to remain with him. RP 1425. Brock was not part of the investigation. RP 1426. Wolter began telling her, unsolicited, that he knew that the other officers were concerned about the blood on him, but that the blood was from his dog. Id. He continued to talk, saying that he had his black Lab with him in Portland and that he had purchased glow-in-the-dark balls to throw for his dog at night. Id. He said that while playing fetch with his dog, and old lady hit and killed his dog. Id. He also volunteered that he had spent three days in jail and owed $10,000 in bail, and he thought it was absurd that he had to put out $1,000 as well as collateral to get out of jail. RP 1427-28. Wolter then tried to chat with Officer Bieber about having a niece who was interested in law enforcement and what the process entailed. RP 1428. Wolter was calm during most of the time he spoke to Bieber, but told her

several times that he wanted to leave and take a shower, and that he was depressed about his dog. RP 1429.

Sergeant Norcross participated in a briefing with Vancouver detectives back at the Camas Police Department, and after that he felt like he wanted to search Evergreen Highway again. RP 1398-99. He decided to travel farther down the highway than he had before. RP 1399. He drove on the shoulder of the road in the oncoming lane looking for anything that may have been dumped into the brush. RP 1400. As he was driving along he came across a bloody tennis shoe right off the side of the road. Id. He got out to search on foot and found Kori Fredericksen's body over the embankment, down in the blackberry bush. RP 1401, 1709. Kori's body was less than a mile from where Wolter was stopped for speeding. Id. Sergeant Norcross called the phone number for Kori that Wolter had given to Officer Gonzalez and heard a phone ringing inside a black purse that was thrown onto a tree branch right over Kori's body. RP 1403. When he disconnected the call, the phone in the tree stopped ringing. Id.

A note from Wolter to Kori was found in Kori's purse. RP 1774. The note said "I, Dennis Lee Wolter, will never touch or hurt Kori abusively as long as she is with me and will never kick her out of my house when I get mad at her or my life." RP 1864, Ex. 309.

The officers who responded to the request for a welfare check at Wolter's residence by Camas P.D. were coincidentally the same officers who responded to the domestic violence call at the house back on May 17, 2011. Officer Magarian found "a lot of blood" in the front yard, on the front porch, and on the doorknob. RP 1575-76. Officer Gutierrez noticed drag marks in blood leading from the front porch to the driveway. RP 1621. He also noticed a pool of blood and a dark sweater with holes in it. RP 1621. Magarian notified his sergeant, who instructed him and Officer Gutierrez to force entry into the house based on the exigent circumstances. RP 1576. They found more blood inside the house and did a sweep to see if anyone was inside. RP 1577. They noticed several bent, broken, and bloody knives. RP 1577. The blood was primarily in the front room, but also in the kitchen. Id. Officer Gutierrez saw blood marks on the wall just inside the doorway, and blood marks on the carpet. RP 1623. He saw a broken kitchen knife in the kitchen, and another in the sink. RP 1623. There was blood in the sink. RP 1623. Unlike the last time the officers were at the house eight days earlier, there were now coverings over the windows all throughout the house. RP 1623. They left the house and secured the scene. RP 1577.

Vancouver Police Officer Jason Beach also responded to Wolter's residence. RP 1632. He observed that the carpet and walls in the living

room just inside the front door were covered in blood. RP 1634. He saw a broken-off knife blade in the living room just inside the front door. RP 1634. He also found five knives in the kitchen sink, all of which had bent or broken blades with blood on them. RP 1634.

Detective Scott Smith of the Vancouver Police Department directed the processing of all three crime scenes (the home, the traffic stop, and the body). RP 1687-1712. At the scene of the murder, most of the blood was located in the entryway. RP 1777. The evidence demonstrated that Kori had been dragged face-down from the house to the truck. RP 1779-80. There was a dog house at the home but no evidence of a dog living there. RP 1902. There were leaves and debris in the dog house, there was no dog food, dog water bowls, dog toys, or dog feces in the yard. RP 1902. In addition to the physical evidence of the murder found on the truck (blood), the detectives found a sleeping bag and bed roll in the back seat of the truck. RP 1919.

Following his assault on Kori on May 17th, Wolter went to see his friend, Paula Gardner.[2] He had not yet been arrested, and brought over some of his possessions as well as some money for her to bail him out of jail. RP 2021. Following his arrest she bailed him out of jail. Id. She also had to put down some of her own collateral. Id. Paula was aware that there

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[2] Paula Gardner is no relation to the fictitious Richard Gardner, the friend that Wolter claimed he was with in Portland when his dog was hit. RP 2383.

was a no contact order against Wolter, and allowed him to stay at her house for a period of time after he got out of jail. RP 2022. During that time Wolter was upset with Kori, and would scream and yell at her on his cellphone. RP 2025. Wolter also asked Paula to call Kori for him, but she refused. RP 2026. Wolter wanted to get Kori back and was angry about his arrest. RP 2057. He was also frustrated about not being able to go to his home. RP 2057. He was angry that the no contact order prevented him from going to his own house. RP 2057. Kori had put some of his property in storage while he was in jail, and he was upset about that. RP 2033, 2057. On the night of the murder Wolter was calm. RP 2062. Paula thought he was calm because Kori was supposed to be on a bus to South Dakota. Id. He was still, however, upset that his belongings were in storage. RP 2063. It seemed to Paula that Wolter had a vendetta against Kori. RP 2065. Wolter left Paula's house on the night of the murder at around dusk. RP 2063.

About a week before the murder, following his release from jail, Wolter visited his bank to cash a check from his employer. RP 2119. He came back to the bank on the day of the murder with another check from his employer, and said he needed to buy new clothes because his girlfriend had thrown bleach on his clothes and he needed to replace them. RP 2121. He told the teller, Ashley Sagor, that his girlfriend would get what she

deserved. RP 2122. Sagor felt the situation had escalated. Id. The next day she heard about the murder on the news. RP 2123. Another teller, Andrea Hammons, also interacted with Wolter during these two visits to the bank. RP 2136. Hammons recalled that Wolter was upset that Kori was planning to leave the state. RP 2136. He was also blamed Kori for his arrest. RP 2137.

Following Wolter's arrest for Kori's murder, he needed to be transported from the Camas Police Department to the Clark County jail. RP 2249. Officer McNall was set to transport both Wolter and another person named Danielle Williams to the Clark County jail. RP 2250. McNall placed Wolter in the backseat and Danielle in the front seat. Id. Danielle is friends with Jonathan Luepke, and used to be his girlfriend. RP 2168. Jonathan Luepke is the adult half-brother of Kori's son, Kyle Luepke. RP 2174, 2387. After arriving at the jail, Wolter and Danielle were sitting in the garage area outside of booking, waiting. RP 2171. Danielle turned to Wolter and asked "What are you in for?" Wolter replied "murder." RP 2171. Danielle said something to the effect of "wow, tough luck." Id. Wolter and Danielle continued their conversation in the waiting area outside of booking. RP 2172. It was at that point that she realized she knew Wolter, and told him she was Jonathan Luepke's ex-girlfriend, and Wolter recognized Danielle too. Id. She asked Wolter who he killed, and

he said "Kori." RP 2173. Danielle asked why, and Wolter said it was because Kori "narced" on him. Id. Wolter then asked Danielle to apologize on his behalf to Jonathan for killing his step-mother. RP 2173.[3] Officer McNall overheard much of this conversation and relayed it to detectives. RP 2175, 2252-53. After some period of time Danielle was contacted by Jonathan Luepke. RP 2178-79. Jonathan told her that Dennis asked him (Jonathan) to ask her not to testify. RP 2179.

Wolter was recorded calling Jonathan Luepke from jail on June 24, 2011. RP 2387. Wolter said to Jonathan "I got something to tell you that you're not going to like. But no names, okay?" RP 2392. Jonathan replied "Okay." RP 2393. Wolter said "Remember the person you told me that called you--and said that I had said something? Jonathan said "Uh-huh?" Wolter said "That they're taken to a different jail?" Jonathan replied "They were taken to a different jail?" Wolter replied "Yes, to be a witness in my case." Jonathan said "Yes. Well, that's what I heard." Wolter said "Yes. So that--that person needs to understand that there was nothing said." Jonathan said "Okay." Wolter said "You know what I'm saying?" Jonathan said "Yes. I got you." RP 2393. Later in the call Wolter admits to Jonathan that he learned that day that Danielle was named as a witness for the State. RP 2409.

[3] Jay Luepke is Jonathan's father, and is the ex-husband of Kori and the father of Kyle. RP 2174.

On June 9, 2011 Wolter was recorded calling Todd Wilson from jail. RP 2413. They were discussing the opinions of some of Wolter's friends about what he had done. RP 2416-18. Wolter said

> But you've got to understand what (sic) when people push you so far, you--there's only so far you're going to let them take it, you know? So one of these days, everybody will understand what I found out and what happened to me, so--so it--it's all about everything that I own being stolen and then sold for dope, and, you know, things like that. It--it just--there's a lot of things built up to--to what happened, so I really can't say much, but you could--you could under--you could understand where I'm coming from. You know what I'm saying?...
>
> ...I just--anyways, I'm going to let everybody know eventually, when this is all taken care of, you know, so--so I'll let everybody know, but you know, it--it's really *something I had to do.* So, that's what they're wanting. That's--they charged me this morning with--with aggravated murder and there was two other charges on there; one was breaking the no contact order in lieu of a murder and then killing a state witness, which is pretty heavy, so...
>
> ...I'm not just going to let, you know, things like this happen. So that's pretty much all I'm going to say. I'm very--still very pissed off about it. *I'm not sorry for what I've done...*
>
> ...I'll tell you one thing: I regret ruining...I regret losing my life, you know, and ruining my life over this deal. I regret that. That's all I regret about it.

RP 2418- 2429.

Kori Fredericksen died of multiple stab wounds and blood loss. RP 2296, 2323, 2336. She was stabbed anywhere from 70 to 75 times, according to the medical examiner, Dr. Wickham. RP 2336. Dr. Wickham described it as an "extensive case" of stabbing, with extensive injuries. RP

2296-97. Kori had a recreational amount of methamphetamine in her system at the time of her death. RP 2305. She was stabbed in the heart. RP 2315. She had a perforated liver and stomach. Id. She was even stabbed in her armpit. RP 2317. She had defensive wounds on her palms, forearms, and hands. RP 2325. By the time her aorta was severed, she had suffered many of her other injuries. RP 2324-25, 2335-36. Dr. Wickman testified it would have taken a number of minutes before Kori lost consciousness. RP 2336.

The blood on Wolter's hands, jeans, and truck bed was Kori Fredericksen's. RP 2271. Both Kori and Wolter's DNA was found on at least four knife handles recovered from the house. RP 2272. There was extensive damage to the black sweater that was found in Wolter's driveway, over the abdomen and chest. RP 2281.

Dr. Michael Daniel is a neuropsychologist. RP 3643. He was asked to determine whether Wolter had a mental or disease or defect that prevented him from being able to form premeditation or intent to commit murder. RP 3649. To determine that question, he used the actual definition of premeditation in Washington. RP 3650. He reviewed a variety of material, including medical history and records, school records, legal records, prior psychological examinations, the videotaped statement Wolter gave to the Vancouver Police, the phone calls Wolter made from

the jail. RP 3652. He also interviewed Wolter. RP 3652. Wolter has anti-social personality disorder. RP 3680. His neuropsychological tests did not show significant impairment. RP 3696. Wolter was able to premeditate his crime, in the opinion of Dr. Daniel. RP 3698-3717. Dr. Daniel's testimony is discussed further in the argument section.

Dennis Wolter was convicted of aggravated murder. CP 377-78. This timely appeal followed.

III. THE CrR 3.5 HEARING

On May 26, 2011 at 12:20 a.m., Officer Hausinger passed Wolter on Evergreen Highway and caught him speeding on his moving radar. RP 199, 201. He stopped Wolter and contacted him at the driver's side window. RP 200. He asked Wolter for his license, registration, and insurance and as Wolter was collecting the items, Hausinger noticed that he had blood on his hands. RP 201. It took a few seconds for Hausinger to see the blood because it was dark and his eyes had not yet adjusted. RP 201. As he shined his light on Wolter he noticed there was blood, in fact, all over his body, including on his face. RP 201. Hausinger asked Wolter if he was okay, believing he might be hurt or injured. RP 202. Wolter answered by telling Hausinger that his dog, a male black Lab named Charlie, was hit by a car in Portland, and that he had taken the dog to a veterinary clinic to be disposed of. RP 202. He told Hausinger that Charlie

was approximately four years old. RP 204. He said Charlie had been "shredded." RP 204. He said that he had been playing fetch with Charlie at a friend's house in southeast Portland, and that the dog ran into the road to fetch a ball. RP 205. At that point Charlie was hit by a lady, and she was quite upset. RP 205. When asked if the dog survived, Wolter said "we lost the dog." RP 205. Wolter made all of these comments during the initial questioning at the driver's side window, before returning to his car to run Wolter's information. RP 206.

As Wolter spoke, Hausinger noticed that he smelled of alcohol and that his eyes were bloodshot. RP 206. Back at his patrol car he learned that Wolter's license was clear but that he possibly had a warrant out of state. RP 207. He asked dispatch to confirm the warrant. RP 207. Hausinger needed to make sure the warrant was valid, extraditable, and that it pertained to Dennis Lee Wolter. RP 207-08. Hausinger decided, prior to returning to Wolter's car, that he was going to conduct a DUI investigation. RP 206. He returned to Wolter's car and asked him to perform voluntary field sobriety tests, to which Wolter agreed. RP 208. Hausinger had switched his focus from the blood to the possible DUI. RP 209. He also asked Wolter to provide a breath sample on the portable breath test which suggested a level of .065. RP 212. After completing these investigative tests, Hausinger returned his focus to the blood

covering Wolter from head to toe. RP 212-13. Based on the amount of blood covering Wolter, Hausinger felt it was important to verify his story before releasing him. RP 213.

Wolter reiterated the story about his dog, adding that he paid $35 to have his dog disposed of and claiming that receipt could be found in his car. RP 214. Wolter claimed the receipt was written on a white and blue sheet of paper. RP 218. Wolter consented to a search of his car but there was no receipt in the car. RP 217. There was, however, a no contact order on the front seat, bearing the names Dennis Wolter and Kori Fredericksen. RP 217. Hausinger asked Wolter if he had been arrested and Wolter confirmed that he had, but told Hausinger that the order had been dropped that day when the victim recanted in court. RP 218. During this time other officers had arrived on scene as back-up. RP 220. The officers decided it would be prudent to send Vancouver Police out to Wolter's home to check and see if anyone there was injured or in need of help. RP 220. Hausinger also continued to question Wolter about the dog in an effort to verify his story. RP 220-21. Hausinger was ultimately advised that the warrant was confirmed and that it was out of Wisconsin, and that it matched the Dennis Wolter he had stopped for speeding. RP 221-22. At that point, at 1:05 a.m., Hausinger arrested Wolter and read him his constitutional rights. RP 222-23. Wolter waived his rights. RP 224. The arrest was based both on

the warrant and on the allegation of negligent driving in the first degree. RP 226.

Detective Katie Brock Bieber was a patrol officer back on May 26, 2011. RP 295. She was on duty early that morning at the Camas Police Department. RP 295-96. She was asked to stand in a booking room with Wolter while Officer Hausinger continued his investigation. RP 296. Without being asked any question, Wolter began spontaneously telling Bieber about how he came to have blood all over him. RP 297. He told Bieber that he was at a friend's house in Portland with his dog and he was throwing glow-in-the-dark balls to him. RP 297. He said that his dog was hit by an old lady and that the lady was upset. RP 297. He said he knew that the officers were worried about all the blood on him, but that the blood was from his dog. RP 297. He volunteered that he was going to see his girlfriend before he was stopped. RP 298. Officer Bieber asked him if he had seen his girlfriend that day and he said he hadn't. RP 298. Wolter volunteered that he thought it was absurd that he had to pay $1,000 cash and collateral to get out of jail. RP 298. He volunteered that he had a brother named Steven and he believed the warrant was for Steven. RP 299. Wolter also offered that he had a sister or a niece who looked like her (Bieber), and that she was interested in law enforcement. RP 299. They had some general conversation about the process for entering law

enforcement. RP 299. Wolter mentioned at least three times that he wanted to go home, that he was tired and wanted to take a shower because he had to work in the morning. RP 300. He also said he was depressed about his dog. RP 300.

Wolter spoke with detectives Creager and Ringo at the Camas Police Department that night. He agreed to a taped interview. CrR 3.5 Exhibit 3, RP 326. Wolter was re-*Mirandized* at the commencement of the recording and renewed his waiver of rights. RP 337. In the interview, Wolter elaborated substantially on his story about the dog. He said the dog was hit at 9:45 p.m. and took him to the veterinary hospital at 10:15 p.m. RP 341. He said the vet hospital was on Foster Road. RP 342. He said that he asked for help with his dog and "the guy" looked at his dog and pronounced him dead. RP 341-42. He said the guy was about 6'4", possibly 30, 35, or 38 years old, and that he was a white guy with black hair. RP 343. He said the sign at the hospital said "Animal Hospital," and it was a white and blue sign. RP 343. He said that the woman who hit his dog was Asian and 28 years old. RP 346. This was contrary to his description to other officers that she was on old lady. He said she was wearing green nursing pants. RP 346. He said she was driving a Honda SUV. RP 346. He said that "they" (the people at the vet hospital) said his dog busted an artery. RP 347. He said that the friend he had been with was

Richard Gardner. RP 348. He said he had been to court that day and had gotten the no contact order dropped. RP 350-51. He said that Kori had been harassing him. RP 355. He said that he was trying to "make up with her." RP 357. At one point, while they were talking about him having been charged with misdemeanor domestic violence offenses, Wolter exclaimed "Look, I haven't seen her and I've got proof of where I've been." RP 363. Wolter became very antsy at this point in the interview, saying he just wanted to know if he had a warrant in Wisconsin. RP 363-67. He reiterated that Kori had been harassing him and that she was a jealous woman. RP 370. The conversation turned to the detectives telling Wolter that they needed to either find proof that he had a dog that died or they needed to test the blood on him to confirm it was canine blood. RP 377. The indicated that wanted to collect evidence from his person. Id. Wolter said "Right, so you're covering your butt. I have no problem with that." RP 377. Detective Ringo said "I guess I would just ask this, since I can't reach Kori right now, is that canine blood or is that somebody else's blood?" Wolter replied "I think it's canine blood." RP 378. Detective Creager asked "Was there someone--someone else's blood that should be on there?" Wolter replied "Well, it's my opinion that it was canine blood. As he was just telling me that, I was going through my head, you're not

getting anything from me without a warrant." RP 378. The following exchange then took place:

WOLTER: That's -- that's something that is -- you're going way over the line here.

DETECTIVE RINGO: I appreciate your honesty. And I appreciate you being forthcoming with that, okay?

WOLTER: But I think something like that, I'd like to have an attorney present for that.

DETECTIVE CREAGER: Truly, cool.

WOLTER: For anything else. If you're going to assume -- you know, have your assumptions of things. I told you what the blood was --

DETECTIVE CREAGER: Well, can I (inaudible) for one here?

WOLTER: -- you're going to take this blood off -- off me, you're going to have to have a warrant.

DETECTIVE CREAGER: Can I -- can I -- for one -- this -- this -- just before you go on with this, okay? Is that you -- you've given us the very logical explanation of what has been going on here today. And, if it wasn't for, like some recent events in your life, but, you know, but we've got the YWCA is going to be asking us questions, you know, there's all people that -- that second guess our work, and so we just have to cover all the bases here. So, if there's, for example, if -- if, you know,

that's a pretty good chunk of blood, and if you told me, "I got into a bar fight tonight, in Portland, I broke some guy's nose."

WOLTER: Right.

DETECTIVE CREAGER: I -- I -- yeah, but -- you know, but -- you've seen a guy with a broken nose.

WOLTER: I've had a broken nose. I (inaudible) a lot.

DETECTIVE CREAGER: Yeah, yeah, you bleed like -- like a (inaudible). And so, if -- if there's an explanation, but, what he's telling you is, like the crime lab, they'll take that sweatshirt, and they'll spend about forty-five minutes with it and they'll (inaudible) a dog --

WOLTER: A dog.

DETECTIVE CREAGER: -- or there -- or this is from a deer. Is this guy, is this guy has poached an elk? You know, I mean, if there's another reason, and we're not fish and game cops, but what we're telling you is --

WOLTER: Okay. Go ahead.

DETECTIVE CREAGER: And correct me if I'm wrong, just tell me, and just make sure your story is -- is -- this is your chance to tell the story.

WOLTER: I have -- I have --

DETECTIVE CREAGER: If it -- if it turns around, and it's like, "Hey, --

WOLTER: But I think this -- the -- the problem I have with that is, I think I need a lawyer present for anything like that.

DETECTIVE CREAGER: Okay. So we --

WOLTER: Because, if we go --

DETERCTIVE CREAGER: -- for my benefit for --

WOLTER: -- if it -- even if it comes up dog blood, like it's supposed to, I'm still thinking that taking my personal property and swabbing it, is -- is not going to happen --

DETECTIVE RINGO: So, for clarification, you're saying that when we get to this point of dealing with your clothing, that's where you need your attorney present with you.

WOLTER: Yeah, right. I will answer all your questions, I'll tell you what's going on --

DETECTIVE CREAGER: Great.

WOLTER: -- but, that is, you know, it's like your attorney tells you, you know, you can't be doing that.

RP 378-382.

Following the clarification that Wolter did not want an attorney for questioning, and only wanted an attorney to be present in the event of

evidence collection, the detectives continued to speak for an additional 22 pages of transcript. RP 382-406. Wolter spoke very little during this portion of the interview. Id. He denied hurting Kori. Id. He complained that he was hungry and tired. Id. He claimed that Kyle, Kori's 8 year-old son, was with Kori. RP 393. Detective Ringo asked him if there was anything he wanted to add or change about the statement he had given up to that point and he declined. RP 403. He denied that he had handled any items in his house that night, particularly in the kitchen, and that he had seen Kori that night. RP 403. For the next three pages Detective Creager did most of the talking. RP 403-06. At page 406, Wolter said "Can I see a lawyer?" At that point Detective Creager said "fair," and Detective Ringo said "Four-fifty-nine, we'll conclude our conversation." RP 406. (At trial, the recording of the interview was only played until the point where, on page 403, Creager asked "Nothing--nothing in the kitchen? and Wolter replied "No." The jury heard nothing after that. RP 1552).

The trial court entered findings of fact and conclusions of law on the CrR 3.5 hearing. The trial court concluded that the statements made to Officer Hausinger during the initial questioning at the driver's door were appropriate community caretaking questions that any officer would have asked when speaking to a person covered with blood; and that the questions were not custodial. CP 232. The court concluded that the second

set of questions that were asked during the traffic stop were also non-custodial because they were being asked during the course of a *Terry* investigation. The court concluded it was an investigatory detention and the officers were not trying to evade the *Miranda* requirement. CP 232. The court concluded that once the contact became custodial and Wolter was arrested, he was advised of his constitutional rights both at the scene of the stop and at the Camas Police Department. CP 232. The court found and concluded that Wolter understood and voluntarily waived those rights. CP 232. The court found that Wolter made spontaneous statements to Office Brock, and that they were not in response to any questions asked by Brock. CP 230. The court concluded that the statements to Brock were spontaneous and were post-*Miranda* in any event. CP 233. The court found that Wolter agreed to a taped interview with detectives Ringo and Creager, and that the statements he made during the interview were mostly the same as the statements he made at the scene. CP 231. The court found that when the subject of evidence collection arose, Wolter said that he would need to have an attorney present while the detectives took samples. RP 231. The court found that Detective Ringo clarified with Wolter that he only wanted an attorney present for the taking of samples, and that he was still willing to speak to the officers without an attorney present. CP 231. The court concluded that when Wolter raised the need for a lawyer,

the officer "appropriately clarified with him that he was not asking to stop the questioning, or asking to have an attorney present at that time, but rather sometime in the future." CP 232. The court found that when Wolter finally affirmatively asked for an attorney the questioning ceased. CP 232.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ADMITTING THE STATEMENTS WOLTER MADE TO POLICE OFFICERS BOTH BEFORE AND AFTER HIS ARREST.

a. *The statements to Camas police officers at the traffic stop*

Wolter claims that the statements he made to Officer Hausinger at the traffic stop prior to his arrest for both negligent driving and an outstanding felony warrant should have been preceded by *Miranda* warnings. In evaluating a claim that the trial court admitted a defendant's statements in violation of CrR 3.5, the reviewing court looks to the written findings of fact and conclusions of law. *State v. Pierce*, 169 Wn.App. 533, 544, 280 P.3d 1158 (2012). Unchallenged findings of fact are treated as verities on appeal. *Pierce* at 544. Challenged findings of fact are upheld if they are supported by substantial evidence. *State v. Solomon*, 114 Wn.App. 781, 789, 60 P.3d 1215 (2002); *State v. Broadaway*, 133 Wn.2d

118, 131, 942 P.2d 363 (1997). The court reviews whether the trial court derived proper conclusions of law from its findings of fact de novo. *Pierce* at 544. Further, the trial court's custodial determination is reviewed de novo:

> Miranda warnings are required when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent. *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992).
>
> "Custodial" refers to whether the defendant's movement was restricted at the time of questioning. *State v. Sargent*, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988). An objective test is used to determine whether a defendant was in custody—whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *Post*, 118 Wn.2d at 607, 826 P.2d 172 ("defendant must show some objective facts indicating his ... freedom of movement [or action] was restricted [or curtailed]").

State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004).

Wolter's argument is entirely unclear. At one point in his brief he appears to argue that the moment the officers developed probable cause for his arrest on negligent driving, they were required to administer *Miranda* warnings. (See Brief of Appellant at page 27, first full paragraph). If this is Wolter's claim, it is meritless. As explained in *Lorenz*, supra, the Supreme Court rejected this view when it adopted the

Berkemer v. McCarty[4] standard in *State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986):

> It is irrelevant whether the officer's unstated plan was to take Lorenz into custody or that Lorenz was the focus of the police investigation. *Beckwith v. United States*, 425 U.S. 341, 347, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). It is irrelevant whether Lorenz was in a coercive environment at the time of the interview. *Sargent*, 111 Wash.2d at 649, 762 P.2d 1127. Thus it is, as the State contends, irrelevant whether the police had probable cause to arrest Lorenz (before or during the interview). *Berkemer*, 468 U.S. at 442, 104 S.Ct. 3138.

Lorenz at 37. In *Harris*, the Supreme Court explicitly rejected the previous rule under *State v. Dictado*, 102 Wn.2d 277, 687 P.2d 172 (1984), which held that *Miranda* attached at the time that officers developed probable cause to arrest. To the extent this is Wolter's argument, it fails.

Wolter next seems to argue that a person in Wolter's position would not have felt free to terminate the encounter from the moment of its inception. (See Brief of Appellant at 27, second full paragraph). He argues that every word he uttered after Officer Hausinger stopped him was custodial. This claim is frivolous. It is well established that roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute custodial interrogation. *Berkemer v. McCarty* at 438-39. It is also well established that the request for field sobriety testing alone does not constitute a coercive environment triggering the *Miranda* requirement,

[4] *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984).

irrespective of whether officers have probable cause to arrest for driving under the influence prior to the request for field sobriety testing. *Heinemann v. Whitman County*, 105 Wn.2d 796, 808, 718 P.2d 789 (1986).

Moreover, Wolter has not assigned error to finding of fact number one, in which the trial court found that the defendant offered his false story about a car hitting his dog in response to Hausinger's question about whether he was alright. He also has not assigned error to conclusion of law number two, in which the trial court concluded that these initial questions by Hausinger were standard community caretaking questions that any officer would ask when interacting with a person covered in blood, and that *Miranda* warnings were not required for these questions. Because the dog story given to Hausinger mere moments after Wolter dumped Kori's body, standing alone, destroyed Wolter's claims of diminished capacity and lack of premeditation, Wolter's failure to establish these statements were custodial precludes his claim of reversible error for the reasons set forth in the harmless error section, below.

Finally, to the extent that Wolter argues that his roadside statements were erroneously admitted because the trial court applied the wrong legal standard, this claim is meritless because even if the trial court had applied an incorrect legal standard (which it didn't), this Court

reviews the trial court's conclusions of law de novo, and reviews the custodial determination de novo.

Responding to Wolter's claim is difficult where he refuses to say exactly where he believes custody began. He merely asserts that it began when a reasonable person in Wolter's shoes would not have felt free to terminate the encounter. But simply parroting the legal standard of review in unhelpful. Did it begin from the inception of the stop? No, because Wolter does not assign error to finding of fact number one. Did it begin when Wolter's name came back as possibly having a warrant? Wolter doesn't say. Did it begin when the police officer asked for Wolter's license? Wolter half-heartedly suggests that it did (see Brief of Appellant at 26) but cites no authority and makes no argument to support this claim. Wolter merely says "Mr. Wolter was restrained to the degree of a custodial arrest after he was stopped by police for speeding, he admitted drinking several beers, and he performed poorly on the field sobriety tests." (See Brief of Appellant at 26). In other words, the entire traffic stop. For the reasons set forth above, this claim is meritless. Wolter has not demonstrated in this appeal that the trial court erred in admitting his pre-arrest statements.

b. *The custodial interview by Detectives Ringo and Creager*

Wolter was questioned by detectives Ringo and Creager of the Vancouver Police Department. His interview is contained on trial exhibit 322 and CrR 3.5 exhibit 3, and comprises pages 333 to 406 of the third volume of the report of proceedings, which was the CrR 3.5 hearing. Following the ruling of the trial court that the recording of the interview could be admitted, under CrR 3.5, up to the point where Wolter unequivocally requested counsel at page 406, the trial court allowed the exhibit to be played for the jury during the trial. See RP at 1486 to 1552.[5] During the custodial interview of Wolter by detectives Ringo and Creager, Wolter made an equivocal request for counsel. After clarification, Wolter made it clear that he did not wish to have an attorney present for continued questioning. When Wolter finally did request counsel unequivocally, questioning ceased. The trial court did not err in admitting a truncated portion of Wolter's statement to detectives Ringo and Creager.

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[5] The recording which was played at trial stopped at the point at which Detective Creager said "Nothing—nothing in the kitchen?" Wolter replied "No." RP at 1552. The recording was stopped by the prosecutor at that point. This exact portion of the interview is found at page 403 in the transcript of the CrR 3.5 hearing (found in volume 3). The jury did not hear the portion of the interview where Wolter and Creager were talking about con men and the con code, found at page 405 of volume 3. As such, it is unclear why Wolter included this portion of the interview in his argument about what the jury should not have been permitted to hear. (See Brief of Appellant at 33). The jury did not hear this exchange.

If a suspect being questioned unequivocally states that he wants an attorney, questioning must stop until an attorney is present. *Davis v. United States*, 512 U.S. 452, 461, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The request must be unambiguous. *Davis* 512 U.S. at 459. "That is, the suspect 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *State v. Nysta*, 168 Wn.App. 30, 44, 275 P.3d 1162 (2012), citing *Davis*, 512 U.S. at 459.

In *Davis*, supra, the United States Supreme Court held that a defendant's request for a lawyer was ambiguous when he said "maybe I should talk to a lawyer." *Davis*, 512 U.S. at 462. In *State v. Radcliffe*, the Washington Supreme Court held that the defendant's request for a lawyer was ambiguous when he said "maybe I should contact an attorney." *State v. Radcliffe*, 164 Wn.2d 900, 907-08, 194 P.3d 250 (2008).

Here, not only was Wolter's request for counsel conditional, and, therefore, equivocal, but the detectives clarified the request so there would be no confusion about what he wanted. Officers are no longer required to clarify a suspect's ambiguous request for counsel. See *Radcliffe*, supra, at 907, recognizing the abrogation of *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (2008). In light of Wolter's equivocal request, the detectives were free

to continue questioning Wolter without clarification. Erring on the side of caution, they elected to clarify. The exact exchange is set forth in the Statement of the Case. In summary, the detectives brought up the fact that they were going to be swabbing the blood on his hands and collecting his clothing, and Wolter said they would need a warrant to do that. See RP 377-78. Wolter then added, "But I think something like *that*, I'd like to have an attorney present for *that*." RP at 379 (emphasis added). There can be no question that Wolter was only asking to have a lawyer present for the swabbing of blood and the collection of evidence from his person.

It must be observed that Wolter's claim that Detective Sergeant Creager questioned Wolter in between the time he made his conditional request for a lawyer and the time that Detective Ringo clarified the exact nature of his request is incorrect. In fact, Creager merely made statements in aid of the clarification that he and Ringo sought from Wolter. The remarks Creager made in this portion of the interview were designed to clarify Wolter's request. While Creager was in the middle of his question, Wolter interrupted him and said "I think I need a lawyer present for anything *like that.*" RP 381 (emphasis added). It is plain from the context that "that" referred to the taking of swabs and clothing. After Creager set up the clarifying question, Detective Ringo asked this clarifying question: "So, for clarification, you're saying that when we get to this point of

dealing with your clothing, that's where you need your attorney present with you?" RP 381. Wolter said "Yeah, right. *I will answer all your questions,* I'll tell you what's going on--but, that is, you know, it's like your attorney tells you, you know, you can't be doing that." RP 382 (Emphasis added).

The State submits that Wolter made an equivocal, conditional request for counsel. He clearly understood the difference between what occurs during questioning and what occurs during the execution of a warrant on his person, and he explicitly said that he only wanted an attorney during the collection of evidence, *not* during questioning. He also clearly understood the difference between and equivocal and an unequivocal request for counsel because he said, 27 pages after his ambiguous request for a lawyer during evidence collection, "Can I see a lawyer?" RP 403. The Court of Appeals in *Nysta*, supra, noted that the use of "obfuscating words" like "if" and "or" can render a request equivocal. *Nysta* at 42. The *Nysta* Court also cited with approval *State v. Lewis*, 32 Wn.App. 13, 20, 645 P.2d 722, *review denied*, 98 Wn.2d 1004 (1982), in which the defendant made a conditional request for a lawyer by saying "if this is going to get into something deep…then I should have an attorney present. If there is any questioning on that particular subject." *Nysta* at 42.

Wolter's case is akin to *Lewis* and nothing like *Nysta*. In *Nysta*, the defendant clearly requested a lawyer and didn't condition his remark on needing a lawyer only for a unique purpose. Nysta said "I gotta talk to my lawyer." *Nysta* at 39. Although the context of the conversation at that point centered around Mr. Nysta submitting to a polygraph, Nysta himself did not confine his desire for a lawyer only for the purpose of attending the polygraph with him. Nevertheless, the detective in that case appeared to assume that Nysta simply wanted a lawyer for the polygraph and nothing else. *Nysta* at 38-39. Notably, the detective did not clarify the request as the detectives did here. The Court of Appeals rejected the State's argument that Nysta confined his request to a lawyer to the question of whether he would take a polygraph. *Nysta* at 42. The Court said there was no ambiguity to the statement "I gotta talk to my lawyer." *Nysta* at 42.

To the extent that Wolter argues that he was subjected to "extensive" questioning after he made his conditional remark about wanting an attorney during evidence collection, as though his equivocal request for an attorney would somehow transform into an *unequivocal* request by virtue of the length and type of questioning that followed the remark, this assertion is not well taken. Contrary to Wolter's claim, the interview did not span an additional 80 pages of transcript after Wolter's

conditional request--it lasted for 27 pages. His clear request for counsel occurred at page 406 of the Report of Proceedings, not page 459. (See Brief of Appellant at 35). The trial court correctly observed that Wolter did not say very much after his conditional remark about wanting a lawyer for evidence collection. Most of the talking over the ensuing 27 pages is done by Creager and Ringo. Notably, the most important part of the interview (the story about the dog) occurred prior to the remark about wanting a lawyer for evidence collection. It was Wolter's carefully thought-out lie about his dog that destroyed his claims of diminished capacity and lack of premeditation, not his self-serving denials of having hurt Kori which occurred after his ambiguous remark about a lawyer. Wolter's request for a lawyer was ambiguous and conditional, and the trial court correctly ruled as such.

c. *If the trial court erred, it was harmless*

If the trial court incorrectly ruled that Wolter's request for counsel was equivocal, the error was harmless beyond a reasonable doubt. The Court of Appeals explained the standard for harmless error in *Nysta*:

> The error requires reversal only if prejudicial. Harmless error analysis applies to erroneous admissions of statements obtained in violation of Miranda. *State v. Reuben*, 62 Wn.App. 620, 626, 814 P.2d 1177, review denied, 118 Wash.2d 1006, 822 P.2d 288 (1991). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct.

1208, 89 L.Ed.2d 321 (1986). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Guloy*, 104 Wn.2d at 425, 705 P.2d 1182. Under the "overwhelming untainted evidence" test, we look only at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Guloy*, 104 Wn.2d at 426, 705 P.2d 1182. Under this test, a conviction will be reversed where there is any reasonable chance that the use of inadmissible evidence was necessary to reach a guilty verdict. *Guloy*, 104 Wn.2d at 426, 705 P.2d 1182.

Nysta at 43.

Here, Wolter claims that the admission of his roadside statements that occurred after his detention but before his formal arrest were erroneously admitted, as well as the short portion of the interview that occurred following his equivocal request for counsel, and that the outcome of the trial would have been different absent admission of those statements. This is so, he claims, because the jury would have believed his ridiculous claims of diminished capacity and lack of premeditation had they never heard his fabricated story about his dog. But Wolter ignores the fact that he simply cannot show that the initial statements he made to Officer Hausinger in response to Hausinger's initial question about whether he was alright (while drenched in blood) were custodial. It was in those initial statements that Wolter provided all of the information the jury would ever need to hear to reject his claims of diminished capacity and lack of premeditation.

Wolter also ignores the fact that he made spontaneous statements to Officer Katie Brock Bieber that he does not challenge in this appeal. His spontaneous statements to Officer Bieber were incredibly damaging to him because they not only reiterated the dog lie, but they showed that he was trying to manipulate and sweet talk Officer Bieber into letting him go. His anti-social personality disorder, which was diagnosed by the State's expert, Dr. Daniel, was in full display during his attempted manipulation of Officer Bieber. Even if the jury had never heard about his roadside statements, they would have heard about his unsolicited statements to Officer Bieber. They would have heard how elaborate and detailed his lie was. They would have concluded that he was lying when he told the various experts who interviewed him that he couldn't remember the murder. They would have concluded that he premeditated the murder and knew exactly what he was doing when he repeatedly and viciously stabbed Kori. As the prosecutor pointed out during trial, a person who suddenly "wakes up" to find himself drenched in blood behind the wheel of his car would be terrified and would ask "what happened?" He wouldn't immediately concoct a story about being his dog being hit by a car while chasing a ball, and relay it in a calm, cool manner.

While it is true that the prosecutor considered many of Wolter's statements to law enforcement on the night he murdered Kori important in

exposing his baseless claim of diminished capacity, the vast majority of those statements were made prior to the custodial interrogation. Indeed, Wolter destroyed his claim of diminished capacity within minutes of meeting Officer Hausinger. The significance of Wolter's statement was his claim that the ocean of blood covering him from the bottom of his boots to the top of his head came from his dog, which he claimed was run over by a car. The irreparable damage Wolter inflicted upon himself by offering the elaborate fabrication about his dog to Officer Hausinger in the initial minutes of the traffic stop was exacerbated by his spontaneous statements to Officer Katie Brock Bieber and his horrific statements on the jail phone calls.

Dr. Daniel's testimony was fatal to Wolter's claim of diminished capacity and inability to premeditate. Dr. Daniel relied on many facts beyond Wolter's statements to the police following the murder to support his opinion that Wolter had the capacity to intend and premeditate his crime. He relied on Wolter's behavior in the week prior to the murder, such as meeting with his boss on a work related matter, hiring a new attorney to represent him in his assault case, banking, arranging for his bail, and declaring his motive for the crime to the bank tellers. RP 3700-02. He relied on Wolter's statement to him (Dr. Daniel) that he didn't remember the murder; that he only recalled Kori arriving at his house and

attacking him, and that he blacked out until he was pulled over by Camas Police and his next memory was of looking through his wallet. RP 3708. Wolter's self-serving claim of blackout was unsupported by his actions following the murder, such as confessing to Danielle Williams and the remarks he made on the jail phone calls, both of which indicate a memory of what occurred during the murder. RP 3709-10. Moreover, there was no injury or defect in his medical history which would support his claim of blackout. RP 3711. Wolter's dumping of Kori's body down an embankment immediately following the murder showed his ability to intend and premeditate the murder. RP 3712. Finally, Wolter's initial statements to Officer Hausinger showed his ability to intend and premeditate the murder. RP 3713-14. The story was very detailed and Wolter was able to conjure answers extemporaneously in response to questions. RP 3713. The story was logical, consistent, and believable. RP 3714. Indeed, it only fell apart because the otherwise believable details could not be corroborated. It is not difficult to believe that a dog that had died in the manner described by Wolter (particularly a large breed dog) would bleed profusely. Had Wolter not been drinking that night (prompting the DUI investigation), he may very well have been three states away by the time Kori Fredericksen was found.

Finally, Wolter showed absolutely no remorse for his crime, telling his friend in a jail phone call that he was "still pissed off" and that he didn't regret what he did. He only regretted that it would cost him his freedom. The fact is that Wolter's claim of diminished capacity was irretrievably ludicrous, but it was the only defense he had. He was caught, literally, red handed. He was stopped a mere mile away from where he dumped Kori's body. His home was covered in her blood and littered with multiple murder weapons. He had her blood on him from the bottom of his boots to the top of his head.

Specifically regarding premeditation, the evidence was overwhelming that Wolter premeditated this murder. He used at least four knives. They kept breaking and bending, causing him to have to disengage and procure a new one. The murder occurred in the front entryway of the home, suggesting that he began the attack the moment that Kori entered the home. Window coverings had been placed over all of the windows in the house, and they hadn't been there eight days earlier when he assaulted Kori. He stabbed Kori between 70 and 75 times. He told Officer Hausinger, in the first moments of the traffic stop, an elaborate lie about his dog getting hit by a car. He repeated that lie to Officer Bieber. He had motive to kill Kori, a motive he seemed intent to share with anyone who would listen: she was going to leave him, she caused him to be arrested,

she had him barred from his own home by getting a no contact order, she was a drug user, she took his property, etc. He was livid with Kori, and told Ashley Sagor she would get what was coming to her. As if that were not bad enough, Wolter just couldn't resist telling his friend Todd Wilson that he murdered Kori because she pushed him too far, that he wasn't sorry, and that his only regret was that he would lose his freedom. The jury heard all of this, and would have concluded that Wolter acted with premeditation even if the only statements they heard him make were those he made to Officer Bieber. Indeed, he could have made no statements at all, to anyone, and the jury would still have concluded he premeditated this crime. The other evidence overwhelmingly established premeditation.

Even if the trial court erred in admitting some or all of Wolter's roadside statements (again, Wolter refuses to say when he believes the questioning at the traffic stop became custodial), or if the trial court erred in concluding that Wolter's conditional request for counsel was equivocal, the admission of the statements flowing from those alleged *Miranda* violations was harmless beyond a reasonable doubt.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REMOVED A JUROR PRIOR TO DELIBERATIONS AFTER THAT JUROR ENGAGED IN AN IMPROPER COMMUNICATION.

On the fifth day of this multi-week trial, juror number 1 informed the court that over the weekend she had spoken to someone about the case. RP 1645. Juror number 1 explained that she saw an old friend the previous evening and she told him she had jury duty and the friend spontaneously began telling her about having spent time with the defendant. (The juror left out the fact that she must have told her friend that the case on which she was serving was the Wolter case or else he would have had no reason to bring up Dennis Wolter). RP 1647. Specifically, the friend told the juror that he had been in jail and that he had spoken with Wolter while there, and that he (Wolter) "just said a few things to him." RP 1647. It was obvious at this point that the juror was being less than forthcoming about what was actually said. The court said "I specifically instructed you not to allow people to discuss the case in your presence, so--" The juror defensively replied "I said that I couldn't talk about it, but he--I mean, he just--we were drinking, I mean, it was just sort of he said something. That's it. I don't know what else I could do." RP 1647. The juror claimed that all that occurred was that Wolter said "hi" to her friend in jail. RP 1648. Although that was obviously not all that occurred because she later added "And then he also said that he (Wolter) told him 'Say hi to the people who are free.' *Or me*. That's it." RP 1648 (Emphasis added). In other words, the juror, after initially acting as though it was a "hi" in the

halls of the jail, later admitted that Wolter told her friend to tell her (the juror) "hi."

The court asked the juror if there was anything about the conversation that would impair her ability to follow the court's instructions on the law or the facts and she said "I hope not." RP 1652-53. When asked by defense counsel if the encounter impacted her thinking toward one side or the other in the case, she replied that it made it more "personable," and "humane," and that "[i]t's weird. All of it is weird." RP 1653.

The State moved to have the juror replaced with one of the alternate jurors because the juror clearly violated the court's instructions, and because she admitted that the case now had a personal overtone for her. RP 1656. The prosecutor opined that she was having difficulty formulating exactly how she felt, but that she indicated the encounter may affect her thinking on the case. Id.

The court found that the juror did not "deliberately" violate the court's order, but that she misunderstood that she needed to be more aggressive in avoiding such conversation. RP 1657. Although the court opined that the information conveyed was "somewhat innocuous," it "had to agree with the State that, apparently, the--the person relating it to her and the type of information that was related seems to have had an effect on

the juror's ability to be fair. For that reason, I will excuse her and seat the first alternate." RP 1657.

Relying largely on inapposite cases, Wolter claims that the trial court abused its discretion in removing juror number 1. Wolter claims the trial court did not find the juror committed misconduct. Wolter is incorrect. The trial court clearly found the juror violated the court's instructions. He merely did not find that she acted deliberately or with nefarious intent. Wolter relies on the court's delicate treatment of the juror while excusing her, wherein the court told her it didn't "particularly find" that she had "done anything wrong," and was excusing her in an "abundance of caution," when the correct focus should be on what the court said to the parties in making its ruling. It was during the court's ruling where it said that juror number 1 clearly did not appreciate the gravity of the court's instructions or her duties, and that the encounter with her friend seemed to have had an effect on her ability to be fair. RP 1657. That Judge Lewis was softer in his words to the juror is understandable in that he likely wanted to avoid causing her further distress. Embarrassing or berating the juror further would serve no purpose where the judge had already determined that she was to be removed from the jury.

Wolter relies on *State v. Elmore,* 155 Wn.2d 758, 767, 123 P.3d 72 (2005) and *State v. Depaz*, 165 Wn.2d 842, 204 P.3d 217 (2009), claiming

that Judge Lewis applied the incorrect legal analysis in making his decision. But both of those cases involved the removal of a juror after deliberations had begun. In this case, the juror was removed well before deliberations had commenced. The difference between removing a juror prior to deliberations and after they've begun are both marked and obvious. The removal of a juror after deliberations has begun could swing a divided juror from one side to another. It raises the specter that a juror could be removed based on legitimate disagreement with her fellow jurors rather than on true unfitness to serve. See e.g. *State v. Johnson*, 125 Wn.App. 443, 105 P.3d 85 (2005). In *Johnson,* the Court of Appeals noted that while the standard of review of the trial court's decision to remove a non-deliberating juror is abuse of discretion, the standard of review for removing a *deliberating* juror is de novo. Thus, *Depaz* and *Elmore* are not the correct cases to guide review in this matter. The cases which should guide review in this matter are cases such as *State v. Rafay*, 168 Wn.app. 734, 285 P.3d 83 (2012), and *State v. Jorden*, 103 Wn.App. 221, 11 P.3d 866 (2000). Both *Rafay* and *Jorden* involved the removal of a juror during the trial. The *Rafay* Court explained the standard of review:

RCW 2.36.110 governs the removal of jurors:

It 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.
>
> CrR 6.5 sets forth the procedure for selecting alternate jurors and provides, in part, that "[i]f 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." "RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." When determining whether the circumstances establish that a juror engaged in misconduct, the trial court need not follow any specific format. We review the trial court's decision to remove a juror for an abuse of discretion.
>
> In assessing alleged juror misconduct, the trial judge necessarily acts as "both an observer and decision maker." Because such "fact-finding discretion" allows the judge to weigh the credibility of jurors, we must accord the court's decision *substantial deference*.

Rafay at 821-22 (emphasis added).

Applying the correct standard of review, Judge Lewis did not abuse his considerable discretion in removing juror number 1 on the fifth day of this lengthy trial. Juror number 1 clearly violated the court's instructions and demonstrated, through her responses, a casual attitude toward her duty to avoid discussing the case in any fashion. She was clearly not strong enough to admonish her friend to desist from speaking about the case. Moreover, the discussion with her friend had caused her to feel somewhat of a personal connection with the defendant.

Wolter's suggestion that the trial court must make exhaustive, formulaic findings is meritless. His assertion that Judge Lewis' personal

observations of the juror must be accorded no deference because he did not specifically articulate that he relied upon juror number 1's demeanor, as well as her words, is unsupported by logical argument or citation to apposite authority.

The court did not abuse its discretion in removing juror number 1. This assignment of error fails.

III. SUFFICIENT EVIDENCE SUPPORTED THE JURY'S FINDING THAT KORI FREDERICKSEN WAS A PROSPECTIVE WITNESS IN HIS FUTURE TRIAL ON CHARGES OF ASSAULT AND MALICIOUS MISCHIEF, AND THAT HER MURDER WAS RELATED TO THE DUTIES SHE WOULD BE PERFORMING AS A WITNESS IN THAT TRIAL.

Wolter challenges one of the two aggravators found by the jury in this case: That Kori Fredericksen was a prospective witness in an adjudicative proceeding (his future trial for assault and malicious mischief), and that her murder was related to the exercise of the official duties she would be performing as a witness. He does *not* challenge the aggravator found by the jury that he murdered Kori while there was an order prohibiting him from having contact with her, and that he knew of the existence of the order.[6] Thus, if this Court affirms Wolter's underlying

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[6] Wolter's stated assignment of error, as well as his argument, is limited to the "official witness" aggravating factor. There is one sentence in his brief in which he states: "The two aggravating circumstances used in the case at bar were not proven to a unanimous

conviction for murder in the first degree, Wolter does not challenge the aggravation of that crime and does not challenge his sentence of life in prison without the possibility of parole. He merely asks that one of the two aggravators be stricken.

Wolter complains that insufficient evidence supports this aggravator. The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the

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jury and must be reversed." See Brief of Appellant at 41. Because he makes no further mention of the second aggravator, does not assign error to it, does not include it in his prayer for relief, and does not complain about lack of jury unanimity in this appeal, it appears this may be a cut and paste error. Wolter has not challenged the no contact order aggravator.

sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

Under RCW 10.95.020 (8) (a), first degree murder is aggravated when the victim was: (a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and (b) The murder was related to the exercise of official duties performed or to be performed by the victim.

Here, Deputy Prosecuting Attorney Patrick Robinson testified that Wolter was charged with assault in the fourth degree (domestic violence) and malicious mischief in the third degree (domestic violence). RP 2001-02. The named victim was Kori Fredericksen and a no contact order was imposed restraining Wolter from contacting her at the May 18, 2011 arraignment. RP 2002, 2009. Robinson testified that Kori Fredericksen was not just a witness for the State in the case, she was the most important witness for the state. RP 2009.

Notably, Wolter does not complain that the statute is vague or overbroad. He does not challenge its constitutionality. He merely complains that the evidence is insufficient. To support his claim, he argues that the State cannot prove this aggravator without proving that Kori Fredericksen had been issued a subpoena to testify at Wolter's trial for assault and malicious mischief. But the statute does not say "subpoenaed witness." It says "prospective, current, or former witness." Is Wolter asking this Court to hold that proof that the victim was subpoenaed is a non-statutory element of this aggravator? If so, he does not articulate that. If he's not suggesting that, then he must live with the statute as it's written. The statute simply does not require the State to prove that the witness had been issued a subpoena. It is nonsensical to suggest that the legislature only intended this aggravator to apply to subpoenaed witnesses,

and intended to give those murderers savvy enough to kill their victims before subpoenas could be issued (as happened here) a free pass. What occurred here is obviously the precise scenario the legislature feared in codifying this aggravator.

Likewise, the statute does not require the State to prove that the witness is material or of great importance. It does not require the State to prove that it would have been unable to prove its case at trial without the witness. To the extent that Wolter makes this argument in his brief, it is meritless.

By making this aggravator applicable to a "prospective" witness whose murder is related to duties to be performed by the witness in the future, the legislature plainly intended to proscribe what occurred here--murdering a witness who is plainly known to the defendant as a future witness against him in his trial on a pending charge. The evidence is sufficient to support this aggravator.

With regard to Wolter's complaint that the instruction on this aggravator omitted an essential element--that the witness was to be a witness "in an adjudicative proceeding," the error, (assuming without conceding that there was error), is harmless.

"To convict" instructions must include every element of the crime charged. *State v. Fisher*, 165 Wn.2d 727, 753, 202 P.3d 937 (2009).

Failure to include every element is constitutional error that may be raised for the first time on appeal. *Fisher* at 753. But omission of an element in jury instructions is harmless if uncontroverted evidence supports that element. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). This Court reviews "to convict" instructions de novo. *Fisher* at 754.

Here, Wolter claims that the jury could have found this aggravator if it merely found that Kori was "a witness in the broad sense of having seen something happen but not a witness in the narrow, legal sense of having a legal obligation to appear at a form judicial hearing." Brief of Appellant at 43. This concern is groundless. The instruction required the jury to find not only that Kori was a prospective witness, but that her murder was related to the exercise of official duties she was to perform as a witness. A witness "in the broad sense of having seen something happen" would not exercise "official duties" as a witness. Such a witness would not be a "prospective" witness.

Moreover, uncontroverted evidence supports this element. As noted above, Deputy Prosecutor Patrick Robinson, who was assigned to prosecute Wolter for assault and malicious mischief, testified that Kori was the central witness in his pending case against Wolter. Wolter told Danielle Williams that he killed Kori because he "narced" on her. A lay person would understand that term to mean that someone who "narcs" on

another is planning to be a witness against that person. The uncontroverted evidence overwhelmingly supports the element that Kori Fredericksen was to be a witness in Wolter's trial on charges of assault and malicious mischief. The error, if any, is harmless. Further, should this Court strike this aggravator, it will have no impact on Wolter's sentence (assuming his underlying conviction is affirmed).

Wolter's conviction and sentence should be affirmed.

D. CONCLUSION

Wolter's conviction and sentence should be affirmed.

DATED this 3 day of July, 2014.

Respectfully submitted:

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CLARK COUNTY PROSECUTOR

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Comments:

Complete Copy of Respondent's Brief. Page 49 was mistakenly omitted in Respondent's Brief filed July 3, 2014. This page is now included in Respondent's Brief.

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